

The Interplay of National, Transnational and International Litigation for Environmental Justice: Seeking Effective Means of Redress for Grave Environmental Damage

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Abstract: Questions of global justice raise within transnational relations in the light of an ever increasing number of instances of massive environmental damage and human rights violations, resulting from the operation of multinational corporations (MNCs) in developing countries with low labour and environmental standards, poor enforcement capacities, and spheres of corruption. This paper appraises the different national and international (judicial and non-judicial) fora that are available to hold MNCs accountable. On the basis of recent judicial developments concerning civil liability claims by victims of the operations of MNCs in various countries, it explores the circumstances under which national, transnational and international litigation, either by itself or in interaction with each other, have proven most effective in providing redress. It concludes that transnational cluster-litigation is the most efficient strategy to tighten the meshes of judicial action upon MNCs, hence promoting the international rule of law and contributing, albeit modestly, to foster (corrective) global justice.

Keywords: environmental justice; national courts; international courts

1. Introduction

Questions of environmental justice raise in the context of transnational relations in the light of an ever increasing number of instances of grave environmental harm resulting from the operations of multinational corporations (MNCs) in the territory of developing countries with low environmental standards, little enforcement capacities, and spheres of corruption. Corporate activities in these countries that are based on the disrespectful exploitation of natural resources have not only negative impacts on the environment, but necessarily imply the deprivation of the enjoyment of basic human rights among local populations.

Does national and international law provide for remedy and redress? This paper presents the main findings of an empirical inquiry into several prominent cases of national, transnational and international litigation instigated by victims of severe environmental harm as a consequence of the activities of MNCs. More specifically, in the light of recent judicial developments concerning civil liability claims by victims of the operations inter alia of Chevron/Texaco in Ecuador, the conflict for land between MNCs and Afro-descendant communities in Colombia, RioTinto in Bourgainville, Shell in Nigeria, or Trafigura in Ivory Coast, it explores whether the different national and international avenues, either by itself or in interaction with each other, have provided some sort of redress.¹ To this end, it is structured as follows: section 2 and 3 briefly sketch the global legal framework in which MNCs operate, and against which they are eventually to be held accountable. Against this backdrop, section 4 presents the most significant factors that have hampered the effectiveness of domestic courts of the countries where damage occurred in the aforementioned cases. Section 5 appraises the conditions under which these sorts of cases may reach the domestic courts of third countries in which MNCs are incorporated or hold forfeitable assets. Finally, section 6 focuses on the role that some regional human rights courts play in the aforementioned cases in order to provide redress.

2. Globalization and the invisibility of MNCs in international law

States do incorporate companies, granting them the status of legal persons under their domestic laws. Bundled to a multinational or transnational holding, each one of the companies that compose it – whether it exerts control over the entire group, or not – has its own legal personality and is subjected to the national law of its incorporation. Hence, whenever companies inflict harm to third parties, domestic legal systems tend to make them accountable. This usually involves administrative and/or civil liability, and in a growing number of countries companies have also criminal responsibility. Beyond national laws, however, states have shown reluctant to make MNCs directly liable under international law (Pigrau 2009). In historical perspective, this attitude of *laissez-faire* (McCorouodale, Simons 2007) explains the patterns of international legal rules directly or indirectly affecting MNCs, which may be

¹ For an extensive in-depth appraisal of these and other cases, constituting the empirical basis for this research, see Pigrau *et al.* (2012).

summarised as follows: high demands in terms of investment protection, liberalization of international trade, and huge resistance to creating direct obligations for them. Therefore, it seems as if there is no correlation between the MNCs' ability to be involved in serious violations of international standards applicable to States and individuals, on the one hand, and the ability to make them liable under international law, on the other (Muchlinski 2007).

Notwithstanding, secondary rules of general international law clearly reflect the states' unwillingness to assume liability for wrongful acts of individuals (including corporations) committed within their territory or elsewhere under their jurisdiction (Pigrau 2011). Moreover, the so-called polluter-pays-principle (PPP) has gradually been introduced to allocate the costs of pollution prevention and abatement measures to economic operators. Even if at present this rule is not (yet) a general principle of international law, the PPP has nevertheless been affirmed in very significant international instruments, such as the International Law Commission's *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities* (ILC 2006), which consolidates the aforementioned trend, making states' liability for transboundary damages dependent on the fulfilment of their due diligence obligation of prevention, and subsidiary to the liability of economic operators under domestic laws. Moreover, specific treaty regimes concerning ultra-hazardous activities that are not prohibited by international law, have envisaged compensation mechanisms based on the operator's strict liability (Boyle 2005). Still, the number of ratifications of these instruments is fairly low. Many are not yet in force, and some of them probably never will.

