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# Legal avenues for EJOs to claim environmental liability

Contributions by

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## Abstract

An ever increasing number of instances of massive environmental damage and human rights violations result from the operation of multinational corporations (MNCs). Issues of global justice arise from this trend. 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

corporate accountability	multinational corporations
corporate social responsibility	national courts
environmental justice	polluter pays principle
environmental liability	precautionary principle
international courts	



# Contents

<b>Foreword</b>	<b>5</b>
<b>1 Introduction</b>	<b>7</b>
<b>2 The general legal framework</b>	<b>9</b>
2.1 Globalization and the invisibility of multinational corporations (MNCs) in international law	9
2.2 Mandatory instruments versus voluntary instruments: corporate social responsibility and voluntary frameworks of business regulation	13
2.3 Environmental damage in international treaty law: a space for corporate responsibility	18
2.4 Globalisation and the power of MNCs in the host states	20
2.5 Standards and protection mechanisms: the connection between environmental damage and the violation of human rights	22
<b>3 Legal avenues to seek environmental liability: some relevant cases</b>	<b>31</b>
3.1 Legal avenues in host state national law (territorial scope)	32
3.1.1 Ownership of land and access to natural resources	32
3.1.2 The persecution of environmental defenders	36
3.1.3 Recourse to national courts	39
Colombia	39
Ecuador	42
India	45
Ivory Coast	46
Nigeria	47
Peru	48
United States	50





3.2	Legal avenues in the national law of the home state	51
3.2.1	The Netherlands	52
3.2.2	United Kingdom	54
3.2.3	United States	57
3.3	Legal avenues in international law	70
3.3.1	The International Court of Justice	70
3.3.2	The special procedures for the protection of human rights within the United Nations	71
3.3.3	Regional systems for the protection of human rights	73
	The Inter-American system for protection of human rights	73
	The African system for human rights protection	76
	Other legal mechanisms established in international investment-protection systems or in the context of international financial entities	77
3.4	Legal instruments within regulatory frameworks of voluntary compliance	79
3.5	Recourse to other instruments of social pressure	81
3.5.1	Courts of opinion	81
3.5.2	The voice of the shareholders	83
<b>4</b>	<b>Conclusions for EJOs</b>	<b>86</b>
	<b>Acknowledgments</b>	<b>94</b>
	<b>References</b>	<b>95</b>



## Acronyms

AfComHPR	African Commission of Human and Peoples' Rights
AfCtHPR	African Court of Human and Peoples' Rights
ATCA	Alien Tort Claims Act
CAO	Compliance Advisor Ombudsman
CEO	Chief-Executive Officer
CSR	Corporate Social Responsibility
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EJO	Environmental Justice Organisation
EJOLT	Environmental Justice Organisations, Liabilities and Trade
IAComHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
IFC	International Finance Corporation
ILO	International Labour Organisation
MNC	Multinational Corporation
MYSRL	Minera Yanacocha, Sociedad de Responsabilidad Limitada
NCP	National Contact Point
NGO	Non-governmental organisation
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development
OMC	Orissa Mining Corporation
SPDC	Shell Petroleum Development Company
SIIL	Sterlite Industries India Limited
UN	United Nations
UNECE	United Nations Economic Commission for Europe
VAL	Vedanta Aluminium Limited

The ISO 4217 standard is used for the currency codes.



# Foreword

Conflicts over resource extraction or waste disposal increase in number as the world economy uses more materials and energy. Civil society organizations (CSOs) active in Environmental Justice issues focus on the link between the need for environmental security and the defence of basic human rights.

The EJOLT project (*Environmental Justice Organizations, Liabilities and Trade*, [www.ejolt.org](http://www.ejolt.org)) is an FP7 Science in Society project that runs from 2011 to 2015. EJOLT brings together a consortium of 23 academic and civil society organizations across a range of fields to promote collaboration and mutual learning among stakeholders who research or use Sustainability Sciences, particularly on aspects of Ecological Distribution. One main goal is to empower environmental justice organizations (EJOs), and the communities they support that receive an unfair share of environmental burdens to defend or reclaim their rights. This will be done through a process of two-way knowledge transfer, encouraging participatory action research and the transfer of methodologies with which EJOs, communities and citizen movements can monitor and describe the state of their environment, and document its degradation, learning from other experiences and from academic research how to argue in order to avoid the growth of environmental liabilities or ecological debts. Thus EJOLT will increase EJOs' capacity in using scientific concepts and methods for the quantification of environmental and health impacts, increasing their knowledge of environmental risks and of legal mechanisms of redress. On the other hand, EJOLT will greatly enrich research in the Sustainability Sciences through mobilising the accumulated "activist knowledge" of the EJOs and making it available to the sustainability research community. Finally, EJOLT will help translate the findings of this mutual learning process into the policy arena, supporting the further development of evidence-based decision making and broadening its information base. We focus on the use of concepts such as ecological debt, environmental liabilities and ecologically unequal exchange, in science and in environmental activism and policy-making.

The overall **aim** of EJOLT is to improve policy responses to and support collaborative research on environmental conflicts through capacity building of environmental justice groups and multi-stakeholder problem solving. A key aspect is to show the links between increased metabolism of the economy (in terms of energy and materials), and resource extraction and waste disposal conflicts so as to answer the driving questions:

*Which are the causes of increasing ecological distribution conflicts at different scales, and how to turn such conflicts into forces for environmental sustainability?*



This report is part of the outcomes of EJOLT's WP9 (Law and institutions), which is centred on cross-cutting methodological activity that should feed into the capacity of EJOs working in other thematic areas of EJOLT, such as nuclear industry, mining, fossil fuel and biomass extraction. Within this context, this report aims to provide legal counselling on current court cases to EJOs, as well as proposals for new institutions of international environmental justice. In a broader sense, the analysis of the range of cases included in the report will also offer instruction on the debates on property rights and environmental management, as well as on environmental policy instruments.





## 1

# Introduction

This text is conceived of as a preliminary report. At the time it was drafted, the EJOLT project was still in its initial compasses. Therefore, this report is thought of as an initial appraisal of a set of selected cases, highlighting the typical features of environmental injustices. It will provide a basis for a more comprehensive, in-depth analysis of a broader range of cases in a second step, in which all relevant legal elements will be addressed simultaneously. On the one hand many of these elements depend not only on divergent national laws, but also on the specific circumstances in a given national, regional or local setting, which determine how rules are interpreted and applied. On the other hand, environmental regimes set up around different multilateral environmental treaties also have a significant incidence, either by themselves, or in conjunction with other norms of international economic law, such as those relating to foreign investment or international trade. Hence, in this first report we have opted to present a sample of relevant cases, emphasizing the potential avenues – with their virtues and limitations – that EJOs may resort to in order to address situations that they perceive of as being environmentally unjust.

Secondly, this report has been drafted on the basis of case studies; it is not a theoretical inquiry into the rules and institutions that apply to the different problems at stake. Although some of the cases presented raise the issue of state responsibility for internationally wrongful acts, as we shall see, the thread common to them all is that severe environmental damage to the environment is often associated with the involvement of large multinational companies. Hence, eleven cases have been selected for this preliminary report, on the basis of four criteria: namely, (1) the severity of their environmental and social impact which qualifies them as cases of significant environmental injustice; (2) the representativeness of the patterns (i.e. similar cases may arise under similar conditions elsewhere in the world); (3) their geographic diversity; and, finally, (4) the existence of sufficiently documented and advanced legal action by the victims on the ground.

Accordingly, the following cases were chosen: the impact of Shell in Nigeria; the impact of Texaco / Chevron in Ecuador; the Trafigura case in Ivory Coast; the impact of Rio Tinto in Bougainville (Papua New Guinea); the impact of Yanacocha in Peru; the impact of the aerial fumigations carried out by Dyncorp in Colombia and Ecuador; the impact of climate change on the Inuit; the effects of uranium



mining in Namibia; the impact of Vedanta in India; and the issue of land tenure and forced displacement in the Department of Chocó, in north-eastern Colombia. Furthermore, a cross-sectional assessment of the problem of persecution of environmental defenders is also included. In the future, the project will continue to examine other cases in order to complete a more comprehensive final report.

Lastly, the third guiding idea that has inspired this report has to do with the content of the case studies. Although they are all quite specific in their own way, they all include:

- a) the basic factual background, which identifies the companies involved, as well as the communities affected and the locations;
- b) the relevant aspects of the applicable legal framework, such as the regime of access to property and natural resources under national law, international environmental regimes, or other relevant regulatory frameworks (voluntary frameworks for the self-regulation of enterprises, indigenous statutes, etc.); and
- c) the legal avenues, both domestic and international, judicial or non-judicial, that the affected communities or its members may resort to in order to seek redress and claim liability for environmental damages.

A compilation of case studies, complementary to this report, will be available at the EJOLT resource library as fact sheets.



# 2

## The general legal framework

### 2.1 Globalization and the invisibility of multinational corporations (MNCs) in international law<sup>1</sup>

Companies are granted the status of legal persons to the extent and under the conditions set out under the national law of the State in which they are incorporated.<sup>2</sup> Each one of the companies belonging to a multinational or transnational holding therefore has its own legal personality, irrespective of the parent company that has effective control over the entire group.<sup>3</sup> The various companies that integrate the group are hence subject to the national laws and the jurisdiction of the courts of the countries they were incorporated in. This notwithstanding, the activities they carry out in other States also mean that they are subject to these countries' national legislations.

Under public international law MNCs lack full legal personality. However, they may benefit from certain entitlements associated with their private activities, insofar as they are specifically granted by a State, usually on a contractual basis. Accordingly, international courts do not have jurisdiction over MNCs, except for the aforementioned cases in which the bilateral agreements between a State and a MNC foresees international arbitration for the settlement of any dispute related with investment protection and international commercial transactions.

<sup>1</sup> Generally, this section follows A. Pigrau Solé, 'La responsabilidad de las empresas transnacionales por daños graves al medio ambiente: explorando la vía de la Alien Tort Claims Act' in A. M. Badia Martí, A. Pigrau Solé and A. Olesti Rayo (eds), *Derecho internacional y comunitario ante los retos de nuestro tiempo. Homenaje a la Profesora Victoria Abellán Honrubia. Volumen I* (Marcial Pons 2009) 517.

<sup>2</sup> Institut de Droit International, 'Statut juridique des sociétés en droit international', Session de New York (12 October 1929).

<sup>3</sup> Institut de Droit International, 'Les entreprises multinationales', Session d'Oslo (7 September 1977). Institut de Droit International, 'Les obligations des entreprises multinationales et leurs sociétés membres', Session de Lisbonne (1 September 1995).



In principle the activities of MNCs are subject to regulation, chiefly through national, as we shall see later, and international law. As far as the latter field is concerned, States that ratify, for example, international conventions adopted under the aegis of the International Labour Organization choose to undertake legal obligations concerning labour relations and, thus, also the activity of companies belonging to multinational groups. However, these international obligations cannot be complied with merely by enacting labour standards: they also require the State to enforce the legislation.

The same is true of other international treaties, such as those concerning the protection of human rights, even though not all of them deal specifically with private actors (for example, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973,<sup>4</sup> or the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979).<sup>5</sup> In the context of international economic law, the United Nations Convention against Transnational Organized Crime, of 15 November 2000<sup>6</sup> (and its three Protocols), as well as the United Nations Convention against Corruption, of 31 October 2003,<sup>7</sup> contain provisions specifically regarding the liability of legal persons.<sup>8</sup> In both instruments the States Parties undertake to prosecute individuals and companies responsible for the crimes foreseen therein in their own national courts. However – save the aforementioned exceptions foreseen in bilateral contracts between companies and States – international tribunals do not have the jurisdiction to directly enforce the liability of companies for possible breaches of international standards.

Most national legal systems have a rule that companies must be made accountable for damages caused to third parties. This usually involves administrative and/or civil liability, but in a growing number of national legal orders companies are also submitted to criminal responsibility.

However, with respect to international law, the policy of the economically powerful States has led to a situation in which making MNCs directly responsible for violations of international rules that they have committed, ordered or helped to commit is virtually impossible, as the State's mediation has made them legally invisible in the international legal order. In general, no direct obligations are imposed upon corporations, and governments are not internationally accountable for the behaviour of individuals, except when the State itself has provided them with assistance in their activities, thereby breaching an international obligation. Moreover, not all States ratify all conventions, and some of those that do, do not adopt the necessary measures to ensure their implementation and enforcement,

**Most national legal orders have a rule that companies must be made accountable for damages caused to third parties. Beyond the national level, however, the policy of economically powerful States has led to a situation in which making MNCs directly responsible for violations of international law is virtually impossible.**

4 UNGA Res 3068 (XXVIII) (30 November 1973), Art. 1.

5 UNGA Res 34/180 (18 December 1979) UN Doc A/RES/34/180, Art. 2.

6 UNGA Res 55/25 (15 November 2000) UN Doc A/RES/55/25.

7 UNGA Res 58/4 (31 October 2003) UN Doc A/RES/58/4.

8 UN Convention Against Transnational Organised Crime, Art. 10. UN Convention Against Corruption, Art. 26.

either because they are not willing, or because they are lacking the capacity to do so.

In particular, the various international courts set up in the context of international criminal law only deal with the criminal responsibility of individuals. Therefore, it is only individuals – irrespective of whether they are linked to a MNC or not – that can be held responsible for certain particularly serious violations of human rights (for example before the jurisdiction of the International Criminal Court) provided that the conditions laid down in the company's statute are met. Yet the prosecution of the company itself is excluded.<sup>9</sup>

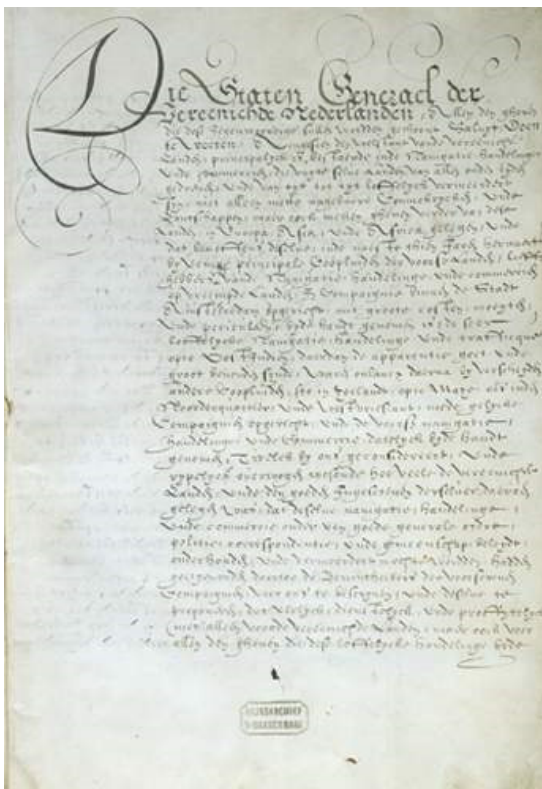


Fig 1

**The founding charter of the VOC (Verenigde Oostindische Compagnie) of 20 March 1602, the first MNC in history**

Source: TANAP – Towards a New Age of Partnership in Dutch East India Company Archives and Research ([www.tanap.net/view.htm?zwartwit\\_octrooi.jpg](http://www.tanap.net/view.htm?zwartwit_octrooi.jpg))

From a historical perspective, most industrialized States have showed no interest whatsoever in limiting their MNCs' freedom of action beyond their own national borders, just as had been the case with their commercial companies during the colonization of Africa, Asia or America. This explains the pattern of development of international standards directly or indirectly aiming to regulate the activity of MNCs: high demands in terms of investment protection, the liberalization of international trade and the removal of restrictions on their freedom of action, but huge resistance to creating direct obligations for them. Thus, these States have

<sup>9</sup> A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000) 139, 141-60.



practised a *laissez-faire* policy, as regards the activities of MNCs beyond their own national jurisdictions,<sup>10</sup> and they have prevented their behaviour from being supervised by relying on the fiction that it is the subsidiaries (of the same nationality as the local state) that operate, rather than the parent company.

Overall, there is a complete lack of correlation between the MNCs' potential for negative impact – including their ability to commit, or be involved in the commission, of serious violations of international legal standards applicable to States and individuals – and the ability to enforce their civil or criminal liability under international law.<sup>11</sup>

According to the former Special Representative of the Secretary-General for Human Rights and Transnational Corporations, Professor John Ruggie, the problem is as follows:

“The permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only a realignment can fix the problem. In principle, public authorities set the rules within which business operates. But at the national level some Governments may simply be unable to take effective action, whether or not the will to do so is present. And in the international arena States themselves compete for access to markets and investments, thus collective action problems may restrict or impede their serving as the international community's “public authority”. The most vulnerable people and communities pay the heaviest price for these governance gaps.”<sup>12</sup>

10 R. McCorquodale and P. Simons. 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *The Modern Law Review* 598.

11 Among the vast literature on the topic, see P. K. Muchlinski (ed), *Multinational Enterprises and the Law* (2nd edn OUP 2007). M. T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000). C. D. Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (2nd edn Martinus Nijhoff 2003). FAFO, 'Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law' FAFO (Oslo 2004) 467. E. Morgera, *Corporate Accountability in International Environmental Law* (OUP 2009). J. Hernández-Zubizarreta, *Las empresas transnacionales frente a los derechos humanos: Historia de una asimetría normativa* (Universidad del País Vasco 2009).

12 UNHRC 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Business and human rights: mapping international standards of responsibility and accountability for corporate acts' (19 February 2007) UN Doc A/HRC/4/35, para. 82.





## 2.2 Mandatory instruments versus voluntary instruments: corporate social responsibility and voluntary frameworks of business regulation

Despite the aforementioned developments, since the second half of the twentieth century several attempts have been made to set up a number of obligations for companies under international law.

In particular, there have been three significant moments within the United Nations (UN):

- In 1974 the Commission on Transnational Corporations was set up, in which for several years (between 1975 and 1983) preparatory work for a “Code of Conduct for Multinational Enterprises” was undertaken. Ultimately, this work was not successful.<sup>13</sup>
- In 2003, in what was the last attempt to adopt a binding text, the UN Subcommission on the Promotion and Protection of Human Rights adopted the “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights”; however, the text was not accepted by the Human Rights Commission.<sup>14</sup>
- Thirdly, since 2006 the Commission on Human Rights – and subsequently the Human Rights Council – has sponsored a wide-ranging discussion led by the UN Secretary General’s Special Representative for Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. The proposed legal framework for addressing the issue is based on three pillars:
  - The States’ obligation to protect human rights;
  - The companies’ obligation to respect human rights; and
  - The existence of effective judicial and non-judicial avenues to seek redress, both in the State where the violation has taken place, and in the company’s State of origin.

**The common features of voluntary frameworks of business regulation for CSR are:**

- limited number of participating companies;
- non-binding commitments;
- soft supervisory mechanisms.

This process has ultimately led to the adoption of the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” by the UN Human Rights Council on 16 June 2011,<sup>15</sup> following John Ruggie’s proposal in his final report.<sup>16</sup> The Council has also set up

<sup>13</sup> UN Commission on Transnational Corporations, ‘Report of the Secretary-General on the progress made in the work on the Code of Conduct on Transnational Corporations’ (29 January 1990) UN Doc E/C.10/1990/5. See also ‘Draft Code of Conduct on Transnational Corporations’ (12 June 1990) UN Doc E/1990/94.

<sup>14</sup> UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

<sup>15</sup> UNHRC Res 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

<sup>16</sup> UNHRC ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and



a Forum on businesses and human rights, as well as a working group of five experts that shall continue to deal with these issues in the future.

Moreover, the growing awareness of global public opinion and, hence, the negative effects on their business as a consequence of a public image associated with violations of human rights, has impelled the companies themselves to adopt corporate policies to increase and make visible their public accountability for the impacts of their activities. These instruments and measures have generally been called “corporate social responsibility” (CSR). The underlying dynamic has ultimately led to the adoption of a number of collective frameworks of business regulation, sponsored by various organizations and *fora*. The common features of these frameworks are a relatively limited number of participating companies, which undertake voluntary commitments that are not legally binding, and the establishment of a number of supervisory mechanisms, leading to variable consequences in the event of non-compliance.<sup>17</sup> Four of these voluntary regulatory frameworks<sup>18</sup> should be singled out:

- In 1976, the so-called “OECD Guidelines for Multinational Enterprises” were adopted within the Organisation for Economic Cooperation and Development (OECD); a document that has undergone several revisions, the last of which

Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31. The underlying ideas of this paper are fully applicable to the environmental field, even though specific references to it are minimal. Research into the relationship between Ruggie’s conceptual framework and the environment has been carried out in a project developed for the European Union at the University of Edinburgh. See D. Augenstein, *Study on the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (University of Edinburgh 2010), at <[ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm)> accessed 27 February 2012. See also E. Morgera, ‘Final Expert Report. Corporate Responsibility to Respect Human Rights in the Environmental Sphere’ (University of Edinburgh 2010) and A. Boyle, ‘Preliminary Draft Core Report: Human Rights and the Environment’ (University of Edinburgh 2010), at <[www.law.ed.ac.uk/euenterpriseslf/documents/expertreports.aspx](http://www.law.ed.ac.uk/euenterpriseslf/documents/expertreports.aspx)> accessed 17 February 2012.

<sup>17</sup> For a critical appraisal of the inherent limitations of this approach, see J. Clapp and P. Utting, ‘Corporate Responsibility, Accountability, and Law’ in J. Clapp and P. Utting (eds), *Corporate Accountability and Sustainable Development* (OUP 2008) 4. T. McInerney, ‘Putting Regionation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility’ (2007) 40 *Cornell International Law Journal* 171.

<sup>18</sup> There are further specific frameworks, such as eg the ‘Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict’ UN Doc A/63/467-S/2008/636 (6 October 2008); the ‘International Code of Conduct for Private Security Service Providers’ (9 November 2010) <[www.icoc-psp.org](http://www.icoc-psp.org)>; with respect to conflict diamonds, the ‘Kimberley Process Certification Scheme’ <[www.kimberleyprocess.com/home/index\\_en.html](http://www.kimberleyprocess.com/home/index_en.html)>; or the ‘OECD Due Dilligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’ (December 2010) <[www.oecd.org/dataoecd/62/30/46740847.pdf](http://www.oecd.org/dataoecd/62/30/46740847.pdf)>. In the context of the UN Convention on Biological Diversity there are specific voluntary frameworks established in a number of guidelines: <[www.cbd.int/guidelines/](http://www.cbd.int/guidelines/)>. All websites were accessed 17 February 2012.



was in 2011.<sup>19</sup> In this case, it is the adhering States that are committed to encouraging companies in their country to comply with the directives.

- In 1977, the “Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration)” was adopted in the context of the International Labour Organisation (ILO), its last revision dating from 2006.<sup>20</sup>
- In 1999, the “Global Compact” was put in place under the aegis of former UN Secretary General Kofi Annan, as a “a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption”. This requires individual, voluntary adherence. Amongst other civil society actors, around 9,000 enterprises have adhered to it.<sup>21</sup>
- Lastly, in 2006 the “Performance Standards on Social Environmental Sustainability” were adopted within the World Bank’s International Finance Corporation (IFC). These were revised in January 2012,<sup>22</sup> and are binding standards that the IFC imposes upon the beneficiaries of its investments.

Be that as it may, the adoption of the aforementioned voluntary regulatory frameworks does not change the fact that, for the time being, it has been literally impossible to adopt any international instruments setting up a body of rules that

19 OECD Guidelines for Multinational Enterprises. <[www.oecd.org/daf/investment/guidelines](http://www.oecd.org/daf/investment/guidelines)> accessed 17 February 2012. Item IV of the text refers to the environment, and starts with the following paragraph: “Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.”

20 (1978) *ILO Official Bulletin*, Vol. LXI, Series A, No.1, 49-56. The fourth edition of the Tripartite Declaration is available at <[www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf)> accessed 17 February 2012.

21 UN Global Compact. <[www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html](http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html)> accessed 17 February 2012). The document contains ten principles, three of which refer to the environment. Their wording is the following: “Principle 7: Businesses should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies”.

