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THE HEALTH OF NATIONS: ECUADOR’S TWENTY YEAR
CRUSADE TO ESTABLISH ENVIRONMENTAL HUMAN
RIGHTS AS CUSTOMARY INTERNATIONAL LAW

ANNIE WILKINSON**

In developing governments around the world the lure of economic stimulus entices leaders to invest in projects that could relieve them of chronic poverty and set their economies on a trajectory to prosperity. These communities, consisting most often of low-income and minority demographics, suffer disproportionately from the impacts of hazardous wastes and toxic chemicals as compared to other communities across the world. In the 1960s, Texaco Petroleum began extensive exploration and extraction of crude oil in a region of the Amazon rainforest formerly inhabited solely by indigenous peoples native to northeastern Ecuador. There is no dispute the events that took place in the region in the subsequent thirty years caused an ecological disaster that permanently endangers the indigenous peoples and the once-pristine region of the Amazon. Agreement on the issues of the environmental catastrophe ends there. In 1993, a group of Ecuadorian plaintiffs filed suit on behalf of the indigenous communities harmed by Texaco’s operations. Texaco argued for the removal of the case to Ecuador whose judiciary, the company argued, was perfectly capable and more suitable of resolving the dispute. In 2001, The Chevron Corporation acquired Texaco and their lengthy litigation in Ecuador. In February 2011, Ecuadorian plaintiffs obtained an 18 billion dollar judgment in an Amazon Provincial Court and suddenly the ‘perfectly capable’ Ecuadorian judicial system became a scapegoat and the avenue of Chevron’s appeal to enjoin enforcement of the judgment. This article insists, as a general theme, that the United States address the inequities of U.S. multi-national corporations’ behavior in communities where there is a substantial need for environmental and human rights protection via the Alien Tort Statute.

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I. INTRODUCTION

The environmental justice movement attempts to address the inequities of economic development in communities where there is a substantial need for environmental and human rights protection.¹ These

¹ See Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413 (2006).

communities, which often consist of low-income and minority demographics, suffer disproportionately from the impacts of hazardous wastes and toxic chemicals as compared to other communities across the world.

During the 1960s, an environmental justice case developed in the Lago Agrio region of Ecuador. An American multinational corporation physically invested itself in the developing nation of Ecuador, whose government was weakened by tyranny and poverty. The American corporation befriended Ecuador's government, contracted with it to pursue fossil fuel exploration and extraction, and conducted its business pursuits without counsel or representation from the indigenous inhabitants of the region. Over the next thirty years, the population of the Lago Agrio region declined as its inhabitants suffered widespread health problems and experienced only brief periods of relief from the debilitating poverty that the government had earlier leveraged to galvanize support for partnering with the corporation.

Frequently marginalized in regard to environmental policy and regulatory enforcement, the vulnerable inhabitants of developing nations such as Ecuador are left without a voice or a vote.² Their fates therefore rest in the hands of their governments, which seek economic development funds by providing advantages to corporations in resource-rich areas around the world via cheap labor and limited environmental regulations.

This article argues that legitimizing the plight of exploited communities like Lago Agrio, Ecuador requires the United States to hold parties accountable for the environmental torts committed in foreign jurisdictions. Additionally, this article argues that this goal can only be effectively achieved via legal obligations, enforceable through judicial bodies, rather than relying on unenforceable frameworks driven by voluntary business agreements.³

The residents of Lago Agrio, who reside in a once-pristine area of the Amazon, recently began a contentious new stage of appeals in their ongoing litigation against one of the largest American corporations: the Chevron Corporation.⁴ Chevron, previously willing to submit to the

² Referring to the lack of informed consent by the Indigenous Peoples in Ecuador, a principle enumerated in the United Nations' Declaration on the Rights of Indigenous Peoples, discussed *infra* Part IV B (2)(b).

³ Referring to the deregulation and lack of oversight regarding environmental practices by multinational corporations in a foreign nation and relying on the corporations themselves to "do the right thing," simply does not work. See Kimerling, *supra* note 1, at 419.

⁴ Chevron Corporation merged with Texaco in 2001. For the purposes of this paper, the operations taking place prior to the merger will also be referred to as that of [Chevron] as the dispute of the merger divesting Chevron of liability for the prior acts is beyond the scope of this paper. For background on the dispute surrounding the merger, see *Chevron Corp. v Naranjo*, 2011 WL 4375022 (2d Cir. 2011).

jurisdiction of Ecuadorian courts, now asserts due process injustice after an Ecuadorian court's February 2011 multibillion-dollar judgment in favor of the indigenous plaintiffs.⁵ The current environmental and health conditions that the plaintiffs face necessitate enforcement of the judgment and prompt environmental remediation.

Typically, when defendants default on judgment obligations stemming from tort proceedings, their assets are attached or seized to satisfy the judgment's financial obligations. Because Chevron has no assets left in Ecuador to attach to satisfy the judgment, recovery is unlikely without the judicial intervention of the United States. The United States has jurisdiction over Chevron's assets and a domestic legal framework to enforce international judgments. The Ecuadorian plaintiffs have obtained a judgment in a once-mutually accepted forum but cannot enforce that judgment due to procedural inefficiencies in the legal framework that regulates the recognition of foreign judgments. The lack of enforcement of foreign judgments creates arduous circumstances for foreign plaintiffs that have included years of litigation in the pursuit of recovery.

More than 200 years ago, U.S. legislative leaders foresaw similar situations as threats to national security and trade. They attempted to construct a framework to alleviate the quandary of domestic enforcement of international judgments altogether by providing that a U.S. District Court would serve as the forum for arbitration. In 1789, Congress enacted the Alien Tort Statute,⁶ which provides foreign plaintiffs the jurisdiction of the United States. In its infancy, the nation sought to prevent disfavor that could possibly lead to military conflict by extending foreign plaintiffs a judicial forum for torts committed abroad, either in violation of a treaty of the United States or in violation of a limited list of universally condemned offenses.⁷ This article contends that any tortious party operating under the laws of the United States should be held accountable for tortious environmental destruction that results in severe human rights violations because they should be included within the universally condemned offenses under the Alien Tort Statute.

⁵ *Aguinda II*, *infra* note 49.

⁶ 28 U.S.C. § 1350 (2006). The Alien Tort Statute (ATS) provides, "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."

⁷ Originally, the ATS included the offenses of piracy and kidnapping of ambassadors. See Carolyn A. D'Amore, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 596 (2006); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479-80 (1986).

Part I of this article discusses the Lago Agrio region of Ecuador before and after the discovery of oil in the early sixties and the environmental legacy of Chevron in Ecuador. Part II examines the two decades of litigation surrounding the misconduct of Chevron, the multibillion-dollar judgment for the plaintiffs in February 2011, and Chevron's subsequent appeals to effectively render the judgment unenforceable.

Part III analyzes pertinent case law of the Alien Tort Statute (ATS) as an alternative theory for recovery. First, non-environmental ATS cases that provide fundamental interpretations of the statute are identified. Next, case law is used to dispute the Second Circuit's decision in *Kiobel v Royal Dutch Petroleum*,⁸ which held that multinational corporations are not proper defendants under the statute. This decision is inconsistent with case law and the congressional intent of the statute. Part III also evaluates pertinent environmental ATS case law that is potentially favorable to environmental human rights plaintiffs. Part IV draws on the Ninth Circuit's conclusion that the United Nations Convention on the Law of the Sea (UNCLOS) provisions meet the standard of customary international law and argues that recognizing environmental human rights as customary international law is the next step in the evolution of ATS environmental case law. Once the courts recognize environmental human rights as customary international law under the ATS, the plaintiffs in this case could prevail under this course of action.

II. PARADISE LOST: THE RAINFOREST, THE KICHWA, AND BIG OIL

A. *The Significance of the Lago Agrio Region and the Kichwa*

The northeast corner of Ecuador, an area roughly the size of Rhode Island, remains the home of some of the planet's most bio-diverse ecosystems as well as of thousands of indigenous peoples who have been in the region for millennia.⁹ Prior to 1964, this region was entirely unexplored and inhabited only by indigenous tribes.¹⁰ Ecuador is one of only seventeen nations known collectively as mega-diversity countries, which contain more than two-thirds of the world's biological wealth. This biological diversity is inextricably connected and essential to the existence and quality of human life, and is reflected in the wealth of life in Lago Agrio.¹¹ Today,

⁸ *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 149 (2d Cir. 2010). "Corporations -- in contrast to individuals -- may not be held liable under the ATS for violations of international law." *Id.* at 177.

⁹ See ALLEN GERLACH, *INDIANS, OIL, AND POLITICS: A RECENT HISTORY OF ECUADOR* (2003).

¹⁰ *Aguinda I*, *infra* note 26.

¹¹ See KRISHNA R. DRONAMRAJU, *Biological Wealth and Other Essays*, World Scientific (2010)

the indigenous in Ecuador are searching for a sustainable way to coexist in a society that prioritizes economic development.¹²

B. *The Discovery of Black Gold*

Below the surface of the Amazon jungle lie reserves of crude oil and natural gas, the ever-growing demand for which threatens the environment and the indigenous communities therein. In 1964, after receiving reports of oil surfacing in the Lago Agrio region of eastern Ecuador, the Government of Ecuador invited a Texaco subsidiary, Texaco Petroleum Company (TPC), and Gulf Oil to investigate and extract the oil.¹³ The following year, TPC started operating a petroleum concession for a consortium owned in equal shares by TPC and Gulf Oil Corporation.¹⁴

Industrial-scale natural resource extraction began in the mid-sixties.¹⁵ Ecuador initiated a plethora of development projects aimed at relieving the nation from the bonds of chronic poverty.¹⁶ During the early years of fossil fuel exploration and extraction, the Ecuadorian Government developed an amicable relationship with the Texaco Corporation that extended as far as allowing the company free-range of control of its operations and the building of infrastructure to achieve successful oil production and refinery.¹⁷

The oil company brought promises of economic prosperity to Ecuador, whose economy relied primarily on the export of bananas.¹⁸ Poverty-relieving development and infrastructure investments fueled nationalist sentiments and as a result, the government of Ecuador created PetroEcuador, the National Ecuadorian oil and natural gas industry. The government also implemented oil-friendly legislation to continue the development of oil and to portray to foreign investors that the country as a worthy candidate for economic developments funds.¹⁹ Although the

¹² See Paul M. Barrett, *Amazon Crusader. Chevron Pest. Fraud?*, BLOOMBERG BUSINESS WEEK, (Mar. 09, 2011), http://www.businessweek.com/magazine/content/11_12/b4220056636512.htm.

