

# **MBANMIRI v. BUM OIL CO.: A HYPOTHETICAL CASE OF INTERNATIONAL ENVIRONMENTAL TORTS**

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## **I. INTRODUCTION**

*It was about 11:00 in the morning. Ngozi had just missed the last twenty-passenger boat to Ikwem, the nearest city, which was approximately three hours away by this mode of transportation. Consequently, Ngozi had no other means of getting to Ikwem to buy the ingredients for the family's dinner. Other than by air transportation, the only feasible means for Ngozi to get to Ikwem would be to swim through the dangerous and polluted river that links the village to the city. The makeshift roadways are covered in mud, about twenty-feet deep. What used to be a bridge had turned into a death trap that had killed ten villagers from Mbanmiri.*

Married with five children — two boys and three girls, ages twelve to twenty-four — Ngozi's ordeal is typical of the daily lives of Mbanmirians, whose standard of living has been reduced to subhuman standards since BUM Oil Company<sup>1</sup> started its oil exploitation.<sup>2</sup>

Mbanmiri is a small village of approximately 100,000 people, located within southeastern Nigeria.<sup>3</sup> Mbanmirians have a long and proud history of being self-sufficient. Their livelihood revolves around farming and fishing. Most of the local stores and marketplaces were established to accommodate the tourist industry, which developed from the uniqueness and quality of the seafood from Mbanmiri. Isolated from other villages, Mbanmirians never had to deal with the economic or social concerns that prevailed in neighboring cities. There was never a health epidemic of any sort; the primary health concerns ranged from the common cold to severe body aches, something often attributed to the Mbanmirians' more than fifteen

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<sup>1</sup> Hereinafter "BUM."

<sup>2</sup> The story of Ngozi and BUM is fictional. What follows in this Introduction is the factual background for Mbanmiri v. BUM Oil Co., the hypothetical international environmental tort action analyzed in this Note.

<sup>3</sup> Although the country of Nigeria is not used in a hypothetical manner, the village of Mbanmiri is purely the writer's creation.

hours-a-day work habit. Of course, this was Mbanmiri before the coming of BUM.

BUM is incorporated in the state of Delaware, with more than fifty branch offices in major cities in the United States. BUM started its oil exploration in Mbanmiri in 1971 when Nigeria became the eleventh member of the Organization of Petroleum Exporting Countries (OPEC).<sup>4</sup> BUM also maintains offices in three different cities in Nigeria. Perhaps to avoid developing a true relationship with Mbanmirians, BUM maintains only its drilling facilities in Mbanmiri. There are no separate offices or employee residences in Mbanmiri. Indeed, a majority of BUM employees are either from neighboring cities or from other parts of Nigeria. The handful of Mbanmirians who are employed by BUM are primarily used as unarmed security guards for the path to the makeshift roadways that lead to the drilling site. BUM's senior employees are transported to the drilling site by corporate helicopter, while lower level employees are driven in a Mack truck that was converted into a passenger bus. Other types of automobiles cannot be used on the treacherous roadways.

The daily output for BUM's oil exploration is about 350,000 barrels.<sup>5</sup> However, maintaining such an output is not without consequences to the Mbanmirians. BUM paid little attention to the environmental safety standards that are customary for oil companies engaged in the business of oil exploration, storage, and/or handling.<sup>6</sup> By 1980, the village of Mbanmiri was threatened with starvation. Its waters were polluted by the untreated sludge that resulted from BUM's practice of cleaning its machinery in a swamp that is directly connected to Mbanmiri waters. Further, there were occasional leaks from ruptured pipes that carried oil from Mbanmiri to BUM's depots in neighboring cities. These oil leaks accounted for approximately 15,000 barrels a day. By 1990, there were reported leaks from the poorly built landfills where BUM dumped its waste. The toxin<sup>7</sup> leaks

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<sup>4</sup> See, e.g., Chudi Ubezonu, *Doing Business in Nigeria by Foreigners: Some Aspects of Law, Policy, and Practice*, 28 INT'L LAW. 345 n.3 (1994).

<sup>5</sup> Some oil producing regions have daily outputs of more than 350,000 barrels. See, e.g., Victoria C. Arthaud, Note, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 GEO. INT'L ENVTL. L. REV. 195, 205 (1994) (citing Diego Cevallos, *Ecuador-Environment: Indigenous People Fight Petroleum Expansion*, INTER PRESS SERVICE, Mar. 11, 1994).

<sup>6</sup> See, e.g., Resource Conservation and Recovery Act, 42 U.S.C. §§ 6924, 6925 (1988) (stating standards for the handling and disposal of hazardous wastes); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1988).

<sup>7</sup> The word toxin generally refers to "any poison or toxicant." BLACK'S LAW DICTIONARY 1492 (6th ed. 1990).

subsequently destroyed whatever was left of Mbanmiri's vegetation. A preliminary investigation by an American human rights organization revealed that BUM was not using the proper equipment, and where proper equipment was used, it lacked adequate maintenance. BUM did not respond to the human rights organization's inquiry.

By 1992, there was a sudden outbreak of related diseases and birth defects.

By 1994, Ngozi had lost her husband and grandparents who were poisoned from eating contaminated fish. Community stores and businesses had stopped operating. As a result, many Mbanmiri women were forced into prostitution, typically at the leisure of BUM's employees.<sup>8</sup> Deprived of their drinking water and vegetation, the once self-sufficient and proud people of Mbanmiri were reduced to near destitution.<sup>9</sup> Today, Ngozi and her fellow Mbanmirians must hurry to catch the daily twenty-passenger boat to Ikwem, where they buy everything from bottled drinking water to basic food items.<sup>10</sup>

The Mbanmirians would like to bring a tort action against BUM in the United States, since BUM has developed a symbiotic relationship with some power brokers in the Nigerian government, particularly where the corporate officers of BUM have been known to have "sympathetic" friends within every level of the Nigerian government — from one administration to the other.

This Note analyzes the issue of whether plaintiffs can bring international environmental tort actions<sup>11</sup> in United States courts for injuries that occurred in a foreign country. Part II discusses the relevant doctrines in this area, with emphasis on strict liability. Part III reviews the relevant doctrinal defenses that might preclude the bringing of any such action in the United States, with a closer look at the doctrine of forum non conveniens. The Note concludes with a proposal for a court initiated approach where the defenses would be less onerous on

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<sup>8</sup> See, e.g., Arthaud, *supra* note 5, at 214 (noting the effect of oil company development in the *Oriente*, ranging from destruction of the region's livelihood — hunting, fishing, and farming — to prostitution at the oil camps by the indigenous people) (footnote omitted).

