Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organizations

Catherine Corey Barber
Hertie School of Governance
Foreword

For many nonprofit organizations, it is critical to attract and continuously justify the support that they receive from donors, volunteers, the media, etc. In doing so, it might not suffice to demonstrate that the organization is pursuing a good cause. The organization also needs to show that it is indeed making a difference. For why give any resources to an organization that is noble but utterly ineffective?

Proving effectiveness, may, however, pose a major challenge to nonprofit organizations. The reason is that their goals are often defined in only vague and general terms. Human rights organizations are a primary case in point, and this is all the more true for those engaged in strategic litigation. It is common for these organizations to lose most, if not all their legal battles. They know about this, and yet, they continue what, to many observers, will appear as “tilting at windmills”. Apparently, their endeavor is not just about victories in court. But how, then, can one possibly define success in strategic litigation, let alone measure it?

In tackling this question, Corey Barber has entered a territory that has so far been largely unchartered. Strategic litigation is a vast field, and highly under-researched at the same time. Similarly, it is still by no means common for nonprofit organizations to systematically manage and measure their performance. Against this background, the present text is a remarkable contribution. Viewed from an academic perspective, it is a step towards a better understanding of strategic litigation and the organizations pursuing it. In practical terms, it may help those engaged in strategic litigation identify the rare occasions on which there is a point in “tilting at windmills”.

Alexander Graser
Professor of Comparative Public Law and Social Policy
Thesis Supervisor
# Table of Contents

Executive Summary.................................................................................................................. iii

Introduction............................................................................................................................. 1

1. The Evaluation Challenge ...................................................................................................... 7
   1.1 What is Evaluation?............................................................................................................. 7
   1.2 The Value of Evaluation.................................................................................................. 8
       1.2.1 Why Human Rights Organizations Should Embrace Evaluation
       1.2.2 What Evaluation Could Bring to the Human Rights Field
   1.3 The Inherent Difficulties of Evaluation............................................................................ 11
       1.3.1 Criticisms of Any and All Evaluation
       1.3.2 Criticisms of Goal-Based Evaluation
       1.3.3 Evaluation Challenges Faced by Human Rights Organizations
       1.3.4 Additional Hurdles Faced by Strategic Litigation Organizations
   1.4 This Article’s Approach to Evaluation............................................................................ 17

2. Case Study Analysis ............................................................................................................... 19
   2.1 Wiwa v. Shell ..................................................................................................................... 19
       2.2.1 Background on Shell’s Role in the Niger Delta
       2.2.2 The Alien Tort Claims Case
       2.2.3 Was the “Victory Settlement” a Tacit Admission of Shell’s Guilt?
       2.2.4 What Is Wiwa’s Impact?
       Table 1. Wiwa’s “Impact” .................................................................................................... 30
   2.2 The Argentinean Cases ..................................................................................................... 31
       2.3.1 Background on Argentina’s Dirty War
       2.3.2 The Cases
       2.3.3 The Current Trials in Argentina
       2.3.4 What Is the “Impact” of the Argentinean Cases?
       Table 2. The Argentinean Cases’ “Impact” ......................................................................... 39
   2.3 The Rumsfeld Cases ......................................................................................................... 40
       2.4.1 Background on the Center for Constitutional Rights’ Decision to Take the Case to Europe
       2.4.2 The Cases and Their Dismissal
       2.4.3 What Is the “Impact” of the Rumsfeld Cases?
       Table 3. The Rumsfeld Cases’ “Impact” ............................................................................. 46

3. Conclusions .......................................................................................................................... 47

4. Recommendations: Incorporating Scientific Thinking into Strategic Litigation ... 51

Bibliography.............................................................................................................................. i
Executive Summary

Many nonprofit organizations struggle to assess their performance. This article seeks to help strategic human rights litigation organizations further their ability to systematically assess the impact of their efforts to promote and enforce human rights through strategic litigation—the use of legal tools to seek positive legal and social change.

By looking at three cases litigated by nonprofit legal organizations, the article analyzes how “success” can be conceived of in each case and identifies potential outcomes and impact of each litigation effort. The article uses three cases to induce goals of strategic litigation:

- **Wiwa v. Shell**, a case of a multinational corporation’s abuse of human rights in Nigeria;
- the **Argentinean cases**, a series of 40 complaints filed in Germany on behalf of German-Argentine victims of the Dirty War; and
- the **Rumsfeld cases**, a series of three complaints filed in France and Germany in the mid-2000s charging former US Secretary of Defense Donald Rumsfeld and other top officials with torture and war crimes.

The article identifies different “successes” of each case. **Wiwa** succeeded in advancing victims’ interests and furthering Alien Tort Claims as a legal tool in the US. The German-litigated **Argentinean cases** sparked and renewed prosecution efforts in Germany and Argentina, investigated and reconstructed “truth,” illustrated the utility of universal jurisdiction, and strengthened transnational human rights networks. The **Rumsfeld cases** allowed for the exploration of alternative legal venues, brought public attention to the issue, affected shifts in public opinion, and helped “crack the walls” of impunity.

This article encourages nonprofit human rights organizations to embrace tools of systematic analysis, be they from the fields of “evaluation” or “measurement” to assess their performance and the external results of their efforts. This article
contributes to the literature available to human rights organizations seeking to measure their effectiveness. It concludes that it is possible and desirable for human rights organizations to assess, measure, and evaluate their efforts.

Finally, the article provides three recommendations for how scientific thinking can be better incorporated into strategic human rights litigation. To tackle the measurement challenges of assessing impact in human rights work, organizations should:

1. Carefully define their goals and regularly assess if their efforts match those goals,
2. Regularly reflect on their priorities and programs, and
3. Develop a common understanding of success in strategic litigation.
Introduction

Nonprofit organizations that undertake strategic human rights litigation (hereinafter referred to as strategic litigation organizations) use a combination of legal tools and traditional advocacy techniques to challenge human rights injustices and the impunity of those who perpetrate them. These organizations employ creative legal and non-legal strategies and use a multitude of forums to achieve their goals. Strategic litigation challenges individual and social injustices. With the goal of affecting positive legal, political and social change, strategic litigation’s potential impact is much broader than traditional client-focused legal services. The legal tactics used by these organizations can be relatively straightforward, such as filing a criminal complaint with a state prosecutor, or can comprise complicated and lengthy legal battles, such as those discussed in this article.

Proving Success

Human rights organizations have a problem—they have a difficult time demonstrating that their efforts make a direct contribution to the issues they are working to improve. The international human rights legal community lacks an agreed-upon definition of strategic litigation, and often times, human rights organizations do not know what would constitute success in their own campaigns. Amnesty International, for example, has been active in the human rights field since 1961 and has only recently attempted to measure or assess its effectiveness or impact. Although it is one of the largest human rights organizations with a huge annual budget in comparison to most strategic litigation nonprofit organizations

---

1 I would like to thank Martin Lutz, Doug Barber, Emilia Roig and Polly Moak for their language corrections on earlier versions of this text. Professor Kai Wegrich of the Hertie School Governance provided helpful insights from the field of public management, and I am grateful to the staff and interns at ECCHR for their helpful input. Professor Alexander Graser of the Hertie School deserves a special thank you for his interest in my project and his vision and guidance throughout.

2 I use the term human rights organizations to refer to human rights nonprofit organizations generally, whereas I use the term strategic litigation organizations to refer to a smaller group of organizations that work in the human rights field but employ strategic litigation to achieve their missions. Legal organizations is used as an umbrella term for organization that seek social, environmental, legal or human rights change through legal tools, though do not necessarily employ strategic litigation methods.
(NPOs), Amnesty continues to rely on anecdotal evidence to publicly communicate what it considers to be its “successes.”³

If you look at many human rights organizations’ websites today, you are likely to find a page of “Our Successes” with quotes from victims of human rights abuses and respected international figures about what an important role that organization plays in furthering the human rights cause.⁴ Amnesty International USA’s “Success Stories” page reads, “Here’s where all of your hard work writing letters and sending emails pays off! Listed below are some more of our most recent victories in the cause of human rights.”⁵ It goes on to describe stories such as, “Turkmen Environmentalist Evades Five Years’ Imprisonment,” “After 3 Months, Iranian Prisoner of Conscience Released Without Charge” and “Stay of Execution for Kenneth Mosley,” without discussing what Amnesty’s role was in achieving these “victories.” Many human rights advocates would prefer to incorporate more systematic ways of assessing their performance, yet lack the methodological tools to do so. This article seeks to fill in some of those gaps by providing insights into how one can define strategic litigation, what constitutes its success, as well as putting forth an argument of how evaluation can benefit the human rights field.

**Defining Strategic Litigation**

Although a commonly used legal concept, strategic litigation has yet to be defined in the literature. In the course of this project, I developed a working definition of strategic litigation as the use of litigation and other legal and non-legal methods to seek legal and social change.⁶

---

³ See Amnesty International USA and UK, “Success Stories.”
⁵ Amnesty International USA, “Our Successes.”
⁶ Although strategic litigation is not defined in the relevant literature, several publications contributed to the development of my thinking about strategic litigation. Wilson and Rasmussen’s 2001 guide to strategic human rights litigation defined the term “human rights lawyering” as an umbrella term for conventional poverty lawyering efforts and modern lawyering on behalf of universally recognized human rights. Koppelman’s 2009 article discusses the risks of strategic litigation in the campaign for equal rights for same-sex partners and Lobel’s 2005 autobiography describes the legal and advocacy strategies employed by the Center for Constitutional Rights.
To forward the discussion of how strategic litigation organizations can evaluate their success, this article poses two research questions:

1. What is “success” or “failure” in strategic litigation cases?
2. How can this “success” or “failure” be measured?

Because there is little scholarly literature that links measurement or evaluation to human rights work, I conducted an exploratory study of three strategic litigation cases to come to a better understanding of the challenges that human rights organizations face in identifying successes and failures in their cases and programs, and to gain insights into how the evaluation challenge can be overcome in the human rights field. In order to get results that are valid for as broad a range of strategic litigation cases as possible, I chose three diverse cases which vary significantly in the nature of the human rights abuses that occurred, in the legal tools used to challenge the abuses, and in the geographical regions in which the human rights abuses took place and were litigated. In order to be able to understand the cases and their effects as well as possible, it was important that each case be well documented. These considerations left me with three series of cases: Wiwa v. Shell, the Argentinean cases, and the Rumsfeld cases. Throughout the thesis, I use the definition of measurement proposed by Harvard University’s Carr Center for Human Rights—the use of systematic assessment techniques, including qualitative and quantitative measures, in the field of human rights. In Part 3, I reflect upon whether this definition of measurement is adequate for assessing strategic litigation.

It is important to acknowledge that the term “measuring human rights” has come to represent two diverging concepts. One looks at organizational evaluation and measurement—tools that NPOs use to find out how well their policies and programs

---

7 Although the human rights abuses differ in each case, they are all core crimes under the International Criminal Court's (ICC) Rome Statute. These core crimes are limited to the most serious human rights violations of genocide, crimes against humanity, war crimes (including torture), and crimes of aggression.
8 I am grateful to Wolfgang Kaleck, who litigated Rumsfeld and Argentina, and Jacqui Zalcberg, part of the Wiwa litigation team, for their invaluable insights into the cases.
meet their objectives. The other concept relates to developing indicators of human rights standards and situations (e.g. government or corporate compliance with human rights legal obligations.) Using the same terms to denote two fields of research leads to confusion about what it means to “measure” human rights. This article focuses on the first type of measurement—essentially, evaluation.

**The Cases**

*Wiwa v. Shell*, a case that lasted nearly 14 years, allowed Nigerian plaintiffs to sue the Shell Oil Company in the United States for human rights abuses committed in Nigeria in the early 1990s using the archaic Alien Tort Claims Act (ATCA). The Center for Constitutional Rights (CCR) and EarthRights International (ERI), the two nonprofit organizations litigating the case, claimed victory when Shell agreed to an out-of-court settlement of 15 million US Dollars (USD) in June 2009, just days before the trial was scheduled to begin.