¹³ Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 374 (S.D.N.Y. 2005).

¹⁴ *Id.* at 334.

¹⁵ *Id.*

¹⁶ Briefing Paper, Amazon Watch, Understanding Recent Developments in the Landmark Chevron-Ecuador Case (Spring 2012), <http://amazonwatch.org/assets/files/Chevron-Ecuador-Briefing-Spring-2012.pdf>.

¹⁷ Megan S. Chapman, *Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights' Systems*, 18 HUM. RTS. BRIEF 6 (2010).

¹⁸ *Id.* at 10.

¹⁹ Judith Kimerling, Interview with Mariana Acosta, Executive Director, Foundations For a New World in Quito, Ecuador (Mar. 3, 1994).

government procured development funds using expanded oil exploration and discovery as collateral, the promise of an exodus from poverty has never been realized. PetroEcuador became the majority owner of the Lago Agrio consortium in 1976, and Ecuador's political leaders maintained a friendly stance toward Texaco/Chevron to keep it in Ecuador.²⁰

C. *The Environmental Human Rights Legacy*

In the United States, impact assessments and procedural protocol designed to protect the natural environment from catastrophic contamination of resources used by humans are standard practice for any oil exploration or extraction project.²¹ Oil extraction typically begins with a well dug deep into the earth. Pits are created for temporary storage of wastes, such as excess oil run-off, wastewater, and toxic chemicals used with project machinery.²² These temporary storage pits are lined with environmentally safe industrial tarps, which function as highly resistant shields that prevent the ground from absorbing any toxic contaminants. While engineers and other employees extract oil, the wastewater (or "production fluids," as it is known in the industry) is stored in these lined pits while the crude is sent to the "separation station" for the refining process. Once the project has been completed, the toxic sludge is disposed of and the wastewater is piped deep into the ground, after which the well is closed and surroundings are restored to their natural state.²³

Evidence that the Texaco Corporation used these environmental impact protections is manifest in its U.S operations in place at the time.²⁴ Texaco had even patented a new reinjection technology aimed at reducing seepage of toxic wastewater, a clear demonstration of its knowledge of the dangerous outcomes of ground absorption.²⁵ In Ecuador, however, Texaco did not follow these procedures that were standard in the United States. Texaco directed its production fluids from its wells into open pits rather than re-injecting the toxic fluids back underground.²⁶ This fact is not in dispute.²⁷ Moreover, the sludge created from the separation process of

²⁰ *Id.*

²¹ Council on Env'tl Quality, Executive Office of the President, *Review of MMS's NEPA Procedures Following the Deepwater Horizon Oil Spill*, available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/mms-review> (2010).

²² *Id.* at 14.

²³ *Id.* at 15, 16.

²⁴ Kimerling, *supra* note 1, at 419-422.

²⁵ *Id.* at 433-436.

²⁶ *Aguinda v. Texaco*, (*Aguinda I*), 945 F. Supp. 625 (S.D.N.Y. 1996).

²⁷ *Id.* at 535.

crude and water was not properly disposed of, resulting in mass accumulation of toxic solid waste throughout northeast Ecuador.²⁸

Environmental scientists have determined that the production fluids were heavy in cancer-causing chemicals including benzene and polycyclic aromatic hydrocarbons (PAHs) and are responsible for present-day contamination of the regional water supply, a water supply used by the Kichwas for hundreds or thousands of years.²⁹ Exploration and extraction operations are estimated to have discharged twenty-six million gallons of crude oil and toxic wastewater into the surrounding environment.³⁰ While there has been a wide array of accusations of faulty tests, reports and scientific analyses sponsored by both the plaintiffs and defendants show a minimum of a 150% increase in cancer cases in the region since 1980. As a result, many of Ecuador's indigenous groups have suffered irreversible damage to their native lands, the erosion of their cultural heritage, and a myriad of health complications, which threaten their continued existence.³¹ Damage to female reproductive organs has thinned birthrates among indigenous tribes. Chevron, while insisting that no causal link between oil operations and cancer rates can be substantiated by evidence of cancer rates increasing generally in the last thirty years, does not deny these past practices.³²

For three decades, the oil entrepreneurs pursued and achieved unparalleled profits, partially from the Lago Agrio crude operations. Chevron's operations have left the rainforest floor stained with toxic waste pits and streams laced with verified carcinogens.³³ Local indigenous and farming communities face a public health crisis consisting of, among others, increased cancer rates, brain damage, liver and kidney damage, respiratory problems, and reproductive problems in women.³⁴ These human rights violations resulting from severe environmental destruction will

²⁸ *Id.* at 535.

²⁹ PAHs occur in oil, coal, and tar deposits, and are produced as byproducts of fuel burning (whether fossil fuel or biomass). As a pollutant, they are of concern because some compounds have been identified as carcinogenic, mutagenic, and teratogenic. See Imre Szeman, *Crude Aesthetics: The Politics of Oil Documentaries*, 46 J. AM. ST. 442 (2012).

³⁰ *Aguinda II*, *infra* note 54.

³¹ Richard Cabrera, Global Damages Expert for the Court of Nueva Loja, *Technical Summary Report*, (reporting on shortened life expectancy, high infant mortality rates, and uterine and ovarian genetic illnesses) available at <http://chevrontoxico.com/assets/docs/cabrera-english-2008.pdf>.

³² Chapman, *supra* note 17, at 14.

³³ *Aguinda I*, 945 F. Supp. 625.

³⁴ See ChevronToxico, Chevron's Human Rights Record, <http://chevrontoxico.com/assets/docs/chevron-human-rights-record.pdf> (last visited Apr. 3, 2012).

eradicate the Kichwa unless necessary funds are immediately allocated to environmental remediation.³⁵

III. LITIGATION HISTORY

A. *Aguinda v. Texaco: United States not an Appropriate Forum*

In 1993, a class-action lawsuit on behalf Ecuadorian citizens affected by the destruction of the Lago Agrio region was filed in the District Court for the Southern District of New York.³⁶ The suit sought compensatory damages for the allegedly reckless extraction operations that resulted in severe environmental contamination of the Ecuadorian rain forest between 1964 and 1992. Chevron promptly moved to dismiss the *Aguinda* action on a number of grounds, most pertinently *forum non conveniens*. Chevron argued that the Ecuadorian plaintiffs and their claims were bodies of International Law. Customary International Law demands that the plaintiffs exhaust all remedies in Ecuadorian Courts, which Chevron asserted were an appropriate forum for the litigation.³⁷

The district court agreed that private citizens did have the right to recover for environmental damage to public lands and that Chevron should to submit to the jurisdiction of the Ecuadorian courts. The court dismissed the action under the *forum non conveniens* doctrine, and the Second Circuit affirmed.³⁸ Following this dismissal, the next decade and a half of contentious litigation in and out of United States' courts, Ecuadorian courts, and International Tribunals, fulfilled the prophecy of the drafters of the Alien Tort Statute.

Forum non conveniens allows a court, on a motion from the defendants, to defer jurisdiction to another court on matters where there is a more appropriate forum available to adjudicate the issues in dispute.³⁹ The grant or denial of the motion is generally committed under the court's broad discretion and the defendant bears the burden of proof on all elements of the analysis.⁴⁰ The defendant has the burden of showing: (1) the existence of an adequate alternative forum, and (2) the balance of private and public interest factors favors dismissal.⁴¹ Colloquially referred to as the "*Gilbert* Factors," public interest factors to be considered include:

³⁵ Chapman, *supra* note 17, at 10.

³⁶ 945 F. Supp. 625.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981).

⁴⁰ Flores v. S. Peru Copper Corp., 525 F. Supp. 2d 510, 2002 WL 587224 (S.D.N.Y. 2002); Torres v. S. Peru Copper Corp., 965 F. Supp. 899, 902 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997).

⁴¹ Piper, 454 U.S. at 254; *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

court congestion; the unfairness of burdening citizens in an unrelated forum with jury duty; the interest in having localized controversies decided at home; the interest in trying the case in a forum familiar with the applicable law; and the interest in avoiding unnecessary conflicts of laws.⁴² However, the court's analysis is generally committed to assessing the cognizability of the suit in the proffered jurisdiction and whether or not the defendant is amenable to process.⁴³

In *Aguinda I*, the court's grant of dismissal on *forum non conveniens* relied on the defendants' acceptance and acquiescence to the jurisdiction of Ecuadorian courts, and the fact that the torts were committed in Ecuador and thus more appropriately adjudicated under Ecuadorian laws. The plaintiffs argued that an Ecuadorian court would not have the means of enforcing a judgment should one be obtained. However, the court decided that, because the United States has legislation that recognizes foreign money judgments, the plaintiffs could seek redress in the United States at a later date in the event of Chevron defaulting on a judgment made by an Ecuadorian court. Thus, the merits of the dispute would be heard in an Ecuadorian court.