22 IFC’s Sustainability Framework - 2012 Edition <[www1.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/IFC+Sustainability/Risk+Management/Sustainability+Framework/Sustainability+Framework+-+2012/#PerformanceStandards](http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Risk+Management/Sustainability+Framework/Sustainability+Framework+-+2012/#PerformanceStandards)> accessed on 17 February 2012. The Performance Standards are related to 1: Assessment and Management of Environmental and Social Risks and Impacts; 2: Labor and Working Conditions; 3: Resource Efficiency and Pollution Prevention; 4: Community Health, Safety, and Security; 5: Land Acquisition and Involuntary Resettlement; 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources; 7: Indigenous Peoples; Performance Standard 8: Cultural Heritage.



are legally binding for MNCs. Yet the voluntary commitments to respect human rights undertaken – as it seems – by some groups of companies will only be meaningful if independent monitoring and supervisory mechanisms are put in place, and some sort of negative consequences arise for those enterprises that are found to be in non-compliance.

Besides, the emphasis placed on the voluntary nature of these instruments contributes to maintaining a deliberate confusion as to the fact that many of the soft commitments undertaken by companies are already binding for many of them, as a consequence of the evolution of international law and the obligation undertaken by States.<sup>23</sup>

This choice in favour of voluntarism has also become visible within the European Union. The evolution of the European Commission's initiative in this regard<sup>24</sup> is quite telling: launched in the European Council meeting held in Lisbon (2000),<sup>25</sup> it was developed through the Green Paper "Promoting a European framework for Corporate Social Responsibility" (2001)<sup>26</sup> and the Communication from the Commission concerning Corporate Social Responsibility (2002),<sup>27</sup> but ended in dead-lock after the communication issued in March 2006 (Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility).<sup>28</sup>

And all of this took place despite the dissenting view expressed time and again by the European Parliament: resolution of 15 January 1999 on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct;<sup>29</sup> resolution of 30 May 2002 on the Commission Green Paper on promoting a European framework for corporate social responsibility;<sup>30</sup> resolution of 13 March 2007 on corporate social responsibility: a new partnership,<sup>31</sup> which notes the lack of progress; and the resolution of 25 November 2010 on corporate social responsibility in international trade agreements.<sup>32</sup>

**The emphasis placed on the voluntary nature of some instruments contributes to maintaining a deliberate confusion as to the fact that many of the soft commitments undertaken by companies are already binding for many of them.**

23 International Council on Human Rights Policy, *Beyond Voluntarism. Human rights and the developing international legal obligations of companies* (The International Council on Human Rights Policy 2002), chs IV and V.

24 J. Wouters and L. Chanet. 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6 *Northwestern University Journal of International Human Rights* 262, 272-81.

25 "39. The European Council makes a special appeal to companies' corporate sense of social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development."; Lisbon European Council, Presidency Conclusions (23-24 March 2000), at <[www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm)> accessed 17 February 2012.

26 COM(2001) 366 final (18 July 2001).

27 COM(2002) 347 final (2 July 2002).

28 COM(2006) 136 final (22 March 2006).

29 European Parliament Resolution of 15 January 1999 on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct [1999] OJ C104/180.

30 European Parliament Resolution of 30 May 2002 on the Commission Green Paper on promoting a European framework for corporate social responsibility [2003] OJ C187E/180.

31 European Parliament Resolution of 13 March 2007 on corporate social responsibility: a new



In the first one of these resolutions, the European Parliament expressed its concern “about numerous cases where intense competition for investment and markets and lack of application of international standards and national laws, have led to cases of corporate abuse, particularly in countries where human rights are not upheld”, and voiced its support for voluntary initiatives, despite sustaining that “codes of conduct cannot replace or set aside national or international rules or the jurisdiction of governments; [...] codes of conduct must not be used as instruments for putting multinational enterprises beyond the scope of governmental and judicial scrutiny.” *Inter alia*, it also asked the Commission to:

- “enforce the requirement that all private companies carrying out operations in third countries on behalf of the Union, and financed out of the Commission's budget or the European Development Fund, act in accordance with the Treaty on European Union in respect of fundamental rights [...]”;
- “ensure that consideration is given, with an appropriate legal basis, to incorporating core labour, environmental and human rights international standards when reviewing European company law, including the new EC Directive on a European-incorporated company”.

In its resolution of 13 March 2007, the European Parliament considered:

“that the credibility of voluntary CSR initiatives is further dependent on a commitment to incorporate existing internationally agreed standards and principles, and on a multi-stakeholder approach [...] as well as on the application of independent monitoring and verification;” and “that the EU debate on CSR has approached the point where emphasis should be shifted from 'processes' to 'outcomes', leading to a measurable and transparent contribution from business in combating social exclusion and environmental degradation in Europe and around the world”.

In its resolution of 25 November 2010, *inter alia*, the European Parliament:

“2. Notes, further, that globalisation has increased competitive pressure among countries to attract foreign investors and competition between corporations, which has sometimes led to serious abuses of human and labour rights and damage to the environment in order to attract trade and investment;

3. Recalls that the principles underpinning CSR, which are fully recognised at international level, whether by the OECD, the ILO or the United Nations, concern the responsible behaviour expected of undertakings and presuppose, first of all, compliance with the legislation in force, in particular in the areas of employment, labour relations, human rights, the environment, consumer interests and transparency vis-à-vis consumers, the fight against corruption and taxation;

4. Recalls that promoting CSR is an objective supported by the European Union and that the Commission takes the view that the Union must ensure that the external policies it implements make a genuine contribution to the sustainable development and to the social development of the countries

[partnership \[2007\] OJ C301E/45.](#)

[32 European Parliament Resolution of 25 November 2010 on corporate social responsibility in international trade agreements \(2009/2201\(INI\)\) \[2012\] OJ C99E/101.](#)



concerned and that the actions of European corporations, wherever they invest and operate, are in accordance with European values and internationally agreed norms; [...]

6. Considers that the Commission should investigate the possibility of establishing a harmonised definition of the relations between an undertaking designated the 'parent company' and all undertakings in a relationship of dependency with respect to that company, whether those undertakings are subsidiaries, suppliers or sub-contractors, in order to establish the legal liability of each of them."

Recently, in October 2011, the European Commission published a new policy on corporate social responsibility.<sup>33</sup> In this document the European Commission, which had previously defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis", puts forward a new definition of CSR as "the responsibility of enterprises for their impacts on society."

## 2.3 Environmental damage in international treaty law: a space for corporate responsibility

States have set up general rules on international responsibility that clearly reflect their unwillingness to assume international liability for wrongful acts that individuals may commit within their territory or elsewhere under their jurisdiction, except for very specific cases.<sup>34</sup>

Under particular circumstances, however, some treaty regimes concerning ultra-hazardous activities that are not prohibited by international law have envisaged compensation mechanisms based on the operator's strict liability. As we shall see, this instrument is being used in a range of issue areas covered by international environmental law. At the same time, independently of the aforementioned treaties, the polluter pays principle has been gradually introduced by the States to allocate the costs of the measures adopted to prevent and abate pollution. This rule may not yet be regarded as a general principle of the international legal order. Nevertheless, it has been affirmed in very significant international instruments, such as European Union treaties.<sup>35</sup>

**Some treaties concerning ultra-hazardous activities that are not prohibited by international law have envisaged compensation mechanisms based on the operator's strict liability.**

<sup>33</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility' (25 October 2011) COM(2011) 681 final.

<sup>34</sup> A. Pigrau Solé, 'La responsabilidad internacional de los estados por daños al medio ambiente' in F. Sindico, R. M. Fernández Egea and S. Borrás Pentinat (eds), *Derecho internacional del medio ambiente: Una visión desde Iberoamérica* (Cameron May-CMP Publishing Ltd. 2011) 106, 110-3.

<sup>35</sup> Art. 191(2) Treaty on the Functioning of the European Union (TFEU) [2010] OJ C83/47. It was first introduced in former art. 130R EEC Treaty by the 1986 Single European Act [1987] OJ L169/27. At present, Directive 2004/35/CE of the European Parliament and of the Council, of 21 April 2004, on environmental liability with regard to the prevention and remedying of environmental damage, constitutes the most significant development of this principle in the EU legal order.





**International treaties impose civil liability mechanisms for damages caused by the use of nuclear energy for peaceful purposes, the transport of oil, dangerous substances and hazardous wastes and the transboundary effects of industrial accidents.**

**But, will all these treaties ever be in force?**

Various international treaties have adopted the approach of imposing liability on individual operators (public or private) involved in certain specific activities: firstly, the use of nuclear energy for peaceful purposes;<sup>36</sup> secondly, the transport of oil;<sup>37</sup> thirdly, the transport of dangerous substances;<sup>38</sup> fourthly, the transport of hazardous wastes;<sup>39</sup> and lastly, the transboundary effects of industrial accidents.<sup>40</sup>

These treaties establish civil liability mechanisms to compensate the victims of damages caused by the operators' activities, regardless of whether operators and victims are private persons or States, hence avoiding the intricate problems of state responsibility under international law. However, some of them are not yet in force, and others probably never will be.

So far, the only attempt that has been made to establish an all-encompassing cross-sectoral treaty is the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, of 21 June 1993,<sup>41</sup> but it has failed to obtain the necessary ratifications to enter into force.

In this context, the Institute for International Law has adopted a resolution regarding liability for environmental damage, which in its article 6 states the following:

“Environmental regimes should normally assign primary liability to operators. States engaged in activities *qua* operators are governed by this rule. This is without prejudice to the questions relating to international

36 With respect to nuclear energy: at the European level, the 1960 OECD Paris Convention on Third Party Liability in the Field of Nuclear Energy, and the 1963 Brussels Supplementary Convention; at the global level, the 1963 IAEA Vienna Convention on Civil Liability for Nuclear Damage, the 1988 IAEA/OECD Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, the 1997 Protocol to the 1963 Vienna Convention on Civil Liability for Nuclear Damage, and the 1997 Convention on Supplementary Compensation for Nuclear Damage; and the 1971 International Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

37 With respect to hydrocarbons: 1969 International Convention on Civil Liability for Oil Pollution Damage, 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1976 Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage and to the International Convention on the Establishment of an International Fund of Compensation for Oil Pollution Damage, which in fact repeal and substitute the original treaties between the ratifying Parties; and the 2003 Protocol establishing and International Oil Pollution Compensation Supplementary Fund.

38 With respect to the transport of dangerous substances: the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, and the 1989 j Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels.

39 The 1999 Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal.

40 2003 UNECE Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

41 <[conventions.coe.int/treaty/en/treaties/html/150.htm](http://conventions.coe.int/treaty/en/treaties/html/150.htm)> accessed 17 February 2012.



responsibility which may be incurred for failure of the State to comply with the obligation to establish and implement civil liability mechanisms under national law, including insurance schemes, compensation funds and other remedies and safeguards, as provided for under such regimes. An operator fully complying with applicable domestic rules and standards and government controls may be exempted from liability in case of environmental damage under environmental regimes. In such case the rules set out above on international responsibility and responsibility for harm alone may apply.”<sup>42</sup>

Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage<sup>43</sup> and the Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities are oriented along these same lines. They were approved by the ILC in 2006,<sup>44</sup> and continue with this tendency to exonerate States of direct liability for trans-border damages caused from within their territories, or for activities carried out under their jurisdiction or control. It also establishes a model of civil liability for operators, which is intended to be applied internationally, and is independent from the responsibility of States for failure to comply with their international obligations in this field.

## 2.4 Globalisation and the power of MNCs in the host states

For all the above reasons, those responsible for taking decisions on exclusively economic criteria may be confident that, in principle, they will not have to face any liability claims for the possible negative impacts of those decisions, except if legally foreseen in the countries where the companies' activities are carried out (host state).<sup>45</sup> Accordingly, the choice for the host state is often made precisely because those countries have enacted laws of a less stringent nature.

Indeed, MNCs have developed and consolidated over the last hundred years in this legal context of freedom of action. They have taken advantage of the comparative advantages arising from the divergent political, social and legal conditions in different countries on labour law, tax law, and the protection of consumers and the environment. In this setting, MNCs have benefitted from those

**MNCs – particularly in the field of the extractive industries – have been directly or indirectly related to violations of fundamental human rights and the causation of serious damage to health and the environment.**

<sup>42</sup> Institut de Droit International, 'Responsibility and Liability under International Law for Environmental Damage', Session of Strasbourg (4 September 1997).

<sup>43</sup> [2004] OJ L143/56.

<sup>44</sup> <[untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_10\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_10_2006.pdf)> accessed 17 February 2012.

<sup>45</sup> Frequently, what is not allowed in the own country is tolerated and even supported abroad, regardless of its consequences, as long as it reports economic benefit. For some people the decisions that seek maximum benefit are regarded as morally neutral: business as usual. Milton Friedman published his well-known article of 13 September 1970 in the NY Times Magazine with the title 'The Social Responsibility of Business is to Increase Its Profits', as recalls B. Stephens. 'The Amoralism of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 45 and 62.



countries that provide the most favourable conditions, often at the expenses of the host country's own potential for development and its peoples' economic and social rights.

The policies of privatization and deregulation encouraged throughout the 80s by the international financial institutions (especially the International Monetary Fund and the World Bank) in the context of the external debt crisis of the developing world have also contributed decisively to this phenomenon.<sup>46</sup> These policies have had an undeniable effect: MNCs have acquired such economic power and political influence that they are in the position – at times even from within the state's structure – to impose their point of view on the negotiations that set the rules for the national and international economic game.

Taking advantage of this dominant position, the activities of MNCs –in particular those involved in extractive industries, such as mining or oil drilling – have been directly or indirectly related to violations of fundamental human rights such as the use of slave labour,<sup>47</sup> the destabilization of governments and the encouragement of coups d'état,<sup>48</sup> supporting armed conflicts<sup>49</sup> or, as we shall see throughout this report, expelling indigenous peoples and rural communities from their lands or causing serious damage to health and the environment, with the exclusive objective of maximizing their profits.

International law obliges States to protect human rights and control the activities carried out on its territory or under its jurisdiction; companies also have an obligation to respect the national legal order in the host countries. The State may find it difficult to exercise effective control over companies for various reasons: limitations on human and material resources for monitoring the compliance of the law, insufficient information on the technology used and the risks it entails, or the

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46 S. George, *The Debt Boomerang. How Third World Debt Harms Us All* (Pluto Press/TNI 1992).

47 The slave labour forces made available by the German Nazi regime to firms such as Ford, Siemens, Volkswagen, Daimler-Benz, or BMW during WW2 is commonly regarded as a reference. See Stephens (n 45), 50.

48 Take for instance the involvement of the United Fruit Company in the overthrow of President Jacobo Arbenz in Guatemala in 1954, or that of the International Telephone and Telegraph (ITT) in the military coup of 11 September 1973 led by Augusto Pinochet against the Chilean democratic government and its President, Salvador Allende.

49 For instance, when the South-African company De Beers financed the UNITA rebels in the conflict of Angola in order to keep control of the diamond mines; or as many companies do in the Democratic Republic of Congo in order to ensure their supplies of strategic minerals, as highlighted in the Final Report of the Group of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo. UN Doc S/2003/1027 (23 October 2003). Obviously the implication is even more direct when it is the companies themselves that provide the combatants, the means, or the training to the parties in conflict, such as the supply of arms by Chiquita Brands, or of runways for landing and take-off by Occidental Petroleum to the paramilitary groups and the regular army in Colombia.



difficulty of making the parent company liable when it operates through subsidiaries that have limited resources with which to meet their responsibilities.<sup>50</sup>

And some factors favour some States' self-restraint: their economic interest in receiving foreign investments and the income that may arise from them, the involvement of State agencies in the granting authorizations for the operations, or frequent State participation, either directly or through State-owned enterprises, in joint venture with the foreign MNC.<sup>51</sup>

Moreover, the national legal framework is often weak, incomplete, or inconsistent from the regulatory point of view. Further, an appropriate system of administrative and/or judicial guarantees is frequently not available, or its operation is limited either by its organizational inefficiency, or by scenarios of structural corruption. The sum of these factors in most cases leads to the system's inability to respond to the claims of the victims of violations of human rights or environmental damage. In the worst scenarios, MNCs have sufficient influence to directly appoint government officials, participate in the drafting of the regulation of their own activities,<sup>52</sup> or hire the services of the state's security forces.

And of course, companies have a range of very powerful resources to deal with any attempts by the host states to effectively control their business: they can hamper and endlessly prolong judicial processes by moving them to different countries; they can threaten disinvestment; and they can exert direct or indirect pressure through their home state's governments to foster changes of policy and/or persons in the host state's governments.

As Sara Joseph has pointed out, "specific problems arise with host States being required to control MNCs because the latter are uniquely international, uniquely mobile and, most importantly, uniquely powerful."<sup>53</sup>

## 2.5 Standards and protection mechanisms: the connection between environmental damage and the violation of human rights

As Judge Weeramantry stated in his Separate Opinion to the majority decision of the International Court of Justice (ICJ) in the *Gabcíkovo-Nagymaros Dam* case:

"The protection of the environment is likewise a vital part of contemporary Human Rights doctrine, for it is a *sine qua non* for numerous Human Rights, such as the right to health and the right to life itself. It is scarcely necessary

<sup>50</sup> Morgera (n 11), 27-8.

<sup>51</sup> *ibid.*, 28-9.

<sup>52</sup> See e.g. the example put by David Kinley and Sarah Joseph, with respect to the law enacted in 2001 by the parliament of Papua New Guinea in favor of the mining company BHP Billiton. D. Kinley and S. Joseph, 'Multinational Corporations and Human Rights. Questions About their Relationship' (2002) 27 *Alternative Law Journal* 7, 8.

<sup>53</sup> S. Joseph, 'An Overview of the Human Rights Accountability of Multinacional Enterprises' in P. K. Muchlinski (ed), *Multinational Enterprises and the Law* (Blackwell 1995).

to elaborate on this, as damage to the environment can impair and undermine all the Human Rights spoken of in the Universal Declaration and other Human Rights instruments.”<sup>54</sup>

This statement suggests that environmental protection is a starting point and prerequisite for full respect for human rights. The reverse path has led to the formulation of a right to the environment as an additional human right. However, the status of this right is not yet comparable to that of the most intensely protected categories of rights in either comparative or international law.<sup>55</sup>

In any case, independently of whether the approach eventually adopted will be more anthropocentric or ecocentric, the connection between environmental and human rights is quite evident. This linkage has been highlighted and underscored in many instruments and decisions of various international organizations.



**Fig. 2**

**Environment Conference meets at Stockholm  
(5-12 June 1972)**

**Mrs. Indira Gandhi, Prime Minister of India,  
addressing the Conference**

Photo credits: UN Photo/Yutaka Nagata

This was recognized by the UN General Assembly in its Resolution 2398 (XXII) of 3 December 1968, in which the 1972 UN Conference on the Human Environment was announced. The resolution warned of “the continuing and accelerating impairment of the quality of the human environment caused by such factors as air and water pollution, erosion and other forms of soil deterioration, waste, noise and the secondary effects of biocides, which are accentuated by rapidly increasing population and accelerating urbanization” and expressed its concern “about the

<sup>54</sup> See the separate opinion of judge Weeramantry in *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits)[1997] ICJ Rep 7, 111.

<sup>55</sup> For an overview on the debate concerning the relationship between human rights and the environment, see K. Bosselmann, 'Human Rights and the Environment: Redefining Fundamental Principles?' in B. Gleeson and N. Low (eds), *Governance for the Environment: Global Problems, Ethics and Democracy* (Palgrave 2001) 118. A. Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 *Fordham Environmental Law Review* 471.



consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries.”

Furthermore, there is a direct relationship between development, human rights and the environment, insofar as poverty has an automatic impact on the first two factors. According to the Special Rapporteur on Human Rights and the Environment of the UN Commission on Human Rights, Fatma Zohra Ksentini:

“It is impossible to draw up an exhaustive or final balance sheet showing the effect of environmental degradation on human rights, the enjoyment of which is already very much affected by underdevelopment and poverty (intolerable infant mortality and undernourishment; illiteracy; lack of primary health care and of social services; precarious housing; marginalisation of the underprivileged strata, or even racism and discrimination; non-participation in the conduct of public affairs and in the country's political, economic and cultural decision-making, and so on). It is easy to see, however, that the poor populations, the underprivileged strata, the minority groups and others are the most affected in that they are more vulnerable to ecological risks and repercussions (absence of legal and material means of protection; lack of access to information; lack of suitable care, etc.). Furthermore poverty, underdevelopment and marginalisation reduce the prospects of economic, social and cultural integration or reintegration of the victims. Those victims find themselves in a vicious circle which includes a series of violations of human rights: assaults on life and health; degradation of living conditions and disintegration of the family unit; unemployment; emigration, exodus, resettlement and even forced migrations which lead to further violations of human rights (racism; discrimination; xenophobia; acculturation; violations of dignity and arbitrary detention; refoulement; marginalisation; precarious living and housing conditions; prostitution; drugs; street children, etc.).”<sup>56</sup>

On the one hand, from the point of view of the substantive content of human rights, after the 1972 Stockholm Declaration<sup>57</sup> there has been a major trend in national legal orders towards recognising – often at constitutional level<sup>58</sup> – the environment as a specific right with different characterisations, depending on the

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56 UNHCR (Sub-Commission on Prevention of Discrimination and Protection of Minorities), ‘Human Rights and the Environment. Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur’ UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994), para. 54. See the *Draft Principles on Human Rights and the Environment* included in the report. See also UNHCR, ‘Human rights and the environment as part of sustainable development. Report of the Secretary-General’ UN Doc E/CN.4/2005/96 (19 January 2005).

57 The Declaration of the UN Conference on the Human Environment, states that: ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.’ Report of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972, 3. UN Doc A/CONF.48/14/Rev.1 (1 January 1973).

58 J. R. May and E. Daly. ‘New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide’ (2011) *IUCN Academy of Environmental Law e-Journal*.





**The confluence between the environmental and the human rights agendas makes it possible to use these two branches of domestic and international law to identify legal strategies and avenues for environmental justice litigation.**

political context and legal traditions of each country. Although this approach is not free of criticism, in the opinion of Bosselmann:

“... in the long term the existence of an environmental human right could be seen as self-contradictory. A better option is the development of all human rights in a manner which demonstrates that humanity is an integral part of the biosphere, that nature has an intrinsic value and that humanity has obligations toward nature. In short, ecological limitations, together with corollary obligations should be part of the rights discourse.”<sup>59</sup>

On the other hand, the relationship between a healthy environment and the effective enjoyment of other basic human rights such as the right to life, to health, to food, the right to property, and even the right to private and family life has also often been highlighted. So, for instance, various regional systems of human rights protection have been able to adopt decisions that protect the environment. Thus, even though the European Convention for the Protection of Human Rights (ECHR) (Rome, 1950)<sup>60</sup> does not directly recognise a right to an adequate environment, the European Court of Human Rights (ECtHR) has dealt with issues directly linked with the protection of the environment on the basis of the interpretation of other explicitly recognised rights.<sup>61</sup> Significantly enough, the ECtHR has also used the general interest in the protection of the environment to justify restrictions on the enjoyment of some human rights, such as the right to property.<sup>62</sup> In contrast to the European system of human rights protection, the American system has indeed recognised the right to an adequate environment through the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 1988).<sup>63</sup> However, this right is not one of those that can give rise to individual complaints before the Inter-American Commission on Human Rights (IAComHR) and the Inter-American Court of Human Rights (IACtHR). Therefore, both institutions have

<sup>59</sup> Bosselmann (n 55) 118.

<sup>60</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, Rome, 4 November 1950.

<sup>61</sup> Among other decisions: *Powell and Rayner v. The United Kingdom* App no 9310/81 (ECtHR, 21 February 1990); *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); *Hatton and Others v. UK* App no 36022/97 (ECtHR, 8 July 2003); *Öneryildiz v. Turkey* App no 48939/99 (ECtHR, 30 November 2004); *Taşkın and Others v. Turkey* App no 46117/99 (ECtHR, 10 November 2004); *Moreno Gómez v. Spain* App no 4143/02 (ECtHR, 16 November 2004); *Fadeyeva v. Russia* App no 55723/00 (ECtHR, 30 November 2005); *Giacomelli v. Italy* App no 59909/00 (ECtHR, 2 November 2006); *Budayeva and Others v. Russia* Apps nos 15339, 21166, 20058, 11673 and 15343/02 (ECtHR, 20 March 2008).