The *Argentinean cases* represent the efforts of the German Coalition against Impunity, a civil society advocacy group, and its legal team to challenge the impunity of the Argentine military junta who waged a Dirty War between 1976 and 1983. Since the first complaint was filed in 1998, cases were filed in Germany on behalf of 40 disappeared German citizens or Argentines with German heritage. Now, for the first time since 1984, General Jorge Rafaél Videla, Admiral Emilio Massera and other former leaders of the military junta are standing trial for crimes committed during the Dirty War, including several cases that are related to the complaints filed in Germany. Although none of the leaders of the military dictatorship went on trial in Germany, the Coalition against Impunity’s legal team succeeded in obtaining German arrest warrants issued for General Videla and Admiral Massera and coordinating with Argentine human rights lawyers to bring these men to justice, wherever possible.

---

10 For a discussion of how indicators are used to measure human rights violations, compliance with human rights norms and treaties, and human rights progress over time, see Rosga and Satterthwaite 2008 and Flosse 2008. See Lensen and d’Engelbronner 2009 for tools to measure corporate compliance with and promotion of human rights standards.
The *Rumsfeld cases* were initiated in 2004, charging former US Secretary of Defense Donald Rumsfeld and others with war crimes and human rights violations during the Bush Administration’s “War on Terror.” These cases consist of three complaints filed between 2004 and 2007 by a network of human rights organizations, using the principle of universal jurisdiction under German and French law. The European authorities dismissed the complaints and there is no ongoing effort to continue the cases. Although unsuccessful in traditional legal terms because they did not result in a courtroom victory, the *Rumsfeld cases* received considerable German and US press coverage, and are seen by many as having contributed to the shift in legal and public opinion regarding the legality and justifiability of the Bush Administration’s use of torture.

**Applying Impact Assessment**

This thesis applies Impact Assessment (IA) tools to human rights work. Impact Assessment is commonly used in public and nonprofit organizations—especially those in the fields of development aid, the environment and health—to systematically evaluate an organization’s effectiveness and efficiency. Part 1 discusses the benefits that measuring impact can bring to the human rights field, as well as the inherent difficulties of any attempt to measure an NPO’s performance. It then turns to the issue of why measurement poses even greater challenges to human rights organizations, especially those that use strategic litigation. It also describes what a complete Impact Assessment Framework would look like, and explains why I have chosen to focus on the cases’ external results—outcomes and impacts—rather than the organizations’ inputs and outputs.

Part 2 looks at each case, describing how each evolved, and what “successes” *Wiwa, Argentina* and *Rumsfeld* achieved. Each case looks at different indicators of success, ranging from outcomes—such as advancing victims’ interests and bringing public attention to an issue—to impacts—such as “cracking the walls” of impunity and illustrating the utility of universal jurisdiction—to indicators that can be either, depending on the range of change affected and whether it remains connected to the case itself or moves beyond in the legal, political or social realms.
Then, in Part 3, I take a step back and look at what these findings say about the applicability of Impact Assessment to strategic litigation generally. It provides my conclusions and seeks to answer, based on the case studies, how evaluation of strategic litigation cases and organizations should progress. Finally, in Part 4, I provide short-term recommendations to strategic litigation organizations and the broader human rights community of how to incorporate better scientific thinking into their work.
1. The Evaluation Challenge

Human rights organizations lag decades behind public and nonprofit organizations in other fields in developing ways to evaluate their effectiveness and measure the outcomes of their policy interventions. Although the “measurement and human rights” research community has been slow in forming, it has picked up momentum over the past year or so. Nevertheless, the research community has largely ignored such questions as, “What is the effect of specific human rights laws, policies and interventions?” and “How can ‘impact’ be defined and measured?”

This section continues, first, by discussing what evaluation is (1.1). Second, it assesses the benefits of evaluation to individual human rights organizations as well as to the human rights field (1.2). The discussion continues by acknowledging the criticisms of — and inherent difficulties in — evaluating impact, paying special attention to the hurdles faced by human rights and strategic litigation organizations (1.3). Lastly, the evaluative approach, scope and criteria taken in assessing the cases’ “impact” are defined (1.4).

1.1 What is Evaluation?

Public policy evaluation is defined as a “systematic or careful assessment of the merit, worth and value of administration, output and outcome of government interventions, which is intended to play a role in future, practical action situations.” Evaluation, regardless of the type of organization under analysis, consists of a broad set of approaches, models and methods that are used to demonstrate data to indicate whether particular activities are good, or good enough,

---

12 This is evidenced by the recently launched research program at Columbia University on impact evaluation and in Amnesty International and Human Rights Watch’s Impact Assessment pilot projects. See Gorvin 2009 for a description of HRW’s pilot evaluation project. Amnesty’s Impact Assessment pilot program is not yet available to the public.
in the eyes of the evaluators or managerial staff.¹⁴ Policy evaluation is an _ex post_ assessment of the strengths and weaknesses of programs and projects and is distinct from _ex ante_ policy analysis, which uses methods as a decision-making aid to evaluate policy alternatives before one is chosen.¹⁵

Western countries have been hit by a wave of evaluation over the past 50 years.¹⁶ Evaluation now constitutes a distinct field that remains largely separate from mainstream policy analysis and performance management, and is part of a larger wave of public management initiatives including audit, inspection and quality assurance.¹⁷ The evaluation wave can be seen as a response to a demand for increased efficiency in the public sector, as well as a need to base practices and decision-making on “evidence.” Today, much evaluation follows the values promoted by the New Public Management (NPM) camp, putting a stronger emphasis on outcomes and effectiveness, rather than on rules and procedures.¹⁸ Although common in many fields, evaluation is more prominent in some areas of public policy than others, with education, social services, and foreign aid being the target of frequent evaluation, while national defense, law, churches and infrastructure remain largely resistant to such attempts.¹⁹ In the nonprofit world, many organizations use some form of evaluation.

### 1.2 The Value of Evaluation

This article argues that even though evaluation is an inherently difficult and normative process, its incorporation into the human rights field can benefit the individual organizations that embrace it, as well as the field as a whole.

---

¹⁴ Dahler-Larsen 2005, 615.
¹⁶ Bialock 1999.
¹⁷ Ibid., 616.
¹⁸ Dunleavy and Hood 1994.
1.2.1 Why Human Rights Organizations Should Embrace Evaluation

Evaluation tools can help organizations improve their performance and the quality of their work. They can also help organizations make better decisions and alter their objectives to better fit their capabilities.

To Improve Quality and Avoid “Successful Failure”

At the time of writing in summer 2010, evaluation has only begun to be used in the human rights field to improve organizational efficiency and effectiveness. Performance management tools, such as Impact Assessment, can help nonprofit organizations measure their internal results (i.e. how efficiently they operate), as well as their external results (i.e. what impact an organization has on its goals). Whether called “impact assessment,” “impact evaluation,” “impact measurement,” “performance measurement,” “organizational effectiveness,” “organizational learning,” “monitoring” or “evaluation,” any systematic assessment of how well a NPO is doing in fulfilling its mission and goals can help human rights organizations demonstrate their efficiency and effectiveness to internal and external stakeholders.

Some scholars hold that the nonprofit sector provides a friendly environment for low-performance, high-persistence organizations. Seibel calls organizations that survive despite inefficiency or failure “successfully failing” organizations. Because of their idealist values, nonprofit organizations can have an incentive to cover up the truth about poor performance, believing that their work is helping “no matter what.” Due to its distinctness as a sector, the nonprofit field provides the structural and cultural (mental and cognitive) prerequisites of reliable organizational failure.\(^\text{20}\)

Unlike organizations in the private sector, nonprofit organizations lack revenue structures that make failure visible and the shareholders to ensure that organizations achieve their goal of earning a profit. In contrast to public organizations, nonprofits are not held accountable to the public through democratic mechanisms. By embracing methods of control, of which evaluation is one tool,

---

\(^{20}\) Seibel 1996, 1016.
organizations can ensure they are efficient, effective and accountable and can avoid the danger of living on, despite poor performance.

**Organizational Learning**

Organizations can benefit from evaluation by learning (i.e. from the creation of systematic knowledge), which can translate into the ability to create better programs or strategies and employ more sophisticated decision-making.\(^{21}\)

Improvement is the key to evaluation—the main goal of goal-oriented evaluation is to learn from evaluation in order to make better organizational and programmatic decisions in the future. This type of organizational learning is not only intended to help organizations achieve their objectives, but also to alter the objectives themselves.\(^ {22}\)

**1.2.2 What Evaluation Could Bring to the Human Rights Field**

It can be argued that evaluation is a good thing in and of itself. Some scholars even believe it to be a democratic right.\(^ {23}\) Human rights organizations are currently an outlier in the nonprofit sector in their resistance to evaluation. Even if one remains unconvinced of the merits of evaluation, it may make strategic sense to “join the crowd” and take part in the evaluation wave and the trend towards “professionalization.”

I argue that most strategic litigation organizations are what Wilson calls “procedural organizations.” These are organizations in which outputs are visible but outcomes are not. In this type of organization, managers can easily learn what their staff is doing on a regular basis, but it is very difficult to observe the outcomes of their work, either because there is no result, or because the result will occur in the distant future.\(^ {24}\) By incorporating evaluation into their work, I hope that human rights organizations can avoid the fate of many procedural organizations, in that they become means-oriented, meaning that “how the operators go about their jobs

\(^{21}\) Dahler-Larsen 2005, 621.

\(^{22}\) Wildavsky 1979, 213.

\(^{23}\) Talbot 2005, 497.

\(^{24}\) Wilson 1989, 163.
[becomes] more important than whether doing those jobs produce the desired outcomes.”

Instead, I advocate that human rights organizations practice goal-oriented management, which would help managers evaluate the outcomes of their staffs’ work.

**Basing Decision-Making on “Evidence”**

Today, an entire field of “evidence based policy and practice” embraces the practice of basing policy choices on “evidence.” This argument suggests that organizations have lost sight of the outcomes they intend to achieve. In the human rights field, organizations often know what their (often unachievable and vague) long-term goals are, i.e. to defend and protect human rights. But it is rare for human rights organizations to be able to articulate the shorter-term outcomes they aim to achieve.

---

**1.3 The Inherent Difficulties of Evaluation**

Evaluation is always a challenge, no matter the field in which it is being conducted, nor the type of evaluation that is undertaken. This section presents criticisms of evaluation, and goal-oriented evaluation generally.

**1.3.1 Criticisms of Any and All Evaluation**

Here, three criticisms of evaluation are discussed—evaluation is never complete; activities change as they are being monitored; and evaluators inevitably influence their evaluations.

**Evaluation Can Never be Complete**

Evaluation is never able to give more than an incomplete picture of an organization’s activities, which are diverse and complex. Much of evaluation is deliberately kept simple for communication purposes.

---

26 Davies, Nutley et al. 2000.
As Talbot points out, evaluations are always bound to a degree of distortion and exclusion, and what is not measured is usually of importance to a particular stakeholder.  

28 Thus, in Wildavsky’s words:

The very step of defining objectives may be considered a hostile act. If they are too vague, no evaluation can be done. If they are too specific, they never encompass all the indefinable qualities that their adherents insist they have. If they are too broad, any activity may be said to contribute to them. If they are too narrow, they may favor one segment of the organization over another.  

29

Activities Change as They Are Being Monitored

Goals shift during the course of the policymaking process to such an extent that original goals bear little relevance in assessing the substance and rationale of a policy that was adopted and implemented in subsequent years. Organizations may ask themselves if it makes sense to be held to the goals it stated at the outset of a campaign.

Evaluator Influence

Although some like to think of goal-oriented approaches to evaluation as being free from influence by the evaluator, like all social science research, in evaluation, the evaluator (or evaluators) must define the scope and evaluation criteria of their project. Parson views policy evaluation as inherently normative and considers it to be “an activity which is knee-deep in values, beliefs, party politics and ideology that makes ‘proving’ that this policy had this or that impact a notion which is deeply suspect.”  

30

1.3.2 Criticisms of Goal-Based Evaluation

This section puts forth several criticisms of goal-based evaluation—it is challenging to identify measurable goals; it is often impossible to establish causality between an intervention and an outcome; and neither negative results nor recommendations are visible in goal-oriented evaluation.