Nevertheless, several attempts have been made since the second half of the twentieth century to set up a number of core obligations for companies under international law. However, the results of this process have been rather meagre, the latest being the adoption by the UN Human Rights Council in June 2011 of the legally non-binding 'Guiding Principles on Business and Human Rights',² following a proposal by the UN Secretary General's Special Representative for Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. Also, the increasing pressure from global public opinion has forced MNCs to make clear their awareness of their activities' socio-environmental impacts, thus developing a series of measures generally subsumed under the notion of 'corporate social responsibility' (hereinafter, CSR). This dynamic has ultimately led to a number of collective frameworks of business regulation, sponsored by various international organizations. These include ia the 1976 'OECD Guidelines for Multinational Enterprises',³ the 1977 'Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration)',⁴ the 1999 'Global Compact',⁵ or the 2006 International

² UNHRC Res 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

³ <www.oecd.org/daf/investment/guidelines> accessed 30 April 2012.

⁴ <www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 30 April 2012.

⁵ <www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> accessed 30 April 2012.

Finance Corporation's 'Performance Standards on Social Environmental Sustainability'.⁶ In these frameworks, however, the relatively few participating companies only undertake legally non-binding commitments, compliance with which is supervised through soft law mechanisms. However, they lack real teeth, and the emphasis placed on the voluntary nature of these instruments creates a deliberate confusion as to the fact that many of these soft commitments are already binding for companies under domestic law (International Council on Human Rights Policy 2002).

The privatization and deregulation policies encouraged throughout the 80s by international financial institutions in the context of the external debt crisis of the developing world have contributed decisively to this phenomenon (George 1992). As a consequence of these policies, MNCs have acquired such economic power and political influence that they are in the position to influence significantly the national and international economic game (Kinley, Joseph 2002). As Sara Joseph has pointed out, 'specific problems arise with host States being required to control MNEs because the latter are uniquely international, uniquely mobile and, most importantly, uniquely powerful' (Joseph 1995), preventing states from too meticulous law-enforcement against MNCs (Morgera 2009: 27-30). For all the above reasons, one may conclude that MNCs' decision-makers may be quite confident that, in principle, should they face liability claims related to their activities anywhere in the world, the economic impact will be manageable and largely limited to the country where harm occurred (Stephens 2002).

3. Environment and human rights: a promising avenue for environmental justice litigation?

In his separate opinion to the majority decision of the International Court of Justice (ICJ) in the *Gabcíkovo-Nagymaros Project* case, judge Weeramantry stated that '[t]he protection of the environment is (...) a vital part of contemporary Human Rights doctrine, for it is a sine qua non for numerous Human Rights, (...) as damage to the environment can impair and undermine all the Human Rights spoken of in the Universal Declaration (...)'.⁷ As this statement suggests, the connection between environment and human rights is quite evident. In fact, after the Stockholm Declaration on the Human Environment (UN 1972) there has been a trend in some domestic legal orders towards recognising the environment as a specific human right (May, Daly 2011), even if this approach is controversial (Bosselmann 2001). Most domestic systems, however, have acknowledged the relationship between a healthy environment and the effective enjoyment of other basic human rights such as the right to life, health, adequate food, the right to property, and even the right to private and family life.

⁶ <www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Risk+Management/Sustainability+Framework/Sustainability+Framework++2012/#PerformanceStandards> accessed 30 April 2012.

⁷ *Gabcíkovo-Nagymaros Project Case (Hungary v. Slovakia)* (Merits) [1997] ICJ Rep 7, at 111.

Various regional systems of human rights protection have also adopted significant decisions in this respect. So, for instance, even though the 1950 European Convention for the Protection of Human Rights (ECHR) does not directly recognise a right to an adequate environment, the European Court of Human Rights (ECtHR) has dealt with environmental issues on the basis of the interpretation of other explicitly recognised rights.⁸ Significantly enough, the ECtHR has also used the general interest in environmental protection to justify restrictions on the enjoyment of some human rights, such as the right to property.⁹ In contrast to the European system, the American system has indeed recognised the right to an adequate environment in the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. However, this right is not actionable through individual complaints before the Inter-American Commission on Human Rights (IACoHR) or the Inter-American Court of Human Rights (IACtHR). Therefore, both institutions have also provided for the protection of the environment on the basis of its connection with such other enforceable rights, such as the right to property, particularly of indigenous peoples.¹⁰ For its part, the 1981 African Charter on Human and Peoples' Rights directly recognizes the right to the environment, providing the basis for remarkable decisions of the African Commission on Human and Peoples' Rights (AfComHPR).

This confluence between the environmental and the human rights agendas (Anaya 1999-2000) allows using both legal branches in domestic, transnational and international litigation concerning scenarios of serious environmental harm caused by MNCs (Chesterman 2004). Compensation for environmental damages may obviously be claimed there where they occurred. Nevertheless, eventually it may also be possible to seek compensation in other countries. This might be particularly the case when harm was caused by a MNC, as the courts of the country where the parent company has been incorporated may eventually accept their jurisdiction. This however will essentially depend on the extraterritorial reach of both, the domestic laws and the jurisdiction of that country's courts (Zerk 2010).