<sup>9</sup> Arthaud, *supra* note 5, at 201 (noting the detrimental effects of oil development on the lives of the indigenous people in the *Oriente*).

<sup>10</sup> While the foregoing fact-pattern is a hypothetical, it nevertheless mirrors some of the facts that are emerging as a result of the on-going debate on how to curb international environmental tort actions against multinational corporations that operate in less-developed countries where these corporations engage in activities that are often unconscionable, immoral, unethical and sometimes illegal. See, e.g., Howard W. French, *Nigeria Accused of a 2-Year War on Ethnic Group*, N.Y. TIMES, Mar. 23, 1995, at A12; Arthaud, *supra* note 5, at 195-97.

<sup>11</sup> See, e.g., *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990) (applying some of the relevant doctrines in an international environmental tort action).

plaintiffs who are similarly situated to the indigenous people of Mbanmiri.

## II. ENVIRONMENTAL TORT DOCTRINES

An environmental tort has been defined as "a civil action seeking damages for personal injuries or death where the cause of the damages is the negligent manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances."<sup>12</sup> The following causes of action are pertinent for environmental tort actions.

1. *Nuisance*. There are two types of nuisance causes of action, namely, private and public.<sup>13</sup> The Second Restatement of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."<sup>14</sup> In *Graham Oil Co. v. BP Oil Co.*,<sup>15</sup> the district court held that the defendant's conduct, which subsequently contaminated the surrounding water and soil, interfered with the public's right "to soil and water free of contamination."<sup>16</sup>

In *Graham*, the contamination resulted from the defendant's activities in running a gasoline station and service center.<sup>17</sup> In finding public nuisance, the *Graham* court reasoned that the plaintiff was uniquely affected given that "it makes commercial use of its property . . . ."<sup>18</sup> Similarly, the Mbanmirians have suffered harm unique from other villages, given that BUM's conduct destroyed the village's commercial fishing.

Under the Restatement's formulation, to determine when an interference with the public right is unreasonable, the court may look at the following factors: (a) Whether the conduct significantly interferes with the public's health, safety, peace, comfort or convenience;<sup>19</sup> (b) whether the conduct is prohibited by law;<sup>20</sup> and (c) whether the conduct "has produced a permanent or long-lasting effect . . . ."<sup>21</sup>

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<sup>12</sup> N.J. STAT. ANN. § 2A: 15-5.3(f)(1) (West 1995).

<sup>13</sup> See, e.g., *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 719-20 (D. Kan. 1991) (distinguishing private nuisance from public nuisance).

<sup>14</sup> RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

<sup>15</sup> 885 F. Supp. 716 (W.D. Pa. 1994).

<sup>16</sup> *Id.* at 723.

<sup>17</sup> *Id.* at 718.

<sup>18</sup> *Id.* at 723.

<sup>19</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979).

<sup>20</sup> *Id.* § 821B(2)(b).

<sup>21</sup> *Id.* § 821B(2)(e).

In *Davis v. Shell Oil Co.*,<sup>22</sup> the district court reasoned that pollution caused by the defendant's activities were sufficient to maintain an action for nuisance. Like the plaintiff in *Davis*, the Mbanmirians have alleged facts sufficient to maintain an action for nuisance.<sup>23</sup>

By contrast, a private nuisance is created when the defendant's conduct interferes with the use and enjoyment of another's property.<sup>24</sup> Under the Restatement's formulation, one may be found liable for a private nuisance when (1) her conduct is the legal cause of the interference of the use and enjoyment of another's property; and (2) "the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise . . . negligent or reckless conduct, or for abnormal dangerous conditions or activities."<sup>25</sup> In some jurisdictions, contributory negligence may be asserted as a defense when the nuisance action is based on negligent conduct.<sup>26</sup>

In *Mourer v. Ashland & Ref. Co.*,<sup>27</sup> a case that involved a defendant's use of land for oil and gas exploration, the Seventh Circuit affirmed the district court's decision holding the oil company-defendant liable for maintaining a private nuisance by causing crude oil to seep out and contaminate plaintiff's land. Similarly, as the alleged facts indicate, BUM's oil exploration and drilling activities caused the resulting pollution of the waters in Mbanmiri.

Under a private nuisance cause of action, the Mbanmirians must show that BUM's interference was either intentional, negligent, or abnormally dangerous.<sup>28</sup> For intentional acts, the rule requires that the defendant either "created or continued the nuisance with knowledge that harm to plaintiff's interests was occurring or was substantially certain to follow."<sup>29</sup> As discussed above, the defendant in *Mourer* was held liable for maintaining a private nuisance by engaging in oil exploration that caused the plaintiff's harm.<sup>30</sup>

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<sup>22</sup> 795 F. Supp. 381, 384 (W.D. Okla. 1992).

<sup>23</sup> *Id.*

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS § 822 (1979).

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., *Copart Indus., Inc. v. Consol. Edison Co.*, 362 N.E.2d 968, 973 (N.Y. 1977) (citing Judge Cardozo's opinion in *McFarlane v. City of Niagara Falls*, 160 N.E. 391, 392 (1928)).

<sup>27</sup> 518 F.2d 659 (7th Cir. 1975).

<sup>28</sup> See RESTATEMENT (SECOND) OF TORTS § 822 (1979).

<sup>29</sup> Ronald J. Rychalk, *Common-Law Remedies For Environmental Wrongs: The Role of Private Nuisance*, 59 Miss. L.J. 657, 674 (1989) (citing W. PROSSER & W. KEETON, *THE LAW OF TORTS* 624-25 (5th ed. 1984)).

<sup>30</sup> 518 F.2d at 661 (finding that facts supported holding the defendant liable under private nuisance).