29 Wildavsky 1979, 216.
Identifying Measurable Goals
Organizational goals are usually multiple, conflicting and vague, making them quite difficult to measure.31 Goals are often untraceable in policy documents and are symbolic rather than substantial, deliberately vaguely worded, and contain mutually contradictory components.32

“Proving” Causality
Specifying causal links between interventions and effects is often a complicated methodological problem. In fact, it is one of the most difficult endeavors social science can attempt.

These “attribution problems” are usually associated with outcomes.33 Have the outputs of an organization resulted in the desired outcomes, and if so, can this be attributed to the outputs? As can happen in any social science research, correlation is often mistaken for causation. Because of these difficulties, goal-oriented evaluators are sometimes charged with ignoring the correlation problem altogether.34

The counterfactual question is equally difficult—it is often impossible to know what would have happened without an intervention.

Only Revealing Positive Progress
Outcome measures are based on stated goals, which concern intended and positive effects.35 This undoubtedly makes an intervention’s shortcomings and failures difficult to see and identify.

Additionally, goal-based evaluation is unhelpful in making recommendations on how to improve organizational performance, “Goal-based evaluations deliver descriptive

31 Wildavsky 1979, 215.
34 Dahler-Larsen 2005, 625.
35 Ibid., 626.
statements about whether goals are met, but since they are often weak on causal attribution, they are difficult to use in a formative way.”

This type of “summative evaluation” offers judgments, but not proposals about improvements.

1.3.3 Evaluation Challenges Faced by Human Rights Organizations

Several factors make measuring the performance of human rights organizations particularly difficult. These include the collaborative nature of advocacy, the politically sensitive nature of many issues, the long-term nature of impact, and the presence of unquantifiable goals.

The Collaborative Nature of Advocacy

Human rights organizations, especially small organizations, often operate in elaborate nonprofit networks with other NPOs. It would be rare for a single human rights organization to be working on a particular issue at any given time. The multitude of actors and organizations involved in an intervention complicates the issue of causality even further.

Political Sensitivity

In some cases, NPOs know that they have affected a policy outcome, but cannot acknowledge it publicly because of the politically sensitive nature of the issue. As Raine explains, in human rights policy work, “In many cases, the government agency or official who needs to make the policy change would be politically and personally compromised if it were acknowledged that pressure from the human rights community played a role in changing his or her mind.” It is often impossible for NGOs to get statements or other evidence from public officials that would demonstrate the immediacy of their efforts.

---

36 Talbot 2005, 625.
Catering to Short-Term and Long-Term Objectives

Human rights organizations must frame their goals with both short-term and long-term objectives in mind, which means measuring outcomes and impact. For example, an organization that works to tackle domestic violence could use a short-term tactic (such as airing a radio program or holding or a training session on domestic violence) with the goal of reducing domestic violence from one year to the next, as well as long-term tactics with the goal of transforming systemic problems (e.g. improving societal attitudes about women’s rights). In this example, the short-term intervention would be an output, and any shifts in systemic problems in the long-term would be an impact. The long-term nature of many human rights issues makes measuring impact extremely difficult for any organization.

The (Im)measurability of Unquantifiable Indicators

An ideal Impact Assessment framework would incorporate quantitative and qualitative indicators that are easy to measure. However tracking, much less measuring, long-term changes in the field of human rights can be very difficult. How can a small nonprofit organization with few resources systematically assess something like a change in public attitudes or the impact of an intervention on public policy? Linking this issue to the US campaign to end the death penalty, Raine raises the following questions:

How does one measure a change in attitudes and shifts in values, even before the policy has changed? Would one need to declare the campaign to end the death penalty a failure, for example, simply because capital punishment still exists in the US? Or could one point to the fact that much has changed in how the courts are limiting the use of capital punishment, and celebrate the possible changes that a campaign against it might bring in the medium term?

These are questions that social scientists can tackle, given the time and resources. But they lie outside of the scope of many practitioners’ training, and most smaller human rights organizations lack the resources to hire an external evaluator to look into these issues.

---

38 Raine 2006, 15.
39 Ibid.
40 Ibid.
1.3.4 Additional Hurdles Faced by Strategic Litigation Organizations

There is no agreed-upon concept of what strategic litigation is or what its success would be. Goal-oriented evaluation requires that organizations have clear and explicit missions and goals before they can develop indicators of their impact. Without them, goal-based evaluation cannot be employed as an evaluation method.

What is Strategic Litigation?

To tackle difficult human rights situations, strategic litigation organizations use innovative techniques that combine litigation, other legal practices, and advocacy. In this way, strategic litigation, defined as the use of litigation and other legal and non-legal methods to seek legal and social change, involves a more holistic approach to challenging injustice than many other forms of advocacy or litigation.41 Strategic litigators choose multiple legal and non-legal tools and domestic, regional or international forums to challenge injustices in an attempt to develop the combination of tactics that is most likely to forward their policy goals.

Strategic litigation is different from typical legal services, which are client-centered, so success cannot only be based on the outcome of a case from the view of the plaintiffs. Strategic litigation is used to change the policies and attitudes of the justice system, government, and civil society. Therefore, success or failure must be conceived of from the perspective of a breadth of actors. That is not to say that strategic litigation is unconcerned with the outcome of an individual case—it is equally concerned with individual and social justice.42 Another difference from traditional legal work is that strategic litigation incorporates support strategies (e.g. NGO networks, media campaigns, international pressure, popular support, legislative reform, and education) to achieve its broad-sweeping goals.43

---

41 For an analysis of how one can assess the impact of legal judgments on public policy, see Donald and Mottershaw 2009.
42 International Media Support, 2009.
43 Wilson and Rasmusen 2001, 70 and 75.
What are its Goals?
Defining goals and conceiving of success is particularly difficult in strategic litigation because there is much more to advancing the protection and enforcement of human rights than winning a case in the courtroom. A critical debate is taking place in many legal organizations, most visibly in the US, about whether a legal NPO can achieve success without legal victory. Organizations such as the Center for Constitutional Rights (CCR), the European Center for Constitutional and Human Rights (ECCHR) and EarthRights International (ERI) have goals other than winning in court, such as furthering public awareness of an issue, publicly challenging injustice and impunity, and often, affecting public policy; whereas organizations such as the ACLU (American Civil Liberties Union) or NAACP (National Association for the Advancement of Colored Peoples) view courtroom victories as being critical to their strategies aimed at furthering social justice, because they set positive legal precedent for future cases. Measuring advocacy and policy is an emerging field of research, and there remain few resources that provide NPOs with tools that can be used to measure the effectiveness of advocacy and policy work.

1.4 This Article’s Approach to Evaluation
This article embraces a goal-oriented approach to evaluation in which activities are evaluated on the basis of whether they achieve explicitly stated goals. This is the simplest form of programmatic evaluation. Typically, goal-oriented approaches evaluate programs in terms of inputs, processes, outputs and outcomes, or in other words, Impact Assessment Frameworks. Using this approach, the only way to understand a program is through its previously stated goals, and this constitutes the only legitimate source of criteria for judging a program. The appeal of the goal-oriented approach to evaluation is that it is based on criteria that are deduced from

---

44 See Lobel 2006.
45 See Reisman, Gienapp and Stachowiak, 2007.
47 Dahler-Larsen 2005, 624.
program goals, regardless of the evaluator’s sympathy with those goals or her belief in the organization’s ability to achieve them.\textsuperscript{48}

I was not able to conduct a traditional goal-oriented evaluation in this study—the strategic litigation organizations I looked at lacked explicit goals for their programs and litigation activities. In order to further the literature available to human rights organizations that are thinking about how they can create explicit goals for their strategic litigation campaigns, this article attempts to create goals for the litigation activities \textit{ex post} by identifying the successes of each case in terms of outcomes and impacts.

Comprehensive performance management Impact Assessment Frameworks typically encompass indicators of an organization’s input, output, outcome and impact in order to measure, assess and manage the performance of an organization. This article focuses on assessing the measurability of an organization’s external level of results, i.e. how well a strategic litigation organization achieves its intended outcomes and impact.\textsuperscript{49} Input can be defined as the resources that go into an organization’s activities, outputs as the product of those activities—what staff do on a day-to-day basis, outcomes as the results of an organization’s work (the quantity and quality of its services), and impact as the effect of that work on the problem.\textsuperscript{50} Changes in impact can be described as, “The ultimate and long-term changes in social and physical lives and conditions (i.e., individuals, populations, and physical environments) that motivate policy change efforts.”\textsuperscript{51} External results can be seen as the ultimate justifications of an activity—“how the world changes because of the outputs.”\textsuperscript{52} Of all the indicators in a performance management system, those that measure impact are the most difficult to develop because they attempt to establish a causal link between an organization’s work and a change in society.

\textsuperscript{48} Dahler-Larsen 2005, 624.
\textsuperscript{49} Human Rights Watch has decided to focus its evaluation on determining the impact being achieved on three levels: outputs, intermediate outcomes, and outcomes, defining outputs as “the work we do” and outcomes as “concrete, positive and conclusive results from the work.” See Gorvin 2009, 481.
\textsuperscript{50} Raine 2006, 23.
\textsuperscript{51} Reisman, Gienapp and Stachowiak 2007, 22.
\textsuperscript{52} Wilson 1989, 158.
2. Case Study Analysis

This section looks at Wiwa, Argentina and Rumsfeld, showing the evolution of each case, whether and how it has been resolved, and finally, proposing potential “successes” of each case. As each case consists of a complicated string of legal steps and setbacks over a period of several years to over a decade, creating a concise narrative of each case was an important preliminary step to being able to assess the cases’ external results. None of the organizations under analysis had clearly identified goals for the cases or the programs they were embedded in. Taking a traditional view of goal-based evaluation would make it impossible to conduct evaluation in such a case. In order to help human rights organizations measure their impact in the future, I used past cases to induce outcomes and impacts of those cases, which could compose ex ante goals of future human rights litigation. In future attempts to assess impact, organizations should identify the goals of their litigation at the outset of a case, or the beginning of a program.

2.2 Wiwa v. Shell

This 13-year-long litigation sought to hold Shell Oil accountable for its complicity in the Nigerian government’s summary execution, torture, and other crimes committed against the Ogoni Nine activists using the US Alien Tort Claims Act (ATCA).

2.2.1 Background on Shell’s Role in the Niger Delta

Royal Dutch Shell was present in the Niger Delta region of Nigeria since oil was discovered there in 1958.\textsuperscript{53} Since then, the Ogoni people, a distinct ethnic group in the Niger Delta region with an estimated population of about 500,000,\textsuperscript{54} have been victims of environmental degradation, poverty, and brutal repression.\textsuperscript{55} For decades, Shell worked closely with the Nigerian government to quell opposition to

---

\textsuperscript{54} Ibid., 44.
\textsuperscript{55} DemocracyNow Interview 2009.
its operations in Ogoniland. In 1992, oil accounted for 94 percent of Nigeria’s GDP.\textsuperscript{56} Shell and Chevron were the only companies to extract oil in Nigeria, giving the government strong financial incentives to comply with and please the multinational corporations. From 1990 to 1995, the Nigerian military government used lethal force against peaceful protesters and conducted “massive, brutal raids” against Ogoni villagers to suppress a growing opposition movement.\textsuperscript{57} This was done at Shell’s request, and with the company’s assistance and financing.\textsuperscript{58}

Ken Saro-Wiwa, nominated for the Nobel Peace Prize in 1995,\textsuperscript{59} was the best-known of the Ogoni Nine activists and enjoyed international acclaim for founding the Movement of the Survival of the Ogoni People (MSOP) and organizing peaceful protests of Shell’s presence in the region. Throughout the early 90s, Saro-Wiwa accused Shell of expropriating land and destroying cash crops without paying adequate compensation for them, as well as for polluting fresh water supplies, killing fish and mangrove forests, and damaging the ecosystem.\textsuperscript{60} Wiwa and MSOP sought to raise international attention about their suffering under the Nigerian government, whose rule was supported by the oil companies.