<sup>62</sup> *Lars and Astrid Fägerskiöld against Sweden* App no 37664/04 (ECtHR, Decision on admissibility, 26 February 2008).

<sup>63</sup> OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992). “Art 11. Right to a Healthy Environment. 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.”



also provided for the protection of the environment on the basis of its connection with such other enforceable rights,<sup>64</sup> as the right to property in the case of indigenous peoples.<sup>65</sup> For its part, the African Charter on Human and Peoples' Rights (Banjul, 1981)<sup>66</sup> already directly recognizes the right to the environment. However, the African Court (AfCtHPR) was not established until some years later.<sup>67</sup> As we shall see below, the African Commission on Human and Peoples' Rights (AfComHPR) has adopted decisions of considerable importance in this context.

Moreover, the infliction of severe damage to the environment is often accompanied by the violation not only of the aforementioned rights, but also of other human rights of a civil and political nature: for example, the rights to physical integrity, freedom of movement, or freedom of expression.

The confluence between the environmental and the human rights agendas<sup>68</sup> makes it possible to use these two branches of the national and international legal

64 In its report concerning the human rights situation of the inhabitants of the interior of Ecuador affected by development activities, the IACoMHR developed an environmental doctrine, stating that: "... Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being [...] The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.[...] Domestic law requires that parties seeking authorization for projects which may affect the environment provide environmental impact assessments and other specific information as a precondition.[...] [I]ndividuals must have access to judicial recourse to vindicate the rights to life, physical integrity and to live in a safe environment [...]. The norms of the inter-American human rights system neither prevent nor discourage development; rather, they require that development take place under conditions that respect and ensure the human rights of the individuals affected. As set forth in the Declaration of Principles of the Summit of the Americas: 'Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly'." See IACoMHR, 'Report on the Situation of Human Rights in Ecuador' OEA/Ser.LV/II.96, Doc. 10 rev. 1 (24 April 1997), para. 92.

65 See *ia: Mayagna (Sumo) Awas Tingni Community Case*, Judgment, IACtHR Series C No 79 (31 August 2001); *Moiwana Community v Surinam*, Judgment of Merits, Reparations, and Costs, IACtHR Series C No 124 (15 June 2005); *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).

66 OAU Doc. CAB/LEG/67/3 rev. 5: "Art 24. All peoples shall have the right to a general satisfactory environment favorable to their development".

67 The African Court of Human and Peoples' Rights (AfCtHPR) was established by the Protocol to the African Charter on Human and Peoples' Rights, which was adopted by the then Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso in June 1998. The Protocol entered into force on 25 January 2004.

68 Which does not mean a complete identity or concordance, as pointed out by S. J. Anaya.



order in scenarios of serious environmental harm, not only from the point of view of substantive rules, but also from that of the enforcement institutions that may need to be used. This is the case not only in the State where the damages occur, but also in other countries and even in the international sphere.<sup>69</sup>

Therefore, the administrative regulations governing activities with environmental impact, as well as the civil and criminal laws that enable those who have been convicted for environmental offences to be held liable (if this is envisaged) will have to be taken into consideration in the country where the environmental damage has occurred. Furthermore, the existence of direct ways to claim one's rights (either the right to an adequate environment as such, or other connected rights) will also have to be taken into account. Particular attention should also be paid to the use of the rights of access to information, participation in decision-making, and access to justice in environmental matters in those countries where they have been recognised.

Likewise, from the institutional point of view, it will be of the utmost importance to determine the avenues and conditions for taking legal action before the competent administrative bodies and judicial courts, as well as human rights bodies and constitutional courts.

But compensation for environmental damages may also be claimed in a country other than the one in which they actually occurred. This might be the case when damages are caused by a MNC, as the courts of the country where the parent company has been incorporated may eventually be resorted to. In this case particular attention will have to be paid to the extraterritorial reach of the national laws, and the extraterritorial reach of the jurisdiction of the country's courts.<sup>70</sup>

Finally it is worth mentioning that some of the voluntary regulatory frameworks for MNCs have put mechanisms in place that enable communications or complaints to be filed at the national level. This is the case, for example, of the "OECD Guidelines for Multinational Enterprises."<sup>71</sup>

At the international level, the opportunities provided by the rules and institutions of international environmental law and international human rights law must also be taken into consideration.

'Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests' (1999-2000) 7 *Buffalo Environmental Law Journal* 1. On the differences between international human rights law and international environmental law, see M. A. Orellana, 'Derechos humanos y ambiente: desafíos para el sistema interamericano de derechos humanos' CIEL (Washington ).

69 S. Chesterman. 'Oil and Water: Regulating the Behaviour of Multinational Corporations through Law' (2004) 36 *New York University Journal of International Law and Politics* 307.

70 J. Zerk. 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) *Corporate Social Responsibility Initiative Working Paper*.

71 Morgera (n 11), 230-40.



From the perspective of rules, one should keep in mind the State Parties' obligations of control and surveillance under a range of environmental regimes covering sensitive areas such as fisheries, the use of nuclear energy, transboundary movements of hazardous waste and toxic products, water and air pollution, or the restrictions on trade in endangered species, nuclear material or tropical timber. Besides, international human rights treaties – both at the global (e.g. the 1966 International Covenant on Civil and Political Rights<sup>72</sup> and the International Covenant on Economic, Social and Cultural Rights)<sup>73</sup> and at the regional level (ECHR,<sup>74</sup> American Convention on Human Rights (San José, 1969) and African Charter on Human and Peoples' Rights (Banjul, 1981) – are relevant, just like other sectoral regulatory frameworks (for example, the ILO Conventions).

As far as institutions are concerned, international courts must be distinguished from non-judicial bodies.

No specific international tribunals deal exclusively with environmental disputes, although some international courts such as the ICJ and the International Tribunal for the Law of the Sea (ITLOS) can deal with environmental issues under their general powers or specific competence. However, specific international tribunals have been established for the protection of human rights in the context of various regional systems: the ECtHR, the IACtHR and the African Court on Human Rights and Peoples' Rights (ACtHPR). Each has its own characteristics, its sphere of competence and its access requirements. Moreover, some of them have particular specificities, as both the American and the African system include a filter body: namely, the IAComHR and the AfComHPR.

At the moment, the jurisdiction of international criminal tribunals – the International Criminal Court and other ad hoc courts – is limited to the most serious crimes of international law (genocide, war crimes and crimes against humanity). Nevertheless, they do not have jurisdiction to prosecute legal persons, even though they may very well prosecute individuals for crimes committed through, with the support of, or in the interests of corporate structures.

Non-judicial bodies are particularly frequent in the context of international environmental law, in which compliance bodies have been established in a number of treaties. In some of these, the compliance mechanism is channelled through the convention's secretariat, or political bodies, such as the Conference of the Parties, and in others compliance control is carried out by specialized standing bodies such as Compliance Committees. These bodies operate quite differently from one treaty to the other, particularly with respect to the conditions that trigger the compliance procedure, and only in very few cases are individuals or non-governmental organisations (NGOs) actually allowed to issue a complaint concerning a State's performance, as under the non-compliance procedure of the

<sup>72</sup> UNGA Res 2200A (XXI) (16 December 1966). 999 UNTS 171 (entered into force 23 March 1976).

<sup>73</sup> UNGA RES 2200A (XXI) (16 December 1966). 993 UNTS 3 (entered into force 3 January 1976).

<sup>74</sup> Supra n 60.



UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998).

In the field of international human rights and in addition to the aforementioned instances of the American and African regional systems, mention should also be made of various committees that monitor the States' compliance with a series of human rights treaties, which may also receive individual complaints under certain circumstances. Among these committees<sup>75</sup> are the Committee of Experts on the Application of Conventions and Recommendations (ILO); the Human Rights Committee, which supervises compliance with the International Covenant on Civil and Political Rights, and the Committee on Economic, Social and Cultural Rights, charged with supervising the States' performance under the International Covenant on Economic, Social and Cultural Rights. Furthermore, independently of these treaty-specific supervisory bodies, a series of special procedures have been developed under the aegis of the UN Human Rights Council (formerly the 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.<sup>76</sup> All of them provide for the possibility to hear the victims of serious violations of human rights, and for the continuing monitoring of the situation. However, their capacity of influence is fairly limited.

Finally, it should be kept in mind that other international (judicial and non-judicial) bodies that may have jurisdiction to deal with disputes of an environmental nature also exist and are based on international legal norms other than those of international environmental and human rights law. This is the case of the arbitrations provided for by bilateral investment treaties, the dispute settlement bodies of the World Trade Organization or the North American Free Trade Agreement, or those belonging to other frameworks of regional economic integration, such as the European Union.

As we shall see below in the selected case-studies, some of the existing avenues are in fact used simultaneously by the victims of serious environmental damages, to the extent that they are accompanied by grave violations of human rights. However, as will also be seen, the power of the MNCs and the States that support

<sup>75</sup> See the recommendations included in the final report prepared by Mrs Ksentini, Special Rapporteur (supra n 56), para. 259.

<sup>76</sup> Amongst them: the Special Rapporteur on the right to food, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the rights of indigenous peoples, the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, the Special Rapporteur on the human right to safe drinking water and sanitation, the Working Group on transnational corporations and other business enterprises or the Expert Mechanism on the Rights of Indigenous Peoples; available at: <[www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx](http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx)> accessed 17 February 2012.



them largely explains the range of quite significant obstacles that these attempts have to face.<sup>77</sup>

<sup>77</sup> Peter Utting has referred to this phenomenon by distinguishing, on the one hand, the *subaltern legality* – an expression taken from De Souza Santos, Boaventura, and Rodríguez Garavito – that ‘involves efforts of the part of social groups and communities whose livelihoods, identity, rights and quality of life are negatively affected by states and corporations to use the existing legal apparatus to seek redress for injustice, and to participate in struggles and processes associated with accountability’ and, on the other hand, the *hegemonic legality*, used to ‘refer to a variety of ways in which powerful actores, institutions, and discourses counteract or dilute the progressive potential of institutional and legal reforms, promote ‘soft’ or normative alternatives to deflect harder ones, and assume leadership positions in reform movements’. See P. Utting, ‘Social and Environmental Liabilities of Transnational Corporations. New Directions, Opportunities and Constraints’, in P. Utting and J. Clapp, *Corporate Accountability and Sustainable Development* (OUP 2008) 92, 106 and 111. See also B. De Souza Santos and C. A. Rodríguez-Garavito (eds), *Law and Globalization from Below. Towards a Cosmopolitan Legality* (CUP 2005).



# 3

## Legal avenues to seek environmental liability: some relevant cases

The second part of this report examines in further detail the regulatory and institutional legal instruments that EJOs can use to demand liability for serious environmental damage, including some of the advantages and disadvantages found in these.

As mentioned above, this study is based on a selection of eleven cases, and reports summarising substantive aspects of these cases are reproduced as an annex to the report. References made to these cases from here forward will use the following abbreviations: SHELL (the impact of Shell in Nigeria), TEXACO (Texaco/Chevron in Ecuador), TRAFIGURA (Trafigura's waste dumping in the Ivory Coast), RIO TINTO – PAPUA (the impact of Rio Tinto in Bougainville, Papua New Guinea), YANACOCOA (the impact of Yanacocha in Peru), DYNCORP (the impact of the Dyncorp's fumigations for Colombia and Ecuador), INUIT (the impact of climate change on the Inuit), RIO TINTO-NAMIBIA (the impact of the Rössing uranium mine in Namibia, via the Connelly Case), VEDANTA (the impact of Vedanta in India), CHOCÓ (issues related to land ownership and forced displacements in the Department of Chocó in Colombia), and DEFENDERS (persecution of environmental defenders).

For purposes of organisation, this discussion will be grouped into five sections: legal instruments for host state national law (territorial scope), legal instruments for home state national law (extra-territorial scope), legal instruments in international law, legal instruments in regulatory frameworks based on voluntary acceptance, and application of other resources for social pressure.



### 3.1 Legal avenues in host state national law (territorial scope)

Prior to the discussion of recourse to the national courts, it is worthwhile in this section to consider two general issues that seem to cross-cut all of the cases studied. Firstly, they all involve forms of land ownership and access to natural resources, and secondly, they present issues related to the persecution of environmental defenders.

#### 3.1.1 Ownership of land and access to natural resources

RIO TINTO – PAPUA demonstrates a manner of land acquisition that has its roots in the process of appropriation of distant natural resources by the world's most powerful states, here by means of colonial domination. In this case, the lease of land by the Australian administration of the territory of Papua New Guinea was involved, with the land leased to an Australian company controlled by the British firm Rio Tinto Zinc. The area used by the company experienced a *de facto* expansion, with adjacent lands occupied and the area's residents displaced. This process required the collaboration, or at least the tolerance, of government institutions, as was the case with the colonial Australian administration and the successive governments of Papua New Guinea during the period of autonomy and the first years of independence. The new Australian operating company Bougainville Copper Ltd held the majority of the company's shares, with the government of Papua New Guinea also holding around 20%. This explains the government's support, which was completely aligned with the interests of Rio Tinto, based on the government's interest in maintaining the income it was receiving from the mine. In fact, the entire secession movement that developed in Bougainville was based on mining policies and related problems with land ownership.

The SHELL case shares many points in common with RIO TINTO – PAPUA, the first of these being its colonial roots. Shell was granted an exploration license in Nigeria in 1938; discovered the first commercial oil field in 1956 in the Niger Delta and started oil exports in 1958. Nigeria attained its independence in 1960.

Meanwhile, TEXACO evinces another very common theme related to the acquisition of the rights to exploit natural resources – in this case petroleum.

These rights derived from a concessionary contract granted by Ecuador's government decades ago (1964), when environmental concerns were not yet perceived as a public issue. The rights were granted not to the parent company, but instead to the company's local subsidiary (TexPet). The subsidiary formed a consortium with a State-owned company (Ecuadorian Oil Gulf Company, later the Corporación Estatal Petrolera Ecuatoriana and then Petro Ecuador), although TexPet maintained control of the operations at all times. This type of agreement is also seen in VEDANTA. In 1973, at the time when oil-producing nations sought to increase their power in the international arena, the concessionary contract with TEXACO was renegotiated in 1977, in order to establish less favourable terms for



the company (reduction of the area, gradual reduction of holdings in the consortium, and the supply of petroleum produced to the government at national market prices).

In 1992, once the concessionary contracts expired and their renewal had failed, the company sued the state before the domestic courts claiming economic compensation in excess of USD 553 million. Eventually, in 2006 Chevron and Texaco instigated arbitral proceedings against Ecuador on the basis of the 1993 Bilateral Investment Treaty (BIT) between the USA and that country, claiming *inter alia* that the systemic failure of the Ecuadorian judiciary put them in a situation of denial of justice, in contravention of article II BIT. Such agreements tend to stipulate mandatory arbitration in accordance with specific norms of international commercial law, beyond considerations of human rights or environmental matters, and which guarantee indemnification that tends to be characterised as “prompt, adequate, and effective” in relation to any circumstances involving expropriation, as well as appropriate avenues of recourse before the national courts of the State in which operations take place. On 30 March 2010 the Arbitral Tribunal issued a partial award on the merits favourable to the claimants, in which Ecuador was condemned to pay compensation.<sup>78</sup> In turn, Ecuador contested the aforementioned award before the District Court of The Hague in July 2010.

Also, and especially in cases involving extractive activities, environmental conflicts are often related to the occupation of territories traditionally inhabited by indigenous communities or peoples, and even, as illustrated by the VEDANTA case, areas within such territories that these communities or peoples consider as sacred. In this sense, the Special Rapporteur on the rights of indigenous peoples has recently concluded that:

“On the basis of the experience gained during the first term of his mandate, the Special Rapporteur has come to identify natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide. In its prevailing form, the model for advancing with natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres.”<sup>79</sup>

YANACocha shows that large, so-called development projects can have a considerable impact on the traditional economic and social structures of communities in developing countries, particularly when they are indigenous. It also demonstrates how, through procedures that were complex and not always transparent, the company ended up appropriating an enormous amount of land at a low price, the current mining district spanning about 160 km<sup>2</sup> with five open pit mines. This process relied upon the support of legal reforms promoted by the

<sup>78</sup> *Chevron Corporation & Texaco Petroleum Company v. The Republic of Ecuador* PCA Case No. 2007-2, Partial Award on the Merits (30 March 2010).

<sup>79</sup> UNHRC, ‘Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories’ UN Doc A/HRC/18/35 (11 July 2011), para. 82.



government, in this case the administration headed by Alberto Fujimori, who later faced criminal prosecution (Act of Promotion of Investments in the Agrarian Sector, 1991, Land Act, 1995). These reforms also included amendments to the Peruvian constitution and executive decrees focused on reversing the effects of the agrarian reforms of 1969 and on facilitating the privatisation of land, as seen in the case of the community of San Andrés de Negritos.<sup>80</sup>

As is the case in several countries in the region, Peruvian law distinguishes between the property of mineral resources in the subsoil and the property of the land where these resources are located. Regardless of the ownership of the land, the former is attributed to the Peruvian government. Permission to mine these resources can be granted to private investors. The Yanacocha mine is partly located on land that is the property of the Negritos community. Therefore, although the Peruvian government granted the Yanacocha company permission to extract the gold from the Yanacocha mine, the Company was not allowed to use the surface because it was the property of the communal area of San Andrés de Negritos.

Between 1991 and 1995, a series of events that served the interests of the company took place, with the support of the government. These involved the appropriation of part of the land by the government, in the form of a reserve, then subsequent transfer of land to new owners outside of the community and distribution of the remaining ownership to individual commoners. This led to the disappearance of communal property, such as by opening the door to individual agreements between Yanacocha and the new proprietors of the land, and finally to the forced expropriation of other lands, in order to allow the company to build the facilities and services needed for the operation of the mine. In 1995, the original titleholder of the land—the community—was suppressed, the land was re-distributed among individual ex-commoners, and large parts of the land were assigned to Yanacocha so that it could carry out its activities. All this was done at minimal cost for the company. This meant that almost a third of the former communal land had been transferred to the company.

The company has never responded to the community's petitions. It has been argued that IFC has been wrongly informed about important facts, such as the condition of indigenous people of the Negritos community or the behaviour of the company in the Choropampa incident. But it seems that IFC has not been accurate enough to detect at the beginning the shadows of the project, and to make an appropriate monitoring of its development afterwards. Given IFC's very high standards, this would have complicated the start-up procedures for the

<sup>80</sup> For a comprehensive study on these cases, see generally C. Kamphuis, 'Derecho y la convergencia del poder público y el poder empresarial: la desposesión campesina y la coerción privatizada en el Perú', (2012) 15 *Revista Latinoamericana de Derecho Social* (forthcoming). Electronic copy available at: <http://ssrn.com/abstract=1879947>. See also C. Kamphuis, 'Foreign Mining, Law and the Privatization of Property: A case study from Peru' (2012) 3 *Journal of Human Rights and the Environment* (forthcoming).



mining operation because the World Bank had introduced new conditions for participation in this type of operation, which would have affected the entire process. As a consequence, the legal process by which the lands were acquired is debatable from the point of view of respecting the indigenous legal institutions, and particularly the common property of land.

The exploitation of natural resources has a significant social and economic impact on the traditional organisation of local communities: their land is put on the market, it is turned into a commodity, and it is allowed to be purchased by multinational corporations so that resources can be obtained at lower prices. National governments are often interested in investments and land acquisitions by international companies, because they obtain financial revenues, which have no direct effect on local people, as the case of the Negritos community, in YANACocha, shows dramatically.

The Chocó case is about land dispossession and biomass extraction. It is quite unique because of the complexities of the Colombian conflict. Within this broader context of armed conflict, the guerrillas, drug traffickers and paramilitary groups have penetrated deeply into the state structures so that they operate as an effective power in large areas of the country. The impact has been daunting in this region, which is extraordinarily rich in biodiversity and located in a strategic place for the American connection projects, and obviously also for the communities that live there, mostly of African descent.

The present case reveals a paradoxical situation. On the one hand, Colombia has enacted legislation that protects Afro-descendants communities and recognizes them collective ownership over their lands. Moreover, national (administrative) courts, including the Constitutional Court and even the bodies from the American system of human rights protection or the Committee of Experts on the Application of Conventions and Recommendations have upheld these communities' claims in a number of rulings. On the other hand, the same communities – as in Curvaradó and Jiguamiandó – have persistently been victims of armed attacks, threats and intimidating crimes against its members, thus having been forced to leave their lands. These in turn are occupied by different companies mainly engaged in the production of oil palm (an expanding activity due the increasing international demand for biofuels), logging and cattle ranching. The companies resort to a range of classical strategies in order to gain control over the lands, by combining military pressure, falsification of data and individual incentives in order to spread division within the communities. Using these methods they are quite successful in obtaining the signature of real or fictitious agreements for the legal acquisition of land for prices below their real value. The pressure is doubled when some of the families dare to remain or return in the community lands. So far, Colombian public authorities have not effectively enforced enacted legislation and court rulings, due to a combination of factors such as the complicity with some companies, the lack of necessary means, the absence of coordination between relevant institutions and, most importantly, the lack of political determination to do so by the government.



As a result, on the one side, Colombian Afro-descendant communities are being progressively deprived from the effective enjoyment of their constitutional entitlement to their lands and the natural resources therein, as well as other rights that are essential to their survival as an ethnic group (autonomy, participation, self-government, differential group identity, etc.). On the other side, those who have been (often illegally) occupying these lands continue to exert a de facto control over the region, to the point of influencing the election of the communities' leaders.

### 3.1.2 The persecution of environmental defenders

In the context of the United Nations, "Human rights defender" is a term used to describe people who, individually or with others, act to promote or protect human rights.<sup>81</sup> This includes all types of rights, including the rights to health or food and the rights to land and natural resources, which positions environmental defenders as a specific group within the larger concept. As demonstrated in the reports dedicated to this subject in the context of the special procedures of the UN's Commission and Council on Human Rights, the persecution of environmental defenders is a growing trend in all corners of the globe. Human rights violations committed against these environmental defenders or activists are generally directly related to their activities of claiming, defending, and protecting territories and natural resources, or their defence of the right to autonomy and the right to cultural identity. It includes defenders carrying out a vast range of activities related to land and environmental rights, including those working on issues related to extractive industries, and construction and development projects; those working for the rights of indigenous and minority communities; women human rights defenders; and journalists.<sup>82</sup>

In YANACocha, the local opposition to the Yanacocha mine allegedly triggered the repression and persecution of activists. Among the most serious cases, a community leader in the community of San Andrés de Negritos, Edmundo Becerra, was killed. Edmundo Becerra had distinguished himself as an opponent of Yanacocha's gold mining project and he was shot dead in Yanacanchilla. It has been reported that he had received several death threats.

The involvement of NGO Grufides in the Choropampa incident and the further mobilisation of local communities against the mining company have also resulted in this type of persecution. Grufides is a local organisation that was created in

As reflected in several reports of the UN, the persecution of environmental defenders is a growing trend in all corners of the globe. This situation is related to their activities in order to protect territories, natural resources, and the right to autonomy and cultural identity of communities.

81 UNHCHR, 'Human Rights Defenders: Protecting the Right to Defend Human Rights' Fact Sheet No 29, Office of the United Nations High Commissioner for Human Rights, United Nations Office at Geneva, August 2004, 3

82 UNHRC, 'Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya' UN Doc A/HRC/19/55 (21 December 2011), para.64.



Cajamarca in 2001, as a direct result of the Choropampa mercury spill in 2000. It was formed mainly by university students, led by Marco Arana, a Catholic priest.<sup>83</sup>

The turning point in the repression of local activists came about as a result of the Cerro Quilish conflict. This mountain was considered to be a protected area by the local government, but *Minera Yanacocha, Sociedad de Responsabilidad Limitada* (MYSRL) challenged the decision before the Constitutional Court, which declared in 2003 that the decision and the rights of the company on the protected area were compatible. On the basis of this ruling, the Ministry of Energy and Mines authorised Yanacocha to work on Cerro Quilish, which gave rise to the social contestation of the communities. Marco Arana acted as mediator and finally managed to get the company to withdraw from the controversial area.