Similarly, the facts are sufficient to find that BUM created the conduct that subsequently interfered with the use and enjoyment of the Mbanmirians' land. By operating with improper and/or inadequately maintained equipment, BUM created and continued the nuisance in Mbanmiri. Further, as a Delaware corporation where similarly situated oil companies operate under various environmental regulations,<sup>31</sup> it would be difficult for BUM to claim that it had no knowledge that the resulting harm was substantially certain to occur.<sup>32</sup>

Also, activities analogous to the facts in this hypothetical, including those found in the cases cited above, have been held to constitute unreasonable interference.<sup>33</sup>

Contributory negligence would not apply here since none of BUM's tortious conduct can be attributed to any intentional act of the Mbanmirians.<sup>34</sup> Moreover, contributory negligence is not available where the defendant intentionally created the nuisance.<sup>35</sup>

2. *Trespass*. This cause of action exists when there has been a substantial invasion of the plaintiff's property interest by the defendant.<sup>36</sup> In the environmental torts context, an invasion of the plaintiffs' property by polluting substances generated by the de-

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<sup>31</sup> See, e.g., Resource Conservation and Recovery Act, 42 U.S.C. §§ 6924, 6925 (1988) (stating standards for the handling and disposal of hazardous wastes); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1988).

<sup>32</sup> As a standard practice, oil companies are generally aware that failure to comply with the applicable regulations would often lead to consequences detrimental to the neighboring environment. See, e.g., Arthaud, *supra* note 5, at 211 (discussing the consequences of oil exploitation in the *Oriente*). In response to the increased environmental disaster in oil producing regions, some commentators have called for environmental regulation covering the activities of American oil companies in foreign oil producing regions. See, e.g., Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practice Act*, 17 *ECOLOGY L.Q.* 477 (1990).

<sup>33</sup> See, e.g., Chatham Steel Corp. v. Brown, 858 F. Supp. 1130 (N.D. Fla. 1994) (holding defendant liable for careless disposal of battery castings); Dickerson, Inc. v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987) (holding United States liable for failure to ensure proper disposal of polychlorinated biphenyls (chemical waste)); Wood v. Picillo, 443 A.2d 1244 (R.I. 1982) (affirming decision holding defendant liable for private and public nuisance resulting from defendant's operation of a chemical waste dump site).

<sup>34</sup> See, e.g., Copart Indus., Inc. v. Consol. Edison Co., 362 N.E.2d 968, 970 (N.Y. 1977) (stating that contributory negligence is not available where the nuisance is based on defendant's intentional conduct).

<sup>35</sup> *Id.*; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 461 (5th ed. 1984) [hereinafter PROSSER AND KEETON]; RESTATEMENT (SECOND) OF TORTS § 467 (1965).

<sup>36</sup> See, e.g., Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 857 F. Supp. 838, 844 (D.N.M. 1994) (citing Pacheco v. Martinez, 636 P.2d 308 (N.M. Ct. App. 1981) in defining trespass).

fendant would suffice as a trespass cause of action.<sup>37</sup> In a related case, *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*,<sup>38</sup> the district court opined that a trespass cause of action "contemplates actual physical entry or invasion."<sup>39</sup> Here, BUM's activities created the pollution that actually invaded and contaminated the waters in Mbanmiri.

In another case, *Wilson Auto Enters. v. Mobil Oil Corp.*,<sup>40</sup> the district court reasoned, in part, that a defendant may be held liable for the unauthorized invasion of another's property.<sup>41</sup> In that case, the plaintiff brought an action alleging, in part, that the defendant's activities in operating a retail gas station caused the release of hazardous chemicals that subsequently invaded and polluted the plaintiff's property.<sup>42</sup> Similarly, the toxin leaks from BUM's poorly built landfills that reached and contaminated the waters in Mbanmiri constitutes an unauthorized invasion of the Mbanmirians' property.

3. *Negligence.* Under the Restatement's formulation, one is liable for "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."<sup>43</sup> To maintain a negligence action, the plaintiff must show that (1) the defendant owed her a legal duty;<sup>44</sup> (2) that the defendant breached that duty;<sup>45</sup> (3) that there is a causal connection between the defendant's breach and the plaintiff's harm;<sup>46</sup> and (4) that the plaintiff suffered actual injury.<sup>47</sup> Factual causation is also known as the "but for" test,<sup>48</sup> which requires that the plaintiff prove that the injury would not have occurred absent the defendant's conduct.<sup>49</sup>

The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff.<sup>50</sup> In *Kowalski v. Goodyear Tire*

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<sup>37</sup> See *id.* at 844.

<sup>38</sup> 857 F. Supp. 838 (D.N.M. 1994).

<sup>39</sup> *Id.* at 844 (distinguishing between trespass and nuisance causes of action); *Cerghino v. Boeing Co.*, 873 F. Supp. 398, 400 (D. Or. 1994) (same) (citation omitted).

<sup>40</sup> 778 F. Supp. 101 (D.R.I. 1991).

<sup>41</sup> *Id.* at 106 (citation omitted).

<sup>42</sup> *Id.* at 103-04.

<sup>43</sup> RESTATEMENT (SECOND) OF TORTS § 282 (1965).

<sup>44</sup> See, e.g., PROSSER AND KEETON, *supra* note 35, § 30; see also *Eiseman v. State*, 511 N.E.2d 1128 (N.Y. 1987) (holding that to prevail under the negligence theory, plaintiff must demonstrate that defendant owed her a duty).

<sup>45</sup> PROSSER AND KEETON, *supra* note 35, § 30 at 165.

<sup>46</sup> *Id.* § 30, at 165.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., PROSSER AND KEETON, *supra* note 35, § 41, at 266.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (holding that

& Rubber Co.,<sup>51</sup> an employee and his wife brought an action against the defendant-tire manufacturer alleging that the employee's exposure to a harmful chemical caused the wife's bladder cancer.<sup>52</sup> The district court stated that the defendant's control over a hazardous substance carries with it a duty to protect foreseeable plaintiffs.<sup>53</sup> Here, BUM controlled the polluting chemicals that subsequently contaminated the waters and vegetation in Mbanmiri. Thus, like the defendant in *Kowalski*, BUM owed a duty to the Mbanmirians to minimize the risk of pollution.<sup>54</sup>

Once a duty has been established, the Mbanmirians need to show that BUM breached that duty.<sup>55</sup> As previously stated, BUM failed to use proper equipment and when proper equipment was used, there was a lack of adequate maintenance.