In general, beyond the national level, international courts are only open to inter-state litigation. Moreover, courts such as the ICJ and the International Tribunal for the Law of the Sea (ITLOS) have dealt with controversies concerning environmental issues, but no international court deals specifically with environmental disputes.¹¹ The

⁸ See *ia López Ostra v. Spain* App no 16798/90 (ECtHR, 9 December 1994); *Guerra and Others v. Italy* Apps nos 116, 735 and 932/1996 (ECtHR, 19 February 1998).

⁹ *Lars and Astrid Fägerskiöld against Sweden* App no 37664/04 (ECtHR, Decision on admissibility, 26 February 2008).

¹⁰ See *ia Indigenous Community Yakye Axa v Paraguay*, Judgment of Merits, Reparations, and Costs, IACtHR Series C No 125 (17 June 2005); *Indigenous Community Sawhoyamaya v Paraguay*, Judgment of Merits, Reparations, and Costs, IACtHR Series C No 146 (29 March 2006); *The Saramaka People v Surinam*, Judgment on Preliminary Objections, Merits, Reparations, and Costs, IACtHR Series C No 172 (28 November 2007).

¹¹ Non-judicial bodies are particularly frequent in the context of international environmental law, where compliance bodies have been established in a number of treaties. Most of them have a political, rather than judicial character. However, individuals or NGOs are not allowed to issue a complaint against states, except for a rather testimonial number of treaties, such as the 1998 Aarhus Convention on

international human rights courts set up in the various regional systems certainly offer a counterpoint in this regard. At the global level, moreover, a number of committees exists that monitor the States' compliance with a series of human rights treaties, which may also receive individual complaints.¹² Further, a series of special procedures have been developed under the aegis of the UN Human Rights Council (formerly Human Rights Commission) to assess the respect for human rights in a specific country, or on a particular issue. In this latter context, the mandates of some of these inquiries do envisage investigations related to environmental issues, even if their capacity of influence is fairly limited.

4. Seeking redress before domestic courts of the state where harm was inflicted

In theory then, the most obvious legal avenue to seek redress in cases of environmental damage and related human rights violations is recourse to the *forum delicti commissi*, ie the domestic courts of the state in which harm was inflicted. Laws in each state tend to provide affected individuals and groups standing before the government agencies responsible for authorising and overseeing the activities causing the damages. Should this first avenue not settle the issue, recourse is possible before administrative, civil, or criminal courts, or even environmental courts, if these do exist.

Nevertheless, the effectiveness of recourse to courts will depend on the institutional strength, capacity and independence of the national judiciaries. Litigation in countries that have attained only a weak degree of statehood, in which the judicial apparatus is co-opted or has been neutralised by specific interest groups, is obviously a non-starter. For example, the close collaboration between Papua New Guinea's entire state system with the RioTinto company, both during the first phase and later within the context of the civil war against the population of the island of Bougainville, made it unconceivable for this latter group to access the nation's judiciary.¹³ Similarly, after the illegal disposal of the *Probo Koala's* highly toxic SLOP wastes in Abidjan in August 2006, the Ivorian Government negotiated a settlement with Trafigura according to which this company would pay €152 million for the construction of a waste treatment plant and the assistance in the recovery operations, thereby depriving the victims from their right to remedy.

Yet, the effectiveness of domestic remedies in developing countries with a significantly higher degree of institutional strength than that of the previous examples

Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Cardesa-Salzman 2012).

¹² See ia the Committee of Experts on the Application of Conventions and Recommendations (ILO); the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights, which supervise the states' compliance with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, respectively.

¹³ This led a US court to regard it inappropriate to require the exhaustion of domestic remedies as a previous condition, before resorting to US courts under ATCA in this case, particularly with respect to the plaintiffs' claims for crimes against humanity, war crimes, and racial discrimination. *Sarei v. RioTinto PLC (RioTinto IV)*, 650 F.Supp. 2d 1004, 1032 (C.D.Cal 2009).

is also very limited. In the cases that provide the empirical basis for the present research, the courts of the countries in which damage occurred were accessed, and judicial decisions throughout the different instances have quite often accorded redress to the claimants. The most spectacular case was certainly the judgment of the Sucumbios Provincial Court of Justice of 14 February 2011, in which Chevron (as a successor of Texaco) was found liable for severe environmental harm and human rights violations caused by their operations in that region, and condemned to pay a US\$18 billion fine.¹⁴ In this context, the role of some courts – in particular the Constitutional Court of Colombia – has been especially important in upholding the rights of indigenous peoples against the activities of MNCs, such as the right to be consulted on issues that affect them as foreseen under ILO Convention No. 169.¹⁵ Moreover, its case-law concerning the protection of the rights of forcefully internally displaced persons has been very significant with respect to environmental justice litigation in the Colombian province of Chocó, between Afro-descendant communities and MNCs pursuing palm-oil plantations.¹⁶ Nevertheless, despite the fact that in many cases affected groups and individuals were able to access courts and even obtain a decision favourable to their claims, a series of factors common to (environmental) litigation hamper the effectiveness of this avenue.