B. *The Lago Agrio Litigation: A Brief Moment of Triumph*

In 2003, the Ecuadorian plaintiffs, consisting of some *Aguinda I* plaintiffs as well as additional indigenous peoples, brought the litigation against Chevron in the Sucumbios Provincial Court in Ecuador, the epicenter of the destruction.⁴⁴ The plaintiffs' arguments were based on articles of the Ecuadorian Constitution⁴⁵ and the Environmental Management Law of 1999, which granted the right to recover damages for environmental degradation and the resulting harm to human beings and biodiversity.⁴⁶ The plaintiffs sought "elimination and removal of

⁴² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁴³ *Piper*, 454 U.S. at 255.

⁴⁴ *Aguinda II*, *infra* note 49, *aff'd*, *Aguinda III*, *infra* note 51.

⁴⁵ CONSTITUCION POLITICA DE LA REPUBLICA DEL ECUADOR arts. 23, 86-88, 90-91 (guaranteeing citizens the right to live in a healthy environment, declaring that environmental protection and the preservation of biodiversity are in the public interest, requiring public consultation and approval of decisions that affect the environment, requiring the government to regulate the production, distribution, and use of substances dangerous to human life and the environment, and placing responsibility for environmental damage occurring during the delivery of public services upon the government).

⁴⁶ Plaintiffs' Complaint Addressed to the President of the Superior Court of Justice of Nueva Loja (Lago Agrio), *Aguinda v. ChevronTexaco Corp.*, Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003 (filed May 7, 2003) (Ecuador) [hereinafter Lago Agrio Complaint].

contaminating elements that persist in the region, healthcare for the inhabitants, and the repair of environmental damages.”⁴⁷ In addition, the complaint sought ten percent of the cost of remediation work to be paid to Frente de Defensa de la Amazonia (The Amazon Defense Fund).⁴⁸

On February 14, 2011, the Ecuadorian provincial court issued a comprehensive opinion adjudicating the case and entering judgment in United States dollars against Chevron. The total compensation for damages amounted to \$8.646 billion, an amount that would be doubled if Chevron did not issue a statement of responsibility and regret within 90 days.⁴⁹ Chevron issued a statement via their website that stated the judgment “Is illegitimate because of documented evidence of fraud and unethical action by the plaintiffs' lawyers as well as the Ecuadorian government and judiciary.”⁵⁰ Needless to say, they did not issue the apology and the judgment therefore sits at nearly \$18 billion.⁵¹ Rather than acknowledging any responsibility, Chevron filed sixteen separate lawsuits in the United States and invoked the arbitration clause of the Bilateral Investment Treaty between the U.S. and Ecuador.

Chevron immediately appealed this judgment to the Appellate Court of Sucumbíos Province, which denied their 193-page appeal. The appeal consisted of arguments surrounding a 1995 “Release” Agreement that Chevron procured from the former President of Ecuador,⁵² in exchange for full remediation of the affected region.⁵³ Chevron also claimed that

⁴⁷ *Id.* at 22-25. The Plaintiffs' claims with respect to “elimination and removal of contaminating elements” included requests for removal, treatment and disposition of contaminants in waste pits, the removal of contaminants from all waterways, the removal of all structures and equipment in the vicinity of closed wells and facilities, and the “clearance of the terrains, plantations, crops, streets, roads and buildings where there may still exist contaminating residuals produced or generated as a consequence of the operations directed by Texaco, including the contaminating debris deposits built as a part of the wrongly environmental cleaning tasks.”

⁴⁸ *Id.* at 24.

⁴⁹ Superior Court of Nueva Loja, 14/2/2011, “Aguinda v. ChevronTexaco” (*Aguinda II*), 2003-0002 (Ecuador), available at <http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-Chevrontoxico-judgement-English.pdf>.

⁵⁰ The Fraudulent Case Against Chevron, available at <http://www.chevron.com/ecuador/patternoffraud/> (last visited July 26, 2013).

⁵¹ Provincial Court of Sucumbios, 3/1/2012, “Republica del Ecuador v. Chevron” (*Aguinda III*), 2011-0106 (Ecuador), 2012 WL 7745068, Case No. 2011-1150, available at <http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf>.

⁵² Sixto Alfonso Durán-Ballén Cordovez, Presidente del Ecuador, 1992-96. Cordovez was an American-born Ecuadorian who became President and supported competitive markets and reducing the government's deficit. He is a well-known supporter of Chevron's presence in Ecuador. See Amazon Defense Coalition, *Texaco's Sham Remediation Efforts of Contamination at Well Sites* (Mar. 2011), <http://chevrontoxico.com/news-and-multimedia.html> (last visited Feb. 5, 2012). See generally, <http://www.chevron.com/news/press/release/?id=2009-09-23> (last visited July 26, 2013).

⁵³ Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 419 (2d Cir. 2011). See also Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N.Y. TIMES, Feb.

Ecuador lacked personal jurisdiction and doubted the competency of the lower judge.⁵⁴ Chevron maintains that responsibility for damage and cleanup now lies with PetroEcuador and the government. It contends that the present damage comes from PetroEcuador activities since 1990, including spills from a pipeline system built by the consortium that PetroEcuador has not maintained.⁵⁵ The damage for which Chevron has taken responsibility is mitigated, according to Chevron, by the acquisition of their enterprise by PetroEcuador.

C. *Chevron's Efforts to Stay Enforcement of the Judgment*

After its appeal in Ecuador failed, Chevron filed suit in the United States and internationally to stay the enforcement of the multibillion-dollar judgment obtained against them. First, Chevron filed a Racketeer Influenced and Corrupt Organizations (RICO) suit against attorney Steven R. Donziger in the United States District Court for the Southern District of New York. Second, Chevron filed with the International Arbitration Tribunal, the forum set out in a U.S./Ecuador Bilateral Investment Treaty (BIT),⁵⁶ seeking injunctive relief on grounds that corruption of proceedings tainted the entire trial and that Ecuador lacked jurisdiction in violation of International Law. In both cases, Chevron argued that the judgment should be universally enjoined.

1. *Chevron Corp. v. Donziger*:⁵⁷ Chevron Appeals Enforcement Domestically

15, 2011, at A4, *available at* <http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html>.

⁵⁴ *Aguinda II*, No. 21101-2011-0106, at 10.

⁵⁵ *Id.* at 13.

⁵⁶ The Bilateral Investment Treaty falls under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which governs agreements that are "commercial and not entirely between citizens of the United States. The New York Convention promotes the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions.

⁵⁷ *Chevron Corp. v. Donziger*, 768 F. Supp.2d 581 (S.D.N.Y. 2011). It is important to note that this case against Mr. Donziger was one of sixteen cases filed in Federal Courts, setting forth the same corruption, fraud, and misuse of justice system arguments to accomplish enjoining the judgment. Most are pending. See Santiago Cueto, *Ecuador Class Action Plaintiffs Strike Back at Chevron's Cynical Game of Musical Jurisdictions*, INT'L BUS. L. ADVISOR, Jan. 18, 2010, <http://>

Under U.S. law and the principles of international comity, a judgment obtained in a foreign court will be recognized in the United States on substantially identical terms without rehearing the substance of the original lawsuit.⁵⁸ Reciprocal recognition of foreign judgments provides accommodation and a predictable framework for all parties involved. After a foreign judgment is recognized, the judgment creditor can seek enforcement in the recognizing country. Monetary judgments are treated as though they were obtained in the recognizing jurisdiction meaning that the creditor has all of the enforcement remedies as one would have if the case had originated in the recognizing country. For the Ecuadorian plaintiffs, this means the fact that Chevron removed all of their assets from Ecuador does not preclude them from recovery. Chevron's assets in the United States can also be attached to satisfy the judgment.

There are limitations on this recognition under U.S. law, however. The several exceptions to the enforcement of the foreign judgments were the predicate of sixteen lawsuits filed by Chevron in the United States. The United States will not recognize judgments obtained in a variety of manners, including those obtained by fraud, in violation of due process, or when the plaintiffs agreed under contract to arbitrate similar disputes in an identified tribunal that was not the tribunal that ordered the judgment.⁵⁹ Chevron filed suit against Steven R. Donziger, the plaintiff's attorney, alleging accusations of wrongdoing and fraud, including lying to investigators and presenting false evidence by Donziger and the indigenous plaintiffs and asked the Court to enjoin the judgment.⁶⁰ Chevron, attempting to use the Act's exceptions offensively, sought mandatory injunctions globally because the judgment was rendered under a system which does not provide impartial tribunals or procedures which are

www.internationalbusinesslawadvisor.com/2010/01/articles/international-litigation/ecuador-class-action-plaintiffs-strike-back-at-chevrons-cynical-game-of-musical-jurisdictions (last visited Oct. 5, 2012).

⁵⁸ Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 149 (1986), §§ 1-3 [hereinafter U.M.J.R.A.].

⁵⁹ *See id.* §4(a): "A foreign judgment is not conclusive if: the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; the foreign court did not have personal jurisdiction over the defendant; or the foreign court did not have jurisdiction over the subject matter." *See also* §4(b): "a foreign judgment need not be recognized if: the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend; the judgment was obtained by fraud; the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of the state; the judgment conflicts with another final and conclusive judgment; the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled or otherwise than by proceedings in that court; or in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action."

