

Corporate Complicity, Access to Justice and the International Legal Framework for Corporate Accountability

Legal Seminar Organized by the ICJ with the Support from Geneva for
Human Rights, FIAN International and Al-Haq

31 May 2013

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I. Introduction

The seminar was convened to provide a space for in depth discussion of specific cases that illustrate many of the legal and political obstacles that victims of corporate human rights abuse face in their pursuit of justice.¹ It is one among several activities the ICJ is undertaking with a view to assessing the need for a new international instrument in the field of business and human rights. The seminar was held under Chatham House rules.

The meeting was opened with an introduction by the ICJ, recalling that so far ICJ work has focused on three components: the development of international standards on business corporations' human rights responsibilities, development of mechanisms of redress- informal or legal (courts/treaty bodies)-, and the promotion of national implementation and international cooperation. It was recalled that, at the UN, after the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, elaborated and adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003 failed to gain political traction and were not taken up by the UN Human Rights Commission or its successor body, the Human Rights Council, John Ruggie was appointed as Representative of the Secretary-General to take up the work in the area of business and human rights. He undertook to develop a framework for business and human rights, and subsequently elaborated the Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in a consensus resolution (17/4) in June 2011. The ICJ considers this instrument to be weak and, in some respects, conceptually problematic. Nonetheless, the framework and Guiding Principles do constitute a step forward for international efforts in this area and a basis for more substantial normative development in the future.

¹ The facts and law of the cases presented in the meeting are reproduced here as they were presented and do not imply any judgement or endorsement of them by the ICJ and/or other participants.

1. First Session: Challenges to establishing legal liability for transnational corporations

The first session was devoted to trends and challenges in making effective legal liability for transnational corporations for the commission of crimes defined under international law. The discussion was kick-started by a presentation of real cases.

1.1. The Case Against Riwal Group/Lima Holding B.V.: Corporate Complicity in International Crimes

Background on the Riwal Case

A participant explained that Lima Holding B.V. is part of the Riwal Group, a Dutch private rental company specializing in the field of vertical transportation. The company rents out mobile cranes and aerial platforms for use in construction work. In 2006, a Riwal mobile crane was seen constructing the Wall around the West Bank village of Hizma in the Occupied Palestinian Territory (OPT). A year later, Riwal's construction equipment was witnessed again being used to build the Wall next to Al-Khader village in the West Bank. Subsequently, in 2009, residents of the West Bank village of Bruqin saw Riwal aerial cranes constructing factories in the Ariel West settlement industrial zone near their village.

In Hizma and Bruqin the Wall was built on privately owned Palestinian land and led to the expropriation of 4418 dunums² and 330 dunums of land respectively, and also entailed the uprooting of olive trees and the destruction of ancient artisan wells. The Wall in both locations cuts off the village inhabitants from hundreds of dunums of their most fertile lands. In Hizma, formerly an economically thriving village, the Wall separates the village from the olive groves on which it depended. In Al-Khader, cultivation of the village's fruit trees and grapevines has been made virtually impossible. Similarly, the establishment of the 'Ariel West' settlement on Bruqin's lands has led to the loss of pastoral land and, along with the establishment of other settlements around Bruqin, the village has lost access to almost all of its traditional sources of income.

The law on Complicity in war crimes and crimes against humanity

Under international law, the West Bank, including East Jerusalem, is occupied territory. As the Occupying Power, Israel must comply with its legal obligations under international humanitarian law, particularly the Fourth Geneva Convention, and human rights law, including the human rights treaties to which it is party. Israel's settlement policy and the construction of the Wall entail confiscation of private property,³ the destruction of private property without fulfilling the standards of military necessity,⁴ and the transfer of its own citizens to the occupied territory,⁵ which amount to grave breaches of the Fourth Geneva Convention. There is an obligation to criminalize Grave breaches under the Fourth Geneva Convention, making them crimes under international law. They are also classified as war crimes under the Statute of the International Criminal Court.

In 2004, an International Court of Justice Advisory Opinion on the Wall held not only that Israel's construction of the Wall in the OPT is unlawful, but also that Israel must stop such construction, dismantle those sections built to date, and provide reparation for the damages

² A *dunum* is equal to 1000 square meters.