One such common feature that has been highlighted by the UN Human Rights Council is the harassment and persecution – often through the state apparatus – of the so-called ‘environmental defenders’ that rise public awareness and mobilise collective action in defence of the affected populations’ interests (UNHRC 2011). Deeply related thereto is also the lack of guarantees for the independence of judges and lawyers in many countries. As stated by the successive UN Special Rapporteurs on the independence of judges and lawyers in the country visit reports concerning Colombia and Ecuador, the lack of institutional guarantees of independence makes judges in these countries vulnerable to governmental interference in the exercise of their jurisdictional functions. Moreover, also here, judges and lawyers are exposed to the harassment of specific groups, particularly in Colombia (UNCHR 2006; UNHRC 2010).

Further, the case studies underlying to the present research also show that the judicial apparatuses in many developing countries more often than not lack the human, technical and institutional resources necessary to effectively enforce the judgments and decisions taken by domestic courts. This situation leads to a systematic frustration of the claimants’ aspirations for recognition and compensation. In this sense, for example, a complaint was filed in 2006 by Ecuadorian citizens before the IACoMHR for the non-enforcement of a ruling of the Constitutional Court, ordering all the country’s relevant ministries to adopt the measures necessary to remedy the damage suffered by communities on the northern border of Ecuador, as a consequence of the aerial herbicide sprayings carried out by DynCorp on the Colombian side of the border, and to prevent further damage from being caused.¹⁷ Be

¹⁴ [2011] Provincial Court of Justice of Sucumbios (Ecuador), Judgment of 14 February 2011. Case No 2003-0002.

¹⁵ [2009] Constitutional Court of Colombia, Judgment of 29 October 2009. Case No T-769/09.

¹⁶ [2004] Constitutional Court of Colombia, Judgment of 22 January 2004. Case No T-025/04.

¹⁷ A decision on the admissibility of the complaint is still pending.

that as it may, this situation of institutional weakness of domestic judiciaries has led in some cases to regard extra-judicial settlement between the MNC and individual victims as an alternative. Among the case studies carried out, this was particularly so with respect to the Choropampa mercury spill, in the broader context of the mining activities of Newmont in Yanacocha (Peru). However, individual victims that entered into settlements later claimed to have been trumped and subsequent litigation before Peruvian courts did not result favourable to their claims.¹⁸

Another significant factor that may hinder the enforcement of domestic judicial decisions, at least in some situations, comes with the international obligations undertaken by the state under bilateral investment treaties (BIT) with the home country of the MNC, as they may provide the basis for companies to challenge such enforcement measures before international arbitral tribunals (Morgera 2009: 27; Simons 2012: 20-2). The Chevron/Texaco case in Ecuador is quite revealing in this respect, in the context of which the company instigated arbitral proceedings against that country in several occasions on the basis of the BIT with the US. In February 2011, a few days before aforementioned judgement of the Sucumbios Provincial Court was rendered, the arbitral tribunal adopted protective measures in favour of Chevron, ordering Ecuador to suspend, both within and outside of the country, the enforcement of any judgment against the company in relation to the case, while waiting for a definitive ruling on the merits.¹⁹ This measure was confirmed in February 2012.

5. Transnational litigation before courts of the MNC's home state

Recourse to courts of the state where MNCs have their centre of operations, or hold otherwise forfeitable assets may be a further option (Ebbesson 2009), as long as they have extra-territorial jurisdiction – ie competence to adjudge acts committed beyond the national borders – and provide access to foreign citizens. So, for instance, EU Regulation No 44/2001²⁰ provides for extra-territorial jurisdiction of the member states' courts in civil and commercial matters. In addition, some member states recognize such powers to their courts on the basis of *forum necessitatis*, ie for circumstances in which the domestic courts of no other state would effectively grant access to justice (Augenstein 2010: 68). Moreover, after the European Court of Justice's judgment in *Owusu v. Jackson*, EU member states' courts are barred to decline adjudging extra-territorial cases on the basis of the *forum non conveniens* doctrine, when the alternative jurisdiction is in a country outside the EU.²¹ As we shall see, this represents a significant difference in terms of access to justice between the

¹⁸ [2008] Supreme Court of Peru, Judgment of 21 April 2008. Cassation Appeal No 1465-2007 (Cajamarca).

¹⁹ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No 2009-23, Order for Interim Measures (9 February 2011).

²⁰ OJ L12/1 (2001).

²¹ Case C-281/02, *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others*. Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) [2005] ECR I-1383.

EU and the USA. It therefore seems as though extra-territorial civil avenues do exist within the EU, despite the fact that these have not been much used (Enneking 2009). In fact, in the context of the case studies on which this research is based, transnational tort litigation in EU member states has only taken place before British courts in the context of the compensation claims for Trafigura's illicit waste disposal in the *Probo Koala* incident in Abidjan. Eventually, Dutch courts also ruled on this matter, but not (yet) on an extra-territorial basis. However, they have accepted extra-territorial jurisdiction in another case concerning the oil-spills caused by operations of the Nigerian subsidiary of Shell in the Niger Delta between 2004 and 2006.²²