⁶⁰ *Donziger*, 768 F. Supp.2d at 590.

compatible with the requirements of due process of law and because the judgment was obtained fraudulently.⁶¹ In a press release, Chevron declared, “Lawyers falsified data and pressured scientific experts to “find contamination” where none existed,” and further exerted that, “The plaintiffs’ lawyers also procured the appointment of a supposedly neutral “global expert” who was recruited and paid by the plaintiffs’ lawyers to pass off as his own a damages report ghostwritten by the plaintiffs’ other consultants.”⁶²

Judge Kaplan, writing for the U.S. District Court found the evidence of fraud and deceit on the part of Donziger to be compelling and said, “Public policy weighed in favor of issuing the preliminary injunction barring enforcement.”⁶³ The preliminary injunction prohibited residents from enforcing or preparing to enforce a potential Ecuadorian judgment against a United States corporation anywhere outside of the Republic of Ecuador. With no Chevron assets left in the country and therefore disqualifying attachment as a means of satisfying the judgment, Ecuador appealed to the Second Circuit Court of Appeals urging the necessity of recognition in the U.S.

On appeal, the Second Circuit chastised the lower court for granting a global injunction and reprimanded Judge Kaplan as well as vacated the injunction and stayed the proceedings in the District Court until further review, which came on January 26, 2012.⁶⁴ The Second Circuit concluded that judgment-debtors can challenge a foreign judgment's validity under the Recognition Act only defensively, in response to an attempted enforcement, an effort that the Ecuadorians had not yet undertaken anywhere and might never undertake in New York.⁶⁵ They formally reversed the District Court's decision, vacated the injunction, and remanded to the district court with instructions to dismiss Chevron's declaratory judgment claim in its entirety.

2. International Arbitral Tribunal Grants Interim Award Enjoining the Judgment

⁶¹ *Id.*

⁶² See *Chevron appeals Ecuador Judgment*, http://www.chevron.com/chevron/pressreleases/article/03112011_chevronappealsecuadorjudgment.news (last visited July 26, 2013).

⁶³ *Id.*

⁶⁴ *Chevron Corp. v Donziger*, 2012 WL 858768 (2d Cir. 2012).

⁶⁵ *Id.*

Under the threat of U.S. enforcement, Chevron then sought injunctive relief again through the quasi-offensive use of an exception under the Uniform Money-Judgments Recognition Act—this time in an international forum. Since the Act can only be used defensively under U.S. law, Chevron sought an issue that could be determined elsewhere and provide a stay of enforcement that the U.S. would be required to recognize ahead of any future petition filed to recognize the judgment obtained in Ecuador.

The Uniform Money-Judgments Recognition Act states that a judgment need not be recognized if the parties previously agreed to arbitrate like disputes in an identified forum.⁶⁶ Chevron asserted that the arbitration clause in a Bilateral Investment Treaty (BIT) between the U.S. and the Republic of Ecuador governed such disputes as this. The Republic of Ecuador agreed to the arbitration, which resulted in a less favorable determination of the plaintiffs' case. On February 16, 2012, per the Bilateral Investment Treaty signed by the U.S and Ecuador, an International Arbitral body determined that the Republic of Ecuador must "Take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the \$18 billion judgment."⁶⁷ They also ordered the Republic not to certify the \$18 billion judgment, which would permit the Ecuadorean plaintiffs to enforce it internationally.⁶⁸ The panel found procedural as well as substantive merit in Chevron's arguments that urgency exists in staying the enforcement of the judgment that Chevron alleged, "may have irreparable harm on the corporation under the veil of corruption and conspiracy charges against the Lago Agrio proceedings."⁶⁹ The panel then claimed jurisdiction over the dispute in its entirety because of the BIT between the United States and Ecuador.⁷⁰

While the international tribunal's interim award is discouraging for the plaintiffs, it is not a death knell. It does, however, ensure the litigation will continue for many more years. The plaintiffs' next course of action will be to petition for the enforcement of the multi-billion dollar judgment, which will undoubtedly involve seeking to demonstrate the injustice of the investment treaty pursuant to which Ecuador's foreign direct investment is governed. If the plaintiffs can show that the agreement authorizing the use of an international arbitral tribunal is in violation of well-established

⁶⁶ U.M.J.R.A., *supra* note 58, at § 4(b)(5).

⁶⁷ Chevron (U.S. v. Ecuador), Hague Ct. Rep. (Scott) 2009-23 (2012), *available at* <http://www.chevron.com/documents/pdf/ecuador/SecondTribunalInterimAward.pdf>.

⁶⁸ *Id.* at 1-5.

⁶⁹ *Id.* at 5.

⁷⁰ *Id.* at 6. International Arbitration is the stated dispute body of the BIT between the U.S and Ecuador.

international law, they can diminish the tribunal's award to merely an extension of that injustice. The degree of complexity and interplay between domestic and international legal principles has rendered the plaintiffs restless and underscores the importance of using the Alien Tort Statute as a possible mechanism for relief.

IV. THE ALIEN TORT STATUTE: TRIALS AND TRIBULATIONS

For almost 200 years after its passage in 1789, the Alien Tort Statute (ATS) lay virtually dormant with the exception of two cases: one maritime case adjudicating a property dispute and one child abuse case.⁷¹ The long period of silence made interpretation of the ATS difficult and ever-evolving. To secure relief under the ATS, a plaintiff must show that a tort was committed in violation of a treaty of the United States, or in violation of the law of nations.⁷² The statute does not indicate who is a proper defendant under the statute; it merely states that an alien may bring the action in U.S. federal courts.⁷³ For the reasons discussed below, the Lago Agrio plaintiffs face significant hurdles under ATS jurisprudence.⁷⁴

A. *Forum Non-Conveniens*

Forum non conveniens is a doctrine of the conflict of laws. It allows a court, on a motion from the defendants, to defer jurisdiction to another court on matters where there is a more appropriate forum available to adjudicate the issues in dispute.⁷⁵ The grant or denial of the motion is generally committed under the court's broad discretion, and the defendant bears the burden of proof on all elements of the analysis.⁷⁶ The defendant has the burden of showing: (1) the existence of an adequate alternative forum, and (2) the balance of private and public interest factors favors dismissal.⁷⁷ Known as the "*Gilbert Factors*," public interest factors to be considered include: court congestion; the unfairness of burdening citizens in an unrelated forum with jury duty; the interest in having localized

⁷¹ See, e.g., *Bolchos v. Darrel*, 3 F. Cas. 810, 811 (D.C.D.S.C. 1795); *Adra v. Clift*, 195 F. Supp. 857, 865 (D. Md. 1961).

⁷² 28 U.S.C. § 1350 (2006).

⁷³ *Id.*

⁷⁴ Justin Lu, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531, 535-37 (1997).

⁷⁵ *Piper*, 454 U.S. at 254.

⁷⁶ *Flores v. S. Peru Copper Corp.*, 2002 WL 587224 (S.D.N.Y. July 16, 2002); *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 902 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997).

⁷⁷ *Piper*, 454 U.S. at 254; *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

controversies decided at home; the interest in trying the case in a forum familiar with the applicable law; and the interest in avoiding unnecessary conflicts of laws.⁷⁸ The court's analysis is generally focused on assessing the cognizability of the suit in the proffered jurisdiction and whether the defendant is amenable to process.⁷⁹ The Supreme Court in *Piper Aircraft Co. v Reyno* reemphasized the *Gilbert* factors and paid special attention to the "interest in having localized controversies decided at home."⁸⁰

In *Aguinda I*, the court's grant of dismissal on *forum non conveniens* relied on the defendants' acceptance and acquiescence to the jurisdiction of Ecuadorian courts and the fact that the torts were committed in Ecuador and thus more appropriately adjudicated under Ecuadorian laws. The plaintiffs argued that an Ecuadorian court would not have the means of enforcing a judgment against the U.S. corporation should one be obtained. Chevron had no assets to levy inside of Ecuador. However, the court ruled that because the United States has legislation that recognizes foreign money judgments, in the event that Chevron defaults, Ecuador was deemed a more proper forum. The merits of the dispute would be heard in an Ecuadorian court, and the Alien Tort Statute would be of no use to them.

B. Non-Environmental ATS Litigation

1. Determining the Scope of the Statute

a. *Filartiga v Pena-Irala*⁸¹

The statute created a split of interpretations in the debate over whether the statute is purely jurisdictional or, alternatively, confers both jurisdiction and a cause of action for alleged violations of international law.⁸² Debate emerged with the interpretation of the statute in *Filartiga v. Pena-Irala*,⁸³ in which the Court of Appeals for the Second Circuit broadened the analysis concerning actionable claims by aliens and citizens alike for damages incurred for human rights violations.⁸⁴ In this case, neither plaintiff nor defendant were U.S. citizens.

Dolly Filártiga and her younger brother Joelito lived in Asuncion, Paraguay, with their parents. Their father, Dr. Joel Filártiga, was a well-known physician, painter, and opponent of Latin America's "most durable

⁷⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁷⁹ *Piper*, 454 U.S. at 255.

⁸⁰ *Id.* at 249-253.

⁸¹ 630 F.2d 876 (2d Cir. 1980).

⁸² See Lorelle Londis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 150 (2005).

⁸³ *Filartiga*, 630 F.2d at 877-879.

⁸⁴ *Id.* at 880.

dictator,” General Alfredo Stroessner. In 1976, 17-year-old Joelito was abducted and later tortured to death by Americo Norberto Peña-Irala, the inspector general in the Department of Investigation for the Police of Asuncion. Dolly Filártiga was forced out of her house in the middle of the night to view her brother’s mutilated body. The District Court ultimately granted Pena’s motion to dismiss the complaint and allowed his return to Paraguay, ruling that, although the proscription of torture had become a universally recognized norm, the court was bound to follow appellate precedents, which narrowly limited the function of international law only to relations between states.

The Second Circuit reversed the District Court’s holding, and the jurisprudential significance was two-fold. The decision held that a non-state actor could be prosecuted for a human rights violation under the ATS. In addition, the Court held that customary international law is evolving and may include violations of human rights that did not exist when the statute was written.