³ Convention (IV) respecting the Laws and Customs of War on Land and its annex, *Regulations concerning the Laws and Customs of War on Land*, the Hague, 18 October 1907, article 46.

⁴ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, article 53.

⁵ *Ibid*, Article 49(6)

it caused. The Court also found that third-party States must not recognize the Wall as legal, must not help in maintaining it, and must ensure that Israel respects its obligations under international law, including both international humanitarian law and human rights law.⁶

The International Crimes Act⁷ in the Netherlands prohibits the commission of war crimes and crimes against humanity by Dutch nationals, including companies. Acts that amount to complicity in crimes, such as the facilitation or the aiding or abetting of crimes are also criminalized.

Submission of a criminal complaint to the Dutch public prosecutor

The participant said that in March 2010, instructions were given to Dutch lawyers in the Netherlands to submit a criminal complaint to the Dutch public prosecutor alleging that Dutch company Riwal was complicit in the commission of war crimes and crimes against humanity through its construction of the Wall and illegal settlements in the occupied West Bank.

Riwal was also accused of complicity in the crimes of persecution and *apartheid*, which are punishable under the International Crimes Act, and also of being responsible for acts that were part of widespread and systematic violations of international law committed by Israel against the civilian population.

Dutch Public Prosecutor's Decision

On 14 May 2013, after three years of investigations, the Dutch Public Prosecutor announced the decision to dismiss the case against Lima Holding B.V., member of the Riwal Group and owner of the Israeli branch, for involvement in Israeli war crimes. In analysing the company's illegal conduct, the Prosecutor weighed Riwal's contribution against the entire settlement enterprise including the Wall, and deemed such contribution as minor. The Prosecutor claimed in the decision that the restructuring of the company was sufficient to terminate activities with Israel.

The case against Riwal represents an initial warning to European companies involved in business with Israeli counterparts in the OPT. Among the positive outcomes the fact was underlined that Riwal Executives came under legal and political scrutiny. The publicity and public pressure surrounding the case meant that Riwal took steps to disassociate itself from its subsidiary and its operations in the OPT (now an Israeli company).

However, the unsatisfactory decision illustrates the need for States to implement measures that ensure that private actors under their jurisdiction do not contribute in any way to violations of international law that take place in other jurisdictions. In the Riwal case, two warnings from the Dutch Ministries of Foreign Affairs and Economic Affairs to the company were not sufficient for the company to take meaningful measures. Action by the prosecutor, seizure of evidence in Riwal's office and its Executives' homes, combined with the inevitable publicity in this kind of cases led to bold company action and change of behaviour.

The political context and the ascertaining of facts in this case as in others under analysis are particularly challenging. The Riwal case highlights the need for stronger domestic access to justice for Palestinian victims in Israel, which has experienced limitations. The Dutch prosecutor was not totally confident in obtaining the necessary evidence for a conviction,

⁶ *Advisory Opinion of 9 July 2004*, International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, p. 136.

⁷ International Crimes Act 2003 (Wet Internationale Misdaden), article 2(2). See also *Access to Justice: Human Rights Abuses Involving Corporations- The Netherlands*, International Commission of Jurists, Geneva, 2010, p. 7.

much of which was located in the OPT and Israel and their collection would require cooperation from the relevant authorities as well as important resources. In weighing all factors, the prosecutor decided not to move forward.

One participant noted that in the Netherlands the legal system recognizes criminal liability for legal entities, including corporations. Such recognition is typical in common law countries and is increasingly accepted in countries following the tradition of civil law, but not in a uniform way. But national jurisdictions do not apply the same standards of criminal responsibility for corporations, even if they recognize criminal liability in general.

In a case challenging the legality of a concession contract signed by Israel and the corporation Citypass –created by Israeli companies and French Alstom, Alstom Transport and Veolia to build and exploit a tramway in Jerusalem- before the French judiciary, the High Court of Versailles in appeal held that the provisions of international humanitarian law do not apply to the concerned companies. Among the international humanitarian law provisions the companies had allegedly breached were those concerning grave breaches of the IV Geneva Convention (i.e. transfer of population to occupied territory). In this civil case, the Court held that the provisions would not apply to companies under any title, whether as treaties, custom or *jus cogens*, but did not address the issue of whether the companies conduct would constitute international crimes under French law.⁸ In France, the Penal Code recognizes criminal responsibility for legal entities such as corporations.