Transnational litigation against MNCs has been much more significant in the USA, as it still is the country where most of the largest MNCs have their parent companies. Moreover, the 1789 Alien Tort Claims Act (ATCA) allows aliens (foreigners) to sue those who violate international treaties that are binding for the US or general (customary) international law.²³ Successful use of the ATCA began with the *Filártiga* case in 1980,²⁴ which opened the US' federal courts for the defence of rights recognised under international law. The possibility of private actors being held liable under ATCA for conspiracy or complicity was established in 1988 in *Carmichael v. United Technologies Corp.*²⁵ In fact, most of the claims against companies for human rights violations are related to complicity with actions perpetrated by government armed forces or police. This is due to the difficulty of establishing direct participation as authors of such rights violations, especially when the requirement that the activity takes place 'under colour of law' is applied (Ramasastry 2002). However, cases in which MNCs have been accused of violating international norms of environmental protection are still very rare, and important parts of scholarship in the US regard this avenue of transnational environmental litigation with scepticism (Posner 2009: 207ff). Moreover, the vast majority of claims filed against companies under the framework of the ATCA have either failed to reach the point of analysis of liability, for myriad reasons, or have been rejected.

5.1 Transnational 'environmental' litigation on the basis of ATCA?

In the case-law of the US' federal courts, liability of private actors and companies under ATCA has so far been restricted to cases of violation of international legal rules that fall within the concept of *jus cogens*,²⁶ particularly when companies acting 'under colour of law' were involved in crimes such as genocide or crimes against humanity.²⁷ However, US courts have refused so far to accept rules of international environmental

²² [2009] Court of The Hague, Civil law section, Judgment in motion contesting jurisdiction of 30 December 2009. Case No 330891/HA ZA 09-579.

²³ ATCA reads as follows: '1350. Alien's action for tort. The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' Act of 24 September 1789, ch. 20, § 9 (b), 1 Stat. 79; June 25, 1948, ch 646, § 1, 62 Stat. 934; 28 U.S.C. § 1350 (2004).

²⁴ *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2nd Cir. 1980).

²⁵ *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988).

²⁶ *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, (S.D.N.Y. 28 February 2002).

²⁷ *Bowoto v. Chevron Corp.*, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal., 21 August 2006).

law as cognizable principles of customary international law, so as to establish their subject matter jurisdiction under ATCA.²⁸ An alternative attempt to build environmental litigation cases from a human rights angle – namely, the alleged impairment of the rights to life and health as a consequence of air and water pollution caused by a copper mine – was also dismissed, as the asserted rights were found to be ‘insufficiently definite to constitute rules of customary international law’.²⁹

This being said, in *Sarei v. RioTinto PLC* the US District Court for the Central District of California seems to qualify to some extent the arguments underlying to the previous case-law.³⁰ In *Sarei*, claims included Rio Tinto’s alleged complicity in the commission of war crimes and crimes against humanity by the Papua-New-Guinean army, racial discrimination in labour practices against indigenous workers, violation of the rights to life and health of individuals as a consequence of the environmental impact of activities at the Panguna mine, and violation of the principle of sustainable development and the 1982 UN Convention on the Law of the Sea (UNCLOS) for massive contamination of marine waters. For the present purposes, the most significant aspect of this ruling is the fact that for the first time, a US federal court seemed to imply that violations of international environmental rules are adjudicable under ATCA, although admittedly under extremely tight conditions. In particular, the court considered UNCLOS to be *a priori* relevant as customary international law (even though it had not been ratified by the US). Nevertheless,

[w]hile the UNCLOS may reflect customary international law that is specific and obligatory, the court concludes – for purposes of applying the second prong of the prudential exhaustion analysis – that it is not a “matter of universal concern” in the same manner that *jus cogens* norms such as genocide, torture or crimes against humanity are.³¹

Therefore, conceiving environmental damage as a matter of local or regional (rather than universal) concern, US courts must prudentially assess whether to require the previous exhaustion of domestic remedies in the country where harm occurred, and eventually exert international comity towards that country’s courts. This is particularly so in cases, in which the link between the claims and the US are considered to be weak, and the US has hence no specific interest in adjudicating them.³²

This reasoning might be relevant in the context of *Aguasanta-Arias et al. v. DynCorp* and *Arroyo-Quinteros et al. v. DynCorp*, which are being presently litigated before the US District Court for the District of Columbia. In these two cases, a group of some 10,000 affected farmers filed a class action against DynCorp, who had been contracted by the US Department of State in the context of the ‘Plan Colombia’ to carry out aerial herbicide fumigations for the elimination of illegal coca plantations. Eventually, such

²⁸ *Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534 (S.D.N.Y. 2001). *Amlon Metals, Inc. v. FMC Corp.*, 775 F.Supp. 668 (S.D.N.Y. 1991). *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

²⁹ *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

³⁰ *Supra* note 13.

³¹ *Id.*, at 1026 (footnotes omitted).