The decision was precedent for claims involving an increasing number of internationally recognized rights, including freedom from torture, slavery, genocide, and cruel and inhuman treatment.⁸⁵ International human rights experts in this country and abroad have embraced the decision, and since the landmark decision, courts have been awarding compensatory damages to victims of human rights abuses committed in violation of the law of nations.⁸⁶

In the years after *Filartiga*, plaintiffs invoked the ATS in federal courts to sue persons responsible for such international human rights violations as torture, disappearances, summary execution, genocide, cruel, inhuman, and degrading treatment, arbitrary detention, and crimes against humanity.⁸⁷ There was much controversy among the circuits.⁸⁸ The Second Circuit’s approach to what constituted a violation of the law of nations, under *Filartiga*, was, “not as it was in 1789 but as it has evolved and exists among the nations of the world today.”

⁸⁵ *Id.*

⁸⁶ Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE L. REV. 745, 749-751 (2004).

⁸⁷ *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (ND Cal. 1987); *Estate of Rodriguez v. Drummond Co. Ltd.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

⁸⁸ *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 (D.C. Cir. 1984) (terrorist attack by PLO on Israeli bus, killing 34 and wounding 87; Court refused to apply broad analysis of *Filartiga*).

*b. Sosa v. Alvarez-Machain*⁸⁹

Modern ATS applicable law was promulgated in *Sosa v. Alvarez-Machain*. Alvarez brought a claim under the ATS for arbitrary arrest and detention.⁹⁰ Alvarez had been indicted in the United States for torturing and murdering a DEA officer.⁹¹ When the United States was unable to secure Alvarez's extradition, it paid Sosa, a Mexican national, to kidnap Alvarez and bring him into the United States.⁹² Alvarez claimed that his "arrest" by Sosa was arbitrary because the warrant for his arrest only authorized his arrest within the United States.⁹³ The United States Court of Appeals for the Ninth Circuit held that Alvarez's abduction constituted arbitrary arrest in violation of international law.⁹⁴

The Supreme Court reversed. The Court clarified that the ATS did not create a cause of action, but instead it merely "furnished jurisdiction for a relatively modest set of actions alleging violations of the law of nations."⁹⁵ The Court compromised broad versus constrictive by reassuring that, although the scope of the ATS is not limited to violations of international law recognized in the 18th century, "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door-keeping," implying that *Sosa* is not meant to provide a free-for-all litigation spectacle in U.S federal courts.⁹⁶

2. Multinational Corporations as Defendants

*a. Kiobel v Royal Dutch Petroleum*⁹⁷

The Second Circuit recently interpreted *Sosa* to preclude multinational corporations from an ATS claim. In *Kiobel*, a dozen Nigerian plaintiffs claimed that Royal Dutch and two of its Shell Oil subsidiaries worked with the Nigerian government to torture and extra-judicially

⁸⁹ 504 U.S. 655 (2004).

⁹⁰ *Id.* at 658.

⁹¹ *Id.* at 657-660.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 670.

⁹⁵ *Id.* at 662.

⁹⁶ *Id.*

⁹⁷ 621 F.3d 111 (2d Cir. 2010), *cert. granted*.

execute individuals protesting against the companies' oil exploration.⁹⁸ Judge Cabranes, writing for the majority, rejected corporate liability under the ATS because it is not recognized under customary international law. He wrote:

We hold, under the precedents of the Supreme Court and our own Court over the past three decades, that in ATS suits alleging violations of customary international law, the scope of liability—who is liable for what—is determined by customary international law itself. Because no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernible—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS.⁹⁹

The court in *Kiobel* has interpreted *Sosa's* jurisdictional restraint to mean that not only is customary international law determinative of the subject-matter of the dispute giving rise to a cause of action, but it is also determinative against whom that cause of action may be brought. I believe this determination is a misapplication of current jurisprudence. *Sosa's* holding provides the guiding precedent that the applicability of the ATS in granting jurisdiction to foreign plaintiffs is driven by the content of the dispute, not in identifying who is or who is not a proper defendant under the statute.¹⁰⁰ Furthermore, *Sosa's* significance was that the violation of a universally recognized norm abroad creates a cause of action under the domestically governed ATS. An alien may obtain jurisdiction as a federal question under the ATS when customary international law provides the violation. The question of whether multinational corporations are liable under customary international law begins with an analysis of the tort itself, not the identity of the defendant entity.

The D.C. and Seventh Circuits also disagree with the Second Circuit.¹⁰¹ In *Flomo v. Firestone Natural Rubber Co.*, Judge Posner from the Seventh Circuit rejected the Second Circuit's analysis of *Sosa* and

⁹⁸ *Id.* at 115.

⁹⁹ *Id.* at 118.

¹⁰⁰ See generally William S. Dodge, *Corporate Liability under Customary International Law*, 43 GEO. J. INT'L L. 1045 (2012).

¹⁰¹ *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40-41 (D.C. Cir. 2011).

called their approach in *Kiobel* “an outlier.”¹⁰² Judge Posner determined that *Sosa* simply did not decide that an ATS plaintiff was required to prove a customary international norm providing for civil or criminal actions against every category of ATS defendant.¹⁰³ Posner further noted that, “If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals: only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law.”¹⁰⁴

Similarly, the D.C Circuit Court of Appeals determined the issue of corporate liability under the ATS in *Doe v Exxon Mobile Corp.* The Court held that “neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations” and therefore concluded that Exxon’s objections to justiciability were “unpersuasive.”¹⁰⁵

*b. Abdullah v. Pfizer, Inc.*¹⁰⁶

The Second Circuit ruled that the prohibition on nonconsensual medical experimentation on human beings constituted a universally accepted norm of customary international law, and consequently an alleged violation thereof fell within the jurisdiction of Alien Tort Statute.¹⁰⁷ The case arose because Pfizer had been testing new antibiotic drugs on children and adults in Nigeria without their consent.¹⁰⁸ After the district court dismissed the action for lack of subject-matter jurisdiction and forum non conveniens, the Second Circuit reversed and remanded.¹⁰⁹ The majority stated clearly that because the plaintiffs sufficiently alleged a violation of customary international law and because Pfizer’s profit from experimentations on unwilling subjects in developing nations would result in significant anti-American animus, the plaintiffs could claim a human rights violation under the jurisdiction of the ATS.¹¹⁰ While there is not a point of unanimous agreement, a growing consensus seems to be emerging from judicial opinions and scholarship that multinational corporations have responsibility for torts committed abroad.

¹⁰² *Flomo*, 643 F.3d at 1017.

¹⁰³ *Id.* at 1019.

¹⁰⁴ *Id.*

¹⁰⁵ *Doe*, 654 F.3d at 40.

¹⁰⁶ 562 F.3d 163 (2d Cir. 2009).

¹⁰⁷ *Id.* at 201.

¹⁰⁸ *Id.* at 199.

¹⁰⁹ *Id.* at 170-180.

¹¹⁰ *Id.* at 177.

C. Environmental ATS Litigation

Achieving jurisdiction under the Alien Tort Statute is difficult for any type of claim, but it has proven especially difficult for claims involving environmental human rights. This de facto doctrine of avoidance is spelled out in a few recent decisions concerning the impact that destructive environmental practices have on human beings.

1. Environmental Abuse proves too vague to support ATS action

a. *Amlon Metals, Inc. v. FMC Corp.*¹¹¹

In 1991, the District Court for the Southern District of New York became the first court presented with a class of plaintiffs claiming jurisdiction under the ATS for human rights violations resulting from flawed environmental practices.¹¹² Amlon, an American corporation specializing in the acquisition of metal residues, and its United Kingdom affiliate, Wath, filed suit against FMC Corporation, a chemical manufacturing company headquartered in Pennsylvania, over allegations that FMC shipped hazardous material to the United Kingdom.¹¹³ The business affiliates functioned such that Amlon acquired various metal residue and then transported this material to Wath for washing and processing.¹¹⁴ FMC Corporation treated copper residue for reclamation purposes, with the understanding that the material would be shipped back to the U.K. free of impurities.¹¹⁵ When a noxious smell revealed that xylene,¹¹⁶ hydrogen 7,¹¹⁷ and dioxin¹¹⁸ were found in large amounts, Amlon, et al sued. The District Court examined The Resource Conservation and

¹¹¹ 775 F. Supp. 668 (S.D.N.Y. 1991).

¹¹² *Id.*

¹¹³ *Id.* at 669.

¹¹⁴ *Id.* at 670.

¹¹⁵ *Id.*

¹¹⁶ Xylene is an EPA-listed hazardous waste. See U.S. Dep't of Health & Human Servs., Toxicological Profile for Xylene 1 (Aug. 1995).

¹¹⁷ See *Amlon*, 775 F. Supp. at 670 (“7-hydrogen is an allegedly carcinogenic pesticide intermediary”).

¹¹⁸ *Id.* Chlorinated phenols may form dioxin when exposed to heat and a catalyst. Tests on laboratory animals indicate that dioxin is the most potent carcinogen known. Exposure to dioxin can cause a serious skin disease called chloracne. Tests on laboratory animals also indicate that exposure may result in a rare form of cancer called soft tissue sarcoma. See Michael Grough, *Dioxin: Perceptions, Estimates, and Measures*, in PHANTOM RISK 249, 249-260 (Kenneth R. Foster et al. eds., 1983).

Recovery Act (RCRA)¹¹⁹ as well as Principal 21 of the Stockholm Declaration.¹²⁰ The court dismissed the RCRA claim for lack of jurisdiction on the ground that RCRA cannot be applied extraterritorially, as it would be a violation of international comity.¹²¹ In other words, since the waste was entirely located within the territory of the U.K., a sovereign nation, it is not the U.S. judiciary's business to enforce U.S laws outside the United States.