States such as Australia and Canada have legislation applying international crimes defined in the Rome Statute to corporate legal entities, but there is not known practice of concrete cases. Whether international criminal law, or, more broadly international law, applies to and binds corporations was also discussed in the *Kiobel vs Shell Inc* case recently dismissed by the Supreme Court of the United States of America, without a clear outcome.⁹ The Supreme Court dismissed the case for lack of jurisdiction under the Aliens Tort Statute, stating that the “presumption against extra-territorial” application of laws also applied to it, but paradoxically did not address the main argument used by the Appeals Court for the Second Circuit to dismiss the case, namely that corporations were not bound by international law and cannot therefore be sued for violations of “the law of Nations”. It was proposed to the meeting that a suitable way how to overcome this divergence of approaches and standards across jurisdictions would be to construct an international standard as a common parameter for all countries. These standards should be contained in an international instrument.

1.2.The Mubende v Neumann Gruppe Case in Uganda

A participant presented information about a case concerning a Ugandan community and German coffee company. In August 2001 the Ugandan army violently expelled more than 2,000 people from their land (2524 ha) in order to lease it to Kaweri Coffee Plantation Ltd., a 100% subsidiary of the Neumann Kaffee Gruppe (NKG) based in Hamburg/Germany. It would appear that the Government acted pursuant to an agreement with the foreign investor under which they committed to provide the land clear of encumbrances. Until today, the evictees have not been compensated for the eviction and the loss of their property. They live in poorer conditions than before the eviction.

⁸ *Affaire Association France-Palestine Solidarité AFPS c/ Société Alstom Transport SA*, Cour d’Appel de Versailles, 22 March 2013

⁹ *Esther Kiobel v. Royal Dutch Petroleum Co.*, Supreme Court of the United States. Petition No. 10-1491 (Shell), Judgment of 17 April 2013.

http://www2.bloomberglaw.com/public/desktop/document/Kiobel_v_Royal_Dutch_Petroleum_Co_No_101491_2013_BL_102043_US_Apr/1 (Accessed 29 May 2013)

The eviction

The process of eviction was reported as brutal and inhuman by the affected communities. The villages were stormed by military personnel and their inhabitants were violently expelled from the area. The evictees report that they were forced to leave at gunpoint and that some of them were beaten. The military personnel conducted arson, and inflicted severe body harm on the members of the population during the eviction. Houses were burnt and demolished, including the private clinic with all the equipment and six churches, movable properties were looted and crops were cut down and uprooted. The building of Kitemba primary school is used as headquarter of the company and no other primary building school has been provided for educational needs.

In 2002 the evictees brought the case to the Ugandan High Court. It took great courage for the leaders to convince, organize and educate the community members about the legal options available and the steps to be taken. Important evidence had been hidden by one of them underground when the attack was imminent and that helped in the case. An important challenge was to obtain legal advice and representation, and the financial means to do so and sustain the legal strategy. They initially hired a lawyer who was later appointed as a Minister of Investment promotion, despite the apparent conflict of interest. Once again through the support of solidarity groups such as Action Aid and FIAN the plaintiffs managed to hire another lawyer.

The case at Nakawa High Court (Kampala) was delayed since 2004 due to a series of obstruction and delaying tactics as well as a legal and judicial system hostile to the plaintiffs. Government officials, when receiving notice of legal suit in 2002, attempted to intimidate and discourage the villagers saying that the process would last forever and they will never get satisfaction. There were also reports of witnesses who were intimidated or offered bribes. In general, the villagers were fighting against a rich company and a strong government. The last judge had a different attitude and expedited the process by requesting written statements by the witnesses who did not want to appear for fear to reprisals.

Following the displacement there was an increase of illnesses and deaths as these internally displaced people lost much of their access to clean water and health care. Many of the evictees have been living since then on the border of the plantation and have constructed makeshift homes there. In order to sustain their livelihood, some evictees have found shelter on the neighbouring land for temporary small-scale farming. However, they only have small plots of land for farming which are insufficient to provide their families with adequate food.