Grufides investigated some of the facts of the Negritos, Choropampa and Combayo incidents, particularly with regard to the killings and the support provided to the families of the people killed or injured by the violent situations within the mining conflict in Cajamarca. This involvement has allegedly led to some harassment of Grufides activists, and particularly Father Marco Arana and Mirtha Vasquez, who reportedly received several death threats. They alleged that they were followed and filmed by personnel of a private security agency connected with WYSRL and former Peruvian intelligence and military officials. Typically, Newmont, however, denied all these allegations and the Peruvian authorities have been somewhat lax in investigating these activities.

The failure of local governments to protect human rights in developing countries (if they are not involved in violating them) means that it is easy for threats to be made on the lives of activists in environmental and social conflicts. Normally economic interests aim to maximise benefits derived from the exploitation of natural resources in these countries and are not very sensitive to human rights.



**Fig. 3**

**Margaret Sekkagya, UN Special Rapporteur on the situation of human rights defenders, briefs the Human Rights Council at its 16th session, in Geneva, Switzerland. 10 March 2011**

Photo credit: UN Photo/Jean-Marc Ferré

The harassment of human rights defenders that support Afro-descendant communities is also clearly present in Chocó. The practice of judicial stigmatization and prosecution of human rights defenders on the basis of falsely constructed charges, supported by false witnesses, seems to be widespread in

<sup>83</sup> <[www.business-humanrights.org/Documents/Yanacocha](http://www.business-humanrights.org/Documents/Yanacocha)> accessed 17 February 2012.



Colombia in recent decades. After her visit to Colombia in September 2009, the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, stated:

“From what I have seen and heard over the past 12 days, I can conclude that patterns of harassment and persecution against human rights defenders, and often their families, continue to exist in Colombia. Journalists, trade unionists, magistrates, lawyers, student and youth activists, women defenders, indigenous and Afro-Colombian leaders, and LGBT activists have been killed, tortured, ill-treated, disappeared, threatened, arbitrarily arrested and detained, judicially harassed, under surveillance, forcibly displaced, forced into exile, or their offices have been raided and their files stolen, because of their legitimate work in upholding human rights and fundamental freedoms. [...] A prime reason for the insecurity of human rights defenders lies in the systematic stigmatization and branding of defenders by Government officials.[...] I am further troubled by the information about surveillance and wiretapping of national and international human rights defenders, [...] In connection with the gathering of intelligence on human rights defenders, I want to express my serious concern about the arbitrary arrests and detention (sometimes on a massive scale) of human rights defenders, as well as unfounded criminal proceedings brought against them, on the basis of military and police intelligence reports and on testimonies of demobilized individuals or informants in exchange of legal and/or pecuniary benefits.”<sup>84</sup>

The IACtHR has also referred to this issue, by stating that Colombia is obliged:

“to guarantee the rights of the people in situation of risk and must expedite the investigation necessary to shed light on the facts and, if applicable, punish the responsible. For such investigation, the State in question must make its best efforts to determine all the facts surrounded the threat and how they were expressed; to determine whether there exist a pattern of threats against the beneficiary or the group or entity to which he belong; to determine the purpose or end of the threat and to determine who are responsible for the threat and, if applicable, punish them.”<sup>85</sup>

One of the common forms of stigmatization of human rights defenders is to claim their connection with the guerrilla, and thus their complicity with the crimes committed by the latter. NGOs traditionally supporting and denouncing the violation of Afro-descendants’ rights in Chocó, such as *Comisión Intereclesial de Justicia y Paz*, *Brigadas Internacionales de Paz* (PBI), *Movimiento Nacional de Víctimas de Crímenes de Estado* (MOVICE), *Corporación Colectivo de Abogados José Alvear Restrepo* (Cajar) or *Projet Accompagnement Solidarité Colombie* (PASC) from Canada, are not an exception.

<sup>84</sup> UN High Commissioner for Human Rights, Press Release, Statement of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, as she concludes her visit to Colombia (Bogotá, 18 September 2009).

<sup>85</sup> *Giraldo-Cardona et al v Colombia*, Provisional Measures regarding Colombia (IACtHR, Order of 2 February 2010) para. 33. In the same sense, *Giraldo-Cardona et al v Colombia*, Provisional Measures regarding Colombia (IACtHR, Order of 22 February 2011).

### 3.1.3 Recourse to national courts

In some of the studied, recourse to the courts of the State where the damages were produced has been minimal or non-existent. For example, in RIO TINTO – PAPUA, the collaboration of the entire State system with the company Rio Tinto, both during the first phase and later within the context of the civil war, made any attempt to access the nation's court system ineffective.

However, it is more typical that victims start out by appealing to the appropriate government entities responsible for authorising and overseeing the activities causing the damages, and if this proves ineffective, appealing to the administrative, civil, or criminal courts, or even to environmental courts, if they exist. All of this must take place, for each case, according to the possibilities offered by national legislation.

This is what has occurred in most cases, though with variable results.

#### Colombia

DYNACORP's fumigation activities took place in Colombia, but gave rise to damages in both Colombia and Ecuador. This led to litigation being filed in the court systems of both countries. The outcome is an example of the difficulties involved in successfully raising allegations in court that draw the government of Colombia's policies into question.



**Fig. 4**

**A plane fumigates coca plantations deep in the forests of southern Colombia**

Photo credit: Olga Castano/AFP/Getty Images

In 2001, two lawyers sued the *Ministerio del Medio Ambiente* [Colombian Ministry for the Environment] and the *Dirección General de Estupefacientes* [National Narcotics Division] before the *Tribunal Administrativo de Cundinamarca* [Administrative Court of Cundinamarca], claiming that aerial fumigations of illicit crops with glyphosate had a negative impact on the enjoyment of collective rights such as the rights to health and to a healthy environment.

In its first instance ruling of 13 June 2003, the Administrative Court of Cundinamarca awarded most of the claimants' claims and addressed to the National Narcotics Division an order of temporary suspension of the aerial fumigation operations, based on the precautionary principle. According to the Court's reasoning, even though there was no scientific evidence of the alleged long-term impacts of the mix of herbicides on health and the environment, more scientific examinations had to be carried out if the possibility of reasonable risks



were to be discounted. The Court further addressed an order to the Ministry of Social Security and the National Institute of Health to undertake all necessary toxicity studies in order to assess the long-term effects of glyphosate, polyethyloxyated tallowamine (POEA) and Cosmo Flux on human health. It also entrusted the National Narcotics Division with carrying out more stringent environmental impact assessments in all previously fumigated areas, in order to properly assess the long-term effects on the environment.

In its ruling, on appeal, of 19 October 2004, the *Consejo de Estado, Sala de lo Contencioso-Administrativo* [Colombian Council of State] dismissed the interpretation of the precautionary principle in the first instance ruling and reversed the order of temporary suspension of the fumigation operations, although it maintained the remaining orders of the Administrative Court of Cundinamarca, in relation to studies regarding the impacts of the herbicides used on both human health and the environment.

With the other claim filed before the Administrative Court of Caquetá, the ruling of 31 March 2005 of the Council of State confirmed the first instance ruling, dismissing a civil action brought by a Colombian citizen seeking redress for damages suffered as a consequence of the aerial fumigation of an illegal coca plantation abutting his property, as well as a temporary injunction not to proceed with further sprayings of the area. The Court's reasoning is exclusively based on the report drawn up by the National Narcotics Division. According to the report, there was no scientific evidence that either the alleged health problems suffered by the claimant and his family, or the harm to his crops and animals, which allegedly constitute his and his family's only source of subsistence, were caused by glyphosate.

**Fig. 5**

**Caution is required in the use of Glyphosate, one of the most widely used herbicides**

Photo credit: © landscapeinfo guide.com.au





With respect to the situation in Chocó, the Colombian judiciary reveals two very different faces. On the one hand, the judiciary shares a big deal of responsibility in hindering the effective criminal prosecution in the vast majority of cases concerning systematic threats, murder, mutilations, forced disappearances or war crimes, thus contributing in a significant way to shape the general picture of impunity of serious human rights violations in Colombia.

On the other hand, the role of some courts –especially the Constitutional Court of Colombia– has been of the utmost importance in upholding the rights of indigenous peoples, such as the right to be consulted on issues that affect them as foreseen under ILO Convention 169.<sup>86</sup> Moreover, the Constitutional Court's continuous case-law concerning the protection of the rights of forcefully internally displaced persons has been particularly important in Chocó.

In this latter context, its judgment of 22 January 2004 (case T-025/04) concerning the protection of the fundamental rights of Afro-descendant victims of forceful displacements must be highlighted, as it declares that:

“the existence of an unconstitutional state of affairs in the situation of the displaced population due to the lack of correlation between the severity of the impairment of the rights recognized in the Constitution and developed by law, on the one hand, and the amount of resources allocated to ensure the full enjoyment of such rights and institutional capacity to implement the relevant constitutional and legal mandates, on the other hand.”<sup>87</sup>

Accordingly, it confirms, amends or revokes a previous set of judicial decisions of lower courts in connection with 108 cases that had been brought to court by 1150 households, all belonging to the displaced population.

After this ruling, the Constitutional Court has issued a number of orders that have contributed to maintain the activities of the authorities involved in the management of the situation of the forcefully displaced persons under constant supervision, hence exerting pressure to comply with constitutional standards.

In particular, order 005/2009 identifies three cross-cutting factors in relation with the forceful displacement of the Afro-descendant population, namely:<sup>88</sup> (i) the systemic exclusion of Afro-Colombians that puts them in situation of marginalization and vulnerability; (ii) the existence of mining projects and agricultural processes (such as oil palm plantations) in certain regions that impose severe strains on their ancestral lands and has encouraged their dispossession;<sup>89</sup>

<sup>86</sup> [2009] Constitutional Court of Colombia, Judgment of 29 October 2009. Case No T-769/09.

<sup>87</sup> Non-official translation.

<sup>88</sup> [2009] Constitutional Court of Colombia, Order No 005/09 (26 January 2009), para. 67.

<sup>89</sup> Hence, the Court seems to consider that this has been the factor that has most significantly contributed to increased violence against Afro-Colombians. In particular, in the Court's assessment, the problem derives from 'legal and illegal pressures to promote development patterns driven by the idea of productivity inherent to the mainstream economic model, while ignoring the Afro-Colombian communities' own productive model that is based on the promotion of self-sufficiency and the respect for the cultural and biological diversity of their territory'. [2009] Constitutional Court of Colombia, Order No 005/09 (26 January 2009), para. 70.





and (iii) the poor legal and institutional protection of collective lands of Afro-Colombians that has encouraged the presence of armed groups that threaten the population and force them to leave.

More specifically, the Constitutional Court found that the situation in the communities of Curbaradó and Jiguamiandó had already been addressed in a series of provisional measures adopted by the IACtHR which the Colombian government had not fully implemented. Therefore, the Constitutional Court reaffirmed their binding character. These provisional measures of the IACtHR will be discussed later. The Court also notes that due to their deep relationship with the land they inhabit, these Afro-Colombian communities are entitled to special constitutional protection and shall benefit from bespoke action plans that ensure their collective rights, as well as the rights of the individuals that belong to them.<sup>90</sup>

More recently, in its judgment of 5 October 2009, the Administrative Court of Chocó upheld the collective property rights of the Afro-Colombian communities of Curbaradó and Jiguamiandó and ordered the effective reinstatement of their lands, as well as the suspension of all activities by the natural and legal persons that had illegally occupied them.<sup>91</sup>

However, these judgments have not been properly enforced either. The effective return of lands has not been achieved, nor have sufficient resources been allocated for the rehabilitation and demarcation of those territories.

## Ecuador

In relation to DYNCORP, in February 2004, a group of women allegedly suffering genetic damages from exposure to the sprayings, sued the Ecuadorian state for the omission of its constitutional duties by not preventing the aerial fumigation operations in Colombian territory from harming Ecuadorian territory. On 30 March that year, the *Tribunal Distrital No.1 de lo Contencioso Administrativo* [Administrative District Court No. 1] granted the claimants' constitutional action (acción de amparo constitucional) and ordered all relevant ministries and agencies to immediately adopt all necessary action to remedy the damage already caused, and to prevent any further harm from happening. The District Court's ruling was appealed by several Ministries before the Ecuadorian Constitutional Court, which nevertheless decided on 15 March 2005—by a majority of eight votes to one—to confirm the prior ruling. This decision by the Constitutional Court established a series of specific obligations for the Ministry of Foreign Affairs, the Ministry of Health, the Ministry of Agriculture and the Ministry of Environment. However, in practice this ruling has been inconsequential.

In TEXACO, recourse to the national courts in the State where the damages were produced (Ecuador) was attempted only after first attempting to have the matter

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<sup>90</sup> [2009] Constitutional Court of Colombia, Order No 005/09 (26 January 2009).

<sup>91</sup> [2009] Administrative Court, Chocó, Judgment No 0073/09 (5 October 2009). Case No 2009-0030.



heard by the courts in the State where the parent company was headquartered (the US).

Although laws applicable to the case did exist, related to hydrocarbons, waters, or health, as shown during the judicial process itself, and although administrative sanctions had been enacted against TexPet, no legal action on a major scale had been attempted. This was perhaps due to a lack of confidence in the judicial system, or because the appropriate avenues for action were lacking, or perhaps because, although there was sufficient social support, it was impossible to sue the parent company since it did not operate in Ecuador.

However, the TEXACO process seems to take on historic relevance due to the perseverance shown by thousands of victims organised as the *Frente de Defensa de la Amazonía* [Amazon Defence Front], who were prepared to defend their rights against a huge MNC with vastly superior resources, and which has resorted to all manner of legal stratagems and extra-judicial manoeuvres. At the moment, an Ecuadorian court has ruled against the company, making use of Ecuador's administrative and environmental legislation, especially the civil liabilities contained in the Civil Code<sup>92</sup> and the Environmental Management Law approved in 1999.<sup>93</sup> These allow collective actions to be taken in defence of the environment, even when the rights of the claimants themselves have not been violated. After more than eight years of proceedings, the judgment announced on 14 February 2011 by Judge Nicolas Zambrano of the Sucumbios Provincial Court of Justice found Chevron liable for payment of a multi-million dollar settlement as the successor to Texaco. The same court affirmed this ruling on appeal on 3 January 2012.



**Fig. 6** Several images about TEXACO: Old Texaco oil barrels left on the side of the Aguarico River, near Lago Agrio (left); A boy stands on an oil pipeline in the Amazonian jungle near the town of Lago Agrio (centre); Ermel Chavez, President of the *Frente de Defensa de la Amazonía* (right)

Photo credits: Left) © 2005 Kayana Szymczak; centre) © 2004 Lou Dematteis; right) © 2005 Kayana Szymczak

<sup>92</sup> Arts 2241 and 2256 of the previous text of the Civil Code, currently arts 2214 and 2229, respectively, according to the new codification published in the Official Gazette (24 June 2005).

<sup>93</sup> Arts 41 and 43 Environmental Management Law, Law No 37 (Official Gazette No 245, 30 July 1999).



Some of the key elements in these rulings include the consideration of the parent corporation as solely responsible for the activities of its subsidiary, which lacked administrative and financial autonomy; the irrelevance of any agreements reached between the company and the Ecuadorian State to the effects of limiting the individual rights of access to the justice system; the confirmation of the serious damages caused; and the establishment of the company's strict liability for carrying out activities involving risk. In terms of this last aspect, the court stated that the rewards derived from these activities must be balanced against the repair of damages caused and affirmed a causal relationship, to the extent that the company was clearly aware of the risks involved in their activities, and that instead of appropriately managing the risk of damages, these risks were instead externalised. Also, in another statement that addressed one of the core issues of the problem, the judge concluded that the defendants could have avoided dumping the contaminants described by using other technologies that were in fact available at the time.

Another interesting aspect of this judgment is that it included not only reparations for the damages caused, i.e. the restoration of the natural resources to their original state and compensation for the limitations of the earlier remedies related to full restoration of the natural resources, as well as for the time that had passed without addressing, mitigating, or attenuating the effects of damages impossible to repair. In addition, it also included punitive sanctions added for dissuasive and exemplary purposes, so as to recognize the moral harm to victims and prevent such conducts in the future. It was also established that compensation would be administered by a trust on behalf of those affected, managed by the Frente de Defensa de la Amazonía, which would also be the organisation responsible for the reparations.

Recourse to Ecuador's criminal justice system is also seen in TEXACO, although as a collateral approach to the main litigation. This is in relation to the May 1995 agreement entered into by Texaco and TexPet and its partner Petroecuador, which involved environmental recovery work in exchange for release from Ecuador's claims. In 1998, Ecuador signed an agreement with TexPet to the effect that the environmental restoration work, costing USD 40 million, had been completed, thereby releasing TexPet and its subsidiaries, including its successors, of any future responsibility or liability. However, this agreement was later disputed in the context of criminal proceedings, and two of TexPet's attorneys were prosecuted in Ecuador for their alleged involvement in the falsification of documents.

The possibility of pursuing criminal prosecution is also seen in VEDANTA. This approach was taken by India's Ministry of Environment and Forests, although in an accessory nature, and linked to indications of corruption in the companies in relation to the government of the State of Orissa.

## India

In VEDANTA, the consortium formed between Vedanta Aluminium Limited (VAL, later Sterlite Industries Limited) and Orissa Mining Corporation Limited (OMC) began to occupy land in order to open up a bauxite mine, prior to its possession of the appropriate authorisations (although the companies had obtained permission to install an aluminium refinery in the same area). This took place within the territory of the Dongria Kondh people, in the context of a country, India, where a framework of environmental regulations sufficient for confronting such situations does exist. Legislation in force, especially the Environmental Protection Act, requires certain conditions to be met before mining activities can be initiated, and guarantees State-level control over mines. It also protects the rights of indigenous peoples, especially through the Forest Rights Act, and also provides for the right to free, informed, and prior consent of the communities through a clear and transparent administrative process. There is also a special law, the Panchayats Extension to Scheduled Areas Act, which includes this territory among those specifically subject to a system of heightened protection for the rights of indigenous peoples.



**Fig. 7**

**Images about VEDANTA:** Dongria Kondh woman picking millet in Niyamgiri, India (left); Vedanta's aluminium refinery at Lanjigarh, Odisha, seen from the Niyamgiri Hills (right)

Photo credits: left) © Toby Nicholas/Survival; right) © Survival

This case calls attention to the distinct manner in which the Supreme Court and Ministry of Environment and Forests have proceeded.

First, India's Supreme Court revoked authorisation related to the operation on the grounds of Vedanta's bad international reputation, making reference to its exclusion from investment by Norway's Sovereign Wealth Fund and for the lack of transparency in the company's financial involvement in the joint venture. However, the Court was in favour of allowing the operations if authorisation was requested instead by Vedanta's Indian subsidiary, Sterlite Industries India Ltd (SIIL), which has resources available in India and also greater financial solvency for covering any potential liabilities. This authorisation was also subject to certain conditions related to the provision of funding for social projects and environmental management, to the offering of work contracts to the local population and others, and to compensation for the deforestation caused by the operation. This decision is interesting considering the fact that SIIL had also been excluded by Norway's



Sovereign Wealth Fund just prior to this ruling. In any event, the company accepted these conditions and again requested permits. The Court conceded them, which included the occupation of approximately 700 hectares of forest in order to open the Niyamgiri Hills bauxite mine in Lanjigarh.

However, in the case of the new mine project, the authorisation of the Ministry of Environment and Forests was also necessary. The Ministry decided to create a panel of independent experts to report on the project's impacts on the environment and the local tribal communities. The panel's report was blunt, stating that the conduct of the companies involved in the joint venture, as well as the governmental authorities of the State of Orissa and the district administration, had manifestly violated such federal laws and regulations as the Forests Rights Act, the Forest Conservation Act, and the Environmental Protection Act, implicitly signaling corruption.

As a consequence of this report, on 24 August 2010, the Minister of the Environment rejected the clearance applications submitted by OMC and SIIL for the mining project in the Niyamgiri Hills, due to the evidence about what seemed to be violations of several pieces of legislation, especially the Forest Conservation Act, the Environmental Protection Act, and the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act. Moreover, in view of the implicit accusations of corruption, the Ministry advised that criminal actions should be initiated against the project proponents (SIIL and VAL).

VAL's appeal before the High Court of Orissa was rejected. However, the appeal filed by the other company, Orissa Mining Corporation Limited, is still pending before the Supreme Court, where the case will be presumably heard by the end of the summer. In the meantime, however, the aluminium refinery continues to operate bringing bauxite from distant mines at great social and environmental cost, and despite of public protests.

## **Ivory Coast**

In TRAFIGURA, toxic and dangerous waste products belonging to Trafigura – one of the world's biggest oil trading companies – were shipped from Amsterdam to Abidjan (Ivory Coast), where in August 2006 they were improperly disposed of at several sites around the city without any further treatment. A causal link between the exposure to the extremely toxic products dumped and the loss of human life in several cases and health injury in tens of thousands of cases seems obvious, but has not been established by a court so far.

The company and the Ivorian Government reached a settlement according to which the company would pay EUR 152 million for the construction of a waste treatment plant and the assistance in the recovery operations. In return, Ivory Coast dropped any present and future criminal or civil liability claims against Trafigura and released its imprisoned personnel. This settlement was heavily criticised by human rights and environmental NGOs, such as the International



Human Rights Federation, for depriving the victims from their rights to truth, justice, and redress.

However, in the context of criminal proceedings, the owner of the Ivorian company incorporated and contracted for the disposal of the Probo Koala Wastes – Tommy Ltd – was sentenced to twenty years imprisonment, and his shipping agent to five years.



**Fig. 8**

**Picture of the ship that caused a stink**

Photo credit: ©Raigo Pajula/AFP

## Nigeria

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 – specifies that companies are liable for spills they cause and that they are obligated to compensate those who suffer damages due to their actions.

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 the viability of these at any given time, and firm judicial decisions are scarce.



**Fig. 9**

**A Shell worker and a victim of a spill in Iwhrekan**

Photo credit: Kadir van Louhuize February 25th, 2008  
© Amnesty International

Among the most recent cases, those related to the Iwherekan community are of particular interest. The Supreme Court of Nigeria decided in April 2006 that Shell would be required to stop gas flaring in that community, as well as in the Ejama-Ebubu community, within a period of one year. Also, after almost ten years of



litigation related to a 40-year-old petroleum spill that took place in 1970, and which affected around 250,000 hectares, a Nigerian Federal Court ruled on 5 July 2010 that Shell must pay approximately 100 million dollars to compensate for damages and losses.

**Fig. 10**

**The Yanacocha gold mine**

Photo credit: © Michael Swerdlyk



## Peru

In relation to YANACocha, mining activity also caused significant health and environmental problems, as demonstrated by the worst recorded case of mercury pollution in the world, in 2000, when 151 kilograms of the toxic metal were spilled while being transported by a truck carrying the mercury from the mine to Lima, contaminating the village of Choropampa and two neighbouring villages. Hundreds of people were poisoned. The local people in Choropampa were not informed about the dangers of the substance that had been spilled either by the local authorities or the mine personnel. They collected it up, thinking it to be valuable, and kept it in their homes. Consequently, symptoms of mercury poisoning appeared affecting many people, some of whom were children.

The investigation into the facts of the case has shown that the truck was neither closed nor equipped with the special handbarrow required for the transport of mercury. In fact, it seems that at that moment the normal procedure was to use a truck that was not specially equipped for mercury transportation.

The company did nothing to inform people about the health hazards of contact with mercury and accepted no responsibility for the consequences of the spill. Indeed it has even been said that mine employees offered local people money for recovering the mercury. As a result, many people inhaled mercury, which had negative effects on their health.