\textbf{2.2.2 The Alien Tort Claims Case}

This case highlights an increasingly common way in which human rights abuses are committed—by governments, with the complicity of multinational corporations. Beginning in 1996, the year after the execution of the Ogoni Nine—a group of Ogoni human rights and environmental activists—a series of cases were brought by the Center for Constitutional Rights (CCR) and EarthRights International (ERI) in tandem with other human rights attorneys in New York, using the ATCA and the Torture Victim Protection Act. The case also alleged that Shell violated the Racketeer Influenced and Corrupt Organizations Act (RICO) and violated New York state law.\textsuperscript{61}

\textsuperscript{56} Wiwa 1992, 8.
\textsuperscript{57} Wiwa vs. Shell Resource Center, “Shell’s Environmental Devastation in Nigeria.”
\textsuperscript{58} CCR, “The Case Against Shell.”
\textsuperscript{59} Kenner 2009.
\textsuperscript{60} Wiwa 1992, 45- 47.
\textsuperscript{61} Wiwa vs. Shell Resource Center, “The Case Against Shell.”
The case, charging Shell with complicity in summary execution, crimes against humanity, torture, inhuman treatment and arbitrary arrest and detention, consisted of three lawsuits: *Wiwa v. Royal Dutch Petroleum*, against the parent companies of Royal Dutch/Shell in the Hague and in London; *Wiwa v. SPDC*, against Shell Petroleum Development Company, the company’s Nigerian subsidiary; and *Wiwa v. Anderson*, against Brian Anderson, the former head of the company’s Nigerian operation. The plaintiffs were made up of three groups: the families of the executed Ogoni Nine; individuals who were imprisoned and mistreated with the Ogoni Nine, but were released; and individuals who were injured and on behalf of individuals who were injured by Nigerian forces.

In 1994, Ogoni leaders Ken Saro-Wiwa, John Kpuinen, Saturday Doobee, Daniel Gbokoo, Felix Nuate, and Barinem Kiobel were falsely accused of murder, imprisoned, and denied access to legal counsel, a fair trial and the right of appeal. During their imprisonment, the activists and members of their families were tortured and mistreated. Following their trial, which was widely considered a sham in Europe and North America, they were hanged on 10 November 1995. The second group of plaintiffs, consisting of Owens Wiwa, Ken Saro-Wiwa’s brother, and Michael Tema Vizor, was detained with the Ogoni Nine but eventually released and brought separate claims regarding their torture, mistreatment and detention. Further claims were brought by Karalolo Kogbara, who, in early 1993, was shot by Nigerian forces (who were requested by Shell as it built a pipeline through Ogoniland) and lost her arm as a result, and on behalf of Uebari N-nah, who was killed later that year by Nigerian troops in a separate attack on Ogoni civilians.

After 13 years of litigation, the case settled on 8 June 2009, the eve of the trial, for 15.5 million USD. The funds were designated to compensate the plaintiffs and cover a portion of their legal fees and costs, as well as to establish a 5 million USD trust for the Ogoni people, which will fund educational and adult literacy programs.

---

62 These lawsuits are referred to collectively as “Wiwa v. Shell” or “Wiwa.”
63 CCR, “The Case Against Shell.”
64 Ibid.
65 Ibid.
agricultural and business skills training initiatives, and programs specifically targeted to help women.66

Since the case did not go to trial, no court ruled on whether Shell was guilty of complicity in the charges put forward by the three lawsuits. When asked what evidence they were prepared to use in trial, Judith Brown Chomsky, lead council for the plaintiffs, replied that they had general evidence of the partnership between Shell and the military government of Nigeria, as well as specific evidence linking Shell to the execution of the Ogoni Nine and other charges.67 This included evidence that Shell bribed two witnesses to testify against the Ogoni Nine, as well as a series of conversations between Owens Wiwa and Brian Anderson.68 In these conversations, Anderson told Wiwa that his brother could be set free if he put an end to the international campaign against Shell.69 Chomsky called the relationship between the government and Shell “extraordinary,” adding, “It is amazing that a corporation can so directly and overtly control a government.”70

2.1.3 Was the “Victory Settlement” a Tacit Admission of Shell’s Guilt?

Although Shell maintained that the settlement signified no admission of guilt,71 the allegations were false, and the settlement represented a “humanitarian gesture,”72 human rights activists viewed Shell’s payment as a tacit admission of guilt and hailed the public settlement as a landmark step forward in challenging corporations’ impunity for committing egregious human rights violations.73 When asked whether he saw the settlement as an admission of Shell’s guilt in its role in killing his father, Ken Saro-Wiwa Jr. replied:

Clearly. They would not have offered anything if they felt that that risk wasn’t there. For us, it’s a moral victory. You know, my father always said that they’d have their day in court. And there are other court cases. Some are aiming to be certified as a class action suit. So

66 CCR, “Press Release.”
67 DemocracyNow Interview 2009.
68 Ibid.
69 Ibid.
70 Ibid.
71 Mouawad 2009.
72 Huisman 2009.
73 Ibid.
this doesn’t preclude that. But what it does do, it shows that corporations cannot act with impunity in places like Nigeria.\textsuperscript{74}

Shell’s insistence that the allegations are false is typical of parties that settle out-of-court. In a press statement, Shell executive Malcolm Brinded insisted, “While we were prepared to go to court to clear our name, we believe the right way forward is to focus on the future for the Ogoni people, which is important for peace and stability in the region. This gesture also acknowledges that, even though Shell had no part in the violence that took place, the plaintiffs and others have suffered.”\textsuperscript{75}

Caroline Bain, an oil industry analyst with the Economist Intelligence Unit, did not find the out-of-court settlement surprising:

\begin{quote}
Shell were [sic] in a quite difficult position. There have been a couple of other cases that have gone through this procedure in the US court. They tend to be very time consuming, very costly and involve a lot of bad publicity for the companies concerned. So an out-of-court settlement was on the cards, even though they haven’t admitted to any guilt in the case. We had the experience with Chevron of a similar case that lasted ten years with a lot of negative publicity. People only tend to read the headlines, and I think Shell wanted to avoid being in the headlines for a number of years on an emotive issue like human rights violations.\textsuperscript{76}
\end{quote}

In conclusion, the plaintiffs and their lawyers, as well as many in the human rights legal community, viewed the settlement as a tacit admission of Shell’s guilt. Shell refutes this, as do others who do not want this settlement to be referenced in future cases.

\textbf{2.2.4 What Is Wiwa's Impact?}

\textit{Wiwa vs. Shell} had the greatest impact in two areas: helping victims seek redress for human rights injustices, and furthering the ATCA as a tool to hold multinational corporations accountable for committing, or enabling, human rights crimes. \textit{Wiwa} helped victims achieve some type of justice in two ways. The first and most visible

\textsuperscript{74} DemocracyNow Interview 2009.  
\textsuperscript{75} Huisman 2009.  
\textsuperscript{76} Ibid.
was to obtain financial compensation from Shell for the ten plaintiffs in the case. In this way, the *Wiwa* litigation achieved the most positive result that tort law enables victims of human rights violations to seek—financial compensation. In addition, the plaintiffs were able to share their stories with a sympathetic, transnational audience. The Ogoni community directly benefited by *Wiwa vs. Shell* directly from the 5 million USD trust that was set up in their name, but also from the cases’ transnational publicity, which made the fate of the Ogoni people visible to the outside world in ways that would have been unlikely without litigation that lasted over a decade.

Other than the case’s impact on advancing the interests of the victims, at different stages over its 13-year duration, *Wiwa* helped the ATCA develop as a legal tool. Because the case was settled out-of-court, no court issued a judgment creating legal precedent that can be used in further cases. Nevertheless, the case’s litigation helped pave the way for other human rights litigation in US courts, especially in cases with corporate defendants. This “impact” was especially great in the earlier stages of the case’s litigation, when ATCA was at risk of failing to become the powerful legal tool it is today.

**Advancing Victims’ Interests**

One of the main results of *Wiwa vs. Shell* was to advance the interests of the victims of human rights crimes in Ogoniland. This impact was twofold—creating direct outcomes for the plaintiffs and for the Ogoni community, as well as producing broader impact for the Ogoni community.

**The Settlement**

The most obvious outcome for the plaintiffs was the 15 million USD settlement that they were awarded by Shell in June 2009. When thinking of law in traditional terms, this is the most that tort law can do—award financial compensation to victims for wrongful action, wrongdoing or a violation of rights.77 When thinking about what the ATCA litigation can do for victims, obtaining financial retribution—whether

---

77 Fletcher 2008, 27.
through a court judgment or an out-of-court settlement—is the ultimate “success.” Tort litigation is not about proving criminal responsibility for an action—this is beyond the scope of the ATCA.

Clearly, the plaintiffs viewed the settlement as a success. On 8 June 2009, the day the settlement was made public, the plaintiffs issued a statement, saying, “It is said that justice delayed is justice denied but today our private agonies and our long struggle for justice have finally been vindicated and we are gratified that Shell has agreed to atone for its actions.” Essentially, one can conclude that Wiwa achieved what could have been its most direct goal—it advanced the plaintiffs’ interests by getting them financial compensation. This is clearly a very positive outcome of the case.

*Letting their Voices Be Heard and Taking Their Stories Seriously*

The second result of the case in advancing the plaintiffs’ interests was in letting their voices be heard, and taking them seriously in legal forums. International lawyers, who provided their services to the plaintiffs *pro bono* over 13 years, took their stories seriously by seeking justice on their behalf.

Throughout various phases of the litigation, the plaintiffs were able to share stories of the crimes that were committed against them, their family members, and their community. Giving depositions, providing witness testimony, attending trials at earlier stages of the litigation, and telling their stories to the public through the media and the outreach efforts of the strategic litigation NPOs involved in the case all contributed to this type of advancement of the plaintiffs’ interests. This is also a positive outcome of *Wiwa v. Shell*.

*The Ogoni Trust*

The wider Ogoni community directly benefited from the *Wiwa* settlement through the 5 million USD trust that was established to educate and empower members of

---

78 CCR. “Statement of the Plaintiffs.”
the community. By funding educational and adult literacy programs, agricultural and business skills training initiatives, and programs specifically targeted to help women, the trust is intended to advance the development of the Ogoni people and their land.

**Increasing and Maintaining the Visibility of the Ogoni’s Strife Due to Shell’s Presence**

Strategic litigation can be viewed as being fought in the “court of public opinion,” and in this respect, *Wiwa* can be seen as a victory for the Ogoni victims and survivors of grave human rights abuses perpetrated by Shell and the Nigerian government. *Wiwa v. Shell* brought transnational public attention and media coverage from the time the case was filed in 1996 to June 2009, when it finally settled. In addition, the case added steam to boycotts against Shell in the US and the British Commonwealth. The boycott was labeled a “dot cause” for its civil society support mainly grew out of and spread through the Internet. Without this litigation, it is likely that the execution of the Ogoni Nine would have made headlines in 1994, but would have faded quickly from the public spotlight, perhaps never to be heard of again. The case helped victims hold the international public’s attention on the fate of the Ogoni. This visibility represents the fourth important *outcome* of the litigation.

**Spurring the Need for Oil Companies to Practice CSR and Respect Human Rights**

As strategic litigation uses legal cases to seek social change, as well to seek justice for the plaintiffs, one of *Wiwa*’s greatest successes is its effect on Shell and other oil companies to improve their human rights record.

In the face of litigation including *Wiwa*, oil companies seem to have woken up to a new power dynamic in which they cannot call the shots, disregarding environmental destruction and human suffering in order to earn higher profits. Bain, an expert on

---

79 Clark 2003, 110.
80 Essential Action, “Boycott Shell.”
the oil industry, believes that oil companies will feel the affects of cases like *Wiwa vs. Shell and Doe vs. Unocal*:

I think the multinational companies have already had to wake up to far more socially and environmentally aware policies. They are very anxious to ensure that there’s no repetition of this type of case. They are also in a relatively weak position at the moment. The number of reserves they are actually controlling or have got a stake in across the world is diminishing, and national oil companies are increasingly the main holders of oil reserves. So the multinationals have to really tread careful to ensure that they don’t make enemies along the way, whether it be with local people or with governments.