The eviction would have violated international standards and also domestic law. The obligation to respect the right to food, which requires the State of Uganda not to interfere with the existing individuals' access to and availability of adequate food may have been violated. The Ugandan Government's acts would be a violation of the Ugandan Constitution (art 26, 29(2-a) and 237(1, 3-a, 8) which states that no person shall be compulsorily deprived of property unless it is necessary for public use or in the interest of defense, public safety, public order, public morality or public health and prior to the taking of possession or acquisition of the property prompt payment of fair and adequate compensation has to be made.

Many of the evictees were lawful customary tenants who are guaranteed security of occupancy under the 1998 Land Act of Uganda. According to this Act in the article 29(2-a) the evictees were *bona fide* Occupant of the land. This means that they had occupied and utilized or developed the land unchallenged by the registered owner or agent of the registered owner for twelve years or more. In the Mubende case the evictees lived in the land more than 12 years unchallenged by anyone.

Judgment

On March 28th, 2013, the High Court in Kampala, Uganda ordered that compensation in the amount of approximately eleven million Euros be paid to the 2,041 evictees of land now occupied by the Kaweri-Coffee-Plantation, which is owned by the German Neumann Gruppe. In accordance with the judgment, compensation is not required directly from the defendants themselves, but rather from the lawyers of the German investors. However, in his final remarks the High Court judge harshly criticized the German investors for neglecting their human rights duty to perform due diligence:

“The German investors had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honourable businessman and investors they should have not moved into the lands unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them. But instead they were quiet spectators and watched the drama as cruel and violent and degrading eviction took place through partly their own workers. They lost all sense of humanity.”¹⁰

Furthermore, the judge stated that the evictees were lawful occupants of the land prior to the leasehold of the land by NKG; that the managers of Kaweri had direct and constructive knowledge that the tenants were to be evicted and were indeed evicted; and that the evictees were not compensated.

The judgment engendered an intense debate in the Ugandan media because it was primarily against the lawyers who were not parties to the case. It is unclear why the judge would acquit the Ugandan government of all responsibility for the eviction carried out by the Ugandan Army, even though the officer in charge declared that the Resident District Commissioner, the regional representative of the government, had ordered the eviction.

After a process that has lasted eleven years, this judgment is considered a milestone for the evictees of the Kaweri-Plantation. The judgment has been appealed, but the Mubende community is confident their position will prevail.

Participants in the seminar highlighted the common issues between this and the previous case, such as the fact that company alleged abuses occur in environments of impunity and permissiveness, lack of independence of the judiciary with a judicial system hostile to the victims, a proactive and well-organized strategy to preserve evidence before the eviction (certain evidence was buried underground by one community leader). Strong community organisation and activism plus active solidarity by international groups and networks make a difference.

In relation to the transnational element of the cases, the Mubende case was not pursued before German courts but before the German National Contact Point –NCP for the OECD Guidelines for Multinational Enterprises. It appears that plaintiffs and their advisors considered that the German legal system did not permit legal action against the parent company (i.e. Neumann Kaffee) on account of its role in the wrongdoing by its subsidiary abroad (Kaweri Inc of Uganda). Instead, plaintiffs decided to have recourse to the German NCP where they filed a complaint in June 2009 alleging the forced eviction and the company’s unwillingness to engage in dialogue and exert influence on the Ugandan government. The

¹⁰ *Baleke Kayira & 4 Ors v Attorney General & 2 Ors*, High Court of Uganda, Civil suit No. 179 of 2002, [2013] UGHC 52, Judgment of 28 March 2013.

NCP accepted the complaint for further examination and in its final statement¹¹ it stated that its mediation created a constructive dialogue where each party was able to present its view, but it is unclear whether that dialogue had occurred in meetings face-to-face. What is clear is that there was a final joint discussion in December 2010 in which both parties presented their views and committed to reach an out of court settlement. On this basis and on account of the company's philanthropic activities, the NCP reached the conclusion that Neumann Gruppe had met the demands by plaintiffs. Interestingly, the NCP concludes that "there were no indications that Neumann Gruppe could not believe in good faith that it had acquired the land for use as the Kaweri Coffee Plantation from the Ugandan investment authority free of encumbrances and claims of third parties." It also urgently called on plaintiffs to refrain "from public attacks against Neumann Gruppe".