The company offered some compensation. Individually, it is alleged that MYSRL compensated 749 local people for the damages suffered with an overall amount of 5,350,000 *nuevos soles* (about USD 2 million). Collectively, the company funded various activities for the benefit of the local communities, such as the improvement of schools, water works, medical facilities, etc.





In addition to the case of the Choropampa mercury spill the local population has alleged that the quality (and quantity) of the water supply has worsened since the opening of the mine. The water sources have been polluted as a result of the mining activity, and this has affected land irrigation and, consequently, the food supply. Independent experts have found some evidence to support these allegations. Conflicts related to water have resulted in episodes of violence, such as the one that took place in August 2006 in Combayo, when the local people protested because a dam was being built near their village. They set up a road blockade and there were clashes between the farmers, and policemen and Yanacocha security guards. In these clashes the farmer Isidro Llanos Chavarria was killed. After the murder, the local people blockaded the traffic on the Cajamarca-Bambamarca road and the Peruvian government were obliged to send a commission to mediate between the company and the farmers. MYSRL agreed to improve the quality of the water.

Lawsuits relating to the Choropampa incident, analysed in YANACocha, were filed against Yanacocha in the local courts of Cajamarca in May 2002 by over 900 Peruvian citizens, most of whom entered into settlement agreements with Yanacocha. The most significant proceedings on the matter concern Giovanna Angélica Quiroz and her two children, who received USD 14,000 to settle her claims against the company. Afterwards, when she realised that the compensation was ridiculous compared with the damage caused, Ms. Quiroz claimed a higher quantity before the Peruvian courts. This led to a controversial journey through the courts, which ended with an extraordinary decision by the Peruvian Supreme Court, which upheld the validity of the settlement agreement reached by the claimant and the company. Subsequently, the Supreme Court reached the same decisions for other people from Choropampa in the same situation, but by the start of 2010 Newmont reported that claims of approximately 200 claimants still remain unsettled.

The Quiroz decision was controversial. The majority of the Supreme Court decided that the extrajudicial settlement between Ms. Quiroz and MYSRL was right and there was no reason for further judicial control.<sup>94</sup> However, a significant minority of the court opposed the decision. For them, the settlement had been reached by an error of the claimant, and this error had been induced by deception. So the minority—in the Quiroz decision and in the other decisions on settlements between Yanacocha and the people affected by the mercury spill in 2000—considered that the extrajudicial settlement was void.

One aspect that tends to be present in many cases, and which is therefore worth emphasising, is that the reparations obtained through litigation processes – often long and drawn-out – are extremely limited in proportion to the damages caused to the environment and to people. These minimal compensations to some extent conceal the real situation of injustice in terms of the loss of assets and the

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94 [2008] Supreme Court of Peru, Judgment of 21 April 2008. Cassation Appeal No 1465-2007 (Cajamarca).



breaking up of consolidated social structures. The impact of YANACocha on the life of the people of Cajamarca shows how insufficiently the local people are rewarded by the mining activity.

## United States

The Kivalina case in INUIT shows an example of litigation brought before the United States courts by the country's own citizens, here in relation to the effects of climate change and the absence of a clear commitment by the government to reducing emissions. In this case, an Inupiat small community is involved. Kivalina is located on the tip of a six-mile barrier reef located on the Northwest coast of Alaska, some seventy miles north of the Arctic Circle. The barrier is disappearing, allegedly due to melting glaciers and rising water levels, and the community therefore has a rather urgent need to find a new location, with related costs estimated to be several hundreds of millions of dollars.

Therefore, before the federal court in San Francisco on 26 February 2008, the village of Kivalina sought damages from 24 of the biggest US oil and power companies for their alleged contribution to global warming. All defendants directly emit large quantities of greenhouse gases and have done so for many years. So, according to the Kivalina complaint, the defendants are responsible for a substantial portion of the greenhouse gases in the atmosphere that have caused global warming and Kivalina's special injuries. Additionally, some of the defendants conspired to create a false scientific debate about global warming in order to deceive the public. Further, each defendant has failed promptly and adequately to mitigate the impact of these emissions, placing immediate profit above the need to protect against the harms from global warming. Kivalina seeks monetary damages for defendants' past and ongoing contributions to global warming, a public nuisance, and damages caused by certain defendants' acts in furthering a conspiracy to suppress the awareness of the link between these emissions and global warming.

In its ruling of 30 September 2009, however, the Federal District Court of Northern California dismissed the case on political question (a non-justiciable question) and standing grounds (because according to judicial parameters it was not possible to establish a clear line of causality between the behaviour of the defendants and the damages alleged).<sup>95</sup> An appeal was filed with the Ninth Circuit Court of Appeals in November 2009.

In relation with the Kivalina case, the recent decision of the Supreme Court of Virginia of 16 September 2011 in *AES Corporation v. Steadfast Insurance Company* is quite revealing, as it may hint at the sort of problem that climate polluting industries may face in the immediate future. In this case, the Supreme Court confirmed a lower court's decision that upheld the insurance company's

<sup>95</sup> [2009] *Native Village of Kivalina v ExxonMobil Corp* Case No CV-08-1138 (US District Court, ND Cal) Motion to dismiss, 30 September 2009.



claims against AES Corp., one of the defendants in the Kivalina case. In particular, the Supreme Court upheld that Steadfast Insurance Company was not required to provide insurance coverage for the type of damages that AES had allegedly contributed to case in Kivalina. According to the Supreme Court of Virginia:

“The Complaint alleges, from the viewpoint of AES, that AES should have anticipated the damages resulting from its emitting carbon dioxide and greenhouse gases. Even if AES were actually ignorant of the effect of its actions and/or did not intend for such damages to occur, Kivalina alleges its damages were the natural and probable consequence of AES’s intentional actions. Therefore, Kivalina does not allege that its property damage was the result of a fortuitous event or accident, and such loss is not covered under the relevant [commercial general liability] policies.”<sup>96</sup>

### 3.2 Legal avenues in the national law of the home state

**In some of the developed countries in which many of the largest MNCs have their headquarters, domestic courts have extra-territorial jurisdiction that allows foreign citizens to sue those companies for damages caused abroad. This is the case for the three countries that appear in the case studies examined here: the Netherlands, the United Kingdom, and the United States.**

For various reasons, victims may believe that their rights cannot be effectively defended by means of the judicial avenues available or under the existing government or judicial authorities in the country where damages have been produced. In such cases, they may seek other avenues that take advantage of norms and regulations in the countries where the companies involved have their closest linkages.

In some of the developed countries in which many of the largest MNCs have their headquarters, there are judicial routes available that allow foreign citizens to access extra-territorial judicial procedures in order to hold companies accountable for damages they cause in foreign countries.<sup>97</sup> This is the case for the three countries that appear in the case studies examined here: the Netherlands, the United Kingdom, and the United States.

In the case of the United States, the approach used is via the Alien Tort Claims Act, while in the other two countries there are laws related to civil liability. Possibilities such as these are not widely available within the European Union.

This is in spite of the fact that for years, the European Parliament has shown interest in the possibilities for extra-territorial jurisdiction in relation to the behaviour of its companies in foreign countries.<sup>98</sup> In its cited Resolution of 13 March 2007, European Parliament called upon the European Commission “to

96 [2011] *AES Corporation v. Steadfast Insurance Company* Case No. 100764 (Supreme Court of Virginia). Opinion by Justice S. Bernard Goodwin, 16 September 2011.

97 J. Ebbesson, ‘Piercing the State Veil in Pursuit of Environmental Justice’ in J. Ebbesson and P. Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009), 270.

98 J. Wouters, L. De Smet and C. Ryngaert. ‘Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?’ (2003) *Institute for International Law, K.U. Leuven, Working Paper*.



organise and promote awareness campaigns and monitor the implementation of the application of foreign direct liability according to the Brussels Convention, and on the application of Directives 84/450/EEC on misleading advertising and 2005/29/EC on unfair commercial practices to adherence by companies to their voluntary CSR codes of conduct.”

In effect, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,<sup>99</sup> stipulates that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.” (article 2), and that “A person domiciled in a Member State may, in another Member State, be sued...” (article 5). Also, “as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.” This clearly includes legal entities, and at the same time, it says nothing regarding the nationality or place of residence of the claimant.

Furthermore, Regulation (EC) No. 864/2007 of the European Parliament and of the Council, of 11 July 2007, regarding the law applicable to extra-contractual obligations,<sup>100</sup> establishes in general that the applicable law is that of the country in which the damages occur, not the country in which the decision that causes the damages is taken (Art. 4.1). However, a specific exception is made in the area of the environment, in article 7:

Environmental damage. The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

In some countries the door has also been opened to extra-territorial civil jurisdiction based upon the argument of *forum necessitatis*, for circumstances in which no other possible forum exists where raising the claim could be effective.<sup>101</sup> It therefore seems as though extra-territorial civil avenues do exist within the European Union, despite the fact that these do not seem to have been much used.

### 3.2.1 The Netherlands

SHELL and TRAFIGURA have both ended up before the courts in the Netherlands, with Shell facing civil claims and with public prosecutors involving Trafigura in criminal proceedings.

<sup>99</sup> OJ L12/1.

<sup>100</sup> OJ L199/40.

<sup>101</sup> Augenstein (n 16), 68-70.



In May 2008, three civil suits were filed against Shell Petroleum Development Company (SPDC) of Nigeria, with the older Shell Transport Trading Company and Shell Petroleum N later brought in as well, in the District Court of The Hague in the Netherlands, where the company has its main headquarters. The claims were filed on behalf of groups of residents from three villages in the Niger Delta (Oruma, Goi, and Ikot Ada Udo), along with Friends of the Earth Netherlands and Friends of the Earth Nigeria, in relation to petroleum leaks that took place in the area between 2004 and 2006.

The company was accused of negligence in allowing the leaks to occur, and was also accused of failing to act quickly to limit the effects of the leaks and failing to properly clean up the affected areas. The claimants also alleged that the Shell parent corporation was negligent for failing to ensure that its subsidiary carried out its petroleum operations in Nigeria with due caution, despite having the capacity to do so.

Shell asserts that the Dutch courts lack jurisdiction over Shell's Nigerian subsidiary, and also states that in the case of Ikot Ada Udo, open judicial proceedings already exist in Nigeria.

On 30 December 2009, the District Court of The Hague rejected the exception alleged by the company and declared itself competent to rule.<sup>102</sup> Having overcome several procedural obstacles, the public hearings in this case have been scheduled for October 2012.<sup>103</sup>

TRAFIGURA has appeared before the Dutch courts in the context of criminal proceedings. As described above, Trafigura is a private company incorporated under the law of the Netherlands.

The Dutch prosecutors accused Trafigura of illegally exporting hazardous waste to Côte d'Ivoire. The District Court of Amsterdam convicted Trafigura in July 2010, ordering the payment of EUR 1 million, as it considered that the concealment of the hazardousness of the *Probo Koala* wastes from the port authorities in Amsterdam, and their subsequent exportation to an ACP country, violated Council Regulation (EEC) 259/93, implementing the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal. Moreover, the captain of the *Probo Koala* received a suspended five-month prison sentence, whereas the Trafigura officer in charge of the onboard 'caustic washing' and the discharge of the slops in Amsterdam received a suspended six-month prison sentence and a fine of EUR 25,000. On the other hand, the director of the Amsterdam Port Services was acquitted from any criminal liability, as he rightfully

<sup>102</sup> [2009] Court of The Hague, Civil law section, Judgment in motion contesting jurisdiction of 30 December 2009. Case No 330891/HA ZA 09-579.

<sup>103</sup> <<http://milieudefensie.nl/english/news/court-date-set-for-milieudefensie-and-nigerians-versus-shell-11-october-2012>> accessed 30 April 2012.



trusted the municipal port authority that allowed him to reload the wastes on the *Probo Koala*.<sup>104</sup> The Appeal Court upheld the decision in December 2011.<sup>105</sup>

Prior to the aforementioned judgments, the Supreme Court of the Netherlands overturned a ruling of 19 December 2008 of the Court of Amsterdam, in which this latter court had decided not to prosecute the Chief-Executive Officer (CEO) of Trafigura Beheer.<sup>106</sup> Accordingly, it reviewed its initial ruling in January 2012, and decided that the CEO of Trafigura Beheer can be prosecuted for the alleged illegal export of waste by Trafigura.

Although the Dutch judicial system is responding effectively, strikingly, in April 2011 the Court of Appeal in The Hague rejected the suit of Greenpeace Netherlands seeking to oblige the Dutch public prosecutor to initiate criminal proceedings against Trafigura Beheer for homicide, bodily harm and environmental crimes committed in Ivory Coast in connection with the *Probo Koala* incident. Interestingly, the Court found that, as an environmental NGO according to its statutes, Greenpeace lacked the capacity to seek the prosecution of offences other than environmental crimes (therefore dismissing its claims with respect to homicide and bodily harm).<sup>107</sup>

### 3.2.2 United Kingdom

British courts have been involved in civil claims filed in relation to both TRAFIGURA and RIO TINTO – NAMIBIA.

Although Trafigura Beheer BV is a company headquartered in the Netherlands, one of its subsidiaries, Trafigura Limited, is domiciled in the UK. In TRAFIGURA, in November 2006 about 30, 000 affected Ivorians brought a civil law suit to the High Court of Justice in London seeking compensation for the “Probo Koala” incident. But in September 2009, shortly before the hearings before the Queen’s Bench Division, both sides reached an agreement to settle the case with the payment of GBP 28 million by Trafigura (approximately GBP 1,000 for each claimant), against the release of a joint statement, according to which exposure to the dumped wastes could not have caused any serious injury or death.

Civil suits tend to proceed slowly, often involve multiple appeals, and can last for years, especially when one of the parties is a large MNC with ample resources to hire large law firms to handle its defence. The psychological strain and economic

104 [2010] Court of District, Amsterdam, Judgment of 23 July 2010. Case No 13/994066-07. See <[zoeken.rechtspraak.nl/detailpage.aspx?ljn=BN2185](http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BN2185)> accessed 26 October 2011.

105 See the website of Business and Human Rights, <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>> accessed 25 February 2012.

106 [2010] Supreme Court, The Hague, Judgment of 6 July 2010. Case No 09/01546 B. See <[zoeken.rechtspraak.nl/detailpage.aspx?ljn=bk9263](http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=bk9263)> accessed 26 October 2011.

107 [2011] Court of Appeal, The Hague, Decision of 12 April 2011. Case No K09/0334. <[zoeken.rechtspraak.nl/detailpage.aspx?ljn=BQ1012](http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BQ1012)> accessed 25 February 2012.



costs can prove to be obstacles difficult to overcome for individual claimants. Only in cases in which the severity of the acts or the company's liability are sufficiently visible, or where potential damage to the company's image is of a high enough degree, may a scenario arise where the company prefers to offer a financial settlement between parties rather than allow the case go to trial. Such possibilities for settlement can force victims to choose between pursuing full justice by continuing to follow through with the litigation, potentially receiving higher amounts of reparations more in line with the damages, or to settle the matter by accepting reparations that are less than might otherwise be obtained, and to accept the company's conditions with respect to release from future liability. TRAFIGURA provides a good example of this dynamic.



**Fig. 11 The Rössing Uranium mine (left) and a view from above the processing plant of the Rössing Uranium Project, Namibia (right)**

Photo credits: Mining technology ([www.mining-technology.com](http://www.mining-technology.com))

Another very interesting aspect seen in TRAFIGURA is the involvement of rights very different to those directly affected by the dumping of toxic waste, with these rights being defended in a place as far away as the UK. This demonstrates the interconnectedness of human rights. Also, as the proceedings have been under way, the company has tried to restrict the release of information regarding the case in the British media, in order to mitigate the negative impact on its image.

Firstly, in May 2009, Trafigura had brought a libel action against the BBC in response to its reporting on the events of Abidjan in August 2006 in its programme Newsnight, where it was said that the dumped slop wastes had caused deaths. Eventually, in December 2009, the BBC decided to settle the case for tactical reasons, as the extra-judicial settlement in the Trafigura Personal Injury Group Litigation – in which the claimants were publicly recognising that the slop wastes could not have caused any serious injury nor death – left the broadcasting corporation exposed in the libel action.<sup>108</sup>

<sup>108</sup> <<http://news.bbc.co.uk/2/hi/programmes/newsnight/8417913.stm>>. Last access 26 October 2011. See also <<http://www.guardian.co.uk/media/2009/dec/17/bbc-trafigura/print>> accessed 26 October 2011.



Secondly, in September 2009, Trafigura obtained an injunction barring 'The Guardian' from publishing the so-called Minton Report, an internal e-mail dated from September 2006, containing the technical assessment of the *Probo Koala*'s slop wastes that had been commissioned by Trafigura in the aftermath of the incident in Abidjan.<sup>109</sup> 'The Guardian' was not only barred from reporting on the content of the Minton Report, but also prevented from informing about its existence. However, once the matter was brought before Parliament in October 2009, it finally became impossible to maintain the secrecy surrounding the report.<sup>110</sup>

In RIO TINTO – NAMIBIA, claims have been filed before the British courts seeking compensation for health-related damages suffered by workers at the Rössing uranium mine, operated by a Rio Tinto subsidiary. In both of the cases discussed in this case study, Edward Connelly's and Peter Carlson's, the claims were unsuccessful because of the prescription period for the events. Therefore, no results have been obtained in the courts in terms of establishing a connection between the cancer suffered by the two workers and uranium exposure in the mine

Nevertheless, important questions related to environmental justice were addressed in the course of these proceedings in Connelly case. The outcome of the case was noteworthy as it questioned the legal principles of "separation of corporate identity" and "forum non conveniens" which are very often used by multinational corporations to avoid being held liable in the parent company's domicile for the damages caused in other countries, enabling them to apply "double standards" in developing countries.

In terms of the second aspect, both the judge in the first instance court and the Court of Appeal judge understood from the beginning that the preference in favour of the Namibian courts would not be superseded by the fact that UK law grants a right to legal assistance that does not exist in Namibia, because the same law impedes consideration of this fact in deliberations for the purpose of determining the most appropriate forum. Later, the courts accepted that the claimant was not going to make use of the law, since an agreement had been reached by which the solicitors agreed not to charge the claimant for their services unless the case is won. The Court found that the availability of legal assistance in the form of a conditional fee agreement in England and the impossibility of accessing justice in Namibia through lack of funds was a sufficient reason not to grant the stay to the forum that *prima facie* (i.e. at first sight) was the most convenient. Furthermore, in support of his opinion the Court also invoked article 6 (1) ECHR, recognising the right to 'a fair and public hearing within reasonable time by an independent and impartial tribunal established by law' and article 14 (1) of the International

**Forum non conveniens doctrine:**

**This doctrine is a procedural instrument typical of common law systems (Anglo-Saxon tradition), but not so extended in civil law countries (continental-European tradition). It allows the judge, at his or her discretion, to reject a claim that may in fact be admissible under the court's jurisdiction, if it is believed that the litigation would be better resolved under another country's jurisdiction.**

109 Minton Report, 14 September 2006, para. 9.3, at <<http://image.guardian.co.uk/sys-files/Guardian/documents/2009/10/16/mintonreport.pdf>> accessed 12 September 2011.

110 The Guardian, 'Trafigura drops bid to gag Guardian over MP's question', 13 October 2009, at <<http://www.guardian.co.uk/media/2009/oct/13/trafigura-drops-gag-guardian-oil>> accessed 26 October 2011.



Covenant of Civil and Political Rights, also concerning the right to a fair and public hearing.

Finally, the House of Lords supported the claimant's position, allowing his appeal and dismissing the defendant's, on the basis of a different focus on the issue, in the sense that the provision of legal aid 'shall not affect (...) the principles on which the discretion of any court or tribunal is normally exercised' should not have the effect of preventing judges from taking into account the availability of legal aid while deciding on an application for a stay of proceedings on the principle of *forum non conveniens*.<sup>111</sup>

It is important to take into account the 2005 judgment of the European Court of Justice (ECJ) in the *Owusu v. Jackson* case, following a reference for a preliminary ruling submitted by the English Court of Appeal.<sup>112</sup> In this decision, the ECJ ruled that the application of *forum non conveniens* in actions instituted against EU-domiciled defendants was not compatible with EU law, if the alternative jurisdiction is in a country outside the EU. This represents a significant difference in terms of access to European civil jurisdiction compared to access in the United States under the framework of the Alien Tort Claims Act, as will be discussed next.

### 3.2.3 United States

Extra-territorial litigation based on serious environmental damages has been raised in the United States due to two main principles. Firstly, it is still the country where most of the largest MNCs are concentrated, although this fact is changing as locations become more diversified. Secondly, the US has an instrument known as the Alien Tort Claims Act (ATCA), which allows those who violate certain international norms outside of the United States to be sued in US civil courts.<sup>113</sup> Successful use of the ATCA to claim reparations derived from human rights

<sup>111</sup> *Connelly vs RTZ Corporation and others* 2 May 1996, 2; [1997] UKHL 30, [1997] 4 All ER 335, [1997] 3 WLR 373.

<sup>112</sup> 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. On this subject, see J. Wouters and L. Chanet. 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6(2) *Northwestern University Journal of International Human Rights* 262, 294-300.

<sup>113</sup> The ATCA was adopted in 1789, and its brief text 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). Regarding the possibilities in European arena: L. F. H. Enneking. 'Transnational Corporate Responsibility for the 21st Century: Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases' (2009) 40(4) *George Washington International Law Review* 903.



violations began with the well-known *Filártiga* case in 1980.<sup>114</sup> This decision opened up the country's federal courts for the defence of rights recognised under international law.

However, the ATCA route is not without its difficulties, which can be grouped into two categories. First of all, there are basic requirements related to the admissibility of the subject matter, among which the material foundation of the claim is especially important, and secondly, there are a series of possible exceptions, which can lead to rejection of the matter at the discretion of the judge, without the case's arguments being heard.

In terms of the first of these challenges, the law requires that the claimant be a foreigner, which excludes any claim raised by United States citizens, but not those of foreign residents of the country. Second, the claimant must have been the victim of an alleged tort, which does not raise any special problems.

Third, for an action to be brought under the framework of the ATCA, the tort must consist of a violation of customary international law (law of nations), or else involve the violation of a treaty linked to the United States. When customary law is involved, the courts' interpretations have ruled that the norm violated must be sufficiently specific (clear and unambiguous), obligatory (irrevocable), and universal (having a sufficiently broad international consensus).<sup>115</sup> However, it is not necessary for the violated norm to be categorised as *jus cogens*, although in some cases the two categories have been confused.<sup>116</sup>

After the *Filártiga* case, which confirmed the customary nature of the norm prohibiting torture, other cases have progressively broadened the range of allegations that are eligible to be addressed under the ATCA. Such matters now include, for example, scenarios of prolonged arbitrary detention, extra-judicial executions, war crimes, genocide, crimes against humanity or systematic racial discrimination, and denial of political rights. On the other hand, in the opinion of the courts, other types of rights violations not clearly backed up by conventional or customary international law have been considered inadmissible within the scope of the ACTA, such as restrictions on freedom of expression, violation of property rights, financing of terrorism, or violations of article 3 of the Geneva Conventions of 1949 against sexual violence.

However, it is important to bear in mind that, first of all, the various first instance federal district courts and district Courts of Appeals<sup>117</sup> do not always maintain

**The term *jus cogens* refers to peremptory principles or norms of international law. Under article 53 of the 1969 Vienna Convention on the Law of the Treaties, such norms are defined as 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. In general, it is accepted that the prohibition of genocide, slavery, racial discrimination and torture are rules of *jus cogens*.**

<sup>114</sup> In which Dr. Joel Filártiga, an opponent of the Stroessner regime in Paraguay, presented a claim for the 1976 kidnapping, torture, and killing of his son at the hands of the general inspector of the police in Asunción, Norberto Peña Irala. In 1980, the appeals court ruled that the ATCA was applicable to the case and that a torturer could be taken to court in the United States for acts committed in a foreign country; *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2nd Cir. 1980).

<sup>115</sup> *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

<sup>116</sup> *Alvarez-Machain v. Sosa*, 331 F.3d 604 (9th Cir. 2003).