³² *Id.*, at 1031.

operations affected not only Colombian territory, but also had serious impact on the environment and the health of the population in northern Ecuador. Therefore, acting under 'colour of law' and carrying out the fumigations under the authority of Colombia and the US, a clear nexus would seem to exist between the claims and the US. Moreover, as these operations allegedly led to transboundary environmental damages, DynCorp may be found to have been involved in a violation of the 'do-no-harm' obligation established (to the benefit of the US) in the 1941 *Trail Smelter* arbitral award,³³ which should thus be accepted as a 'cognizable principle of customary international law'.³⁴

5.2 Forum non conveniens and the enforcement of foreign judgments: insights from the *Chevron-Texaco* litigation

In addition to the legal basis for US courts to establish their subject matter jurisdiction under ATCA, the doctrines of *forum non conveniens* (FNC) and of enforcement of foreign judgments constitute further cornerstones of transnational litigation in the US. By virtue of FNC, a court may dismiss a suite despite having jurisdiction, if it finds that 'an alternative forum is available, adequate, and more appropriate than the US for adjudicating the suit' (Whytock, Robertson 2011). This doctrine was applied in the *Chevron-Texaco* case, which was brought before Ecuador's domestic courts after having first been raised in the US, where the parent company (Texaco, later Chevron) has its headquarters. The claim, filed in November 1993 in a New York federal court, on behalf of 30,000 Ecuadorian citizens from the Oriente region, alleged that between 1964 and 1992, Texaco's operations in the region through its subsidiary TexPet had contaminated and destroyed the environment in a 14,000 km² area. It was also alleged that these operations were directed and controlled by the parent company in the United States. However, the court did not end up hearing the case, instead applying the FNC exception, which had been invoked by the company arguing that the Ecuadorian courts were more suitable to adjudge the claims.³⁵ Yet, it is also significant in this case that one of the judges involved considered that FNC was possibly being used in bad faith, conditioning his agreement to it on Texaco's acceptance of the jurisdiction of the Ecuadorian courts. This provision was supported by the Second Circuit Court of Appeals. After various procedural events, the District Court and the Court of Appeals both confirmed this decision in 2001³⁶ and 2002,³⁷ respectively. In exchange, Texaco had to commit to accepting Ecuador's jurisdiction as well as the fact that any judicial decision taken in Ecuador in the case could be executed against Texaco in the US.

³³ Arbitral Award, *Trail Smelter Case (United States v. Canada)*, 3 UN RIAA 1905 (11 March 1941).

³⁴ See the brief recently submitted on behalf of fourteen international environmental law professors and practitioners as *amici curiae*. *Venancio Aguasanta-Arias, et al. v. DynCorp Aerospace Operations, LLC, et al.*, Civil Action No. 01-1908 (RWR), consolidated with Civil Action No. 07-1042 (RWR) for case management and discovery purposes, US District Court for the District of Columbia, Memorandum Order, 21 November 2011.

³⁵ *Aguinda v. Texaco, Inc.* 945 F. Supp. 625, 627 (S.N.Y.D. 1996).

³⁶ *Aguinda v. Texaco, Inc.* 142 F. Supp. 2d 534, 554 (S.N.Y.D. 2001).

³⁷ *Aguinda v. Texaco, Inc.* 303 F. 3d 470,473 (2d Cir. 2001).

In turn, the foreign judgment enforcement doctrine provides US courts discretionary power to refuse such enforcement if the defendants prove ‘that the judgment, or the legal system producing it suffers from deficiencies that should preclude enforcement’ (Whytock, Robertson 2011). However, the invocation of this doctrine may seriously affect the consistency and credibility of the defendant party, if it previously had relied on the appropriateness of the foreign country’s courts to invoke FNC. This is precisely what happened in the Chevron-Texaco litigation. Shortly before the Provincial Court of Sucumbios rendered its decision, the company made significant attempts to discredit the judicial proceedings in Ecuador and obstruct the execution of the Ecuadorian court’s judgment. To do this, the company has been willing to use all sorts of means, in particular a civil suit against the claimants’ attorneys in the US, alleging conspiracy to commit extortion under the framework of the Racketeer Influenced and Corrupt Organisations Law.³⁸ In this way, the company received a temporary injunction order, which prevented the Ecuadorian claimants and their attorneys from requesting the enforcement of the previous judgment not only in the United States, but anywhere outside of Ecuador.³⁹ This decision was eventually overturned by the Second Circuit Court of Appeals,⁴⁰ which also seized the opportunity to draw attention to the paradox of the company’s move to bring the proceedings to Ecuador in the initial stages of the litigation, only to systematically discredit the Ecuadorian judiciary and its outcome in a later stage, in order to seek the protection of the US courts against enforcement. Therefore, the drawback that the application of FNC in a specific case may suppose for the foreign claimants’ aspirations before US courts seems to be compensated by the fact that successful invocation of FNC hinders significantly the eventual application of the foreign judgment enforcement doctrine in a later stage, if the foreign court’s decision does not suit the interest of the defender.

5.3 Is there a future for litigating against MNCs on the basis of ATCA?

Finally, recent developments in relation with the claims that have been filed against Shell under the framework of the ATCA, seriously cast shadow over the future prospects of this unique avenue for transnational litigation. The most significant cases brought against Shell in the US are the *Wiwa* and *Kiobel* cases. Both are based on claims that the company was complicit with the government in committing serious human rights violations in Ogoniland, including crimes against humanity, torture, and arbitrary detention. The *Kiobel* case nevertheless is of particular relevance for the future of claims against companies under the framework of the ATCA.