The NCP is situated within the Ministry of Economics that has as one of its objectives the promotion of trade and investment, which some participants suggested as a conflict of interests. Other participants highlighted that such is the case also for the Swiss and Brazilian NCPs, among others. The NCP treatment of the case also suggest that it had difficulties to position itself legally, whether as a mediation or as an adjudicator, and about the nature of the claim. There were issues of lack of capacity and also uncertainty as to their powers and procedure among NCP staff. Many NCPs, or staff within it, assume that their work is one of promotion of the guidelines and mediation when disagreements emerge and, it was said, these cannot be said to be remedial mechanisms. There were also issues that arose concerning jurisdiction: is the German NCP entitled to deal with a case where the primary perpetrator of the eviction and property (houses) destruction was the Army (Government)? But it was also said that the company personnel destroyed crops and trees.

By reference to the "human rights due diligence" standard set out in the Guiding Principles, some comments pointed to the need to address company social standards and their implementation. Whether the parent company Neumann Kaffee Gruppe was legally guilty or not, at the very least it seems to have ignored its due diligence responsibilities *vis a vis* the subsidiary's actions in Uganda. On these regards, participants highlighted the stark contrast between the holdings of the Ugandan High Court judge and the German NCP as to the probable knowledge the company should have had in the circumstances.

A participant noted that at the very least the responsibility of the State for violently evicting the locals is clear and there should be some reflection as to ways to make that responsibility effective.

Some participants spoke about the broader issue of business human rights responsibilities and the state of the debate. The key issue seems to be the implementation in a transnational setting. It is clear that German enterprises have responsibilities but the means to enforce them are lacking. There seems to be an urgent need to work in a process of codification of rules in this area. Another participant observed that the Human Rights Council is playing a role in this field with the adoption of the Guiding Principles on Business and Human Rights based on the tripartite "Protect, Respect and Remedy". A subsidiary body, the Working Group on Business and Human Rights, is now in charge of disseminating and promoting its implementation. But the purportedly non-binding character of the rules contained in the Guiding Principles is a weakness, and continued civil society pressure is needed to make progress inside the Human Rights Council.

On the topic of implementation of standards, one participant suggested the need to urgently reflect on the kind of instrument that is needed to enable States to make business

¹¹ Final Declaration by the NCP for the OECD Guidelines for Multinational Enterprises regarding a complaint by Wake up and Fight for your Rights Madudu Group and FIAN Deutschland against Neumann Gruppe GmbH, Berlin 30 March 2011.

responsibilities to respect human rights –currently of non legal nature- a legal requirement, including when operating abroad. Another participant suggested that it would be preferable to work on the use of the Guiding Principles before the human rights treaty bodies and eventually show with specific cases that the Principles are not working. A final intervention in this segment reminded all that the rules of international humanitarian law and broader human rights treaties on genocide, *apartheid*, and other crimes should be also factored in when discussing corporate legal responsibilities.

2. Second Session: Challenges to jurisdiction, investigation and enforcement of judgments in transnational cases

2.1. Summary of the Texaco (Chevron) case

One of the participants explained the background and facts of this case. The city of Nueva Loja, commonly known as Lago Agrio, is the capital of the Province of Sucumbíos in Ecuador. It is located in the northeast part of the country, in the Amazon region. Since 1967, it became one of the most important cities of Ecuador due to oil exploitation and extraction.

In 1964, the Republic of Ecuador granted a 1.400,000 acres of concession in the Oriental Region to Texaco (subsidiary of Texaco Inc.), and Ecuadorian Gulf Oil Company (GULF), for the exploration and production of oil. Texaco was designated as operator of all the activities in the oil fields. In 1972, the first concession was reduced to 480.000 acres; and at the same time, the Ecuadorian State Petroleum Corporation (CEPE in Spanish) signed the Joint Cooperation Agreement (consortium) with Texaco and GULF, and the Government acquired 25% participation in the venture. In 1976, CEPE acquired the remaining 37,5% of participation that belonged to GULF, holding a total of 62,5% of shares in the consortium.¹² Texaco continued operating the oil fields until 1990. During this period, the company drilled 399 oil wells, and built 22 drilling stations. The concession granted to Texaco ended in 1992, and Petroecuador (formerly CEPE) took over the control of the oil fields.