Often, the most litigated issue in a negligence action is whether the defendant's conduct was the proximate cause of the plaintiff's harm.<sup>56</sup> The pertinent question here is whether BUM's conduct created a foreseeable risk of harm to the Mbanmirians.<sup>57</sup> In *Palsgraf v. Long Island R.R.*,<sup>58</sup> the New York Court of Appeals concluded that the defendant had no way of knowing "that the parcel wrapped in newspaper would [eventually] spread wreckage through the [train] station."<sup>59</sup> Unlike the plaintiff in *Palsgraf*, however, the Mbanmirians were not so situated that BUM was not able to foresee their resulting harm.

In *Western Greenhouses v. United States*,<sup>60</sup> the district court con-

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defendant owed no duty to the plaintiff); *Edwards v. Honeywell, Inc.*, 60 F.3d 484 (7th Cir. 1995) (citing *Palsgraf* in affirming decision holding that defendant owed no duty to the plaintiff); see also *Eiseman v. State*, 511 N.E.2d 1128 (N.Y. 1987).

<sup>51</sup> 841 F. Supp. 104 (W.D.N.Y. 1994).

<sup>52</sup> *Id.* at 105.

<sup>53</sup> *Id.* at 111.

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., FOWLER V. HARPER ET AL., THE LAW OF TORTS § 19.1, at 2 (2d ed. 1986) (discussing proof of breach in negligence cases).

<sup>56</sup> See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (applying the proximate causation analysis).

<sup>57</sup> *Id.* at 100 (articulating principles of the foreseeability test in stating that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation . . ."); see also PROSSER AND KEETON, *supra* note 35, § 41, at 264 (stating that "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified by imposing liability"); *Branstetter v. Gerdeman*, 274 S.W.2d 240, 245 (Mo. 1955) (stating that "[a] causal connection must be established between the negligence charged . . . and the loss or injury sustained . . .").

<sup>58</sup> 162 N.E. 99 (N.Y. 1928).

<sup>59</sup> *Id.* at 101.

<sup>60</sup> 878 F. Supp. 917 (N.D. Tex. 1995).



cluded that the defendant had no way of knowing that its waste disposal would subsequently contaminate plaintiff's property.<sup>61</sup> In that case, landowners were suing the government for contamination resulting from waste disposal from an adjacent Air Force base. The court reasoned that the industry's standard practice at the time of contamination was such that the defendant could not have anticipated the resulting harm.<sup>62</sup> Unlike the defendant in *Western Greenhouses*, however, the oil industry's standard of practice at the time when BUM started its oil exploration in Mbanmiri was such that BUM should have foreseen the resulting harm suffered by the Mbanmirians.<sup>63</sup>

For factual causation, the Mbanmirians must show that but for BUM's conduct the resulting harm would not have occurred.<sup>64</sup> The facts as alleged here are sufficient to meet the but for test.<sup>65</sup>

In jurisdictions that recognize contributory negligence, a plaintiff who contributed to his or her injury is completely barred from recovery.<sup>66</sup> Under comparative negligence doctrine, however, plaintiff's negligence would reduce any recovery only in direct proportion to her fault.<sup>67</sup>

4. *Negligence per se*. Where a defendant's conduct violates a statute set forth by the locality, negligence *per se* may be raised as a cause of action.<sup>68</sup> Also, where the defendant's non-compliance with the applicable statute caused the resulting injury, negligence *per se* can be used to impute liability.<sup>69</sup> In *Myers v. United States*,<sup>70</sup>

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<sup>61</sup> *Id.* at 927.

<sup>62</sup> *Id.*

<sup>63</sup> The applicable standard here would be the standard for oil companies incorporated under the laws of the United States. See *supra* notes 31-32.

<sup>64</sup> See, e.g., PROSSER AND KEETON, *supra* note 35, § 41, at 266.

<sup>65</sup> It should be noted that this Note does not attempt an in-depth analysis of a negligence action. For a discussion of negligence, see David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Measures and Precaution*, 36 ARIZ. L. REV. 357 (1994).

<sup>66</sup> See, e.g., PROSSER AND KEETON, *supra* note 35, § 65, at 461; RESTATEMENT (SECOND) OF TORTS § 467 (1965).

<sup>67</sup> See PROSSER AND KEETON, *supra* note 35, § 67, at 472 (discussing "pure" comparative negligence). There are three types of comparative negligence: "pure," "modified," and "slight-gross," *Id.* For a discussion of comparative negligence, see Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

<sup>68</sup> See, e.g., Wendell B. Alcorn, Jr., *Liability Theories for Toxic Torts*, 1988 A.B.A. SEC. NAT. RESOURCES & ENV'T 3; Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 857 F. Supp. 838, 847 (D.N.M. 1994) (stating the elements of negligence *per se*) (citation omitted).

<sup>69</sup> See, e.g., *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920); *Osborne v. McMasters*, 41 N.W. 543 (Minn. 1889) (applying negligence *per se* to impute liability on the defendant who violated a statutory provision that required proper labeling of drugs).

the Sixth Circuit stated that to rely on negligence *per se*, the plaintiff must show that the defendant owed her a duty.<sup>71</sup>

5. *Strict liability*. Viewed by commentators as one of the most sweeping causes of action for environmental torts,<sup>72</sup> strict liability as formulated in the Restatement states: "One who carries on an *abnormally dangerous activity* is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."<sup>73</sup> Borrowing from the reasoning in the famous English strict liability case, *Rylands v. Fletcher*,<sup>74</sup> the Restatement outlines the following six factors to be considered in determining when an activity is abnormally dangerous: (a) the existence of a high degree of risk of some harm to a person, or the land or chattel of others;<sup>75</sup> (b) likelihood that the resulting harm will be great;<sup>76</sup> (c) inability to eliminate the risk by exercising reasonable care;<sup>77</sup> (d) extent to which the activity is not a matter of common usage;<sup>78</sup> (e) inappropriateness of the activity for the place where it is carried on;<sup>79</sup> and (f) extent to which the activities' value to the community is outweighed by its dangerous attributes.<sup>80</sup> The accompanying comment to this section of the Restatement states that the relevant question in determining how abnormally dangerous an activity is in relation to the community is whether the "dangers and inappropriateness for the locality [are] so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence."<sup>81</sup>

Here, the pertinent inquiry is whether BUM's conduct was an abnormally dangerous activity.<sup>82</sup> In *Darton Corp. v. Uniroyal Chemical Co.*,<sup>83</sup> the district court reasoned that the abnormal activity was

<sup>70</sup> 17 F.3d 890 (6th Cir. 1994).