Even the plaintiffs of *Wiwa v. Shell* have acknowledged that Shell’s practices improved from the early and mid-1990s, when the Nigerian government’s repression surrounding the oil industry was most severe. In a comment in *The Guardian*, Ken Saro-Wiwa Jr., reflected on Shell’s settlement:

> History will show that this was a landmark case. Multinationals now know that a precedent has been set, that it is possible to be sued for human rights violations in foreign jurisdictions. In the end we collectively agreed to settle because the terms and conditions of the offer from Shell enabled us to gain some measure of psychological or financial relief, [and] provided for a contribution towards the future development of our community. ... This settlement will not in itself immediately provide [those who are still suffering unnecessarily] with any restitution other than the consolation that with enough perseverance and commitment to justice, a better, safer, more humane and more prosperous world is possible.

One of the most ideal, long-term effects of the *Wiwa* litigation would be if Shell’s settlement impacted the way it and other oil companies operate in Nigeria and elsewhere. While no direct evidence of this cause and effect is available (i.e. Shell

---

81 Doe vs. Unocal (litigated by a team of lawyers, including several from ERI and CCR, as well as Judith Brown Chomsky, all of whom were involved in *Wiwa*) sought redress for Burmese peasants who experienced egregious human rights abuses at the hands of the Burmese army as it was protecting the building of a Unocal pipeline. Like *Wiwa, Doe vs. Unocal* used the ATCA to sue the oil company for human rights abuses, including forced labor, rape and murder. The case ended in March 2005, when Unocal agreed to compensate the plaintiffs in a private settlement. A jury trial to hear the case of alleged murder, rape and forced labor was scheduled to begin at the Superior Court of California in June 2005. See EarthRights International, “Doe vs. Unocal Case History” and “Doe vs. Unocal” for further information.

82 Ibid.

83 CCR. “Plaintiffs’ Statement.”

84 Saro-Wiwa 2009.
did not publicly announce that this case caused it to improve its human rights record and institutionalize Corporate Social Responsibility (CSR) projects), it is very likely that cases like *Wiwa* did have such an effect on these multinational corporations.

Shell ended its operations in Ogoniland in 1993 in the face of mass protests against its presence, and no oil has been extracted from the land since.\(^85\) When looking at Shell’s website today, it is clear that it wants to be perceived as a company that delivers “energy in a way that provides social benefits and considers the environment.”\(^86\) It even devotes special attention to Nigeria in the “Shell and Society” section of its website, which is the only country to be profiled.\(^87\) On this webpage, it highlights the company’s CSR achievements, such as winning the Global Business Coalition’s Partnership in Collective Action award in late June 2009 for its work in preventing the spread of HIV/AIDS in the Niger Delta. It also has links to a web chat, which took place on 23 June 2009, just weeks after the *Wiwa* settlement, entitled “Doing Business with Nigeria: Challenges and Questions,” during which the term “human rights” was mentioned nearly 50 times.\(^88\) These developments seem to lend credibility to the claim that the ATCA litigation against corporations, including *Wiwa v. Shell*, helped pressure Shell to have a more conscious attitude of the way it does business. This can be considered a major *impact* of *Wiwa*.

**Furthering the ATCA as a Legal Tool**

In an article entitled “A Win for Wiwa, a Win for Shell, a Win for Corporate Human Rights,” legal commentator Michael D. Goldhaber writes that, “While the facts in dispute will never be settled, Wiwa has left its mark on law and legal culture—and in this respect the movement for business human rights is the big winner.”\(^89\) According to Professor Ralph Steinhardt of George Washington Law School, *Wiwa* established too many plaintiff-friendly precedents to list.\(^90\) Over 13 years of litigation, US courts repeatedly refused to throw the case out, even after Shell’s many attempts to do so.

---

\(^85\) Walker 2009.  
\(^86\) Shell, “Environment and Society.”  
\(^87\) Shell, “Nigeria.”  
\(^88\) Shell, “Video Transcript.”  
\(^89\) Goldhaber 2009.  
\(^90\) Goldhaber 2009.
Professor Steinhardt believes that the 2nd Circuit Court’s 2000 ruling on \textit{forum non convenies} will be remembered as \textit{Wiwa}'s best-remembered precedent, in which the court ruled that “torture committed under color of law in a foreign nation is ‘our business.’”\footnote{Ibid.}

This precedent, building upon other watershed ATCA cases such as \textit{Filártiga}\footnote{\textit{Filártiga} v. \textit{Peña-Irala}, decided in 1980, was the first case to be filed under the ATCA in 200 years. CCR lawyers, representing the Filártigas, used the ATCA to charge former Paraguayan official Américo Peña-Irala with the torture and wrongful death of Joelito Filártiga. See CCR, “\textit{Filártiga} v. \textit{Peña-Irala}” and Fuks 2006.} and \textit{Sosa}\footnote{\textit{Sosa} v. \textit{Alvarez-Machain}, a lawsuit that charged Francisco Sosa with wrongfully detaining Humberto Alvarez-Machain, was the first case in which the US Supreme Court took up the ATCA in its 215-year history. This 2004 decision, based on the precedent established by \textit{Filártiga} v. \textit{Peña-Irala}, created a complex framework for future ATCA litigation. See Fuks 2006, Fletcher 2008 and CCR, “\textit{Sosa} v. \textit{Alvarez-Machain} (amicus).”} may help other cases get to trial. Judith Brown Chomsky stated, “The fortitude shown by our clients in the 13-year struggle to hold Shell accountable has helped establish a principle that goes beyond Shell and Nigeria—that corporations, no matter how powerful, will be held to universal human rights standards.”\footnote{CCR, “\textit{Appeals Court Rules.”}} Jennie Green, the CCR attorney who initiated the lawsuit in 1996, added, “This was one of the first cases to charge a multinational corporation with human rights violations, and this settlement confirms that multinational corporations can no longer act with the impunity they once enjoyed.”\footnote{Ibid.} It is clear that \textit{Wiwa} helped to further the ATCA as a legal tool by which corporations can be held accountable for human rights violations.

To date, no corporation has been found guilty of complicity in human rights violations under the ATCA.\footnote{Ibid.} Perhaps \textit{Wiwa} v. \textit{Shell} would have been that landmark case had it gone to trial. But there were risks in going to trial. Besides the probability of a lengthy appeal process, unappealing to plaintiffs who had already spent over a decade of their lives waiting for the case to bring them some type of justice, there is a chance that the plaintiffs might have lost the case. Although the \textit{Wiwa} team had a compelling case, it is very difficult to convince a jury that a

\begin{thebibliography}{99}
\item Filártiga v. Peña-Irala, decided in 1980, was the first case to be filed under the ATCA in 200 years. CCR lawyers, representing the Filártigas, used the ATCA to charge former Paraguayan official Américo Peña-Irala with the torture and wrongful death of Joelito Filártiga. See CCR, “Filártiga v. Peña-Irala” and Fuks 2006.
\item Sosa v. Alvarez-Machain, a lawsuit that charged Francisco Sosa with wrongfully detaining Humberto Alvarez-Machain, was the first case in which the US Supreme Court took up the ATCA in its 215-year history. This 2004 decision, based on the precedent established by Filártiga v. Peña-Irala, created a complex framework for future ATCA litigation. See Fuks 2006, Fletcher 2008 and CCR, “Sosa v. Alvarez-Machain (amicus).”
\item CCR, “\textit{Appeals Court Rules.”}
\item Ibid.
\item Mouwad 2009.
\end{thebibliography}
company has tort responsibility for human rights abuses that it enabled but did not necessarily commit directly. Chevron was found not guilty in a similar case in 2008. Human rights activists are hopeful that, as the first public settlement in a corporate ATCA case, *Wiwa* may enable other, similar cases to achieve public settlements. *Wiwa v. Shell’s impact* on the ways in which the ATCA cases with corporate defendants are litigated is another of the case’s important results.

**Table 1. Wiwa’s “Impact”**

<table>
<thead>
<tr>
<th>Type of General Change</th>
<th>Specific Change</th>
<th>Type of Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advancing Victims’ (the Plaintiffs’) Interests</td>
<td>Achieving 15 million USD in financial compensation for the plaintiffs</td>
<td>Outcome</td>
</tr>
<tr>
<td></td>
<td>Listening to the plaintiffs’ stories, and taking them seriously by pursuing legal channels to seek retribution</td>
<td>Outcome</td>
</tr>
<tr>
<td>Advancing Victims’ (the Ogoni Community’s) Interests</td>
<td>Establishing a 5 million USD trust to promote development initiatives in Ogoniland</td>
<td>Outcome</td>
</tr>
<tr>
<td></td>
<td>Making Shell’s human rights abuses in Ogoniland visible transnationally</td>
<td>Outcome</td>
</tr>
<tr>
<td></td>
<td>Contributing pressure to make Shell and other oil companies practice CSR and refrain from abusing human rights in Nigeria and elsewhere</td>
<td>Impact</td>
</tr>
<tr>
<td>Furthering the ATCA as a Legal Tool</td>
<td>Developing ATC as a tool to hold corporate actors accountable for human rights violations in ways that made it possible for other cases to follow suit</td>
<td>Impact</td>
</tr>
</tbody>
</table>

97 *Bowoto v. Chevron* was a class action lawsuit initiated by lawyers at CCR and ERI that charged Chevron with enabling human rights violations, including torture and extrajudicial killing that were committed by Nigerian soldiers, on behalf of Nigerian plaintiffs. A case that began when the plaintiffs filed suit under the ATCA in 1999, *Bowoto v. Chevron* ended after a federal jury cleared Chevron of the charges in the case in December 2008. See Business and Human Rights, “Chevron Lawsuit (re: Nigeria); CCR, “Bowoto v. Chevron;” and ERI, “Bowoto v. Chevron” for more information.
2.3 The Argentinean Cases

The Argentinean cases\(^{98}\) started as criminal complaints filed against leaders of the Argentine military junta on behalf of 40 disappeared German-Argentines. The cases resulted in Germany’s requests for the extradition of several leaders of the military dictatorship. These cases did not go on to be tried in Germany, but several are included in the series of ongoing trials than began in Argentina in late 2009.

2.3.1 Background on Argentina’s Dirty War

Argentina’s Dirty War was one of the bloodiest in Latin America. From 1976 to 1983, the leaders of the military junta committed atrocities against its citizens, including “disappearing” its political rivals and critics. In the words of General Videla, spoken in 1975, “all those persons necessary will die in order to achieve the security of the country.”\(^{99}\) Of the approximately 30,000 victims disappeared by the regime, about 100 were German or of German decent.\(^{100}\) After a series of military rebellions, pardons, and amnesty laws prevented the leaders of the military dictatorship from being brought to justice for their crimes,\(^{101}\) a team of lawyers from the Coalition against Impunity, a German-based CSO (civil society organization), filed cases in Germany on behalf of 40 German-Argentine victims.

The Argentinean amnesty laws did not cover the charges of rape and crimes committed against children, such as the kidnapping of babies born to imprisoned mothers and their sale to families in the military junta, and the Argentine authorities continued to pursue these charges.\(^{102}\) At the time the cases were filed in Germany, General Jorge Videla and Admiral Emilio Massera were under house arrest in Argentina for such crimes.

\(^{98}\) This thesis focuses on the cases that were initiated in Germany, beginning in the early 1990s. Similar proceedings in Italy, Spain, France, Belgium and Britain are not discussed.

\(^{99}\) Roehring 2009, 728.

\(^{100}\) ECCHR, “Argentinean Dictatorship Cases.”

\(^{101}\) In the mid-1980s, after a military court held that the defendants (including Videla and Massera) were not guilty (due to what it claimed as insufficient evidence), a civilian court found Videla and Massera guilty, giving them life sentences. See footnote 115 for an explanation of why these men were pardoned in 1990, serving only five years of their lifetime sentence.