In 1993, a group of inhabitants from the Ecuadorian Amazon region initiated a class-action suit against Texaco in the Southern District Court of New York (*Aguinda vs Texaco Inc.*).¹³ The plaintiffs argued that the negligent company had seriously endangered the health, culture, and livelihoods of the Ecuadorian Oriente inhabitants. In 1995, legal proceedings started in the United States and Texaco signed an environmental remediation agreement with Ecuador. The remediation programme ended in 1998 with an agreement between Texaco Petroleum Company and Petroecuador, in which the State of Ecuador released Texaco from all future obligations or liabilities.¹⁴ This agreement did not involve third private parties, although some have disputed this interpretation. It was said that the General State Comptroller and others found the remediation programme not in compliance with technical standards. In October 2001, Texaco was merged into Chevron.¹⁵

The legal process that started in New York lasted for 10 years. In the United States courts the company apparently argued that courts of justice in Ecuador were capable of guaranteeing due process rights and access to justice for both Texaco and the plaintiffs. Because the courts in New York did not have access to necessary witnesses and evidence the court did not consider itself to be the convenient forum to review the case. In 2003, the New York Court

¹² Judicial Inspection Guide Shushufindi 04, July 27, 2005, available in digital version: http://www.texaco.com/sitelets/inspections/es/information/shushufindi/SSF-04_Judicial_Inspection_Guide_27-Jul-05.pdf, (Accessed 20 May 2013)

¹³ *Maria AGUINDA, et al., individually and on behalf of all others similarly situated, Plaintiffs v. TEXACO, INC.*, United States District Court, S.D. New York. Petition N° 93 CIV 7527 (VLB), Judgment of 29 April 1994.

¹⁴ Information on past activities of Texaco Petroleum Company in Ecuador. <http://www.texaco.com/sitelets/ecuador/es/history/background.aspx>, (Accessed 22 May 2013)

¹⁵ Chevron Company's History. <http://www.chevron.com/about/history/1980/>, (Accessed 22 May 2013)

declared itself as *forum non conveniens* and decided that Texaco must recognize and respect the Ecuadorian judicial system as the company itself had pledged to.

On 7 May 2003, the plaintiffs filed a civil action against Texaco in the Provincial Court of Justice of Sucumbíos (formerly Superior Court of Justice of Nueva Loja). It was the first time in which a civil action against a transnational company had been submitted by private parties in national courts.¹⁶ During trial, nearly 40 witness' testimonies, 106 experts' reports and more than 80.000 pages of chemical analysis of soil, water and sediments were incorporated and reviewed in the record. Likewise, various studies of the inhabitants' health were made. The judges also carried out an inspection of the damages produced in 54 locations formerly operated by the company.¹⁷ On the basis of the large amount of scientific and expert evidence of the environmental damaged (80.000 lab analysis), on February 14 2011, the President of the Provincial Court of Justice of Sucumbíos ruled against Texaco, and ordered it to pay 9.5 million dollars as compensation for the environmental damage caused, which would be used in programmes of soil cleaning, and the building of potable water and health systems in the region. The judge also held that the company should publicly apologize for its deceiving conduct in the process within the next 15 days, or else be subject to a penalty that would double the amount for compensation. The order was not heeded by the company, resulting in Texaco's debt rising now to 19.000 million dollars. In July 3rd, 2012, the Provincial Court of Sucumbíos confirmed the ruling at the appeals level.

Meanwhile, in 2004 Chevron-Texaco started arbitration proceedings against Ecuador in the United States. In its petition, the company claimed that the agreement signed between Texaco and Ecuador stated that any dispute between the parties should be settled by arbitration in New York, and further released the operator (Texaco) from any liability for harm, claim or demand due to the performance of its activity. In June 2009, the United States Supreme Court affirmed the decision taken by the New York District Court of Appeals and ruled against Texaco's request of arbitration.¹⁸ However, Chevron started a new arbitration proceeding under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules arguing Ecuador's breach of the Treaty on reciprocal protection of investments signed with the United States as well as the lack of due process of law and impartiality in the proceedings before Ecuadorian courts. In February 28th 2012, the Arbitral Tribunal accepted Texaco-Chevron's petition and ordered Ecuador to stay any enforcement of any judgment against the company, which some see as an attack on the separation of powers as it requires the Executive branch to intervene in a judicial process.