<sup>71</sup> *Id.* at 899. The facts in this hypothetical do not raise any issues on negligence *per se*, thus further analysis of this doctrine is unnecessary.

<sup>72</sup> See, e.g., Richard J. Lippes, *Environmental And Toxic Tort Litigation*, C317 A.L.I.-A.B.A. 493, 502 (1988).

<sup>73</sup> RESTATEMENT (SECOND) OF TORTS § 519(1) (1977) (emphasis added).

<sup>74</sup> L.R. 3H.L. 330 (1868).

<sup>75</sup> RESTATEMENT (SECOND) OF TORTS § 520(a) (1977).

<sup>76</sup> *Id.* § 520(b).

<sup>77</sup> *Id.* § 520(c).

<sup>78</sup> *Id.* § 520(d).

<sup>79</sup> *Id.* § 520(e).

<sup>80</sup> *Id.* § 520(f).

<sup>81</sup> *Id.* § 520 cmt. f.

<sup>82</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 519 (1977) (defining the general principles of abnormally dangerous activity).

<sup>83</sup> 893 F. Supp. 730 (N.D. Ohio 1995).

the defendant's disposal of waste, as opposed to the mere manufacturing of toxic chemicals.<sup>84</sup> Similarly, the abnormal activities here are BUM's handling of its waste products. As previously stated, the abnormal activities that BUM engaged in ranged from operating the poorly built landfills that resulted in toxin leaks, to the practice of cleaning its machinery in a swamp directly connected to Mbanmiri waters.

As noted, to determine when an activity is abnormally dangerous, the Second Restatement of Torts lays out six factors to be considered.<sup>85</sup> In a case brought by a landowner against a storage plant operator, *Buggsi, Inc. v. Chevron U.S.A., Inc.*,<sup>86</sup> the court could not find, as a matter of law, that activities at the petroleum storage and distribution plant were not ultrahazardous.<sup>87</sup>

Here, BUM may nevertheless argue that it had no way of knowing that there was a likelihood that the resulting harm from its conduct would be great. This argument, however, does not pass muster when viewed in light of the fact that, as a multinational corporation, BUM was on notice as to the standard of practice for similarly situated oil companies, and the resulting consequences for noncompliance.<sup>88</sup> In *Indiana Harbor Belt R.R. v. American Cyanamid Co.*,<sup>89</sup> the court reasoned that an activity presents a great risk of harm when the potential for harm from one mishap is so great and there is a probable risk of the mishap occurring.<sup>90</sup> Here, BUM's

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<sup>84</sup> *Id.* at 740.

<sup>85</sup> See *supra* notes 75-81 and accompanying text (outlining the six factors).

<sup>86</sup> 857 F. Supp. 1427 (D. Or. 1994).

<sup>87</sup> *Id.* at 1432-33 (citation omitted). The court relied on the applicable statute which defined oil and other petroleum products/wastes as hazardous substances. *But see* Schwartzman, Inc. v. General Elec. Co., 848 F. Supp. 942, 945 (D.N.M. 1993) (finding that, under New Mexico law, the doctrine of strict liability does extend to "handling, transportation, storage or disposal of petroleum products" where the risks can be eliminated by exercising reasonable care).

<sup>88</sup> See *supra* notes 31-32 and accompanying text. Indeed, one of the applicable statutes provides: "[a]ny person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged . . . shall be subject to a civil penalty in an amount up to \$25,000 per day of violation . . ." 33 U.S.C. § 1321(b)(7)(A) (Supp. V 1993). Where such a regulation is available and readily enforceable in the oil producing regions outside of the United States, BUM and the like would be compelled to comply with the environmental standards. See, e.g., Hanson Hosein, *UNSETTLING: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L & COMP. L. REV. 285 (1993) (proposing a mandated insurance scheme for international environmental disasters where the multinational corporations involved would be required to provide the funds to be used in compensating the victims of those disasters).

<sup>89</sup> 662 F. Supp. 635 (N.D. Ill. 1987).

<sup>90</sup> *Id.* at 643.

improper disposal of toxic waste created a great risk of harm to the Mbanmirians.

Because BUM was duly licensed by the Nigerian government, it is likely that they will argue that Mbanmiri is an appropriate location<sup>91</sup> and that oil exploration in the village is a matter of common usage.<sup>92</sup>

In a case where a gas station owner sued an oil company for damages caused by gasoline leakage from underground storage tanks, the court declined to apply strict liability.<sup>93</sup> In that case, *Arlington Forest Assocs. v. Exxon Corp.*,<sup>94</sup> the court reasoned that gas stations are necessarily appropriate near residential areas, and are as a matter of common usage in the communities.<sup>95</sup> In reaching its conclusion, the *Arlington* court looked favorably on the benefit of the gas stations to the nearby residents.<sup>96</sup>

Unlike the residents and gas stations in *Arlington*, however, the Mbanmirians received no such benefit from BUM and improper waste disposal was not carried on by many in Mbanmiri. Thus, it was not common usage.<sup>97</sup>

Perhaps BUM's most predictable argument against strict liability would be that the harm resulting from its conduct can be eliminated by exercising reasonable care.<sup>98</sup> In *Arlington Forest Assocs. v. Exxon Corp.*,<sup>99</sup> the court declined to apply strict liability on the ground that underground storage of gasoline is not an abnormal

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<sup>91</sup> See *supra* pp. 16-17 and accompanying notes.

<sup>92</sup> *Id.*

<sup>93</sup> *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387, 391 (E.D. Va. 1991).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 391 (quoting the Second Restatement of Torts in defining common usage as one that is carried on by many people in the community).

<sup>96</sup> *Id.* (observing that gas station in residential areas is "widespread and routine").

<sup>97</sup> *Id.* The political dynamic which allows some foreign governments to issue licenses to oil companies notorious for non-compliance with environmental regulations in oil producing regions outside of the United States, is beyond the scope of this Note. If the reader wishes to explore this and other related issues, however, the following should be helpful: Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542 (1985); Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849 (1991).