In this case, the district judge initially accepted the charges of torture, illegal detention, and crimes against humanity to establish subject matter jurisdiction.⁴¹ At a later stage, however, the defendant’s claim that US courts generally lack jurisdiction over companies under ATCA – which had already been raised in the *Wiwa* case – gained new relevance. At first, in March 2008, the district court accepted the

³⁸ 18 U.S.C. § 1962.

³⁹ *Chevron Corp. v. Donziger*, 768 F. Supp. 2d, 581 (S.D.N.Y. 2011).

⁴⁰ *Chevron Corp. v. Naranjo*, 2011 WL 4375022 (2d Cir. Sept. 19, 2011).

⁴¹ *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464-65, 467 (S.D.N.Y. 2006).

defendants' motion to dismiss for lack of personal jurisdiction over companies for both cases. Then, after an appeal by the claimants, and the 3 June 2009 decision of the Second Circuit Court of Appeals that overturned the district court's decision in the *Wiwa* case, the district judge rejected this cause of inadmissibility for Royal Dutch Petroleum, while upholding it for Shell's Nigerian subsidiary (SPDC).

However, upon a new appeal by the defendants, the Second Circuit Court of Appeals in New York issued an unexpected decision on 17 September 2010, this time ruling out categorically the possibility of suing companies under the framework of the ATCA.⁴² After the presentation, and rejection, of other appeals, the claimants filed a petition for writ of certiorari to the Supreme Court, asking it to address the question

[w]hether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations...⁴³

The petition was granted on 17 October 2011, and a hearing took place on 28 February 2012, after which the case was restored to the calendar for reargument on 5 March and the parties were directed to file supplemental briefs addressing the question 'whether and under what circumstances the Alien Tort Statute (...) allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States'.⁴⁴ Needless to say, the Supreme Court's decision will be determining for the future applicability of the ATCA to companies, and more generally, to adjudge violations of international norms committed abroad, and the conservative majority in the Court provides reasons for concern. The significance of this decision is also made clear by the large number of *amicus curiae* briefs that have been submitted to the Supreme Court,⁴⁵ among which the brief filed by the US administration in favour of the claimants is quite remarkable.⁴⁶

6. International human rights courts

International human rights courts may provide further means of remedy to alleged victims of environmental harm impairing significantly the enjoyment of human rights. The regional human rights protection systems established in Europe, America, and Africa grant individuals (and groups) access to the courts they establish. So far, the cases on which this research is based have not led to complaints before the ECtHR. However, it should be kept in mind that this Court has jurisdiction over any case of

⁴² *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111, 149 (2d Cir. 2011).

⁴³ <www.supremecourt.gov/qp/10-01491qp.pdf> accessed 30 April 2012

⁴⁴ *Id.*

⁴⁵ <www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm> accessed 30 April 2012.

⁴⁶ Brief for the United States as Amicus Curiae Supporting Petitioner, 21 December 2011, at 7-8; Available at <www.earthrights.org/sites/default/files/documents/USG-Kiobel-amicus.pdf> accessed 30 April 2012.

alleged violations of human rights recognised in the ECHR that may occur virtually anywhere in the world, as long as it is committed under the jurisdiction or control of a state party. Therefore, as in the application of the Chagos islanders against the UK,⁴⁷ the ECHR is susceptible to having extra-territorial reach (Sand 2012). Yet, the role of the American and African systems of human rights protection has been more prominent in the case studies selected for this research.

The IACoMHR and IACtHR are actually playing a remarkable role in providing some sort of relief to institutional and operational deficiencies that affect the domestic judiciaries of some of the states parties to the ACHR (see section 4). So, for instance, in the case concerning the killing of the environmental defender Blanca Jeanette Kawas in Honduras – in which state agents were involved – the IACtHR found the facts to be a violation of her right to life, her freedom of association, and of the personal integrity of her family members. The obstacles that her family had to overcome before the Honduran courts were also found a violation of their rights to legal guarantees and protection, which prevented them from learning the truth about what happened and from seeking reparations for the damages and losses they suffered. In terms of reparations, the Court also ordered Honduras to implement a national awareness campaign ‘directed towards security officials, law enforcement, and the general public, on the importance of the work performed by environmental defenders in Honduras and their contributions to the defence of human rights’.⁴⁸