Next, and most pertinent for this discussion, the court in *Amlon* evaluated Stockholm Principle 21 regarding the violations of FMC Corp as under customary international law, which would grant jurisdiction under the ATS.¹²² The court found that although Principle 21 is applicable to this case, it is not a source of international law that is specific or universal enough to be considered a part of customary international law.¹²³ The court found Principle 21's responsibility measures to simply be a guiding tool that countries should reach to achieve and that it could not be used to bind the United States under customary international law. While the court assessed what does not meet the standard for customary international law, it did not say what does. *Amlon* did not result in the much-needed guidance as to the standard to be met in order to sufficiently allege a violation of customary international law on the grounds of human rights and the environment.

*b. Beanal v. Freeport-McMoran, Inc*¹²⁴

Beanal is another notable case in which environmental human rights victims sought redress in the United States via the ATS. The suit was initiated by plaintiff Beanal, who alleged that a U.S. multinational corporation, Freeport, was liable for cultural genocide, environmental torts, and human rights abuses committed against his Amungme tribe in their operations of mines in Indonesia.¹²⁵ Beanal, a resident of a small mining village in Indonesia, alleged that, "Freeport's activities caused destruction,

¹¹⁹ *Id.* at 669; 44 U.S.C. §§ 6901-6992 (1985).

¹²⁰ UN Conference on the Human Env't, Stockholm, Sweden, June 1972. Principle 21 states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and 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."

¹²¹ *Amlon*, 775 F. Supp. at 670. International Comity and the Act of State Doctrine are used interchangeably.

¹²² *Id.*

¹²³ *Id.* at 722.

¹²⁴ *Beanal v. Freeport-McMoran*, 969 F. Supp. 362 (E.D. La 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

¹²⁵ *Id.* at 369.

pollution, alteration, and contamination of natural waterways, as well as surface and ground water sources; deforestation; destruction and alteration of physical surroundings.”¹²⁶ He invoked three principles of international law as the basis for obtaining jurisdiction in the United States under the ATS: (1) the Polluter Pays Principle,¹²⁷(2) the Precautionary Principle,¹²⁸and (3) the Proximity Principle.¹²⁹

The court rejected all three principles explaining that, “the principles relied on by the Plaintiff, standing alone, do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content.”¹³⁰ In addition, the court further noted that the principles invoked by the plaintiff pertained only to members of the international community and not to non-state actors, such as the Freeport-McMoran Corporation.¹³¹ The court concluded that a treaty must exist to bind non-state actors and hold them responsible for torts under international law.

Moreover, Beanal alleged that, through the environmental destruction, Freeport-McMoran had committed cultural genocide to the indigenous peoples inhabiting Tamika, Indonesia. The court rejected this claim noting that, “genocide requires the destruction of a group, not a culture.” When claiming the destruction of culture by means of genocide, the court reasoned that much more clarity is necessary and that Beanal’s complaint fell short of being sufficiently specific. In affirming the district court’s dismissal of the case, the Court of Appeals for the Fifth Circuit found Beanal’s complaint to be general and vague and advised other courts to operate with caution when adjudicating environmental claims under the purview of another nation’s laws.¹³² Like the decision in *Amlon Metals*, the

¹²⁶ *Id.*

¹²⁷ See PHILLIPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS, AND IMPLEMENTATION 213-217 (1995) “This principle states that the costs of pollution are to be borne by the polluter.”

¹²⁸ “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” See Rio Declaration Prin.15, UN Conference on Env’t and Development, Rio De Janeiro, June 3-14, 1992, available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last visited July 27, 2013).

¹²⁹ The proximity principle suggests that hazardous waste should be disposed of in the state of its creation, to the extent that such disposal is reasonable. Sands, *supra* note 127 at 217.

¹³⁰ *Beanal*, 969 F. Supp. at 384.

¹³¹ *Id.* at 370 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601-602).

¹³² *Id.* “If Beanal in fact means that Freeport is destroying the Amungme culture, then he has failed to state a claim for genocide. On the other hand, if Beanal intended to state that Freeport is

Fifth Circuit warned of violating international comity by becoming involved in the affairs of other sovereign nations.

The *Beanal* decision left the human rights community disappointed and restless. The courts involved cautioned against finding an allegation of environmental human rights as cognizable under customary international law so as to grant jurisdiction under the ATS. The decision therefore left the international community wondering if there even existed a threshold for achieving the definiteness required to transform broad principles into concrete legal structures. *Beanal* was seen as a squandered opportunity to challenge ATS jurisprudence, scuttled due to poor planning and execution despite a perfect set of facts, and created an enormous amount of frustration among environmental human rights advocates.¹³³

*c. Flores v. Southern Peru Copper, Corp.*¹³⁴

Echoing the Fifth Circuit's repudiation of general environmental principles as sufficiently definite to attach customary international law status, the Second Circuit rejected the use of the right to life, health, and sustainable development, three fundamental principles of environmental justice, to gain recognition under the ATS. In this case, the plaintiffs brought suit against the corporation for instances of fatal lung disease allegedly resulting from its copper mining, refining, and smelting operations.¹³⁵ The Peruvian class action plaintiffs claimed that pollution from the operations undertaken by the defendant violated their right to life, health and sustainable development—principles that the plaintiffs argue have risen to the level of customary international law.¹³⁶ The District Court found that the plaintiffs' reliance on non-binding sources of international law failed to meet the universally recognized standard set forth in ATS jurisprudence.¹³⁷ The Second Circuit affirmed, stating that the right to life and health, as far as a sustainable environment provided by the government, is concerned¹³⁸ come from the "clear and unambiguous" standard promulgated by the *Filartiga* Court.¹³⁹

committing acts with the intent to destroy the Amungme group, i.e. its members, then he has failed to make this allegation sufficiently explicit."

¹³³ See generally Jean Wu, *Pursuing International Environmental Tort Claims under the ATCA: Beanal v. Freeport-McMoran*, 28 *ECOLOGY L. Q.* 487, 498 (2001).

¹³⁴ 253 F. Supp. 2d 510, 514 (S.D.N.Y. 2002), *aff'd*, *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

¹³⁵ *Flores*, 414 F.3d 233.

¹³⁶ *Id.* at 240.

¹³⁷ *Id.* at 237.

¹³⁸ *Id.* at 244. Plaintiffs dropped sustainable development for review by the Second Circuit.

¹³⁹ *Id.* at 255; *Filartiga*, 630 F.2d 876. See also Ulrich Beyerlin, *Different Types of Norms in International Environmental Law*, in *OXFORD HANDBOOK OF INT'L ENV'L L.* 425, 425-26 (Daniel Bodansky et al. eds., 2007).

Flores is especially notable because it was the first case to directly plead the link between human rights and the environment.¹⁴⁰ Plaintiffs in the case attempted to distinguish their case from the failed *Amlon* and *Beanal* cases by emphasizing a human rights approach as their primary basis for obtaining jurisdiction under the ATS.¹⁴¹ The Second Circuit did not see distinguishable facts here and found that, “labels plaintiffs affix to their claims cannot be determinative.”¹⁴²

2. Using UNCLOS as Vehicle for International Recognition

a. *Sarei v. Rio Tinto PLC*¹⁴³

The foregoing case law has demonstrated the challenges of recognizing environmental torts as customary international law and thus affected the plaintiffs' ability to establish jurisdiction in a U.S. court for an ATS claim alleging environmental harm. The *Sarei* decision, while unsuccessful, has illuminated the first viable path to success for environmental justice plaintiffs.¹⁴⁴

In *Sarei*, the defendant, Rio Tinto PLC, operates an international mining group on the island of Bougainville, in Papua New Guinea.¹⁴⁵ The plaintiffs are current or former residents of the island of Bougainville.¹⁴⁶ They brought this case under the ATS, alleging among other claims that the intentional dumping of hazardous material into the community's river system caused environmental destruction and harm to the island.¹⁴⁷ In a lawsuit substantively equivalent to the *Flores* case, the plaintiffs here alleged that the actions of Rio Tinto PLC violated their right to life, health, and sustainable development, and they stressed that these rights are

¹⁴⁰ See Natalie L. Bridgeman, *Human Rights Litigation under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 23 (2003).

¹⁴¹ *Flores*, 253 F. Supp. 2d at 510

¹⁴² *Id.* at 510-514.

¹⁴³ 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *aff'd in part, vacated in part (Sarei II)*, 456 F.3d 1069 (9th Cir. 2006), *aff'd in part, vacated in part, reversed in part (Sarei III)*, 487 F.3d 1193 (9th Cir. 2007), *en banc rehearing granted*, 499 F.3d 923 (9th Cir. 2007), *heard on exhaustion of remedies (Sarei IV)*, 650 F. Supp. 2d 1004 (C.D. Cal. 2009).

¹⁴⁴ Christopher M. Kozoll, *Poisoning the well: Persecution, the Environment, and Refugee Status*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 271 (2004).

¹⁴⁵ *Sarei*, 221 F. Supp. 2d at 1120.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1121-1126. For the purpose of this paper, I have omitted the plaintiffs' additional claims accusing the defendants of war crimes, crimes against humanity, and racial discrimination committed during a long-lasting internal conflict in Papua New Guinea in which many died. These *jus cogens* violations are still pending before the Ninth Circuit.

sufficiently specific and universally recognized to meet the *Sosa* standard.¹⁴⁸ Counsel for the plaintiffs referred to the same international documents used by the plaintiffs in *Flores*.¹⁴⁹ However, in *Sarei*, the plaintiffs also claimed that the intentional dumping of toxic waste violated two provisions of the United Nations Convention on Law and the Sea (UNCLOS).¹⁵⁰

The District Court refused to give merit to the plaintiffs' claims emanating from violations of right to life, health, and sustainable development, ruling that that they were insufficient in definiteness to rise to the level of customary international law.¹⁵¹ In fact, the District Court, eventually affirmed by the Ninth Circuit, went one step further. It pronounced that even if the right to life and health were a part of customary international law, harm to the environment as the catalyst for the deprivation of these broad rights is certainly not a specific, universal, and obligatory norm.¹⁵² In regards to the sustainable development claim, the courts refused to accept the international documents as obligatory instruments that could bind the United States to their declarations.¹⁵³

While the decision failed to negotiate access to environmental justice by way of international human rights in U.S federal courts, the District Court held that the allegations of UNCLOS violations met the requirements of *Sosa*.¹⁵⁴ The Ninth Circuit affirmed on this count and held that while the United States is not a party to UNCLOS, the binding legal instrument is specific enough in its provisions, obligatory among the 162 nations party to it, and universally recognized as customary international law.¹⁵⁵ This revelation has provided the international environmental justice community and future plaintiffs with strategies to create a sufficient nexus between environmental human rights damages and access to redress.