<sup>98</sup> See, e.g., *Sprinkle v. Borwer Ammonia & Chem. Co.*, 824 F.2d 409 (5th Cir. 1987) (finding that the dangers from ammonia can be eliminated through exercise of reasonable care); *Philip Morris Inc. v. Emerson*, 368 S.E.2d 268 (Va. 1988) (holding that where harm resulting from disposing toxic chemicals can be prevented by exercising reasonable care, strict liability would not apply). But see *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. Super. Ct. Law Div. 1976) (imposing strict liability on defendant for harm resulting from oil storage).

<sup>99</sup> 774 F. Supp. 387 (E.D. Va. 1991).

activity.<sup>100</sup> In reaching its decision, the *Arlington* court reasoned that strict liability would not apply where "reasonable precautions would have sufficed to prevent the harm."<sup>101</sup> The rationale here is to use strict liability to deter only those activities with risks that cannot be eliminated by exercising reasonable care.<sup>102</sup>

However, in a seminal strict liability case, *New Jersey State Dep't of Envtl. Protection v. Ventron Corp.*,<sup>103</sup> the New Jersey Supreme Court held that the dumping of toxic wastes is an abnormally dangerous activity.<sup>104</sup> In *Ventron Corp.*, the state's Environmental Protection Agency brought an action against several corporations for contaminating a community's river through their mercury processing activities.<sup>105</sup> As was the case in *Ventron*, the contamination in Mbanmiri waters resulted from dumped chemical wastes which created waters in which "fish no longer inhabit[ed]."<sup>106</sup>

BUM may further argue that the benefit of its oil exploration activities to the Mbanmirians outweighs any resulting harm from its waste disposal practices.<sup>107</sup> But, as previously stated, the abnormal activity in question is the improper waste disposal, as opposed to oil exploration per se.

In *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*,<sup>108</sup> the district court suggested, in dictum, that a court would be reluctant to apply strict liability against a defendant who is the only industry in the community.<sup>109</sup> Here, BUM is the only company in Mbanmiri that is engaged in oil exploration. Indeed, no other business entity in Mbanmiri compares in style, form, or substance.

In arguing its value to the community, BUM would likely define the community as covering the entire country of Nigeria. The rationale for such an argument would be that the company entered into an agreement with the Nigerian government, and paid its taxes and related fees to the Nigerian government. Therefore,

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<sup>100</sup> *Id.* at 390 (applying the Restatement factors) (citation omitted).

<sup>101</sup> *Id.* at 391.

<sup>102</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 520 cmt. h. (noting that other than the use of atomic energy, there is hardly any activity where the accompanying risk could not be eliminated by "exercising the utmost care").

<sup>103</sup> 468 A.2d 150, 160 (N.J. 1983) (concluding that toxic waste dumping is an abnormal dangerous activity).

<sup>104</sup> *Id.* at 160.

<sup>105</sup> *Id.* at 154.

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 520(f) (1977).

<sup>108</sup> 662 F. Supp. 635 (N.D. Ill. 1987).

<sup>109</sup> *Id.* at 643 (citing the Second Restatement of Torts in discussing the extent of an activity's value to the community) (citation omitted).

BUM will argue that the burden on the Mbanmirians should be weighed against the company's benefit to the Nigerian government.<sup>110</sup> However, given the symbiotic relationship between executives of BUM and some power brokers in the Nigerian government, as alleged in the hypothetical facts, the community must be defined as one where the abnormal activities occurred.<sup>111</sup>

Under the Restatement's approach, all the factors discussed above need not be present to find an activity abnormally dangerous.<sup>112</sup> However, what is relevant here is that BUM polluted the waters and vegetation in Mbanmiri, and as one court has resolved, "[t]hose who poison the land must pay for its cure."<sup>113</sup>

The foregoing discussion looked at environmental tort actions that occurred in the United States. A foreign plaintiff would look to other avenues to bring an environmental tort action against a United States corporation, person, or entity for tortious conduct that occurred in a foreign country.<sup>114</sup> This practice of litigating or resolving common law disputes in a host<sup>115</sup> country for activities that took place in a foreign country has been referred to as extraterritorial adjudication.<sup>116</sup> However, under the rubric of international law,<sup>117</sup> an alien plaintiff suing a United States tortfeasor can bring such action under the Alien Tort Claims Act,<sup>118</sup> which provides that "the district courts shall have original jurisdiction of any

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<sup>110</sup> The focus of this Note does not allow for a thorough examination of this particular issue. However, note 97, *supra*, intimates some of the reasons why such a system, though used here in a hypothetical context, continues to exist.

<sup>111</sup> As previously stated, the dynamic of oil companies' symbiotic relationships with some officials of foreign governments is truly beyond the scope of this Note.

<sup>112</sup> RESTATEMENT (SECOND) OF TORTS § 520 cmt. f. (1977).

<sup>113</sup> New Jersey State Dep't. of Envtl. Protection v. Ventron Corp., 468 A.2d 150, 160 (N.J. 1983).

<sup>114</sup> The alien plaintiff would be precluded by jurisdictional issues. See David A. Soley, Comment, *Hunt v. Galtieri: A Hypothetical Scenario for Holding International Aggressors Civilly Liable in American Courts*, 33 EMORY L.J. 211, 217 (1984) (discussing some of the barriers to holding tortfeasors liable in the United States for a cause of action that occurred in a foreign country).

<sup>115</sup> In this case, a host country would be one other than the country where the cause of action accrued. For example, in an exemplary case, Indian plaintiffs sued an American corporation in an American court for injuries sustained in India. See *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 404 U.S. 871 (1987).

<sup>116</sup> E.g., *Extraterritorial Environmental Regulation*, 104 HARV. L. REV. 1609 (1991) [hereinafter *Extraterritorial*] (discussing extraterritorial regulation as it applies to international environmental law).

<sup>117</sup> See generally Soley, *supra* note 114, at 217 (citing 1 RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REV.) 13 (Tent. Draft No. 1, 1980) defining international law as the binding set of rules regulating the international political system).

<sup>118</sup> 28 U.S.C. § 1350 (1988).

civil action by an alien for a tort only, committed *in violation of the law of nations* or a treaty of the United States."<sup>119</sup> Accordingly, under the Alien Tort Claims Act, the Mbanmirians can bring an environmental tort action against BUM.