<sup>117</sup> In the United States there are 93 judicial districts divided into 12 regional circuits, with a Court of Appeals existing for each of these circuits.



coinciding positions, and secondly, that a certain degree of evolution can be seen, in the sense that claims related to certain types of actions may not be considered at one time, but may be considered later.

Finally, for jurisdiction under the ATCA to be valid, the court must have personal jurisdiction over the defending party, which requires that party to have certain associations with the United States. When foreign corporations are involved, the link required becomes that of carrying out a particular degree of economic activity (“doing business”) in the US state where the claim is filed.<sup>118</sup> In this respect, it is reasonable to assume that the larger the foreign transnational company involved, the more likely it is that sufficient linkage with one or more of the US states can be identified.

However, even when this set of initial requirements is met, a good portion of the cases in which the applicability of the ATCA has been admitted end up being dismissed prior to a judicial decision, based upon the various exceptions that allow judges to abstain from hearing the matter. Without going into further analysis, it is worthwhile to at least mention that the main exceptions to jurisdiction under the ATCA have turned out to be State immunity,<sup>119</sup> the Act of State doctrine, qualification of the case as a political question,<sup>120</sup> and the *forum non conveniens* doctrine.

With transnational companies, which tend to be sued in relation to activities that take place outside of the United States, the *forum non conveniens* exception, mentioned above for RIO TINTO – NAMIBIA, is particularly relevant. In this exception, the judge perceives the existence of another, more appropriate forum to hear the claim, generally in the country where the acts subject to the claim occurred or the country where the company is registered. This requires the judge to examine whether an alternative forum exists for handling the claim, and to determine whether analysis of the factors pertinent to the case (those related to the object of the process itself, the interests of the parties, and the public interest) makes recourse to the other forum preferable. The argument of the political question has also been used, based on respecting the separation of powers, when it is determined that the role of addressing matters of a political nature belongs to the executive branch of government rather than the judicial branch. Finally, it is also pertinent to refer to the Act of State doctrine, as in some cases it is only considered to be applicable to companies in the extent to which violations attributed to them have taken place in collaboration with agents of the country in which operations take place. The exception to the Act of State doctrine is based on the idea that when sovereign states are involved, the courts of one State cannot judge the actions of another State’s government when these take place

<sup>118</sup> ‘Under New York law, a foreign corporation is subject to general personal jurisdiction in New York if it is “doing business” in the state.[...] The continuous presence and substantial activities that satisfy the requirement of doing business do not necessarily need to be conducted by the foreign corporation itself.’; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), 95.

<sup>119</sup> See the Foreign Sovereign Immunity Act (FSIA); 28 U.S.C. § 1603 (2002).

<sup>120</sup> *Baker v. Carr*, 369 U.S. 186 (1962), 217.





within its own territory.<sup>121</sup> In cases involving the actions of agents of the State, the question becomes one of whether these can be attributed to the government to the point at which they should be considered as acts of State. To determine this, criteria established by the Supreme Court in 1964 are used: the degree of international consent with respect to the norms applicable in the specific case; the importance of the implications of the case for foreign relations; and whether the government that committed the acts remains in power.<sup>122</sup>

Although rulings under the ATCA have admitted the possibility of private actors, including companies, being the authors of violations of international legal norms, this possibility has been restricted to certain types of norms that seem to be associated with the concept of *jus cogens*.<sup>123</sup> Therefore, the ATCA has been seen as not applicable to other violations, such as torture, arbitrary imprisonment, or persecution, which have been viewed as attributable only to agents of the State, and which have not been considered subsumed under other types of crimes of greater severity, such as genocide or crimes against humanity.<sup>124</sup> However, even acts such as these can be attributable to private actors, if they have been committed with the appearance of legality (“under colour of law”).<sup>125</sup>

Furthermore, the possibility of private actors, including companies, being held liable for conspiracy or complicity was established in 1988;<sup>126</sup> a ruling that has been confirmed by numerous other decisions. 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.<sup>127</sup>

<sup>121</sup> *Underhill v. Hernandez*, 168 U.S. 250, 18 S. Ct. 83, (1897).

<sup>122</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>123</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, (S.D.N.Y. 28 February 2002).

<sup>124</sup> *Bowoto v. Chevron Corp.*, 2006 U.S. Dist. LEXIS 63209 (N.D. Cal., 21 August 2006).

<sup>125</sup> Although there is not a unanimous consensus: ‘Recognising acts under color of law would dramatically expand the extraterritorial reach of the statute. [...] It is also highly unfair to corporations operating in states with potentially problematic human rights records which under the color of law rule may (or may not) be subject to liability for doing business there and benefitting from the state’s infrastructure.’; *Doe v. Exxon Mobil Corporation*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005). Various criteria have been used to determine an action with the appearance of legality, although the most common is known as the “joint action test”, wherein “private actors are considered State actors if they are ‘wilful participant[s] in joint action with the State or its agents’”, *Wiwa v. Royal Dutch Petroleum Company et al.*, 2002 U.S. Dist. LEXIS 3293, (S.D.N.Y. 28 February 2002). See also the Unocal case, *Doe v. Unocal Corp.*, 963 F.Supp. 880, 891 (C.D. Cal. 1997). Other criteria are used in *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997).

<sup>126</sup> *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988).

<sup>127</sup> A. Clapham and S. Jerby. ‘Categories of Corporate Complicity in Human Rights Abuses’ (2001) 24(3) *Hastings International and Comparative Law Review* 339. Along the same lines, see A. Ramasastry. ‘Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations’ (2002) 20(1) *Berkeley Journal*



This has therefore led to the incorporation into civil proceedings of the criminal law concept of complicity, and has been referred to with regard to the interpretations of international criminal courts for the former Yugoslavia or Rwanda.<sup>128</sup> However, not all courts apply the international parameters for criminal complicity, and some refer to the concept of complicity found in US law.<sup>129</sup>

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.<sup>130</sup> In two such cases, a settlement between the parties has been reached just before trial: the UNOCAL case, related to the petroleum company's participation in a variety of human rights violations during the construction of a pipeline in Myanmar (Burma); and the *Wiwa v. Shell* case, related to the company's responsibility for the repressive actions of the Nigerian armed forces against the Ogoni people, in the form of torture, killings, and other human rights violations. In the few cases that have gone to trial, the companies have prevailed. For example, these include the case of Drummond Ltd, related to the killing of three union leaders at one of this company's mines by Colombian paramilitary groups (although this case has been reopened through another claim) and *Bowoto v. Chevron Texaco Corp.*



**Fig. 12**

**Pablo Fajardo, lawyer of the Chevron-Texaco case in Ecuador. In the background, gas flaring near Lago Agrio**

Photo credit: © 2007 Ivan Kashinsky / Aurora photo (in San Francisco Chronicle, 15.04.2008)

of International Law 91.

<sup>128</sup> In this respect, see J. A. Menon. 'The Alien Tort Statute. Blackstone and Criminal/Tort Law Hybridities' (2006) 4(2) *Journal of International Criminal Justice* 372, 379. C. Shaw. 'Uncertain Justice: Liability of Multinationals under the Alien Tort Claims Act' (2002) 54(6) *Stanford Law Review* 1359.

<sup>129</sup> See the various positions expressed by the judges in *Khulumani v. Barclay National Bank*, 504 F.3d 254, (2d Cir. 2007).

<sup>130</sup> The following companies, among others, have been sued: Shell, Texaco, Chevron, Exxon-Mobil, General Motors, Titan, Coca-Cola, Drummond, Unocal, Rio Tinto, Del Monte, Freeport-McMoRan, Copper & Gold, Pfizer, Talisman Energy, Bridgestone, Caterpillar, Dow Chemical, Monsanto, Union Carbide, Chiquita Brands, and Dyncorp. In the *Khulumani* case, related to alleged complicity in perpetuation of South Africa's racial apartheid system, more than fifty large companies from all economic sectors were named as defendants: *Khulumani v. Barclay Nat'l Bank Ltd*. 504 F.3d 254 (2d Cir. 2007).



In any event, cases in which multinational corporations have been accused of violating international norms of environmental protection are still very rare. However, this avenue has been used in several of the cases studied.

As mentioned above, in TEXACO the case was sent before Ecuador's national courts after having first been raised in the US courts, the country in which the parent company (Texaco, later Chevron) has its headquarters. The US litigation lasted from November 1993 until 2002, after numerous procedural incidents based on the civil legislation of the United States.

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 square kilometre 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 *forum non conveniens* exception. As mentioned above, this is a procedural instrument that allows the judge, at his or her discretion, to reject a claim that may in fact be admissible under the court's jurisdiction, if it is believed that the litigation would be better resolved under another country's jurisdiction.

However, it is also significant in this case that one of the judges involved considered that the *forum non conveniens* exception 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 the decision to apply the doctrine of *forum non conveniens*, in 2001 and 2002, 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 enforced against Texaco in the US.

Thus another relevant aspect of TEXACO in the United States is seen in the company's attempts to discredit the judicial proceedings in Ecuador and obstruct the execution of the Ecuadorian court's judgment internationally, particularly in the United States.

To do this, the company has been willing to use all types of mechanisms, in particular a civil suit filed in the Southern New York District Court against the claimants' attorneys in the United States, alleging conspiracy to commit extortion under the framework of the Racketeer Influenced and Corrupt Organisations (RICO) Law. In this way, the company received a temporary injunction order from the judge a few days before the ruling on Lago Agrio, which prevented the Ecuadorian claimants and their attorneys from requesting execution of this judgment not only in the United States, but anywhere outside of Ecuador. The arguments stated by the judge are sufficiently eloquent that no commentary is required: that the Ecuadorian courts do not, either in general or specifically in this

case, offer a fair trial; that Chevron is “a company with great importance for our economy”, and that Chevron is a different company than Texaco and is not linked to Texaco’s commitment to accept Ecuador’s jurisdiction or execution of the ruling passed there. However, this decision was overturned by the Second Circuit Court of Appeals, which also took advantage of the opportunity to draw attention to the paradox of the company’s denial of the jurisdiction of the US courts during the first phase of the process in order to move the proceedings to Ecuador, then its later allegations of a systematic lack of legal protection in Ecuador in order to seek the protection of the US courts.

In DYNACORP, two parallel claims were filed in the United States under the ATCA, which were later merged: *Aguasanta-Arias et al. v. Dynacorp* and *Arroyo-Quinteros et al. v. Dynacorp*.

The first of these was filed on 11 September 2001, by a group of some 10,000 farmers affected by the aerial herbicide sprayings by filing a class action against DynCorp before the US District Court for D.C. Among other allegations, taking into consideration that the sprayings had been commissioned by the US Department of State in the context of the so-called ‘Plan Colombia’ for the elimination of illegal coca plantations, DynCorp alleged that the claimants’ claims were entangled in non-justiciable issues concerning the foreign and national security policy of the US. It also argued that the claimants’ claims based on State common law were preempted by the federal government’s exclusive authority over foreign policy and national security. On 21 May 2007, DynCorp’s motion was granted in part and dismissed in part, as some claimants’ claims survived.<sup>131</sup>



**Fig. 13**

**The ‘Plan Colombia’ involved fumigation of illegal coca plantation**

Photo credits: left) Foreign Policy ([www.foreignpolicy.com](http://www.foreignpolicy.com)); right) Jeremy Bigwood

In this specific case, Dynacorp was hired by the US Department of State to carry out fumigation work in Colombia, using funding approved by US Congress as part

<sup>131</sup> *Venancio Aguasanta Arias, et al., Claimants, v. DynCorp, et al., Defendants* (Civil Action No. 01-1908 (RWR), US District Court for the District of Columbia, *Memorandum Opinion and Order*, 21 May 2007, at 20-1.



of the 'Plan Colombia', and the work was carried out in coordination with the two governments involved. With regard to the applicability of the ATCA, the judge rejected a motion to dismiss the case and stated that the company acted "under colour of law":

"Claimants have alleged sufficient facts to state a claim that defendants are operating as a 'willful participant in joint activity with the State or its agents', are 'controlled by an agency of the state,' or are 'entwined with governmental policies' ".<sup>132</sup>

This was an important decision in that, when the fundamental claims were examined, the assertion was made that an environmental norm should be given greater possibilities for being considered by the US courts as a sufficiently specific, obligatory, and universal norm:<sup>133</sup> one that establishes for States "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". This is in accordance with the content of Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration on Environment and Development. During the last twenty years, this principle has been incorporated and adapted into multiple multilateral and bilateral international agreements in various contexts.<sup>134</sup>

The second claim against Dyncorp was filed in December 2006, by another group of about 1,600 affected farmers, before the US District Court for the Southern District of Florida on the grounds of alleged violations of the ATCA, various international treaties, and state common law doctrines of negligence, nuisance, trespass, assault, intentional infliction of emotional distress, strict liability and medical monitoring. But the District Judge granted a motion of Dyncorp to transfer and ordered its transfer to the District Court for the District of Columbia. Forthwith, the Aguasanta-Arias' and the Arroyo-Quinteros' cases have been consolidated for case management and discovery purposes.

On 21 November 2011, Judge of the District Court for the District of Columbia granted the motion for leave to file a brief on behalf of fourteen international environmental law professors and practitioners as *amici curiae*.<sup>135</sup> The *amicus* brief affirms that the obligation to prevent transboundary environmental harm is

<sup>132</sup> *Aguasanta v. Dyncorp*, 517 F. Supp. 2d 221, 227 (D.D.C. 2007).

<sup>133</sup> This is what seems to be suggested in *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 384 (E.D.La. 1997).

<sup>134</sup> See the "Fifth and Final Report of the Committee on Legal Aspects of Sustainable Development to the International Law Association", New Delhi Conference (2002), p.8. Also Resolution 3/2002, adopted by the International Law Association, at the 70th Conference held in New Delhi, India, in April 2002, "New Delhi Declaration of Principles of International Law Relating to Sustainable Development".

<sup>135</sup> *Venancio Aguasanta-Arias, et al. Claimants, v. DynCorp Aerospace Operations, LLC, et al., Defendants*, 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.



indeed an existing obligation under applicable customary international law. The 2011 *amicus* brief develops and reinforces the argument already upheld in the *amicus curiae* brief submitted in March 2002 by Prof. Richard J. Wilson and J. Martin Wagner (Earthjustice) in the Aguasanta-Arias action. In this brief, *amici* sustained that transboundary environmental harm is to be prevented by states—irrespective of its causation by public or private actors—particularly when damage inflicted to the environment is ‘significant’, due to its ‘long-term, widespread and severe’ effects on the enjoyment of basic human rights, such as the rights to life, food, water and health of individuals belonging to the communities established in the areas affected. Moreover, it argues that claims for violations of well-established norms of customary international law are indeed actionable under ATCA, and that DynCorp is to be considered a ‘state actor’ acting under colour of law, having regard of the fact that DynCorp’s authority to spray herbicides in Colombia was delegated to it by the governments of the US and Colombia itself.

In RIO TINTO – PAPUA, the claim against Rio Tinto was filed in September 2000. The alleged claims included Rio Tinto’s complicity in the commission of war crimes and crimes against humanity, which were committed by the Papua New Guinea 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 for massive contamination of marine waters.<sup>136</sup>



**Fig. 14**

**Panguna mine on Bougainville Island**

Photo credit: The Australian  
([www.theaustralian.com.au](http://www.theaustralian.com.au))

This case presents three essential points of interest. Firstly, it makes reference to pressure from the government of Papua New Guinea, supported by Australia and the United States, which caused the judge to reject the claim by applying the

<sup>136</sup> On this case, see L. J. Dhooge. ‘The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism’ (2004) 35 *Georgetown Journal of International Law* 3, 56-62.



exception of the political question doctrine, alluding to the presumed detrimental effects that a trial and subsequent judgment would have on bilateral relations and the peace process for the Papua New Guinea conflict. Although at first the judge accepted this argument, a change in position by the new administration in Papua New Guinea, which ceased opposition to continuing the litigation, brought about a review of this aspect, and it was concluded that the political question doctrine was no longer applicable.

The second remarkable aspect is the fact that for the first time, a US federal court ruled that an environmental norm could be the basis for admissibility under the ATCA, by consideration as a customary right. Specifically, the court considered the stipulations found in Article 194 of the 1982 UN Convention on the Law of the Sea (UNCLOS), related to measures to prevent, reduce, and monitor contamination of the marine environment, and those of Article 207, related to contamination deriving from terrestrial sources, to be relevant, even though that treaty had not been ratified by the US. This decision by the district court judge was confirmed, albeit ephemerally, by the Ninth Circuit Court of Appeals, in the first version of its decision of August 2006. A revised version of the decision issued in April of 2007 did not include these considerations, and was based on other arguments. Be that as it may, given the fact that *jus cogens* norms were not involved, both the district judge and the Court of Appeals considered the *Act of State exception* applicable to these claims.

The third aspect, which was on the verge of permanently paralyzing proceedings that had not yet been concluded (although only the charges of racial discrimination and crimes against humanity were still standing), was the issue of whether an additional requirement for the exhaustion of internal resources in the host country should exist before allowing recourse to US courts. This would be similar to the requirements found, for example, in regional systems for the protection of human rights in relation to international entities, or in the framework for exercising diplomatic protection. By means of judicial decisions between 2007 and 2009, and with a great diversity of opinion among the participating judges, the necessity of such a requirement was rejected by the district judge for certain charges (crimes against humanity, genocide, war crimes, and racial discrimination), but not for the others, including violation of the UN Convention on the Law of the Sea, which was considered to lack the same degree of seriousness as the others. The claimants therefore dropped this particular claim.

As mentioned above, the first point in common between RIO TINTO – PAPUA and SHELL is the colonial origins of the two situations. The second point in common is the close relationship between the company and the government. In the case of Shell this meant relations with the various governments of Nigeria, many of which were military regimes that came into power as the result of various *coups d'état*, due to the extraordinary importance of the company's various gas- and petroleum-related economic activities for the country's revenues. In this context, the company collaborated with the governments to repress popular opposition to the continuance of company operations in the region. The third point in common is the





enormous negative impacts on human rights and the environment perpetrated by the two companies.

It is therefore no surprise that claims have also been filed against Shell under the framework of the ATCA, with the most significant of these being the Wiwa and Kiobel cases. Both of these cases are founded upon accusations that the company was complicit with the government in committing serious human rights violations in Ogoniland.



**Fig. 15**

**Floating oil along the coast of Ogoniland, Nigeria**

Photo credit: UNEP

In the Wiwa case, the claim was initially rejected by the district judge in accordance with the *forum non conveniens* doctrine who expressed the opinion that the process should be undertaken in the United Kingdom. Furthermore, as also occurred in TEXACO, the judge conditioned this decision on the commitment of the defendants, among other obligations, to accept UK jurisdiction, to comply with all of the orders related to the surrender of corporate documents, and to comply with any other rulings issued in that country. However, the Second Circuit Court of Appeals decided to overturn the district court's decision in relation to *forum non conveniens* for three reasons: the choice of forum made by persons residing in the United States; "the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights"; and the lack of relevancy of the arguments in favour of UK jurisdiction in terms of precedent. In support of the second argument, the court offered this paragraph, which deserves to be quoted here not only because it perfectly describes the situation of torture victims, but because it is also applicable to any incident of the mass violation of human rights:

"One of the difficulties that confront victims of torture under colour of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the



claimants nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as “not our business”.<sup>137</sup>

The other especially relevant aspect of the Wiwa case is that a variety of procedural obstacles were overcome, and although some of the charges were invalidated along the way, the proceedings related to crimes against humanity, torture, and arbitrary detention survived.<sup>138</sup> Just as the case was about to go to trial in June 2009, the parties reached several agreements to settle the litigation.<sup>139</sup> These agreements included the payment of a total of 15.5 million dollars (7.5 million by Shell Petroleum N.V. and Shell Transport and Trading Company Ltd, 3.5 by SPDC of Nigeria, and 4.5 by Energy Equity Resources Limited), which covered compensation for the ten claimants and a portion of their legal expenses. The agreements also established a trust on behalf of the Ogoni people, assigned with independent managers, in order to finance initiatives in the Ogoni territory related to education, women’s programmes, adult literacy, and support for small businesses.

The Kiobel case, in which some of the debates and decisions of the Wiwa case were repeated, presents one aspect of great interest not only for this case, but also for the future of claims against companies under the framework of the ATCA. In this case, the district judge also accepted the allegations of torture, illegal detention, and crimes against humanity as the material basis for the applicability of the ATCA.<sup>140</sup> At the same time, however, one of the arguments raised by the defendants, and also raised in the Wiwa case, gained new relevance: the defendants alleged a lack of jurisdiction over companies as grounds for inadmissibility. At first, in March 2008, the district court accepted the defendants’ motion to dismiss for lack of personal jurisdiction over companies for both cases. However, 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, 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 against the possibility of suing companies under the framework of the ATCA.<sup>141</sup> The first paragraph of the dissenting judge’s minority opinion is worth quoting:

The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule my colleagues have created, one who earns profits by commercial exploitation

<sup>137</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), para. 106.

<sup>138</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d (S.D.N.Y. 2006).

<sup>139</sup> Documents related to the agreement can be viewed on the website of the Center for Constitutional Rights: <<http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>>.

<sup>140</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464-65, 467 (S.D.N.Y. 2006).

<sup>141</sup> *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111, 149 (2d Cir. 2011), 17 September 2010.



of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form. Without any support in either the precedents or the scholarship of international law, the majority take the position that corporations, and other juridical entities, are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims.<sup>142</sup>

After the presentation, and rejection, of other appeals, the claimants filed a petition of writ of certiorari to the US Supreme Court, asking it to address *inter alia*:

(...) Whether 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, as the Eleventh Circuit has explicitly held.

The petition was granted on 17 October 2011. So far, the Second Circuit Court of Appeals is the only body among the US federal courts of appeals to have applied this criterion. Subsequent to the New York Court of Appeals' decision, other district appellate courts have ruled to the contrary, confirming the applicability of the ATCA to companies. The importance of the Supreme Court's decision for the future applicability of the ATCA to companies is enormous,<sup>143</sup> and organisations that defend human rights cannot hide their concern regarding the decision that may be reached by a Court with a majority of conservative justices. One reflection of the importance of the ruling is the large number of *amicus curiae* briefs that have been submitted to the Supreme Court.<sup>144</sup> The brief filed on 21 December 2011 by the US government in favour of the claimants is particularly significant.<sup>145</sup>

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".<sup>146</sup>

<sup>142</sup> *ibid.*

<sup>143</sup> To date the Supreme Court has only issued one ruling related to the ATCA, in the *Álvarez-Machain* case on 29 June 2004; *Álvarez-Machain*, 542 U.S. 692 (2004), 124 S.Ct. 2739 (2004).

<sup>144</sup> <[www.supremecourt.gov/qp/10-01491.qp.pdf](http://www.supremecourt.gov/qp/10-01491.qp.pdf)> accessed 30 April 2012.

<sup>145</sup> 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](http://www.earthrights.org/sites/default/files/documents/USG-Kiobel-amicus.pdf)> accessed 17 February 2012.

<sup>146</sup> See n 144.

### 3.3 Legal avenues in international law

#### 3.3.1 The International Court of Justice

DYNCORP is also of interest in the context of this report because the matter has been brought before the International Court of Justice as a result of the claim presented by Ecuador against Colombia in March 2008 for the damages that intensive herbicidal fumigation activities performed in Colombia gave rise to in the neighbouring country. According to Ecuador, severe harm was inflicted on the environment — topsoil contamination, pollution of rivers and aquifers, and poisoning of flora and fauna — and the health of individuals from the communities residing in the affected areas.

The International Court of Justice is a tribunal accessible only by States to resolve disputes. The State being accused must have accepted the Court's jurisdiction, either by ratifying the UN Charter or by having expressly accepted its jurisdiction in some other way. Its decisions are binding for the State, and reparations can be imposed if it is believed that international law has been violated, although this does not necessarily mean that the specific victims of such violations, if any, will be the ones to directly benefit.