\(^{102}\) Roehrig 2009, 734.
2.3.2 The Cases

After all of the failures to hold the leaders of the military junta accountable for their crimes in Argentina, the European cases represented a new effort to prosecute, labeled by Naomi Roht-Arriaza as the “Pinochet Effect,”\(^{103}\) and deemed “justice revisited” by Terence Roehring.\(^{104}\) In Germany, the campaign to challenge and raise awareness about the crimes of the military regime was organized by the Coalition against Impunity, made up of religious and solidarity groups, as well as legal and human rights organizations. In addition to initiating legal proceedings, the Coalition against Impunity has monitored trials and disseminated information on the disappearances of German citizens, represented victims in civil actions, and mentored witnesses.\(^{105}\)

Between 1998 and 2004, criminal complaints were filed in Germany on behalf of 39 victims, including Elisabeth Käsemann, Klaus Zielschank and Adriana Marcus, against 89 members of the Argentine military and a former manager of a Mercedes-Benz plant outside of Buenos Aires.\(^{106}\) Elisabeth Käsemann became one of the most well-known German-Argentine victims, largely due to the fact that her body was found, which enabled the team of German lawyers to pursue her case in ways that were not possible for cases of the “disappeared” whose bodies were never found and whose death and cause of death were unknown and difficult to prove.

The *Argentinean cases* were filed in Germany before the country’s universal jurisdiction law was in place.\(^{107}\) The German Federal Supreme Court found that the Nuremberg-Fürth State Court had jurisdiction over the complaints under Section 13a of the Code of Criminal Procedure (*Strafprozessordnung*, or StPO.\(^{108}\) German jurisdiction was justified for most of the cases involving German citizens or victims of

---

\(^{103}\) Roht-Arriaza 2005. Former Chilean President Augusto Pinochet was protected by Chilean law and could not be prosecuted for human rights violations in Chile, so lawsuits were filed in other countries in an effort to bring him to justice. Pinochet’s extradition from Britain to Spain remains one of the most visible exercises of universal jurisdiction. See Webber 1999 for further detail.

\(^{104}\) Roehring 2009, 734.

\(^{105}\) ECCHR, “Argentinean Dictatorship Cases.”

\(^{106}\) Kaleck 2007, 100.

\(^{107}\) For a discussion of Germany’s universal jurisdiction law, see section 2.3.1.

\(^{108}\) Kaleck 2007, 100.
German descent under the passive-personality principle in Section 7.1 of the Criminal Code.\textsuperscript{109}

The criminal complaints resulted in comprehensive investigations by the public prosecutor’s office. In 2002, the Nuremberg district court issued arrest warrants for General Videla Admiral Massera and others for the murders of Käsemann and Klaus Zielschank.\textsuperscript{110}

As a result, in 2003, the German government requested that the Argentine government extradite Videla and Massera. That same year, the German public prosecutor formally halted any further investigations because the accused were not on German soil.\textsuperscript{111} On 2 June 2008, the Corte Suprema de Justicia de la Nación Argentina (Argentinean Supreme Court) formally dismissed Germany’s extradition warrant because of the re-opening of trials against the former leaders of the military junta in Argentina.\textsuperscript{112}

In addition to the cases involving German victims, Wolfgang Kaleck and the team of lawyers representing the Coalition attempted to hold a Mercedes Benz (then Daimler Chrysler) manager accountable for the abduction and disappearance of 14 trade unionists who worked at a Mercedes Benz factory. In September 1999, they filed a criminal complaint with the public prosecutor in Nuremberg against Juan Tasselkraut, a German-Argentine who had been a plant manager in González Catán, outside of Buenos Aires.\textsuperscript{113} While comprehensive investigations were initiated because of the complaint, all proceedings in Germany were ultimately closed. In 2004, the lawyers were involved in a civil proceeding against Daimler Chrysler in the US, but the appellate court dismissed the claim for compensation.\textsuperscript{114}

\textsuperscript{109} Kaleck 2007, 100.
\textsuperscript{110} Klaus Zielschank (also known as Claudio Zielschank), born in Argentina to German parents, was disappeared in Buenos Aires in March 1976. His body was discovered years later in an unmarked grave. For more information, see Project Disappeared, “Claudio Manfredo Zielschank: Desaparecido el 26/3/76.”
\textsuperscript{111} Kaleck 2007, 100.
\textsuperscript{112} Ibid.
\textsuperscript{113} ECCHR, “Argentinean Dictatorship Cases.”
\textsuperscript{114} Ibid.
2.3.3 The Current Trials in Argentina

Trials against the former leaders of the military junta are now taking place in Argentina for the first time since 1985. Several cases initiated in Germany by the Coalition against Impunity and their legal team are being tried as part of the ongoing proceedings in Argentina.

The ESMA Case

ESMA, the Escuela Mecánica de la Armada (Mechanical School of the Navy), was used by the military as an illegal detention and torture center from March 1976 to December 1983. The trial, which began on 11 December 2009, is being heard by the Federal Court No. 5 in Buenos Aires and is scheduled to last several months. Eighteen former military officials have been charged with torture, deprivation of liberty, murder and other crimes. Adriana Marcus, a German citizen whose torture composed one of the charges filed by the Nuremberg prosecutor in his request for arrest warrants for Videla and Massera, is a witness in the ESMA trial.

---

115 On 9 December 1985, an Argentine civilian court found five of the nine defendants guilty of illegal detention, murder, torture and other crimes. Two of the five leaders from the military regime, General Videla and Admiral Massera, were given life sentences. To block the mounting attempts by individuals to file indictments, then-President Raúl Alfonsín introduced Punto Final (the End Point Law) on 24 December 1986, allowing cases that were already filed to remain on the docket, but requiring that any new cases be filed within 60 days, except if they involved child victims. This law had the effect of pressuring judges and lawyers to work furiously to file as many cases as possible within the 60-day deadline. One estimate found that an additional 400 military personnel were charged during this period. In response to mounting pressure from the military, Alfonsín introduced a second amnesty law, Obenecia Debida (Due Obedience), in April 1987. This law exempted all soldiers below the rank of colonel from prosecution. Pardons for 277 people were issued in October 1989 by then-President Carlos Menem, and pardons for the senior junta officers were issued in December 1990. The two amnesty laws Punto Final and Obenecia Debida, along with Medem’s pardons, effectively brought all other in-country attempts to prosecute to an end. Videla and Massera were under house arrest during the German-litigated Argentinean cases for crimes committed against children (for which junta leaders were not granted immunity from prosecution by the above-mentioned laws.) For a more in-depth discussion of the attempts at and hindrances to prosecuting the military junta, see Roehrig 2009.

116 ECCHR, “Update on On-Going Trials in Argentina I.”

117 Ibid.

118 Ibid.
The Campo de Mayo Case

Over a thousand victims were secretly detained and tortured in the Campo de Mayo complex outside of Buenos Aires between 1976 and 1980. Many of the victims were members of trade unions, which links this case to the German complaint filed against the Mercedes-Benz plant manager Juan Tasselkraut. Héctor Ratto, a former Mercedes-Benz factory worker in Gónzales Catán, served as a witness in the Campo de Mayo trial. Ratto testified about the illegal detention and kidnapping of some of his coworkers and that some of the staff and executives of Mercedes-Benz were involved in these acts. Eight defendants are standing trial in this case, which began on 2 November 2009. Juan Tasselkraut is not among the defendants.

The Cuerpo del Ejercito Case

This case encompasses the abuses committed at El Vesubio, the torture center where Elisabeth Käsemann was detained and tortured in 1977. After being postponed several times, the trial began in Buenos Aires on 26 February 2010. The case encompasses the crimes committed against 157 victims, including Käsemann. The Federal Republic of Germany is one of the case’s plaintiffs and is represented in the proceedings by its own legal counsel. Pedro Duran Saenz, the commander at El Vesubio, and Jorge Rafael Videla are two of the case’s defendants. Duran Saenz was also implicated in the German-litigated Argentinean cases, and a warrant for Saenz’s arrest was requested by the Nuremberg-Fürth Federal Court in December 2001 on suspicion of murder, together with an arrest warrant for Videla, who was charged of being the “indirect perpetrator” of murder.

2.3.4. What Is the “Impact” of the Argentinean Cases?

The German-litigated Argentinean cases’ “succeeded” in putting pressure on the Argentinean authorities to investigate and prosecute the crimes at times when they

---

119 ECCHR, “Update on On-Going Trials in Argentina III.”
120 Ibid.
121 Ibid.
122 Over a two-month period, Käsemann was tortured and otherwise mistreated at El Vesubio, after which she was killed. Her case is emblematic of many other victims, although what actually happened to most of the disappeared remains unknown.
123 For this and related discussion, see ECCHR, “The Case of Elisabeth Käsemann.”
were not willing (or able) to initiate proceedings. The German cases also contributed to the Argentinean investigations when they were reopened, helping uncover and reconstruct the “truth” about what happened to the disappeared, showing how universal jurisdiction can be used to bring about positive legal change, and strengthening transnational human rights networks. One important aspect of these “successes” is whether they constitute outcomes or impacts. Truth finding and strengthening human rights networks can be either. As outcomes are direct results of the cases, it is easiest to demonstrate that the Argentinean cases achieved outcomes. To prove impact, one must show that they created legal, societal or political change beyond the cases themselves. This will be discussed further in the respective sections below.

A Renewed Effort to Challenge the Injustices of the Dirty War

In writing about the European Argentinean cases, Naomi Roht-Arriaza reflects:

The power of these cases does not come solely, or even, I suggest, mainly, from the capacity to capture errant dictators and torturers. Nor does it come from the possible salutary deterrent effects, either on atrocities or, at the least, on post-atrocity travel. ...Rather, the primary value lies in the ability of a transnational investigation to prompt investigations and prosecutions at home. Through focusing world attention, through forcing the government to defend its judiciary, through empowering and strengthening domestic human rights lawyers and activists, transnational prosecutions time and time again have jump-started stalled or non-existent processes of accountability.124

Roht-Arriaza refrains from explaining exactly how the European-litigated Argentinean cases prompted investigations or prosecutions in Argentina. We can see from the cases’ timing that they were initiated in Germany when no investigations or prosecutions were taking place in Argentina, and that several years after Germany issued arrest warrants for those accused of torturing and murdering German-Argentine victims, further attempts to bring the human rights criminals of the Dirty War to justice were made. These efforts represent an important outcome of the case. To more fully demonstrate the causality between the German, or

European-litigated cases and the current proceedings in Argentina, one would need to conduct further research, perhaps interviews with the Argentinean judiciary and human rights nonprofit and legal community, to better establish these links.

**Truth Finding**

One important goal of strategic litigation can be to reconstruct the truth about past human rights violations. In the case of Argentina’s Dirty War, survivors, family members and the public were left completely in the dark about what happened to the hundreds of thousands of disappeared.

The German investigation helped reconstruct the truth about what happened to the 40 German-Argentine victims involved in the cases. The case of Elisabeth Käsemann illustrates the valuable role strategic litigation can play in this regard. The Argentine authorities claimed that those killed in the late 1970s/early 1980s were Communist enemies of the state. When Käsemann’s family was first notified of her death, they were told that she had died in combat. With the support of the Coalition against Impunity, her family brought her body back to Germany, where an autopsy was carried out. The coroner found that her hands were bound at the time of her death, and that she had been shot four times in the back at point-blank range. These conditions make it clear that she did not die in combat. Building on this evidence, the Coalition and its legal representation were able to reconstruct what happened to her during her two-month detention, and eventual murder. This evidence was then used by the Coalition’s legal team to accuse several members of the military junta of her murder, which led to German warrants for their arrest. In addition to its role in the German proceedings, this evidence is being used today in the Campo de Mayo trial.

Truth finding would be categorized or classified as an *outcome* of the case if it helped the victims’ families learn what happened to their loved ones, and if this information was used in the cases themselves. It would become an *impact* if the truth-finding efforts for the 40 German-Argentine victims affected the Argentinean or German publics or others’ conception of what happened to the disappeared
during the Dirty War. It is very likely that the German-litigated cases contributed to a much broader “truth-seeking” movement in and outside of Argentina, which sought to discover what had happened to the disappeared.

**Illustrating the Utility of Universal Jurisdiction**

One of the cases’ *impacts* is its demonstration of how universal jurisdiction can be used as a positive tool in what Naomi Roht-Arriaza describes as “cracking the walls of impunity.” These cases were initiated even before universal jurisdiction was codified in German law. The only link to Germany was that the victims were German. The crimes were not committed on German soil, or by German perpetrators (with the exception of the *Mercedes-Benz case*.)