The judgement is proving difficult to enforce due to a number of factors, it was said. Chevron no longer holds assets in Ecuador that could be eventually seized to guarantee payment to plaintiffs, political attacks and blackmail against the Ecuadorian Government, the integrity of the Ecuadorian judicial process and the victims and their representatives have also taken place according to some participants. Finally, it was said that the arbitration started by Chevron lacks legal basis as the bilateral treaty on investment protection entered into force after Texaco ended its activities in Ecuador.

During the general discussion, some seminar participants highlighted the significance of addressing the use of international arbitration proceedings as a way to challenge measures intended to improve human rights protection and, as in the case at issue, judicial measures granting remedies to plaintiffs. Such use would seem to be on the increase as illustrated also by on-going international arbitral proceedings in cases such as tobacco company Phillip Morris

¹⁶ Texaco Tóxico, *History of a Trial*. <http://www.texacotoxico.org/historia/>, (Accessed 23 May 2013)

¹⁷ Ibid.

¹⁸ Procuraduría General del Ecuador, *New York District Court Definitively Rejects Chevron's Claims Against Ecuador*, CS.115, July 23, 2009. <http://www.pge.gob.ec/es/boletines/archivo-2009/julio2009/1292-boletines-de-prensa-julio-de-2009-6.html>, (Accessed 23 May 2013).

vs Uruguay, and another similar case against Australia. News concerning threats by investors in Costa Rica to start arbitration to request compensation for the closing of their open mining pit by a decision of the Supreme Court if confirmed would stress the need to further reflect on options to safeguard the integrity and effectiveness of judicial remedies in this context. International arbitration is often seen as a form of judicial process to which States frequently commit through treaty. In principle it would not be exceptional that an international tribunal adopts a holding about the consistency of a domestic judge ruling with international law, but questions may be raised as to the appropriateness of having international tribunals created to enforce investment protection rules also ruling on human rights related matters. It would be for to States to craft rules that would ensure the integrity of each process without undermining the other.

One participant highlighted the advantages of the arbitration system that enjoys an international legal framework that endows the awards with high chances to be enforced: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Another participant disagreed as to the convenience of using arbitration proceedings to enforce human rights, as exemplified in the case of Chevron, which is claiming the violation by Ecuador of its rights to due process and a fair trial.

The Chevron- Ecuador case also highlights the pending question about the use of doctrines such as *forum non conveniens* in certain jurisdictions as a bar to access justice by foreign plaintiffs. This doctrine is no longer in use within the European area as a result of the enactment of the Brussels II Regulations that assign automatic jurisdiction to European courts over civil and commercial cases concerning a subject domiciled within one European country. However, it is still in use in a number of other jurisdictions, such as Canada, United States of America and Australia. This fact illustrates a divergence of approaches to jurisdiction and to the use of judicial prudential doctrines across jurisdictions that need to be addressed.

Other participants also mentioned the need to reflect on extraterritorial obligations of States (ETOs). These concern the obligation of States to respect human rights beyond their own borders, to protect and fulfil them. Obligations in the extraterritorial context require each State to provide judicial cooperation to others in the investigation and, as appropriate, prosecution and sanction of offending corporations or corporate managers. It was submitted that ending impunity in the context of corporate abuse of human rights requires such cooperation which can only be brought about through an appropriate international legal framework similar to the New York Convention for arbitral awards, the UN Conventions on Corruption, Convention on Human Trafficking and similar others.

One participant linked the issues with a reflection about ending impunity for human rights violations. To end impunity we need adjudicatory mechanisms that can investigate and reach decisions that are enforceable. Existing rules on corporate human rights responsibilities are not enforceable and their inobservance is not justiciable, which underscores the need for further reflection and elaboration of international standards on access to justice and the need to focus on and listen to the victims.



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