¹⁴⁸ *Sarei*, 221 F. Supp. 2d at 1120.

¹⁴⁹ Plaintiffs referred to the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter of Human and Peoples' Rights, and the Charter of Fundamental Rights of the European Union. *Id.* at 1156.

¹⁵⁰ *Id.* at 1160. U.N. Convention on the Law of the Sea, entered into force November 16, 1994, 1833 U.N.T.S. 397 (1982) [hereinafter UNCLOS]. Widely regarded as the "Constitution of the Sea," UNCLOS has been ratified by 162 countries. Plaintiffs cited Article 194, which says, "states take all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment that involves hazards to human health, living resources and marine life through the introduction of substances into the marine environment," and Article 207 which states that, "States adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources."

¹⁵¹ *Sarei*, 221 F. Supp. 2d at 1140-1150.

¹⁵² *Id.* at 1158.

¹⁵³ *Id.* at 1156.

¹⁵⁴ *Id.* at 1161.

¹⁵⁵ *Sarei II*, 456 F.3d at 1078.

Unfortunately, even though a cognizable claim was found in the UNCLOS violations, the Ninth Circuit ultimately dismissed the case under the ATS due to international comity concerns similar to those in *Amlon Metals*.¹⁵⁶ The Court sitting *en banc* found the actions of Rio Tinto PLC to be closely related to the actions of the nation of Papua New Guinea, and not within the purview of the United States' judiciary.¹⁵⁷ This facet of the case underscores the procedural hurdles to obtaining jurisdiction under the ATS. It seems that even when all of the puzzle pieces fit together convincingly, environmental justice via the ATS remains an illusion.

b. Environmental Victims Deserve a Remedy

After analyzing the seemingly infinite obstacles to achieving jurisdiction under the ATS, one might consider using an established norm of customary international law as a route to circumvent these barriers. The Ninth Circuit Court provided the possibility of such recovery in a short section of its opinion in *Sarei*.¹⁵⁸ The Court distinguished the UNCLOS claims from the remaining claims the plaintiffs brought, which included violations of the laws of war and racial discrimination.¹⁵⁹ After it was determined that the prudential interests of international comity preempted the UNCLOS claims, the court implicitly suggested that had the plaintiffs asserted what the Court defined as "*jus cogens*"¹⁶⁰ offenses of racial discrimination and violations of war, the result of dismissal would have been different because these very serious offenses are not trumped by prudential concerns.¹⁶¹ Asserting existing *jus cogens* offenses as a route to environmental justice, in lieu of the environmental atrocities as *jus cogens* violations themselves, is not the answer.

For indigenous communities like the Kichwa of Ecuador, the Korubo and Urarina of Peru, and the Amungme Tribe of Indonesia, the

¹⁵⁶ *Id.* at 1193. Previously, the court had declined to dismiss on the basis of the *forum non conveniens* doctrine after deeming that private interests favor retaining jurisdiction and that public interests were neutral. *Id.* at 1175.

¹⁵⁷ *Id.* at 1176-77.

¹⁵⁸ *Id.* at 1165-72.

¹⁵⁹ *Id.* at 1172.

¹⁶⁰ Markus Petsche, *Jus Cogens as a Vision Of The International Legal Order*, 29 PENN ST. INT'L L. REV. 233, 258 (2010) ("Jus cogens is based on the idea that the international legal system recognizes, or should recognize, a set of fundamental values.").

¹⁶¹ *Sarei II*, 456 F.3d at 1165-75. "Only the other claims assert *jus cogens* violations that form the least controversial core of modern day ATCA jurisdiction." *Sarei III*, 487 F.3d 1193, *en banc hearing granted*, 499 F.3d 923 (9th Cir. 2007) ("A different outcome would only have been possible if the invoked UNCLOS norms were part of *jus cogens*.").

environment is the lynchpin of posterity. The indigenous peoples involved in these cases are not the only victims here. Future generations of indigenous peoples, if in existence at all, are relegated to adapting to a new way of life and compromising their cultural heritage. Over time, this effectively results in the extinction of the tribes, or at least the way of life that they know. Obtaining the equitable relief necessary to fix this threat of eradication must, then, be found in environmental claims themselves, and financial recovery must go to environmental remediation for the sake of the indigenous identity.

The Ninth Circuit's interpretation of UNCLOS will be helpful for future environmental victims. The concepts of the right to life, to health, and sustainable development are amorphous indeed, and the instruments that contain such rights are only binding, if at all, for the nations who voluntarily assent to be bound by them. The Ninth Circuit's finding of sufficient definiteness in UNCLOS violations suggests that another court, with the right set of facts, could find pollution on the level of severity akin to that of the Ecuadorian plaintiffs, worthy of customary international law status via UNCLOS.

V. CONNECTING THE DOTS: RECOVERY FOR ENVIRONMENTAL TORT PLAINTIFFS

A. *Achieving Jurisdiction via the Alien Tort Statute*

To prevail in an environmental ATCA claim, a plaintiff must: (1) overcome the motion to dismiss on forum grounds, and (2) prove that the defendant's actions and the resulting damage are in violation of, "Norms of international character accepted by the civilized world and defined with a specificity "comparable to the 18th century paradigms." ¹⁶² that the *Sosa* Court required.

1. Clearing the *Sosa* Hurdle

Of the three prongs of the *Sosa* test,¹⁶³ specificity is the primary hurdle in every environmental ATS claim. Traditionally, the consensus among the circuits has insisted that the "right to life" and the "right to health" are vague concepts that do not meet the standards set in *Sosa*.¹⁶⁴ In *Flores*, for example, the Second Circuit stated that the rights to life and to

¹⁶² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

¹⁶³ *Amlon*, 775 F. Supp. 668; *Beanal*, 969 F. Supp. 362; *Flores*, 253 F. Supp. 2d 510.

¹⁶⁴ Sarah M. Morris, *Intersection Of Equal And Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275 (2009).

health are too indeterminate to constitute a cause of action under the ATS.¹⁶⁵

Transcending this interpretation and including environmental human rights violations is, for the first time, a conceivable path. Two years after *Flores*, the United States District Court for the Northern District of California held that, “The limits of a norm need not be defined with particularity to be actionable; rather, the norm need only be so defined that the particular acts upon which a claim is based certainly fall within the bounds of the norm.”¹⁶⁶ In *Doe v. Qi*, that court stated, “The fact that there may be doubt at the margins—a fact that inheres in any definition—does not negate the essence and application of that definition in clear cases.”¹⁶⁷ The dispute among the circuits concerning what exact parameters should be assessed to customary international law status is a misinterpretation of *Sosa*.¹⁶⁸

Furthermore, the court also described how to determine what actions should be excluded as an international norm, holding that, “The actions alleged should be compared with actions that international adjudicatory bodies have found to be proscribed by the norm in question.”¹⁶⁹ The *Doe* Court gave deference to decisions by institutions such as the Human Rights’ Committee, the European Court of Human Rights, and the African Commission on Human Rights to elucidate international consensus.

Facts comparable to the Chevron/Ecuador case demonstrate a level of specificity that U.S. courts should regard as adequate. The evidence of the harmful actions taken by the defendants, or actions they knowingly failed to take, is clear and overwhelming.¹⁷⁰ Their operations in Ecuador were carried out in a tortious manner for thirty years, resulting in relentless environmental decay. The evidence shows that there were responsible disposal methods available and that Texaco utilized them in its United States operations but not in Ecuador.¹⁷¹ Evidence also shows that even after the first action was filed against Texaco in 1993, no sincere remediation efforts were made and the very same destructive practices persisted.¹⁷² The “totality of the circumstances” evaluation used in *Doe* is the most equitable

¹⁶⁵ *Flores*, 414 F.3d at 247.

¹⁶⁶ *Doe v. Qi*, 349 F.Supp. 2d 1258 (N.D. Cal. 2004).

¹⁶⁷ *Id.* at 1266.

¹⁶⁸ *Sosa*, 504 U.S. 655; 28 U.S.C. § 1350 (2006).

¹⁶⁹ *Doe*, 349 F. Supp. 2d at 1261-62.

¹⁷⁰ See Paul M. Barrett, *Amazon Crusader. Chevron Pest. Fraud?*, BLOOMBERG BUSINESS WEEK (Mar. 9, 2011), http://www.businessweek.com/magazine/content/11_12/b4220056636512.htm.

¹⁷¹ *Aguinda v Texaco, Inc.* 945 F.Supp. 625 (1996).