Pursuant to relevant case law, the threshold question under the Alien Tort Claims Act is whether a defendant's conduct constitutes an actionable tort within the law of nations.<sup>120</sup> In *Xuncax v. Gramajo*,<sup>121</sup> the court stated that an act violates international law when: (1) the act is universally condemned, (2) there are established criteria to ascertain when the act violates international norm, and (3) the prohibition is "binding at all times upon all actors."<sup>122</sup> In *Xuncax*, the court held that "any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable . . . under § 1350."<sup>123</sup>

To bring a claim under the Alien Tort Claims Act, an alien plaintiff is merely required to allege that a defendant committed a tort "in violation" of international law or a treaty of the United States."<sup>124</sup> Torture, along with cruel, inhuman, or degrading treatment, have all been recognized as being in violation of international law.<sup>125</sup>

### III. DOCTRINAL DEFENSES AND FORUM NON CONVENIENS

Once a successful cause of action under the Alien Tort Claims Act has been pleaded, the plaintiff must overcome the following defenses traditionally raised by defendants.

1. *Comity*. This is the principle which allows the courts of

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<sup>119</sup> *Id.* (emphasis added).

<sup>120</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that "deliberate torture perpetrated under color of official authority" violates the law of nations); cf. *Abiodun v. Martin Oil Serv.*, 475 F.2d 142 (7th Cir.) (holding that fraud is not an actionable tort under the Law of Nations), *cert. denied*, 414 U.S. 866 (1973). It should be noted that the Law of Nations is used synonymously with the term "international law." See, e.g., Soley, *supra* note 114, at 217 n.25 (citing 1 J. WESTLAKE, *INTERNATIONAL LAW* 1 (1st. ed. 1904)).

<sup>121</sup> 886 F. Supp. 162 (D. Mass. 1995).

<sup>122</sup> *Id.* at 184 (citation omitted).

<sup>123</sup> *Id.* at 187; cf. *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (holding that fraud and breach of fiduciary duty do not violate the law of nations so as to be actionable under the Alien Tort Claims Act).

<sup>124</sup> *Xuncax*, 886 F. Supp. at 180.

<sup>125</sup> *Id.* at 184-86.

one state to defer to the laws and jurisdiction of another.<sup>126</sup> This principle is usually triggered when the court is considering the adequacy of procedural safeguards in another jurisdiction.<sup>127</sup> However, this may be inapplicable to the *Mbanmini* case because this principle "is more frequently applied in cases of public regulatory law, such as antitrust, than in cases of private law, such as torts."<sup>128</sup>

2. *State Doctrine*. This principle protects the acts of foreign officials acting in their sovereign capacity.<sup>129</sup> In *Filartiga v. Pena-Irala*,<sup>130</sup> however, the Second Circuit suggested, in dictum, that illegal conduct by officials of sovereign governments will not be protected under state doctrine.

3. *Local Action doctrine*. Under this principle, when the tortious action relates to specific real property, the case must be resolved where the property is located.<sup>131</sup>

4. *Sovereign Immunity*. This doctrine, which is similar to state doctrine, has been codified in the Foreign Sovereign Immunities Act.<sup>132</sup> It provides: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States. . . ."<sup>133</sup> An exception under this rule arises when the foreign state is involved in private commercial activities "carried on in the United States by the foreign state."<sup>134</sup> Also, in *Xuncax v. Gramajo*,<sup>135</sup> the court concluded that the Foreign Sovereign Immunities Act does not apply to foreign officials who acted beyond their scope of authority.<sup>136</sup>

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<sup>126</sup> See, e.g., *Flynn v. General Motors, Inc.*, 141 F.R.D. 5, 9 (E.D.N.Y. 1992) (applying the principle of comity).

<sup>127</sup> *Id.*

<sup>128</sup> *Extraterritorial*, *supra* note 116, at 1628 (citing *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 749 F.2d 1378, 1384-86 (9th Cir. 1984) (examining "intrusion of U.S. antitrust laws on the economic policies of Honduras"), and other exemplary cases). International comity is not the focus of this Note. For a discussion of comity, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

<sup>129</sup> See, e.g., *Underhill v. Hernandez*, 168 U.S. 250 (1897) (barring suit by a group of Americans against the Venezuelan head of state); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>130</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>131</sup> See, e.g., *Mississippi & Missouri R.R. v. Ward*, 67 U.S. 485 (1862) (applying local action doctrine).

<sup>132</sup> 28 U.S.C. § 1604 (1988).

<sup>133</sup> *Id.* This statute generally provides the jurisdictional hook over foreign states. See, e.g., *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that Foreign Sovereign Immunity Act is the "sole basis for obtaining jurisdiction over a foreign state . . .").

<sup>134</sup> 28 U.S.C. § 1605(a)(2).

<sup>135</sup> 886 F. Supp. 162 (D. Mass. 1995).

<sup>136</sup> *Id.* at 175. Cf. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343 (S.D. Tex. 1989) (holding that under the Foreign Sovereign Immunity Act the Republic of Sudan is immune from action resulting from the wrongful death of a Texas



5. *Forum Non Conveniens*. Perhaps the most onerous hurdle the Mbanmirians would have to overcome is the doctrine of forum non conveniens.<sup>137</sup> The statute codifying this principle states, in relevant part, that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."<sup>138</sup>

A majority of tort cases, including environmental tort cases involving an alien plaintiff and a United States defendant, have been dismissed on the basis of forum non conveniens.<sup>139</sup>

A forum non conveniens analysis begins with the threshold question of whether an adequate alternative forum exists.<sup>140</sup> There is a strong presumption that generally favors the plaintiff's choice of forum.<sup>141</sup> The defendant can only overcome this presumption by showing that the balancing of private and public interests favors dismissing the case from the chosen forum.<sup>142</sup> In balancing the private interests, the factors considered include: (1) "ease of access to sources of proof";<sup>143</sup> (2) availability of unwilling witnesses; (3) cost of producing willing witnesses;<sup>144</sup> (4) the possibility of viewing the premises, where applicable;<sup>145</sup> and (5) "*all other practical problems* that make trial of a case easy, expeditious and inexpensive."<sup>146</sup> Additionally, the court considers whether any subsequent

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resident who was employed in the Sudan), *aff'd*, 954 F.2d 1061 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992).

<sup>137</sup> See, e.g., Arthaud, *supra* note 5 (observing that the doctrine of forum non conveniens continues to frustrate plaintiffs who are seeking relief in American courts for tort injuries that occurred in a foreign country).