Also, in this case various principles of international environmental law of a customary nature enter into play, in particular, along with the principles of prevention and precaution, the principle whereby States are obliged to take all necessary measures—according to due diligence standards—to prevent any significant transboundary harm to the territory of neighbouring states. As has been said, this international customary obligation has been upheld in several decisions and awards of international courts and arbitral tribunals ever since and is affirmed in Principle 21 of the 1972 Stockholm Declaration on the Human Environment, and Principle 2 of the Rio Declaration on Development and Environment. However, this is a principle that has not yet been recognised by the US federal courts within the framework of ATCA, as discussed above.

**Fig. 16**

**The Peace Palace, seat of the International Court of Justice (ICJ), at The Hague, Netherlands**

Photo credit: UN Photo/ICJ/Jeroen Bouman





**Beyond the national level, international courts are only open to inter-state litigation. However, regional human rights courts offer a possibility for claims by individuals and groups. At the global level, moreover, a number of committees exists that monitor the States' compliance with human rights treaties, which may receive individual complaints. Further, a series of special procedures have been developed under the aegis of the UN to assess the respect for human rights in a specific country, or on a particular issue.**

From this perspective, the court's specific acknowledgement of this norm and the obligations of prevention and precaution that it raises, as well as its binding applicability for all States based on its customary nature, would be extraordinarily desirable and useful for the consolidation of international environmental law.

### **3.3.2 The special procedures for the protection of human rights within the United Nations**

In addition to the monitoring entities established by various international agreements for the protection of human rights, the former UN Commission on Human Rights, replaced by the current UN Council on Human Rights, began to articulate a set of extra-conventional monitoring procedures, including those referred to as special procedures.

An example of the role played by these various special procedures can be seen in the Special Rapporteur's activities related to the situation of human rights defenders, mentioned in DEFENDERS. Although they have limited authorities, these representatives or rapporteurs have a certain degree of autonomy in terms of visiting countries, questioning governments, becoming involved in specific cases of human rights violations, gathering information and performing studies, formulating recommendations related to their specific scope of responsibility, and publicising their conclusions and accusations by means of the periodic reports they produce.

Numerous such rapporteurs cover often inter-connected subjects or specific countries. They generate a relatively intense monitoring dynamic from diverse perspectives, and represent a significant element of pressure in situations where a generalised scenario of human rights violations may exist. This is illustrated in the DYNCORP case, where pronouncements have been made by various special rapporteurs as well as by the monitoring committee for the Convention on the Rights of the Child, the latter being a procedure stipulated by the convention.

Firstly, the former Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, as the result of his visit to Colombia in March 2006, detailed the negative impacts of the fumigations on human health and the environment, in this case in Colombia's interior, and made a recommendation to the government of Colombia stating that '[e]xcept where expressly requested by an indigenous community which has been fully apprised of the implications, no aerial spraying of illicit crops should take place near indigenous settlements or sources of provisions'.<sup>147</sup>

<sup>147</sup> UN Doc E/CN.4/2005/88/Add.2 (10 November 2004), para. 106.





Fig. 17

**Rodolpho Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, addresses a Human Rights Council meeting, 12 December 2007**

Photo credit: UN Photo/Pierre-Michel Viot

During his visit to Ecuador, he focused on the damages sustained in that country. He recommended that Colombia end spraying along its border with Ecuador and also recommended that both governments ‘... appoint an independent international commission to study the effects of aerial spraying on indigenous border populations [and that][c]orresponding binding measures are also recommended, to provide compensation for the damages caused’.<sup>148</sup>

Secondly, the former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, also paid a visit to Ecuador (May 2007) and Colombia (September 2007) in order to examine the impact of the aerial spraying of glyphosate, combined with additional components, along the Ecuador-Colombia border, from the point of view of the enjoyment of that particular human right.<sup>149</sup> Because Paul Hunt was succeeded by Anand Grover as Special Rapporteur a little later, no final report has ever been submitted to the Council.

In TRAFIGURA, the Special Rapporteur who visited the Ivory Coast and the Netherlands in August and November of 2008 has also taken actions related to the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, in relation to the *Probo Koala* incident.

The Special Rapporteur found that the *Probo Koala* incident had had – and was continuing to have – serious implications for the enjoyment of the right to life under the International Covenant on Civil and Political Rights, and the right to health under the International Covenant on Social, Economic, and Cultural Rights.<sup>150</sup> The Special Rapporteur’s report makes several recommendations to Trafigura, in order to provide continuing financial support to the Ivory Coast and to develop ‘a corporate accountability and human rights policy and management framework’

<sup>148</sup> UN Doc A/HRC/4/32/Add.2 (28 December 2006), para. 85-86.

<sup>149</sup> UN Doc A/HRC/7/11/Add.3 (4 March 2008), para. 3.

<sup>150</sup> UN Doc A/HCR/12/26/Add.2., Annex, para. 29-38.





that should enable it to attain substantially higher standards of corporate social responsibility.<sup>151</sup>

Within the UN system, the Chocó case also reveals the significant activity of the ILO's Committee of Experts on the Application of Conventions and Recommendations that has supervised Colombia's compliance with ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. Since 2006, the Committee has addressed several comments to Colombia with respect to the situation in the communities of Curvaradó and Jigumiandó, reaffirming the relevance of the Convention and the rights recognized therein for those communities, namely the right over the natural resources of their lands and the right to be consulted on any issue that may affect them.

### 3.3.3 Regional systems for the protection of human rights

The regional systems established for the protection of human rights in Europe, the Americas, and Africa are the most advanced mechanisms in effect for such protection, as they include the intervention of international tribunals. Although they have some aspects in common, there are also differences between these systems in terms of the catalogue of rights protected and in terms of access to their tribunals. Such access is only direct in the European system, in which as yet a commission entity has not been established as an institutional protection mechanism in terms of fulfilling the role of a filter for the cases that reach the Court. This preliminary report does not include cases that have taken recourse before the European human rights system, although it is important to bear in mind that it is susceptible to having extra-territorial application.

#### **The Inter-American system for protection of human rights**

The Inter-American system for human rights and its two primary entities, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, have carried out important work in the defence of human rights and the environment.

The main responsibility of the Commission on Human Rights is to receive and investigate petitions related to human rights violations filed against nations that are members of the Organisation of American States (OAS). In addition to investigating cases, the Commission can, on its own initiative, research and publish a report on the human rights situation or perform in loco investigations within a particular OAS member State. The commission also presents an annual report to the General Assembly of the OAS.

The Commission has been involved with a great number of cases of human rights violations that have affected indigenous communities or persons belonging to

<sup>151</sup> *ibid*, Annex, para. 87.



them, and specifically with environmental problems, which have been a factor present in most of the claims it has received.<sup>152</sup>

The DYNACORP case reached the Inter-American Commission on Human Rights as the result of a suit filed by the claimants alleging the lack of compliance with the Constitutional Court's ruling on the part of the Ecuadorian government ministries affected by the case. Their complaint was based on the alleged violation of the right to judicial protection and, as a consequence of the lack of enforcement, also on the alleged violation of the right to life. At present, the Commission's decision on the admissibility is still pending.

In this context, the INUIT case is also very interesting because it is representative of a new series of litigation originating in relation to the impact of climate change on the rights of the various peoples who inhabit Arctic regions. In the INUIT case, the Inuit Circumpolar Council, which represents more than 150,000 people affiliated with that ethnicity in the Arctic regions of Canada, Russia, Greenland, and the United States, presented a petition before the Inter-American Commission on Human Rights against the United States, although the Commission could not accept it.<sup>153</sup> The United States is not part of the American Convention on Human Rights, and therefore the appeal to the Commission had to be based upon the 1948 American Declaration of the Rights and Duties of Man.

The petition alleged that the United States' emissions of carbon dioxide, the main gas contributing to the greenhouse effect, had contributed so much to global warming that the country's actions should be considered as a violation of human rights, for failing to adopt effective measures to reduce greenhouse gas emissions and for failing to protect the human rights of the Inuit from the impacts caused by climate change. However, the Commission decided that the information provided was insufficient to determine whether a violation of the rights protected by the Inter-American Declaration of Human Rights had occurred.<sup>154</sup>

<sup>152</sup> Among others, in the case of the Yanomami community; Resolution No. 12/85. Case No. 7615 (Brazil), 5 March 1985. Annual Report of the Inter-American Human Rights Commission 1984-1985, Chapter III.1. OAS/Ser.L/V/II.66, Doc. 10 rev. 1, 1 October 1985; the in the case *Indigenous Mayan Communities in the District of Toledo*, Belize, Report No. 40/04, Case 12,053, Background, 12 October 2004. Annual Report of the Inter-American Commission on Human Rights 2004, Chapter III.C.5; OAS/Ser.L/V/II.122, Doc. 5 rev. 1, 23 February 2005.

<sup>153</sup> Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States (No P-1413-05). See also Earth Justice, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (7 December 2005) available at <[www.earthjustice.org/library/reports/ICC\\_Human\\_Rights\\_Petition.pdf](http://www.earthjustice.org/library/reports/ICC_Human_Rights_Petition.pdf)> accessed 17 February 2012. See further S. Watt-Cloutier, 'Global Warming and Human Rights' CIEL (Washington 2005); E. M. Zimmerman, 'Valuing Traditional Ecological Knowledge: Incorporating the Experience of Indigenous People into Global Climate Change Policies' (2005) 13 *New York University Environmental Law Journal* 812.

<sup>154</sup> Letter sent to Sheila Watt-Cloutier as representative of the petitioner, the Inuit Indigenous People. Petition No. P-1413-05: <<http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>>



Soon thereafter, in February 2007, the Commission agreed to hold a hearing for the Inuit's representatives on 1 March 2007, in order to allow the petitioners to lay out their arguments in detail. This was a novel action, and it made a notable impact in some media sources.

Finally, the *Kawas Fernández* case against Honduras, discussed in DEFENDERS, is representative of the importance of the activities carried out by the entities of the Inter-American system in relation to environmental defenders. In this case, a claim was made against Honduras by a variety of NGOs in relation to the killing of the president of an environmental organisation, with the probable participation of agents of the State, and in relation to the lack of an effective investigation into the killing by Honduran authorities. This has led to the reporting, first by the Inter-American Commission and then later by the Inter-American Court, of a series of violations of the human rights recognised by the American Convention on Human Rights.

In this case, the killing of the environmental defender Blanca Jeanette Kawas has been related to a violation of her right to life, violation of freedom of association, and violation of the personal integrity of her family members and their right to legal guarantees and legal protections, which prevented them from learning the truth about what happened and from seeking reparations for the damages and losses they suffered.

In its ruling of 3 April 2009,<sup>155</sup> the Inter-American Court emphasised the obligations of States in relation to human rights defenders:

“States have a duty to provide the necessary measures to allow human rights defenders to conduct their activities freely; to protect them when they are subjected to threats in order to prevent attacks against their lives and integrity; to abstain from imposing obstacles that make their work more difficult; and to seriously and effectively investigate violations committed against them, combating impunity. [...] Given the important role played by human rights defenders in democratic societies, the free and full exercise of these rights imposes upon States the duty to create legal and de facto conditions where they can freely carry out their functions.”<sup>156</sup>

The court also decided, in terms of reparations, to order 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.”

In *Chocó* the IACtHR has so far issued a number of provisional measures, as provided for under article 63(2) of the American Convention on Human Rights in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons. Accordingly, these provisional measures are binding for the

[accessed 17 February 2012.](#)

<sup>155</sup> *Kawas Fernández v Honduras* Judgment on Indemnification, Reparations, and Costs IACtHR Series C No 196 (3 April 2009).

<sup>156</sup> *ibid*, paras. 145-6.



State they are addressed at. At the request of the IAComHR, the Court has repeatedly issued provisional measures in situations in which human lives were in danger.

Hence, in 2003 the IACtHR 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.”<sup>157</sup> Nevertheless, in view of the persisting situation of grave risk the people concerned, the IACtHR has been continuously reaffirming these measures in successive orders, the last one adopted in February 2012.<sup>158</sup>

### **The African system for human rights protection**

SHELL provides another example of how regional systems for the protection of human rights operate, in this case the region being Africa, whose system recognises the right to a healthy environment.

The African Commission on Human and Peoples’ Rights announced a decision in October 2001 stating that Nigeria had violated various articles of the African Charter of Human and Peoples’ Rights 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. It considered the companies Nigerian National Petroleum Company (NNPC) and SPDC to be implicated in these violations.

In terms of the violation of the right to health and to a healthy environment, the Commission considered that these require:

“the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. [...] The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from

<sup>157</sup> *Communities of the Jiguamiandó and the Curbaradó v Colombia* Provisional measures IACtHR Order of 6 March 2003.

<sup>158</sup> *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.



carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual. [...]”<sup>159</sup>

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:

“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties [...] The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments ...”<sup>160</sup>

The Commission 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.

### **Other legal mechanisms established in international investment-protection systems or in the context of international financial entities**

In a somewhat different sense than in the systems discussed until now, TEXACO offers a representative example of the functioning of bilateral investment treaties (BIT) between countries. These tend to emphasise indemnification for all types of expropriations of nationals of the other contracting state, as well as access to the domestic justice system for the protection of investments. As previously mentioned in relation with the termination of the concessionary contract in 1992, Chevron and Texaco instigated arbitral proceedings against Ecuador in 2006 on the basis of the 1993 BIT between the USA and Ecuador. Although the procedure took time, in this case the arbitration tribunal issued a 2010 decision favourable to the parent company, in relation to the liquidation of the concessionary contract and the other related claims presented in Ecuador.<sup>161</sup>

Later, another appeal to the arbitration tribunal took place in the TEXACO case in relation to its main claim, again for violation of the 1993 BIT. This was based on two arguments: the validity of the agreement between TexPet and Ecuador in terms of reparation of damages, and interference by the government of Ecuador in the independence of Ecuador’s judicial powers. In February of 2011, again just a few days before the ruling in Lago Agrio, the arbitration tribunal adopted protective

<sup>159</sup> *The Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* AfComHR Communication No 155/96 (Oct. 2001), para. 52-54.

<sup>160</sup> *ibid.*, para. 57-58.

<sup>161</sup> See n 78.



measures in favour of Chevron, ordering Ecuador to suspend, both within and outside of the country, the execution of any judgment against the company in relation to the Lago Agrio case, while waiting for a ruling on the merits of the case.<sup>162</sup> This measure was confirmed in February of 2012.

On the other hand, YANACocha illustrates the instruments for intervention available to the World Bank through the IFC, in terms of establishing conditions for the development projects in which it participates.

Despite the fact that the IFC has been involved in order to support a project promising to generate substantial revenue, employment and foreign currency flows in Cajamarca, it seems that the project has significantly worsened the quality of life of the local people, altering their traditional economic and social practices on the land, generating important environmental damages and putting at risk the life of some people who were publicly against the project.

As it would seem, the IFC has been wrongly informed about such important facts as the condition of the indigenous local people or the behaviour of the company in the Choropampa incident. But it seems that the IFC was not careful enough in checking the project in its initial stages, and it did not monitor it appropriately once it was underway.

After the mercury spill in Choropampa, in July 2000, the IFC's Compliance Advisor Ombudsman (CAO) oversaw an independent investigation, which found that there were significant discrepancies in the company's waste management and emergency procedures. This investigation led to a comprehensive understanding of the magnitude and seriousness of the incident.<sup>163</sup> Subsequently, in December 2000, the *Frente de Defensa de Choropampa* lodged a complaint with CAO on behalf of the citizens affected by the mercury spill. In response to the complaint, CAO conducted meetings with all the relevant parties who agreed that the instigation of an Independent Health Evaluation (IHE) process would be adequate, and it monitored compliance with its recommendations up until the case was closed in November 2003, allegedly due to a lack of institutional and social support.

Also, as the result of another claim, the CAO action led to the constitution of a forum for dialogue between the community and MYSRL. A roundtable (*Mesa de Diálogo y Consenso*) was formed, which was involved above all in monitoring water quality in the four basins affected by the Yanacocha mine activity, but there was no significant result regarding the Choropampa mercury spill. Despite the CAO's efforts to provide technical and financial support for the consolidation of this roundtable as a means of permanent dialogue, it has not been able to provide solutions for specific problems such as the Choropampa or the Combayo, and has therefore been unable to establish sufficient credibility to maintain continuity.

<sup>162</sup> *Chevron Corporation & Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No 2009-23, Order of Interim Measures (9 February 2011).

<sup>163</sup> See IFC, Compliance Advisor Ombudsman, *Investigación del derrame de mercurio del 2 de junio de 2000 en las cercanías de San Juan, Choropampa y Magdalena, Perú*, Washington DC, 2000, 15.





Recently, Newmont and MYSRL have been promoting an additional mining project in the Cajamarca region – the Conga project – that poses similar problems to Yanacocha.

### 3.4 Legal instruments within regulatory frameworks of voluntary compliance

A rarely used mechanism has been employed in VEDANTA, with a complaint filed before the National Contact Points (NCPs) of the OECD in relation to the OECD Guidelines for Multinational Enterprises. The NCPs form a network working within the countries that have accepted the guidelines and are designed to promote the application of the OECD Guidelines for Multinational Enterprises. In the process, the NCP must perform an initial evaluation to determine whether the issues raised in the complaint merit a more careful examination. If so, the parties involved are offered the organisation's good offices to help resolve the dispute. The results of the procedures must be made public, regardless of whether or not an agreement is reached.

On 19 December 2008 the NGO Survival, brought the case to the attention of the OECD National Contact Point (NCP) in the UK, claiming that Sterlite's operations did not comply with the OECD Guidelines for Multinational Enterprises. The complaint was based on the alleged non-compliance with the following OECD guidelines:

“II.2 Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

II.7 Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

V.2b Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.”<sup>164</sup>

After its initial assessment, the UK NCP accepted Survival's complaint for further consideration on 27 March 2009. The company refused to participate in the process, with this being the only time a company has refused to participate in an OECD investigation in UK. April 2009, the company refused the UK NCP's offer of conciliation/mediation, so the NCP informed both parties that it would move to an examination of the complaint. Without providing any evidence, the company denied that it had breached the Guidelines. In particular, it argued that most of the local community supports the mine project; the mine project has been approved by the Supreme Court of India; and it has been evidenced that the Company consulted the local communities in June 2002 and February-March 2003.

<sup>164</sup> UK NCP for the OECD Guidelines for Multinational Enterprises. Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Survival International and Vedanta Resources plc URN: 09/806 (27 March 2009).



The NCP's final report of 25 September 2009<sup>165</sup> went against the company's interests. The report states that there is no evidence that the Dongria Kondh community was consulted about the construction of the bauxite mine in the Niyamgiri Hills next to Lanjigarh, and that Vedanta did not comply with Chapter V(2)(b) of the Guidelines, because Vedanta failed to put a consultation mechanism in place to fully inform the Dongria Kondh about the potential environmental and health and safety impact of the construction of the mine. The report also states that Vedanta failed to act consistently with Chapter II(7) of the Guidelines, because it did not develop an effective self-regulatory practice to foster a relationship of confidence and mutual trust between the company and the local tribe. Furthermore, it claims that Vedanta has behaved inconsistently with Chapter II(2) of the Guidelines, given that it failed to perform any type of consultation in relation to the impact of the mines on the rights and liberties of the Dongria Kondh and did not take any other measures to consider the impact of the construction of the mine on those rights and freedoms, or to balance the impact against the need to promote the success of the company.

A complaint has also been filed in SHELL before the OECD's National Contact Points (NCPs) in the Netherlands and the United Kingdom, by Friends of the Earth Netherlands, Friends of the Earth International, and Amnesty International.

The claim against Shell focused on the company's repeated statements to the effect that the vast majority of the petroleum leaks in Nigeria were due to sabotage. According to the organisations raising the claim, these statements represent violations of three aspects of the OECD guidelines:

"The section on Disclosure (III), which states that enterprises "should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance," and that "[e]nterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported." [...]

The section on Environment (V), which states that enterprises should "take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development." [...]

The section on Consumer Interests (VII), which states that enterprises should "act in accordance with fair business, marketing and advertising practices." Specifically, point 4 requires that enterprises "[n]ot make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair."<sup>166</sup>

<sup>165</sup> UK NCP for the OECD Guidelines for Multinational Enterprises. Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc URN: 09/1373 (25 September 2009), para. 16. Available at <[www.berr.gov.uk/files/file53117.doc](http://www.berr.gov.uk/files/file53117.doc)> accessed 19 February 2012.

<sup>166</sup> *ibid.*, 12-3.



After the initial examination, the NCP in the Netherlands notified the claimants on 23 February 2011 that it would act on behalf of the two NCPs, and that it believed that the claim's allegations merited a more careful examination. The procedures therefore remain open.

### 3.5 Recourse to other instruments of social pressure

The cases analysed show that victims may also have recourse to other mechanisms of political or social pressure, such as courts of opinion or public statements made by shareholders in the companies causing the damages.

#### 3.5.1 Courts of opinion

Despite their names, these “courts of opinion” or “opinion tribunals” are not legal courts established within national or international judicial systems. In general, they are forums that meet on a one-time or continual basis, and which are created, organised, and funded by NGOs or private contributions in order to take a public position on the violation of human rights within a specific thematic or territorial context. They are forums that allow victims to be heard and to formulate their claims directly. Experts in the issues, representing various social sectors and often having high public profiles, are brought together to help draw attention to the claims. The decisions made by these courts of opinion or ethics tribunals, which usually contain specific recommendations for action, have both a moral and political content, although they are often based on legal argumentation. These decisions are distributed to the public and private institutions involved, and tend to be widely disseminated by the NGOs in the media and social networks.

In CHOCÓ, reference is made to the hearings on biodiversity held by the Permanent Peoples' Tribunal,<sup>167</sup> in the context of a series of thematic sessions held in Colombia between 2006 and 2008.<sup>168</sup> In that case the Court condemned the linkage between the interests of employers illegally established in the collective lands of communities of African descent, paramilitary groups operating in the area and some of the public authorities involved, as the main cause of the situation of violation of human rights and environmental damage.

<sup>167</sup> The Permanent Peoples' Tribunal is international opinion tribunal that was founded in Italy, in 1979 at the initiative of Senator Lelio Basso, as the successor to the Russell Tribunals on Vietnam (1966-1967) and on the Latin American Dictatorships (1974-1976), has the mission, according to its calling and its Statutes, to raise awareness of all those situations in which the massive violation of fundamental human rights receives no institutional recognition or response, whether at a national or an international level, and to qualify such situations in legal terms. See the list of rulings in <[www.internazionaleleliobasso.it/?page\\_id=207&lang=en](http://www.internazionaleleliobasso.it/?page_id=207&lang=en)>. Most of its rulings can be found at <[www.internazionaleleliobasso.it/?cat=15](http://www.internazionaleleliobasso.it/?cat=15)>.

<sup>168</sup> Transnational corporations and peoples' rights in Colombia (2006-2008), hearing on the destruction of biodiversity (Bajo Atrato, Chocó, 25-26 February 2007).



In YANACocha, the GRUFIDES organisation presented a claim against Yanacocha and the government of Peru before the Latin American Water Tribunal,<sup>169</sup> which held one of its sessions in Mexico in February 2006 to coincide with the 4th World Water Forum.<sup>170</sup> This opinion tribunal reached a decision in which it resolved to:

1. Declare that Empresa Minera Yanacocha S.A. is responsible for performing activities in the Cajamarca region that are harmful to human health and to the environment, and that the government of Peru has failed to comply with its constitutional and ethical obligations to defend the environment and the public health.
2. That the company should immediately suspend all of its activities liable to cause environmental damage and negative impacts on the public health.
3. That the government of Peru must take the necessary measures to avoid harm to the environment, to public health, and to communities in the region.
4. That Empresa Minera Yanacocha S.A. should compensate the communities and individuals harmed by environmental and health-related damages.