There has been much debate in the transnational legal community, as well as in political circles, about what role universal jurisdiction should play in prosecuting human rights crimes. The *Argentinean cases* represent the greatest possible success of universal litigation in the eyes of Roht-Arriaza—prompting investigations and prosecutions in Argentina. The Coalition and its lawyers used the principle of universal jurisdiction (and its predecessor under German law, the *Strafprozessordnung*) to trigger investigations by German authorities into what happened to the German-Argentine victims of the Dirty War. These efforts resulted in arrest warrants for Videla, Massera and others. The question of whether to extradite former leaders of the military junta was then decided by the Argentinean Supreme Court. This clearly qualifies as an indicator of *impact* in Impact Assessment analysis in that it showed the international legal community how universal jurisdiction can be used to “revisit justice.”

**Strengthening Transnational Human Rights Networks**

The *Argentinean cases* also helped strengthen human rights networks, bringing European and Argentinean human rights defenders together. The German lawyers involved in the case worked closely with lawyers and human rights activists in Argentina to communicate what they were doing in Europe and gauge the political and judicial mood of the times in Argentina. Arguably, the litigation, lasting over a
decade, maintained and strengthened these networks in ways that other advocacy efforts (e.g. hosting a conference or writing a report) would not have.

This is a valuable outcome of the case. To be an impact, one would need to demonstrate that this network building contributed to broader effects in the promotion and enforcement of human rights, beyond being merely instrumental in this case. This would be the case if these networks allowed future cases to be better, or more easily, investigated and litigated, as this would represent a positive shift in the effectiveness and efficiency of the transnational legal community to achieve its human rights objectives.

Table 2. The Argentinean Cases’ “Impact”

<table>
<thead>
<tr>
<th>Type of General Change</th>
<th>Specific Change</th>
<th>Type of Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Renewing Efforts to Prosecute the Human Rights Crimes of the Dirty War</td>
<td>The German cases and authorities put pressure on Argentina’s judiciary and politicians to renew proceedings against the accused</td>
<td>Outcome</td>
</tr>
<tr>
<td>Truth Finding</td>
<td>Investigating and publicly reconstructing what happened to the disappeared</td>
<td>Outcome/Impact</td>
</tr>
<tr>
<td>Illustrating the Utility of Universal Jurisdiction</td>
<td>Showing how this method can be used to challenge impunity in countries that have yet to deal with their past</td>
<td>Impact</td>
</tr>
<tr>
<td>Strengthening Transnational Human Rights Networks</td>
<td>Establishing links between human rights community in Europe and Latin America</td>
<td>Outcome/Impact</td>
</tr>
</tbody>
</table>
2.3 The Rumsfeld Cases

The *Rumsfeld cases* consist of three criminal complaints filed in Germany and France between 2004 and 2007 accusing former US Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, former Attorney General Alberto Gonzales and other military and civilian officials of torture, war crimes and other criminal acts. After the public prosecutor dismissed both complaints filed in Germany, a complaint was filed in France by French lawyers on behalf of CCR, ECCHR, and two French human rights organizations, the International Federation for Human Rights and the French League for Human Rights. To date, all complaints have been dismissed and there are no ongoing efforts to revive the cases.

2.3.1 Background on CCR’s Decision to Take the Case to Europe

In 2004, lawyers at CCR attempted to bring Bush Administration officials to justice in Europe for the torture and inhumane treatment experienced by detainees of the “War on Terror.”125 Michael Ratner and Peter Weiss, two of the leading lawyers in CCR’s campaign to hold officials in the Bush Administration accountable for war crimes and human rights violations, were convinced that the public scandals of detainee abuse at the Abu Ghraib military prison in Iraq in 2004 and the Guantanamo Bay Detention Camp were only the tip of the iceberg of the government’s policy of torturing and mistreating detainees.126 They were utterly unsatisfied with the Bush Administration’s focus on the trials of low-ranking soldiers, primarily those who posed in the photos that sparked the scandal at Abu Ghraib. By classifying these soldiers as “a few bad apples,” it refused to look up the chain of command to find out who was accountable for the administration’s stance on allowing torture and inhumane treatment.

Without a commitment on the part of the Bush Administration to hold top officials accountable for these abuses, CCR turned to other outlets. The International Criminal Court (ICC) was not an option since the US has not ratified its Rome Treaty.

125 Ratner and Weiss 2006, 264.
126 Ibid.
So Ratner and Weiss were left without the possibility of bringing the case to an international court or tribunal. Therefore, they decided to bring the case to a foreign state’s national court—a state where victims can initiate criminal proceedings, regardless of the nationality of the persons involved in the case or the location of the crime. After examining their options, primarily in Europe, the lawyers decided on Germany, which had an “extremely good” war crimes law,\textsuperscript{127} and later, on France, which had a suitable law on the books that had not yet been enforced.\textsuperscript{128}

The \textit{Rumsfeld cases} would be based on the principle of universal jurisdiction—a legal theory that allows certain grave human rights crimes to be tried by national courts, regardless of where the abuses occurred or the nationality of the victims or perpetrators. Universal jurisdiction is a modern legal tool derived from provisions in human rights treaties that lay dormant for decades. Universal jurisdiction was rejuvenated and put into practice in countries such as Belgium, Spain, Germany, the UK, France and Denmark in the mid-1990s.

In Germany, universal jurisdiction is codified in the Code of Crimes Against International Law (CCIL), which went into effect in 2002. The provision incorporates Germany’s obligations under the ICC’s Rome Statute into German criminal law, and allows for the prosecution of genocide, crimes against humanity and war crimes by German courts, regardless of where the crimes were committed or the nationalities of the victims or perpetrators.\textsuperscript{129}

Codified in Article 689 of the Code of Criminal Procedure, French universal jurisdiction is based on the country’s treaty obligations.\textsuperscript{130} In addition to the laws set out in its criminal code, France enacted two statutes that allow \textit{jus cogens} crimes,\textsuperscript{131} committed during the Yugoslavian and Rwandan conflicts, to be

\begin{itemize}
\item \textsuperscript{127} Ratner and Weiss 2006, 262.
\item \textsuperscript{128} Ratner 2008.
\item \textsuperscript{129} For further detail on universal jurisdiction in Germany, see Jessberger 2007.
\item \textsuperscript{130} Sulzer 2007, 1.
\item \textsuperscript{131} \textit{Jus cogens} crimes are preemptory norms under international law. These norms, accepted by the international community, cannot be violated, under any circumstances. It is generally agreed that \textit{jus cogens} include a prohibition on genocide, piracy, slavery, torture, and wars of aggression.
\end{itemize}
prosecuted on French soil.\textsuperscript{132} Otherwise, crimes against humanity and genocide (that occurred post-WWII) do not fall under French jurisdiction.

2.3.2 The Cases and Their Dismissal

On 29 November 2004, Kaleck filed a criminal complaint with the public prosecutor in Nuremberg on behalf of CCR and four Iraqis who were illegally detained and tortured by American forces during the Iraq war. The case charged Secretary of Defense Donald Rumsfeld, CIA Director George Tenet and high-ranking military personnel, some of whom were stationed at US military bases in Germany. The German public prosecutor dismissed the complaint on 10 February 2005, officially stating that Germany only had jurisdiction over the US case if the US was “unwilling” to investigate the case itself, and concluding that “there are no indications that the authorities and courts of the United States of America are refraining from, or would refrain, from penal measures as regards violations in the complaint.”\textsuperscript{133} The lawyers who filed the case believe that the prosecutor dismissed the case for political reasons.\textsuperscript{134} ECCHR and CCR appealed this decision, but their appeal was rejected by the Stuttgart Appellate Court in September 2005.

On 14 November 2006, another complaint was filed based on new evidence. This complaint was filed against Rumsfeld, Tenet, and other high-ranking civilian officials, including the lawyers who advised the Bush Administration that its “enhanced interrogation techniques” were constitutional and did not amount to “torture” (former Attorney General Alberto Gonzales, former Department of Defense General Council John Haynes, former Vice Presidential Chief of Staff David Addington, University of California Law Professor John Yoo and former Assistant Attorney General Jay Bybee.) This complaint challenged the German public prosecutor’s assertion in 2005 that the US was “willing” to investigate the abuses, since no investigations had been initiated in the US or Iraq as of November 2006. Although this complaint was supported by many human rights and other nonprofit organizations, lawyers’ associations and distinguished legal scholars, the German

\textsuperscript{132} Sulzer 2007, 6.
\textsuperscript{133} Ratner and Weiss 2006, 265.
\textsuperscript{134} Ibid., 265 and Gallagher 2009, 1106.
public prosecutor rejected the complaint. This time, the prosecutor cited the fact that the accused did not reside on German soil, and therefore Germany had no jurisdiction over the case.\textsuperscript{135} The Appellate Court in Stuttgart rejected the appeal on 21 April 2009.

After unsuccessful attempts to pursue the \textit{Rumsfeld case} in Germany, CCR and ECCHR filed a similar case in France on 25 October 2007 while Rumsfeld was in the country on vacation with the help of French human rights organizations. On 27 February 2008, the French authorities formally rejected the request to initiate an inquiry into the abuses detailed in the complaint, citing Rumsfeld’s immunity from prosecution as a former high-ranking public official.\textsuperscript{136} This was the final step in the \textit{Rumsfeld} litigation.\textsuperscript{137}

\section*{2.4.3 What Is the “Impact” of the Rumsfeld Cases?}

\textit{Rumsfeld} had several major “successes”: allowing lawyers to explore alternative legal venues; bringing transnational attention to the issue, both in the general public as well as sparking debate in the legal community; affecting public opinion about the justifiability and legality of using “enhanced interrogation techniques” on detainees from the “War on Terror;” and finally, making “cracks” in the “wall of impunity” by demonstrating that universal jurisdiction can be used to challenge abuses by powerful states.

**Exploring Alternative Legal Venues**

It is important to evaluate “success” not just based on what we know now, but on what we knew at the time the cases were initiated. In 2004, and perhaps less so in 2006, it remained possible that Germany could exercise universal jurisdiction against a state like the US. The \textit{Rumsfeld} litigation can be seen as an experiment—it allowed

\begin{itemize}
\item \textsuperscript{135} ECCHR, “The Torture Cases against Rumsfeld, Gonzales and Others.”
\item \textsuperscript{136} Ibid.
\item \textsuperscript{137} A related case was initiated in Spain on behalf of four former Guantanamo detainees (although ECCHR and CCR were not involved.) In January 2010, Spanish Judge Balasar Garzón issued a decision that Spain has jurisdiction over these cases and that they may proceed. See CCR, “Universal Jurisdiction” for more information.
\end{itemize}

43
lawyers from CCR and other organizations to test the waters in Germany and France. Ex post, we know that these efforts did not lead to German or French investigations of Rumsfeld and others, but exploring alternative legal venues remains an important outcome of the case.

**Bringing Public Attention to the Issue**

*Putting the Issue on the General Public’s Radar*

The *Rumsfeld cases* were filed in the mid-2000s, when there was much less debate in the US than there is today about whether “enhanced interrogation techniques” constituted torture, if torture and mistreatment of detainees was the result of a few “bad apples” or a policy handed down by the executive branch or defense department, and if the treatment of detainees (torture or other) was legal under US and international law. In Germany, articles appeared in top newspapers about what Germany’s role can and should be in prosecuting US officials.138 Articles in American newspapers discussed the German lawsuits and what role this should play in the US’ counterterrorism efforts.139 As with other events at the time, the cases helped put this issue on the general public’s radar, an important outcome of the case.

**Sparking Debate in the Transatlantic Legal Community**

The *Rumsfeld cases* also helped spark debate in the transatlantic legal community. Since the mid-2000s, there has been considerable debate among legal professionals about the legality of US treatment of detainees from its counterterrorism efforts. This debate covers a broad range of issues, from whether the lawyers who advised the Bush Administration about which “interrogation techniques” are constitutional can be held accountable for their role in how detainees were treated, to whether waterboarding and other “enhanced interrogation techniques” meet the legal definition(s) of torture, to the role of international human rights law in binding US foreign policy. This represents the third outcome of the cases.