<sup>138</sup> 28 U.S.C. § 1404(a) (1988).

<sup>139</sup> See, e.g., Arthaud, *supra* note 5; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (outlining the factors to be considered in reviewing a forum non conveniens motion to dismiss); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (expanding on *Gilbert*); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 804 (E.D. Pa. 1987) (finding that balancing of private and public factors favored dismissing products liability case against a helicopter manufacturer); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (holding, in part, that balancing of private and public factors favored dismissing case on ground of forum non conveniens).

<sup>140</sup> See, e.g., *Jennings v. Boeing Co.*, 660 F. Supp. 796, 799 (E.D. Pa. 1987) (citation omitted).

<sup>141</sup> *Id.* at 804; see also *Flynn v. General Motors Inc.*, 141 F.R.D. 5, 11 (E.D.N.Y. 1992) (concluding that "[t]here is a strong presumption in favor of plaintiff's choice of forum . . .") (quoting *Piper Aircraft Co. v. Reno*, 454 U.S. at 255 (1981)).

<sup>142</sup> *Flynn*, 141 F.R.D. at 11 (citation omitted).

<sup>143</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (outlining the private interest factors).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (emphasis added).

judgment can be enforced.<sup>147</sup>

The relevant public interest factors include concerns of whether the courts are being congested,<sup>148</sup> the burden of jury duty on a community with no "relation to the litigation,"<sup>149</sup> the local interest in having "localized controversies decided at home,"<sup>150</sup> and the interest "in having the trial of a diversity case in a forum that is at home with the state law that must govern the case rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."<sup>151</sup>

The doctrine of forum non conveniens "seeks to promote convenience to the parties and ensure fairness of the trial."<sup>152</sup> However, the reality is that the doctrine has been disparately used against foreign plaintiffs.<sup>153</sup> In a recent case involving plaintiffs from twelve foreign countries who were injured from exposure to the defendants' products,<sup>154</sup> the court concluded that the balancing of private and public factors favored granting the motion based on forum non conveniens.<sup>155</sup>

If improper waste disposal and other chemical dumping practices are prohibited in the United States, corporations that are incorporated under the laws of this country should not be allowed to evade liability by pleading forum non conveniens after engaging in known abnormally dangerous activities. The courts should be more active in curbing intercontinental environmental torts that are being perpetrated by multinational corporations.<sup>156</sup> In balancing the parties' convenience, the courts should be cognizant of the fact that foreign plaintiffs are also often brutalized by their governments, especially where the defendant has developed a symbiotic

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<sup>147</sup> Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1366 (S.D. Tex. 1995) (citing Gonzalez v. Naviera A.A., 832 F.2d 876, 878 (5th Cir. 1987)).

<sup>148</sup> Gilbert, 330 U.S. at 508.

<sup>149</sup> Id. at 508-09.

<sup>150</sup> Id. at 509.

<sup>151</sup> Id.

<sup>152</sup> Extraterritorial, supra note 116, at 1628.

<sup>153</sup> See, e.g., William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1691-94 (1992) (noting how foreign plaintiffs receive "disparate treatment" under the doctrine of forum non conveniens) (citation omitted).

<sup>154</sup> Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995).

<sup>155</sup> Id. at 1369-71.

<sup>156</sup> As this Note demonstrates, the conduct of these multinational corporations has often been devastating to the people and their environment. See, e.g., Laird M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries*, 6 INT'L TRADE L.J. 95 (1981).

relationship with the political leaders.<sup>157</sup>

#### IV. CONCLUSION

The absence of an international environmental tort cause of action<sup>158</sup> creates the need for foreign plaintiffs to use the Alien Tort Claims Act to seek relief in United States courts. Given the globalization of commerce and technology, and the emerging environmental justice movement,<sup>159</sup> international environmental tort practice is bound to mushroom within the next few years. As such, the practitioner should become familiar with the dynamics, as demonstrated in this hypothetical case, of the courts' balancing act with regard to forum non conveniens.

Perhaps, under the Alien Tort Claims Act, courts should recognize environmental torts analogous to BUM's conduct as a crime in violation of the law of nations. As the court suggested in *Xuncax v. Gramajo*,<sup>160</sup> conduct that is universally condemned should be recognized as being in violation of international law.<sup>161</sup> Also, within the boundaries of the established public and private interest factors articulated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*,<sup>162</sup> courts should take the initiative by engaging in a more equitable balancing of the parties' interests where, if the various policy issues are fully examined, the onus would not weigh so heavily on foreign plaintiffs. If the doctrine of forum non conveniens seeks to promote fairness,<sup>163</sup> it necessarily follows that the Mbanmirians of the world should be allowed their day in court.<sup>164</sup>

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<sup>157</sup> This is especially true in the so called less developed countries. See, e.g., Lippman, *supra*, note 97.

<sup>158</sup> *Extraterritorial*, *supra* note 116.

<sup>159</sup> See, e.g., Marc Whitehead, *Toxic Tort Litigation: Developing Issues and Their Impact on Case Preparation and Presentation*, C921 A.L.I.-A.B.A. 525, 536 (1994) (noting that environmental justice movement "really began in 1982 at a demonstration in Warren County, North Carolina"); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993) (examining environmental racism); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Sitting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1003 n.7 (1993) (observing that sites for "locally undesirable land uses" have a disparate impact on "people of color").

<sup>160</sup> 886 F. Supp. 162 (D. Mass. 1995).

<sup>161</sup> *Id.* at 184.

<sup>162</sup> 330 U.S. 501, 508-09 (1947).

<sup>163</sup> See *Extraterritorial*, *supra* note 116, at 1628.

<sup>164</sup> While this Note presents a hypothetical scenario of an oil producing region reduced to near destitute, the issues raised are anything but fictional. See, e.g., Dele Olojede, *A Shell Game*, N.Y. NEWSDAY, June 7, 1995, at A24 (reporting on the real life horrors of how one government used its military might to crush and literally annihilate the lives of the indigenous people of Ogoni, an oil producing region in Nigeria,

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who dared to demand humane treatment from Shell Oil, a multinational oil company that has been drilling oil from this region for more than thirty-seven years). An effective United Nations involvement and/or initiative also is needed. The calling for such an analysis, however, is beyond the scope of this Note.