¹⁷² *Id.* at 627.

approach possible and should be used in evaluating the Chevron/Ecuador case as well. To refuse to hear a case on its merits in the face of blatant violations and misconduct committed abroad effectively vitiates the vision and intent of the ATS.¹⁷³

The universal component required under the *Sosa* analysis is the least contentious element in ATS controversy. Something is not customary international law if it is not a standard to which the vast majority of countries adhere. Both the *Filartiga* and *Sosa* cases, from which the foundational principles of ATS analysis emanate, declare that customary international law is an evolving body of law that includes norms that emerge when “conduct, or the conscious abstention from certain conduct, of states ... becomes in some measure a part of the international legal order.”¹⁷⁴ Very simply stated by a note from the Third Restatement of the Law of Foreign Relations of the United States, “practice builds law.”¹⁷⁵

The conduct of Chevron in Ecuador is universally condemned.¹⁷⁶ There is well-established, universal consensus that the rights of sovereignty and the ability to exploit one's own natural resources exist in every nation. When the ability to capture those resources is lost due to the tortious conduct of another, international consensus that a remedy should be afforded to such victims exists.

Moreover, it is universally agreed that a significant purpose of the ATS was to “ensure that the United States complied with its obligations under international law by providing redress for certain violations of the law of nations.”¹⁷⁷ The obligatory element of the *Sosa* framework is a qualifier of the specificity requirement and a limitation on the universal component. The general rule is that to be recognized as customary international law, the violations committed must present a binding obligation on the U.S.¹⁷⁸ Concepts that are not of binding character are determined not sufficiently specific, and even if the concepts are universally condemned, they are not enough to rise to the level of customary international law. I, along with others, find strict adherence to a narrow definition of “obligatory” antiquated and not in line with the intent of the ATS.¹⁷⁹ The Second Circuit in *Abdullah v Pfizer, Inc.*¹⁸⁰ determined

¹⁷³ *Id.*

¹⁷⁴ HENRY J. STEINER & PHILIP ALSTON, INT'L HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 224 (2008).

¹⁷⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102.

¹⁷⁶ *Aguinda III*, 2012 WL 7745068.

¹⁷⁷ Bradley & Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997).

¹⁷⁸ *Sosa*, 504 U.S. at 660.

¹⁷⁹ Bradley & Goldsmith, *supra* note 177, at 330-331. The authors attack the obligatory element on the grounds that “The modern position claim that CIL is to be applied as federal common law thus compensates for the abstinence of the United States vis-a-vis ratification of international

that medical experimentation on persons without their consent is universally censured, and while the Court used the Nuremberg trials in Germany only as persuasive material, their focus was the anti-American animus that would abound if we failed to hold Pfizer accountable.

Moreover, requiring a binding document to obligate U.S. courts to establish customary international law is counterintuitive to the ATS. If it were meant to be a requirement, the statute would only have extended jurisdiction for torts committed in violation of a U.S. treaty with no mention of those committed in violation of the law of nations. Binding documents are produced from a legislative process in which complex political systems have to work in tandem to agree on something. Requiring that a violation either be enumerated in a binding document to which the U.S. assents or the decision of a court the U.S. chooses to validate, presupposes that the legislative branch is a corollary of the judicial branch, which it is not.¹⁸¹ The two are separate branches of government designed to keep a “check” on one another. The ATS is a jurisdictional statute, and the question of what constitutes customary international law under the statute is a legal question. Thus, by logical extension, allowing the defiance of environmental human rights’ policy by American legislators to dictate the parameters of the ATS is logically flawed. The obligatory requirement is a technicality and should only be used as a persuasive factor—not as a requirement.

2. Using the UNCLOS analysis from *Sarei v. Rio Tinto PLC*

The bane of the Kichwa in Ecuador was thirty years of mass pollution to the environment, resulting in widespread illness and resource degradation.¹⁸² Significant funds will be necessary to repair the environment to a livable habitat. The Ninth Circuit’s recognition of UNCLOS provisions in *Sarei*, as customary international law, opened the door to recovery for environmental human rights victims.¹⁸³

The Ninth Circuit affirmed the District Court’s determination that the two provisions of UNCLOS had risen to the level of an international norm, primarily because of the wide acceptance and adherence by the

human rights treaties. It permits federal courts to accomplish through the back door of CIL what the political branches have prohibited through the front door of treaties.”

¹⁸⁰ 2005 U.S. Dist. LEXIS 16126 (S.D.N.Y. Aug. 9, 2005.)

¹⁸¹ See Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J. L. & PUB. POL’Y 67 (1988).

¹⁸² *Id.*

¹⁸³ *Sarei II*, 456 F.3d 1069.

nations of the world to the prohibition of willful marine pollution.¹⁸⁴ This signals a very important benchmark in the evolution of ATS jurisprudence and is enormously important for environmental human rights plaintiffs. What this effectively does is recognize that international norms exist independently of the obligatory requirement under *Sosa*. Until this case, no treaty provision rose to the level of binding customary international law for ATS purposes without ratification by the United States government. This decision establishes the precedent that specific violations of universally recognized pollution standards are actionable under the ATS.

B. *Dispelling the Act of State Doctrine*

The final hurdle any environmental plaintiff must overcome is the Act of State Doctrine. This doctrine provides that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation.¹⁸⁵ As seen in the *Sarei* decision, even if the requirements of customary international law are met, U.S. federal courts have established a precedent of non-intervention on matters that straddle foreign affairs and the law. The threshold inquiry is the degree of interplay between the government in which the tort takes place and the tortfeasors. If the developing nation's government is knowingly contributing and allowing the cause of the damages, U.S. courts will very likely determine that the dispute belongs within the courts of that nation.

Although not required under international legal principles,¹⁸⁶ the doctrine aims both to protect other nations' sovereignty by intervention from the U.S. and to protect the U.S. Executive's broad foreign affairs powers from being usurped by a decision issued from the judiciary.¹⁸⁷ If a federal court made a determination of law that ran afoul of the executive's foreign policy, the authority of the executive would be diminished.

In 1964, the Supreme Court upheld the Act of State Doctrine to the chagrin of Congress and American investors in *Banco Nacional de Cuba v. Sabbatino*.¹⁸⁸ In that case, the Court maintained that the Act of State Doctrine barred recovery for American investors in Cuba's sugar production after the government nationalized the sugar industry and refused

¹⁸⁴ UNCLOS, 1833 U.N.T.S. 397 (1982).

¹⁸⁵ *Underhill v. Hernandez*, 168 U.S. 250 (1897).

¹⁸⁶ Neither customary international law nor treaty law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). The Restatement maintains that a domestic court possessing adjudicatory jurisdiction may exercise that jurisdiction if it is reasonable to do so. It asserts that the principle of reasonableness is based on customary international law.

¹⁸⁷ See, Deborah Azar, *Simplifying The Prophecy Of Justiciability In Cases Concerning Foreign Affairs: A Political Act Of State Question*, 9 RICH. J. GLOBAL L. & BUS. 471 (2010).

¹⁸⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

to compensate the shareholders.¹⁸⁹ The Court held that Cuba's sovereign right to control its domestic affairs is beyond the scope of the federal judiciary's adjudicative authority.¹⁹⁰ Congress responded with the Hickenlooper Amendment,¹⁹¹ which balances the interests of foreign affairs and justice by allowing the United States Executive to decide, on a case-by-case basis, when the Court should invoke the doctrine.¹⁹² The President of the U.S. will invoke the doctrine when intervention in such affairs does not belong in the purview of the judicial branch.

In *Sarei*, the Rio Tinto company's operations were found to be attributable to the sovereign Papua New Guinea government due to the state-sanctioned violence and torture of opposition to the company.¹⁹³ Even though the *Sosa* elements were met, the Act of State Doctrine precluded the extension of jurisdiction for prudential reasons. In contrast, plaintiffs in the Chevron/Ecuador litigation would likely not face preclusion under doctrine. The Ecuadorian Government fully supports its indigenous peoples and condemns the actions of Chevron. The Ecuadorian government's involvement with Chevron is no longer a matter of state policy, and intervention by a U.S. adjudicative body would pose no threat to the foreign affairs' policy of the U.S.

Chevron has argued that because Ecuador's oil and natural gas industry is nationalized, there is a sufficient connection between the actions of Chevron and the Ecuadorian Government, thus transforming the dispute into a political question under the Act of State doctrine. This argument is flawed. For the Act of State Doctrine to apply, it must be shown that the government of Ecuador either affirmatively took steps to suppress justice, as in the case of *Sarei*, or entirely acquiesced. With a favorable judgment in Ecuador and the support of that nation to enforce it, neither is present.

VI. CONCLUSION

The plaintiffs affected by the tortious conduct of the Chevron Corporation are entitled to a remedy. Unfortunately, by the time a remedy materializes, it may be too late to save their cultural lands and ensure the continuation of their indigenous identity. For more than twenty years, the

¹⁸⁹ *Id.* at 410.

¹⁹⁰ *Id.* at 417.

¹⁹¹ 22 U.S.C. § 2370(e)(1) (1964).

¹⁹² See, Frances X. Hogan, *The Hickenlooper Amendments: Peru's Seizure of International Petroleum Company As a Test Case*, 11 B.C. L. REV. 77 (1969).

¹⁹³ *Sarei II*, 456 F.3d at 1165.

plaintiffs have journeyed through one procedural hoop after another, and it appears that there is no end in sight.

For future plaintiffs of environmental human rights violations, U.S. federal courts should use the Chevron litigation as a motivator to apply the Alien Tort Statute as it was intended: as a deterrent to such convoluted, expensive, and time-consuming litigation. Accountability measures should be imposed on multinational corporations' actions abroad to protect indigenous communities from tortious environmental misconduct occurring on a level that will cause great damage to their lands and people. Under the Alien Tort Statute, such measures have existed for more than two centuries to provide relief from extrajudicial murder, medical experimentations on non-consenting persons, torture, genocide, and other offenses. With the favorable determination from the Ninth Circuit that UNCLOS pollution provisions rise to the level of customary international law, the natural evolution of ATS jurisprudence includes human rights violations resulting from tortious environmental degradation.