---


139 See Landler 2006 and Zagorin 2006.
Affecting Public Opinion

The *Rumsfeld cases* comprise part of a larger movement aimed at shifting public attitudes surrounding the use of torture in the “War on Terror.” Many civil and human rights organizations based or operating in the US, from Physicians for Human Rights, to Amnesty International, Human Rights Watch and the ACLU, initiated lobbying and advocacy efforts, issued reports and held events with the aim of exposing and raising attention about the human rights crimes committed during the Bush Administration’s counterterrorism efforts.\(^{140} \) Often, these NPOs sought to convince the public that the CIA and the US military’s “enhanced interrogation techniques” actually constituted torture, and that torture was illegal and immoral. To be considered an *impact,* one would need to demonstrate that these efforts contributed to a shift in societal values.\(^{141} \)

Making “Cracks in the Wall of Impunity”

Finally, the *Rumsfeld* litigation chipped away at US officials’ impunity by publicly charging them with war crimes and human rights violations. These cases show that universal jurisdiction can be used to highlight and challenge the wrongs of a state as powerful as the US. At times, US officials made public statements, demonstrating their concern over the case. In late 2004, Rumsfeld announced that he would not travel to Germany before the complaints were dismissed.

Strategic litigation is about *challenging injustice*—it cannot always “deliver” justice. In the words of Michael Ratner, *Rumsfeld* “initiated a discussion that international justice has to be more than special justice for fallen dictators from southern countries or special tribunals for Africa. If universal jurisdiction wants to be taken seriously in the future, it has to go after the powerful perpetrators, also of the West

---


\(^{141} \) Some preliminary efforts have been made to measure change in societal attitudes about the “War on Terror.” See Kuzma 2004, which examines the public opinion of residents of Portland, Maine, in six-month intervals. To be used as evidence of “impact,” a broader sample (either across the US, or in North America and Europe, depending on the effort’s targeted “public”) would need to be used to gauge changes in public attitudes about the legality or morality of torture (as well as whether practices like waterboarding are “torture.”)
and the North.”142 The Rumsfeld cases succeeded in challenging the human rights violations of US officials during their counterterrorism initiatives of the early and mid-2000s. Making “cracks” in the “wall of impunity” is one of Rumsfeld’s greatest impacts.

Table 3. The Rumsfeld Cases’ “Impact”

<table>
<thead>
<tr>
<th>Type of General Change</th>
<th>Specific Change</th>
<th>Type of Indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exploring Alternative Legal Venues</td>
<td>The cases allowed lawyers to experiment and see if courts in Germany and France were willing to prosecute Rumsfeld and others, after their efforts in the US had been frustrated</td>
<td>Outcome</td>
</tr>
<tr>
<td>Bringing Public Attention to the Issue</td>
<td>The cases attracted attention across Europe, the US and elsewhere, putting the issue on the general public’s radar</td>
<td>Outcome</td>
</tr>
<tr>
<td></td>
<td>The cases spurred discussion in the transatlantic legal community about the legality of torture and the use of European universal jurisdiction laws to achieve accountability for human rights abuses committed by American officials</td>
<td>Outcome</td>
</tr>
<tr>
<td>Affecting Public Opinion</td>
<td>The case contributed to a wider movement that changed public opinion on the justifiability and legality of torturing detainees</td>
<td>Impact</td>
</tr>
<tr>
<td>Making “Cracks in the Wall of Impunity”</td>
<td>Publicly charging top US officials with war crimes and human rights violations helped show that even powerful states can be the targets of universal jurisdiction efforts</td>
<td>Impact</td>
</tr>
</tbody>
</table>

142 CCR, “Michael Rather Explains the Case against Rumsfeld.”
3. Conclusions

Evaluation remains a relatively foreign field to most human rights organizations, which tend to lack clear, tangible case and programmatic goals. This can be seen in the case studies. As goal-based evaluation requires external results to be measured against explicit organizational goals, this article could not take a traditional approach to such an evaluation undertaking. Instead, it looked at cases of strategic litigation retrospectively and identified the external results of each case. Each type of general change (listed for each case in tables 1-3) could be framed as a goal for the case, or a program the case was a part of.

The goal of this article has been to forward the state of research on evaluation and/or measurement of human rights organizations, focusing specifically on strategic litigation organizations. It has done so by putting forth a definition of strategic litigation, discussing what constitutes its success. It has also argued that evaluation can benefit human rights organizations and the field of human rights.

This article used *Wiwa v. Shell*, the *Argentinean cases* and the *Rumsfeld cases* to find outcomes and impacts that are examples of potential *ex ante* goals for future cases. This exercise resulted in four main conclusions:

1. Organizations need to clearly define their litigation and programmatic goals at their onset,
2. Different cases require different indicators of “success,”
3. The terms “measurement” and “evaluation” need to be better defined and used consistently in the field of human rights, and
4. By focusing on successes, failures and questions of effectiveness can easily be overlooked.
Clearly Defining Case and Programmatic Goals

Human rights organizations often have vague, long-term notions of how they hope to achieve change, but fail to identify clear, achievable short and medium-term goals. Each organization should identify which indicators it wants to identify—it is recommended that rather than focusing on inputs and processes, organization focus on a combination of outputs, outcomes and impacts—sometimes referred to as short-term and long-term outcomes. If organizations believe that the long-term outcomes of their work are not visible, either because there is no result, or because the result will occur in the distant future, it may make sense to identify goals that can be measured by inputs and outputs. This concern has been raised in Human Rights Watch’s pilot Impact Assessment program. Gorvin notes that HRW achieves some “champagne moments”—visible moments of “success”—while other activities carry on for years without affecting visible change.

Using Different Indicators of Success for Different Cases

It can be argued that each case discussed in this article “succeeded” in different ways. Wiwa advanced victims’ interests and furthered ATC as a legal tool for challenging human rights injustices in the US. Argentina renewed efforts to prosecute the human rights crimes of the Dirty War, contributed to truth-finding, illustrated how universal jurisdiction can be used as a positive tool in human rights litigation, and strengthened transnational human rights networks. Rumsfeld allowed lawyers to explore alternative legal venues, brought public attention to the issue at stake, affected public opinion about the legality and morality of torturing those detained in the “War on Terror,” and made “cracks in the wall of impunity” by charging officials of one of the most powerful Western states with war crimes and human rights violations. Because of the diverse nature of their cases, it does not make sense for a strategic litigation organization to use the same indicators of success for every case or program it pursues. Rather, indicators should be used to measure pre-identified goals of each case. Only then can it be determined whether a case or program was successful. Using such a form of evaluation will allow
organizations to answer the questions of if, and how, a program or case met its objectives (and how it did not).

Clean-up of the Terms “Evaluation” and “Measurement”

“Evaluation” and “measurement” are used to mean many different things. Using the definition of measurement developed by Harvard University’s Carr Center—the use of systematic assessment techniques, including qualitative and quantitative measures—impact in Wiwa, Argentina and Rumsfeld would be largely immeasurable, since few indicators can be quantitatively operationalized with the resources available to smaller NPOs. I suggest that the Carr Center’s definition of measurement be reworked to include instances when no indicators can be assessed quantitatively. Research biases are always a risk, regardless of whether one uses qualitative or qualitative methods.

Additionally, when referring to “measurement and human rights,” authors should be clear about whether they mean organizational evaluation, or the measurement of human rights standards. “Evaluation” may be a more appropriate term than “measurement” when referring to assessing organizational impact.

By Focusing on Successes, Failures and Ineffectiveness Are Easy to Ignore

This article fell short of identifying failures in the cases’ effectiveness and inefficiency. This is typical of goal-oriented evaluation and organizations should be aware of this positive bias.

Counteracting overly positive assessments is one reason it is advisable to decouple the evaluation of an organizational or program with that of personnel. Strategic litigation organization will be best served by being honest about their contributions to promoting and enforcing human rights.

Summary

Embracing Impact Assessment and other types of goal-oriented evaluation would benefit strategic litigation organizations by allowing them to better communicate
their “successes” to the outside world, as well as to come to a clearer internal understanding of what their tangible, achievable goals are for a particular case or program. Incorporating this culture of routine, systematic evaluation can help organizations to develop better strategies in future cases. We have seen in Chapter 2 that Wiwa, Rumsfeld and Argentina had different results—different outcomes and impact. In future litigation efforts, organizations are encouraged to define their goals ex ante, with the intent of evaluating the results of their work against the goals they have set.

Incorporating systematic assessments of the impact of strategic litigation efforts would be a big step forward in promoting honest and transparent reflections on the work of human rights nonprofit organizations. Even with all of the obstacles to evaluating the impact of a nonprofit organization, it is valuable for organizations to move toward more systematically assessing their efforts. Being a part of the evaluation wave will allow organizations to answer how they are doing in achieving their goals, and how they will know when they have reached their goals.

At a minimum, NPOs can set clear goals for new campaigns and cases, and regularly reflect upon their performance, as honestly and systematically as possible, thinking in terms of outputs, outcomes and impacts. The value of measuring impact will increase over time, as organizations can compare their results with similar, previous undertakings.
4. Recommendations: Incorporating Scientific Thinking into Strategic Litigation

In the long term, it would be ideal for human rights organizations to become self-evaluating organizations in order to encourage change. This would mean that organizations would be able to evaluate their efforts in-house, incorporating evaluation into their everyday thinking and working. Evaluation would become a continuous process. Wildavsky writes, “The self-evaluating organization would be skeptical rather than committed. It would continuously be challenging its own assumptions. Not dogma but scientific doubt would be its distinguishing feature. It would seek new truth instead of defending old errors. Testing hypotheses would be its main work.” This type of attitude could greatly improve the effectiveness and efficiency of human rights organizations.

It is important for evaluators to remember that for this type of evaluation to be legitimate, it must “remain safely and explicitly anchored in official goals. If not, evaluation loses its normative and intellectual foundation.”

Strategic litigation organizations can benefit from developing and using a more systematic way of assessing their progress and making sure that their efforts promote their mission and objectives, and are working towards meeting clear and reachable goals. The following recommendations are meant to help such organizations think about steps they can take in the short-term to work towards creating a culture of evaluation in their organization.

1. Carefully Define Your Goals and Regularly Assess If Your Efforts Fit Those Goals

It is recommended that all strategic human rights organizations take the time to carefully define their goals when they begin new programs or cases and to begin to think about whether their efforts are well matched to those goals. Goals should be clear, tangible and achievable. When thinking about its goals, organizations should think about how measurable or visible change will be, catering their Impact Assessment indicators to such a reality. If an organization finds itself to have many

---

144 Wildavsky 1979, 234.  
145 Schön and Rein 1994, 625.
long-term, intangible goals, it should think about what short and medium-term goals it will take to work towards those long-term objectives. If this is the case, it may make sense to put more of an emphasis on measuring outputs rather than on external results.

2. Regularly Reflect on Your Priorities and Programs
At a minimum, organizations should take the time to reflect on their decisions about which cases or problems to pursue and the strategies used to pursue them. Human rights organizations are constantly making decisions about which human rights issues to tackle and how to tackle them. This can help staff (as well as the public, if such information is shared with them) understand why managerial and strategic choices are being made. Why do organizations choose the human rights focuses they do? Why do they pursue their objectives through certain tools and not others? How do they justify the use of those tools?

3. Develop a Common Understanding of Success in Strategic Litigation
Institutional learning is important for an individual institution, but also for the broader human rights community. By coming to agreement on notions of what “success” means in strategic litigation, strategic litigation organizations can work toward evaluating their efforts on the same scale. Agreed upon goals, at least within similar types of strategic litigation organizations, will help organizations think about success in the same way. Network building and communication between NPOs can help organizations avoid making the same mistakes, and can help them share what has worked.146 Only this kind of regular communication will allow the human rights community, and more specifically, the strategic litigation community, share answers to the “evaluation challenges” described in this thesis and develop “best practices” in evaluating impact and organizational performance.

---