In the context of the conflict between Afro-descendant communities, the paramilitary, and MNCs in the Colombian province of Chocó, the IACtHR has reinforced the aforementioned role of the Colombian Constitutional Court in the defence of the rights of the indigenous peoples, thereby playing a crucial complementary role to the domestic judiciary in administering justice. In relation to this conflict, the Court has so far issued a number of provisional measures, as provided for under article 63(2) ACHR in cases of extreme gravity and urgency, in order to avoid irreparable harm to persons. These provisional measures are binding for the State they are addressed at. In particular, since 2003 the IACtHR has adopted provisional measures in the case of the Communities of the Jiguamiandó and the Curbaradó requesting Colombia to adopt inter alia ‘all necessary measures to protect the lives and safety of all the members of the communities composed of the Community Council of the Jiguamiandó and the families of the Curbaradó’, as well as all necessary measures ‘to ensure that the persons benefiting from these measures may continue living in their place of residence, free from any kind of coercion or threat.’ It further requested from Colombia to ‘grant special protection to the so-called ‘humanitarian refuge zones’ established for the communities comprising the Community Council of the Jiguamiandó and the families of the Curbaradó and, to that effect, to adopt the necessary measures so that they may receive all the humanitarian aid sent to them.’⁴⁹ Nevertheless, in view of the persisting situation of grave risk the people concerned, the

⁴⁷ *Chagos Islanders v. United Kingdom*, App no 35622/04 (ECtHR, 20 February 2009).

⁴⁸ *Kawas Fernández v Honduras* Judgment on Indemnification, Reparations, and Costs IACtHR Series C No 196 (3 April 2009), paras. 145-6.

⁴⁹ *Communities of the Jiguamiandó and the Curbaradó v Colombia* Provisional measures IACtHR Order of 6 March 2003.

IACtHR has been continuously reaffirming these measures in successive orders, the last one adopted in February 2012.⁵⁰

In a similar way, the AfComHR is playing a significant role in correcting, to the extent possible, the deficient output of domestic judiciaries in environmental justice litigation. With respect to the heinous consequences of Shell's operations in the Niger delta, it is true that Nigerian legislation – in particular the Nigerian Petroleum Act of 1969, the Nigerian Federal Environmental Protection Agency Act of 1988, and the Oil Pipelines Act of 1990 – makes companies liable for spills they cause and that they are obligated to compensate affected groups and individuals. Accordingly, Shell's operations have given rise to a tremendous number of lawsuits in the Nigerian courts, although changes in legislation and delays in rulings by the courts have decisively influenced their viability, and firm judicial decisions are scarce.

In this context, the AfComHR's decision of October 2001 is particularly relevant, as it declares that Nigeria has violated the AfCHPR in relation to the Ogoni people's right to health, right to a satisfactory and healthy environment, right to sovereignty over natural resources, right to food, and right to life, and considered the companies Nigerian National Petroleum Company and Shell Petroleum Development Corporation to be implicated in these violations.⁵¹ In various passages from its decision, the Commission emphasised the obligation of States to guarantee the enjoyment of the rights contained in the Charter, and to monitor the activities of private actors operating in their territories. It has to be acknowledged, nevertheless, that the AfComHR only has the capacity to make recommendations, but it urged the government of Nigeria to prosecute the leaders of the Nigerian National Petroleum Company's security forces, as well as those from other relevant institutions involved in human rights violations.⁵²

7. Conclusions

The previous assessment suggests that liability claims for environmental damage in transnational settings are best served through cluster-litigation, by which 'parallel or serial litigation of overlapping or closely related claims before multiple [national and/or international] courts' is meant (Nollkaemper 2008). In addition to the territorial jurisdiction of administrative bodies and courts in the countries where environmental damage and human rights violations occur, EU Regulation 44/2001 offers a legal basis to 'pierce the state veil' and establish extra-territorial jurisdiction of domestic courts in the EU, and particularly ACTA has provided one in the USA, although admittedly under extremely narrow conditions. Yet, the Supreme Court's ruling in the *Kiobel* case will be crucial for the future prospects in this regard. Be that as it may, whenever possible, the

⁵⁰ *Communities of the Jiguamiandó and the Curbaradó v Colombia* Provisional measures IACtHR Orders of 17 November 2004, 15 March 2005, 7 February 2006, 17 December 2007, 5 February 2008, 17 November 2009, 3 May 2010, 30 August 2010, 7 June 2011, 25 November 2011, and 27 February 2012.

⁵¹ *The Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* AfComHR Communication No 155/96 (Oct. 2001).

⁵² *Id.*, at paras. 52-8.

simultaneous or successive resort to available courts in different countries in which liable companies have forfeitable assets seems to be the most promising strategy to obtain economic compensation.

Further, international human rights courts, quasi-judicial treaty bodies, and even voluntary mechanisms provide an additional avenue through which significant influence is exerted on national courts to enforce international environmental and human rights standards. In particular, some regional human rights courts are playing a crucial role in reinforcing and correcting the deficient output of domestic courts in the actual administration of justice. Moreover, due to their intrinsic focus on human rights that emerge from a Kantian conception of the human being as an end in itself, these courts contribute to provide not only economic, but more importantly than that, also moral recognition and compensation for inflicted wrongs, there where domestic judiciaries have failed to do so. By way of conclusion then, far from being an easy way to go, transnational cluster-litigation seems the most efficient strategy to tighten the meshes of judicial action upon multinational corporations, hence promoting the international rule of law and contributing, albeit modestly, to foster (corrective) global justice.

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