It also recommended:

1. That a roundtable be created, made up of Cajamarca's and Peru's main social and governmental stakeholders, for discussion and dialogue regarding the environmental, health-related, social, and economic impacts of mining activities.
2. That academic institutions in Peru, and if possible from outside of Peru, with experience in the mining industry, perform independent studies on the impacts of mining in Cajamarca and other areas of Peru.<sup>171</sup>

The DEFENDERS case study discusses the organisation of the Ethical Tribunal Regarding the Criminalisation of Human Rights and Environmental Defenders that was held in Cuenca, Ecuador, within the context of the Continental Conference for Water and Pachamama on 22-23 June 2011. It was organised on behalf of people, organisations, communities, and ethnic groups who have suffered some type of violation of their fundamental rights because of their defence of collective rights or the rights of nature, and who have been assigned – or who have been threatened with assignment of – criminal or formal administrative penalties after being accused of some type of crime, including in some cases terrorism. The Tribunal was organised by the associations *Acción Ecológica* [Ecological Action],

<sup>169</sup> The Latin American Water Tribunal, founded in 1998, is an autonomous, independent and international organisation of environmental justice created to contribute in the solution of water related conflicts in Latin America. It bases its work on principles such as the balanced coexistence with nature, respect for human dignity and solidarity among peoples for the preservation of the region's water systems. See: <[www.tragua.com/index\\_english.html](http://www.tragua.com/index_english.html)>.

<sup>170</sup> Grufides. Demanda a Yanacocha y el Estado Peruano ante el Tribunal Latinoamericano del Agua. México. Marzo 2006, <[www.grufides.org/noticias/demandaaltribunaladelagua.pdf](http://www.grufides.org/noticias/demandaaltribunaladelagua.pdf)> accessed 17 February 2012.

<sup>171</sup> Caso: Explotación minera a cielo abierto en Cajamarca. República del Perú. <[www.grufides.org/noticias/veredictosocajamarca.pdf](http://www.grufides.org/noticias/veredictosocajamarca.pdf)> accessed 17 February 2012.



*Red de Ecologistas Populares* [the Peoples' Ecological Network], *Comisión Ecuémica de Derechos Humanos (CEDHU)* [Ecumenical Human Rights Commission], and *Fundación Regional de Asesoría en Derechos Humanos (INREDH)* [Regional Foundation for Human Rights Advocacy].

The tribunal, after analysing fourteen cases, ruled that the communities, peoples, and social and non-governmental organisations that have fought for collective rights and the rights of nature in Ecuador have been extensively and increasingly victimised by criminalisation and punishment, encouraged by national and transnational companies – particularly in the extractive sector – and carried out by various judicial, police, military, and administrative authorities, as well as by private security forces. The tribunal therefore confirmed the existence of the “systematic practice of criminalisation as a means to punish and eliminate social protest”, and that the justice system is used to criminalise the defenders of nature, while remaining passive against the human rights violations where these defenders and nature are the victims.<sup>172</sup>

The Tribunal stated a series of recommendations for the executive, legislature, and judiciary branches, as well as for other groups.

### 3.5.2 The voice of the shareholders

Very recently, NGOs have begun to realise the value of appealing directly to the shareholders of large corporations in the various economic and financial sectors, informing them of the negative impacts that company activities are causing. At times they have even become shareholders themselves in order to gain access to shareholder meetings held at company headquarters.

The TEXACO case study describes how Chevron's top executives witnessed the case come up as a matter of public debate during the company's shareholder meeting held in California on 25 May 2011. A group of shareholders, representing twenty investment funds, requested that Chevron's management enter into an agreement with the indigenous communities and finally put an end to the litigation. According to the jointly signed letter, “Chevron has shown poor judgement and has caused investors to wonder whether our company's leaders can adequately manage the variety of environmental challenges and risks that they face.”

VEDANTA also makes reference to the fact that the Supreme Court of India took into consideration the news that had appeared in the media, according to which Norway's Government Pension Fund withdrew its investments from Vedanta Resources, following a recommendation from its ethics council. As reflected in the Supreme Court's order of 23 November 2007, the fund's ethics council had considered that in maintaining the investment in Vedanta, the fund would bear an

<sup>172</sup> See “Veredicto del Tribunal Ético ante la Criminalización a defensores y defensoras de los derechos humanos y de la naturaleza”, Cuenca, Ecuador 22 and 23 June 2011. Available online at: <<http://servindi.org/pdf/TribunalEtico23Jun2011.pdf>> accessed 3 January 2012.



unacceptable risk of complicity in severe present and future environmental damage and systematic human rights violations.

The practices of Norway's Sovereign Wealth Fund are also surely of great interest. This Fund follows "Guidelines for the observation and exclusion of companies from the Government Pension Fund Global's investment universe", which establish that:

"(1) The assets in the Fund shall not be invested in companies which themselves or through entities they control: a) produce weapons that violate fundamental humanitarian principles through their normal use; b) produce tobacco; c) sell weapons or military material to states mentioned in section 3.2 of the guidelines for the management of the Fund."

And also that:

(3) The Ministry of Finance may [...] exclude companies from the investment universe of the Fund if there is an unacceptable risk that the company contributes to or is responsible for: a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation; b) serious violations of the rights of individuals in situations of war or conflict; c) severe environmental damage; d) gross corruption; e) other particularly serious violations of fundamental ethical norms."<sup>173</sup>

The Fund has an Ethics Council that analyses cases and presents corresponding reports to the Ministry of Finance regarding Norway's potential for complicity in activities considered to be unethical, and provides corresponding recommendations. Around fifty companies have been subject to exclusionary measures in terms of investment, or else have been targeted for divestment by the Fund. The companies subject to such actions for severe environmental damages are the following: Lingui Development Berhad Ltd (16 February 2011); Samling Global Ltd (23 August 2010); Norilsk Nickel (31 October 2009); Barrick Gold Corp (30 November 2008); Rio Tinto Plc. (30 June 2008); Rio Tinto Ltd (30 June 2008); Madras Aluminium Company (31 October 2007); Sterlite Industries Ltd (31 October 2007); Vedanta Resources Plc. (31 October 2007); Freeport McMoRan Copper & Gold Inc. (31 May 2006).<sup>174</sup> Another company, South Africa's DRD GOLD Ltd., was excluded in 2007 but readmitted by the Fund in 2009.

Recently, in February 2012, a group of Right Livelihood Award laureates from around the world made a request to Norway's Sovereign Wealth Fund to divest in Shell, in relation to the damages caused in the Niger Delta as described in SHELL, and this request, quoted here, is currently under study by the Council on Ethics: "We feel that it would be unethical for the Norway Fund to continue

<sup>173</sup> These guidelines are available at [www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics\\_council/Ethical-Guidelines.html?id=425277](http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/Ethical-Guidelines.html?id=425277) accessed 17 February 2012.

<sup>174</sup> See the text of those recommendations at [www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics\\_council/Recommendations/Recommendations/recommendations-on-environmental-damage.html?id=614304](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/recommendations-on-environmental-damage.html?id=614304) accessed 17 February 2012.





“profiting” from its investments in Shell, while Shell is “profiting” from its continuing negligence regarding the environment and people of the Niger Delta.”<sup>175</sup>

175 Business and Human Rights Resource Centre. <[www.business-humanrights.org/Categories/Issues/Environment/EnvironmentGeneral](http://www.business-humanrights.org/Categories/Issues/Environment/EnvironmentGeneral)> accessed 17 February 2012.



# 4

## Conclusions for EJOs

**1.** The cases studied here make it clear that, in practice, the victims of serious environmental damages, and the EJOs that support them, combine all types of political and legal avenues, whether national or international, territorial or extra-territorial, in their search for effective means by which to hold the perpetrators of such damages accountable. However, this does seem to be the best manner in which to proceed. The existing avenues are very diverse, each with its own advantages and drawbacks, although all of them bring an elevated level of difficulty and take considerable periods of time. Other factors, such as consideration of which is the host State and which is the home State, the type of environmental issue, the type of activity, the identity of the company or companies involved, or the way in which the enterprises have gained access to the natural resources, give each case its own unique characteristics, causing some routes to become more viable than others. It is therefore essential to study all of the possible routes available in order to prioritise those that might bring the best results.

**2.** Regardless of which judicial avenue is pursued, it is essential to be able to provide evidence. The demand for evidence tends to be more flexible in civil cases, where evidence of a causal relationship between the acts and damages is required, than in criminal cases, where specific evidence is required to implicate specific persons in the commission of a specific crime. However, in either case, environmental actions often fail for lack of sufficient evidence. For example, it is not sufficient to allege general damages to human health unless it is possible to produce medical certifications or epidemiological studies proving that specific persons have suffered specific damages. Similarly, it is not sufficient to allege conspiracy between a private company and State entities if documents or witnesses cannot be produced to prove this relationship. This is a key factor that both victims and EJOs must always bear in mind.

**3.** In the cases that have been appraised the extent of the damage is so huge that it is impossible to measure in its just terms: they imply harm to the commons, such as air, soil or water; they destroy or hamper essential environmental services

**The victims of serious environmental damages, and the EJOs that support them, combine all types of political and legal avenues.**

**It is essential to study all of the possible routes available, and to be able to provide evidence.**



**Environmental justice must try to cope with this range of damages on the basis of different forms of reparation, financial compensation being just one among many means. Still, it is essential that EJOs have the knowledge to assign monetary values to such damages, or else to have the support of technicians who can assist them in doing so.**

such as climate regulation, biodiversity maintenance, water provision; they also imply harm to persons in form of damage to their physical and mental health, to their personal life projects and those of their families, to their spiritual link with the lands they inhabit; they diminish their capabilities to exercise rights and freedoms, and, of course, they imply harm to the ecosystems, the fauna and flora, and properties. Environmental justice must try to cope with this range of damages on the basis of different forms of reparation, financial compensation being just one among many means. Economic compensation is not the only or the most important element when the damage affects peoples and communities belonging to low income segments of society, or groups living under the poverty line, or tribal peoples largely outside the generalized market system, as in most of the cases that have been appraised. Nevertheless, the economic valuation of damages is often a key element, even if it has to be acknowledged that it is extremely difficult to carry out a comprehensive economic assessment of personal injuries, damage to private property, and even more so, of harm to the environment. Hence, it is essential that EJOs have the knowledge to assign monetary values to such damages, or else to have the support of technicians who can assist them in doing so, in order to avoid situations in which compensation that seems ample in theory turns out to be entirely insufficient in reality.

**4.** One obvious space that should be explored in terms of access to justice is naturally within the scope of the host State's national jurisdiction. The pertinent factors at the time of evaluating the various possibilities are the following: the existence and quality of environmental legislation; the existence of instruments for State monitoring of industrial activities and their effectiveness; the existence of other non-judicial entities for the protection of human rights (attorneys, ombudsmen, etc.); the existence of independent and effective judicial power; the possibilities for citizen access to environmental information; the possibilities for citizen participation in the decision-making process for environmental matters; and finally, the existence of routes of access to environment-related justice for NGOs, for ordinary citizens, and for victims. EJOs should create a roadmap of the possibilities offered within their own country at any given time, and should be prepared to make this available to EJOs in other countries. As part of the creation of this plan, all possible avenues for judicial proceedings must be studied: administrative, civil, criminal, and, in countries where they may exist, specific environmental systems. The criminal route in particular, in countries where the concept of an environmental crime exists, can be particularly useful for its effects in terms of prevention and dissuasion, and because it is generally accompanied by civil liability. This avenue may be followed either for prosecuting the persons materially responsible for damages, or those in charge of supervising the operations that cause them, or else for bringing criminal proceedings against the company itself if legislation recognises criminal liability for corporate entities.

**5.** Within the analysis of applicable legislation, it is fundamental to pay attention to the international obligations that the State has assumed by means of international treaties. This is especially true in the context of international environmental and human rights law, both in the framework of the UN – especially the 1966 International Covenants – and other specialised agencies as the ILO, but



also in other areas such as those that exist to fight corruption or trans-national organised crime, or those related to international commerce or protection of investments. This process is valid not only for the host State but also for the home State, and also for access to international monitoring entities of a judicial or non-judicial nature.

**6.** The main pertinent factors in terms of evaluating the possibilities for legal action in the host State are its national legislation, where the various avenues for action and the jurisdictional scope of its various court systems are described, and the contents of the international commitments that the State has assumed, including the expression of these in national law. As shown in the case studies related to the United States, the United Kingdom, and the Netherlands these host State possibilities vary from one State to another. One task for EJOs located in countries that may figure as home States is to construct a mapping of such possibilities and to make this available to other EJOs. One aspect of particular interest is the analysis of the economic costs of such proceedings in the home State, taking into account all of the pertinent factors (legal assistance, relocations, lodging and per diem costs for relocated persons, etc.) as well as the existing possibilities for covering such expenses. In some developed countries, financial assistance is available in this area. This type of help may come from public funds, or may come from law firms or law-related NGOs that are willing to assume the costs related to cases and to receive payment only in the event that litigation is successful.

**7.** Use of the ATCA in the United States to defend the environment against damages caused by transnational corporations presents both advantages and drawbacks. The advantages include the fact that if a claim proves to be successful and a judgment is entered involving payment of significant amounts of money – which can be both compensatory as well as punitive in nature – this also carries an easily understood message for shareholders, who can promote changes in the company's future behaviour. Such funds can also be accessed as economic reparations for any victims that may exist, as well as for the restoration of the environment itself. In addition, although not on equal grounds with criminal prosecutions, civil procedures can have a negative impact on the image of the company being sued. On the other hand, the main limitations of the ATCA route lie in the difficulties in actually obtaining a favourable decision, both on the basis of the merits of the claim, discussed further below, and because of the multiple procedural requirements and exceptions that can be used to block the jurisdiction of the courts. Also, even with a favourable decision, there can be great difficulties for the claimants in recovering the reparations established, unless the companies involved hold assets within the United States. Also, compared to criminal proceedings, civil actions often fail to emphasise the gravity of the facts related to a case when these involve irreversible damages to the environment and to human life and health.

**8.** Access to the United States courts under the ATCA remains an open issue pending the US Supreme Court's decision in the Kiobel case. If the decision ends up being favourable to the possibility of companies being sued, the underlying

**EJOs should create a roadmap of the possibilities offered within their own country at any given time, and should be prepared to make this available to EJOs in other countries. Special attention must be paid**

- to the international obligations that the State assumes by means of international treaties, and**
- to the economic cost of and financial means for the legal proceedings.**



issue will then become whether US courts will consider the prevention of serious environmental damages as a norm that can be protected under the ATCA. This could happen in two ways. The first is if environmental protection is considered to be within the category of *jus cogens*. This is already the aim of the International Law Commission, as seen in Article 40 of its Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC and the GA in 2001. The second way is through acceptance that, although violation of *jus cogens* norms may not be involved, environmental damages do not require a State-level author. In fact, an appreciable trend regarding liability in conventional international environmental law is that the costs of damages, under the “polluter pays principle”, should be borne by specific public or private operators who cause the damage, to the extent to which the cause can be assigned to them.

**9.** In recent decades, it has become evident that litigation before the domestic courts of European countries may become an effective route in seeking liability for transnational companies that violate human rights or cause environmental damages in developing countries. This avenue may represent a good alternative to claims based on the ATCA. Among the arguments in favour of this option are the difficulties that in many cases exist of accessing justice in the host State; the scarce guarantees offered under such countries’ judicial systems that judgments, if awarded, will end up being executed; and the limitation of such awards to the capital of the subsidiary companies. However, recourse to the home State’s jurisdiction also raises numerous problems, some derived from procedural or mercantile law, such as prescription periods, formal separation between a parent company and its subsidiaries, or forum non conveniens. With respect to the last of these, one positive element to take into account is the 2005 ruling of the Court of Justice of the European Union in response to the preliminary issue raised in the context of the *Owusu v. Jackson* case, which established that application of the principle of forum non conveniens is not compatible with EU standards of jurisdiction when a claimant domiciled in the EU is involved. Although it only affects the European Union, the doctrine established by the UK courts in the *Connelly* case could become significant in other countries subject to British Common Law such as Australia or Canada.

**10.** If the world’s most important MNCs used to have their parent companies in the North, i.e. in developed countries, patterns have recently been changing at an increasing pace. Companies from the so-called ‘emerging’ countries – particularly China and India – are ever more present in the transnational struggle for access to natural resources. However, the extra-territorial reach of their domestic jurisdiction in cases of transnational environmental litigation remains largely to be explored, just as the prospects of increasing the involvement of their MNCs in frameworks of corporate accountability. On the other hand, little as they are, access-to-justice standards for transnational litigation have basically been attained in Western legal cultures. But may they be extrapolated to other legal cultures and systems in an increasingly multipolar world? In relation there to, another issue for consideration raised by cases of litigation in countries far away from the place where damages occur, is the impact, from a culture of law perspective, of the tendency for cases involving environmental and health-related damages caused in developing

**Litigation before the domestic courts of European countries and access to the United States courts under the ATCA may become effective routes in seeking liability for transnational companies. Access-to-justice standards for transnational litigation have basically been attained in Western legal cultures. But may they be extrapolated to other legal cultures and systems in an increasingly multipolar world?**



countries to be brought before the courts of certain developed countries, in so far as these developed countries apply their own legal concepts and standards. This is likely to contribute to the perpetuation in other countries of a Westernised legal culture that could in some cases be very inappropriate within very different socio-economic contexts. The export of such a culture could give rise to the paradox in which the most satisfactory judicial alternative for guaranteeing the rights of individuals or groups in specific cases could have corrupting effects on a more general scale, in the sense that a type of “acculturation” of other judicial models could take place, or perhaps in some cases a process of empowering and reproducing existing acculturation. This is the case in many post-colonial countries, where the judicial system is entirely inspired by the system of the corresponding colonial power. Although this phenomenon may already be irreversible in the majority of cases, this concern takes on additional weight when the litigation involves victims who belong to indigenous peoples or communities, who tend to maintain very different cultures in terms of the concepts, forms, functions, and instruments of justice.

**11.** States have the obligation to protect human rights and to monitor the activities carried out by companies within their territories or under their jurisdictions. Regional human rights systems have been created as mechanisms for overseeing compliance by States with the obligations they have assumed internationally for guaranteeing specific rights.

The European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples’ Rights therefore exist not as civil or criminal tribunals that can directly punish those who cause environmental damages. They have the authority to determine the violations committed by States that participate in the respective legal frameworks, and can establish the corresponding reparations in favour of the victims, when victims exist. They can also dictate provisional measures to protect persons threatened for defending human rights, and have indeed done so on certain occasions, although not always with success.

These systems therefore represent powerful tools that can be used in favour of EJOs, as long as it is possible to connect environmental damages with the violation of the human rights recognised within the respective frameworks for legal action of these regional institutions (courts and commissions, in the African and Inter-American cases). The African framework is particularly interesting in this sense for its direct recognition of the right to a healthy environment and for its recognition of collective rights. The requirements and procedures established within each of these systems should also be taken into account.

**12.** Although the cases studied do not reflect the use of the instruments contained in environmental regimes, all of them have a Secretariat at which information can be addressed regarding the possible non-compliance of a State. Also, in some cases, treaty bodies have been established to monitor compliance with the obligations assumed by States under international conventions. However, only States or the Secretariat may trigger such a compliance procedure, and it is still unusual for individuals or NGOs to be able to address these bodies directly,

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with the remarkable exception of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). Furthermore, the area of international treaties covering human rights of a universal scope includes a set of monitoring entities that can be appealed to under certain circumstances, the UN's Human Rights Committee and Committee on Economic, Social and Cultural Rights being key among these. Although all of these procedures have limited authority in terms of resolving specific cases, their role in the interpretation of treaties has become very relevant for other cases that may arise in the future.

**13.** The special procedures created by the UN Commission on Human Rights and currently managed by the UN Council on Human Rights – special rapporteurs, special representatives, working groups, and other figures – are highly flexible mechanisms to which EJOs can easily gain access. Although their mandate is limited and they lack any binding powers, these representatives or special rapporteurs have a certain degree of autonomy for visiting countries, questioning governments, becoming involved in specific cases of human rights violations, gathering information and performing studies, formulating recommendations related to their specific scope of responsibility, and publicising their conclusions and accusations through the periodic reports they produce. The mandates of many of these have a direct connection with environmental issues, such as in the case of the Special Rapporteur on the right to food, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the rights of indigenous peoples, the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, the Special Rapporteur on the human right to safe drinking water and sanitation, the Working Group on transnational corporations and other business enterprises or the Expert Mechanism on the Rights of Indigenous Peoples. A certain degree of coordination is also maintained between these mechanisms, which allows several of them to take simultaneous, coordinated actions in the context of a single problem.

**14.** Although it is not easy to meet the security and financial conditions needed to organise a court of opinion, doing so is recommended as long as the following requirements are met: a) there is a sufficiently serious scenario involving environmental damages and other human rights violations; b) there has been a demonstrated ineffectiveness of national judicial means for protection of the rights of victims and of the environment; c) the case has the support of numerous NGOs and victims organisations, with the victims in turn having significant social support. The process that takes place prior to the event should make use of discussion and debate to focus on clarifying the strategies for political and legal action, and to improve cohesion among the organisations. The decision issued by the court of opinion or opinion tribunal, in addition to generating effective publicity when released, can be a very useful and legitimate instrument for later social-awareness work and for allowing the organisations involved to exert political pressure both nationally and internationally.



**15.** The persecution of environmental defenders is a generalised phenomenon, as demonstrated by several of the cases studied. Protection of the environment requires attention to be paid to the protection of environmental defenders, who play an essential role, as recognised by the UN General Assembly in its 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms. To provide this protection, institutional mechanisms for protection must be strengthened at the national and international levels, and existing national legislative instruments must be improved. The UN Declaration states that it is the duty of States to adopt any legislative or administrative measures, or any other type of measures that may be necessary, in order to ensure that the rights and liberties that it contains can be guaranteed. However, the best way to protect environmental defenders is through the enactment of strict and effective legislation related to the impacts of industrial activities on the environment, and related to respect for the human rights of all people, especially the rights of access to information and participation, including the right to free, prior, and informed consent of the communities affected by industrial activities.

**16.** EJOs that are based in the EU have an important role to play in relation with environmental harm caused by European companies within the EU itself. However, they can also play a vital role in supporting claims for environmental justice that are related to European companies operating in other countries by studying the ways in which particular aspects of EU policies can have an effect. Among these, the following are particularly noteworthy: the concept of corporate social responsibility for European companies that have foreign operations as outlined in the framework proposed by the Council on Human Rights called “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”; the possibilities offered by European norms related to environmental responsibility; the environmental impact assessment (EIA) or the Environmental Management and Audit Scheme (EMAS) to regulate EU support for European companies that operate in foreign countries; the possibilities for requiring EU companies to apply the standards contained in various international environmental systems and in particular the instruments that exist under the UN Convention on Biological Diversity regimen; the relationship between the Charter of Fundamental Rights of the European Union – in which article 37 confirms that EU policies will integrate and guarantee an elevated level of protection and quality improvement for the environment in conformity with the principle of sustainable development – and the European Convention on Human Rights and its possible extra-territorial scope; the promotion of the harmonisation of private international law standards related to jurisdiction over civil and mercantile matters and the laws applicable to such litigation, along the lines of facilitating claims made in EU countries related to environmental damages caused by EU companies and their subsidiaries in other countries; and the possibilities of development of Directive 2008/99/EC of the European Parliament and Council, of 19 November 2008, on the protection of the environment through criminal law, from the perspective of its extra-territorial scope in relation to serious environmental damages caused by EU companies in foreign countries.

**The best way to protect environmental defenders is through the enactment of strict and effective legislation related to the impacts of industrial activities on the environment, and to respect for the human rights of all people, especially the rights of access to information and participation, including the right to free, prior, and informed consent of the communities affected by industrial activities.**



**Corporate social  
responsibility and  
information  
shareholders of large  
MNCs can also play a  
vital role in supporting  
claims for  
environmental justice**

**17.** Finally, the case studies show the importance of keeping the shareholders of large MNCs informed regarding the impacts of industrial, financial, and commercial activities on the environment and human rights. The shareholders in these companies are extremely diverse, and it is both possible and worthwhile to identify those groups of shareholders who, whether by being more socially or environmentally aware or more conscious of the risk to their investments represented by possible damage to a company's corporate image through its implication in serious environmental damages or human rights violations, could themselves exert internal pressure in favour of a change in a company's behaviour.



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