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Legal developments in the enforcement of international environmental commitments

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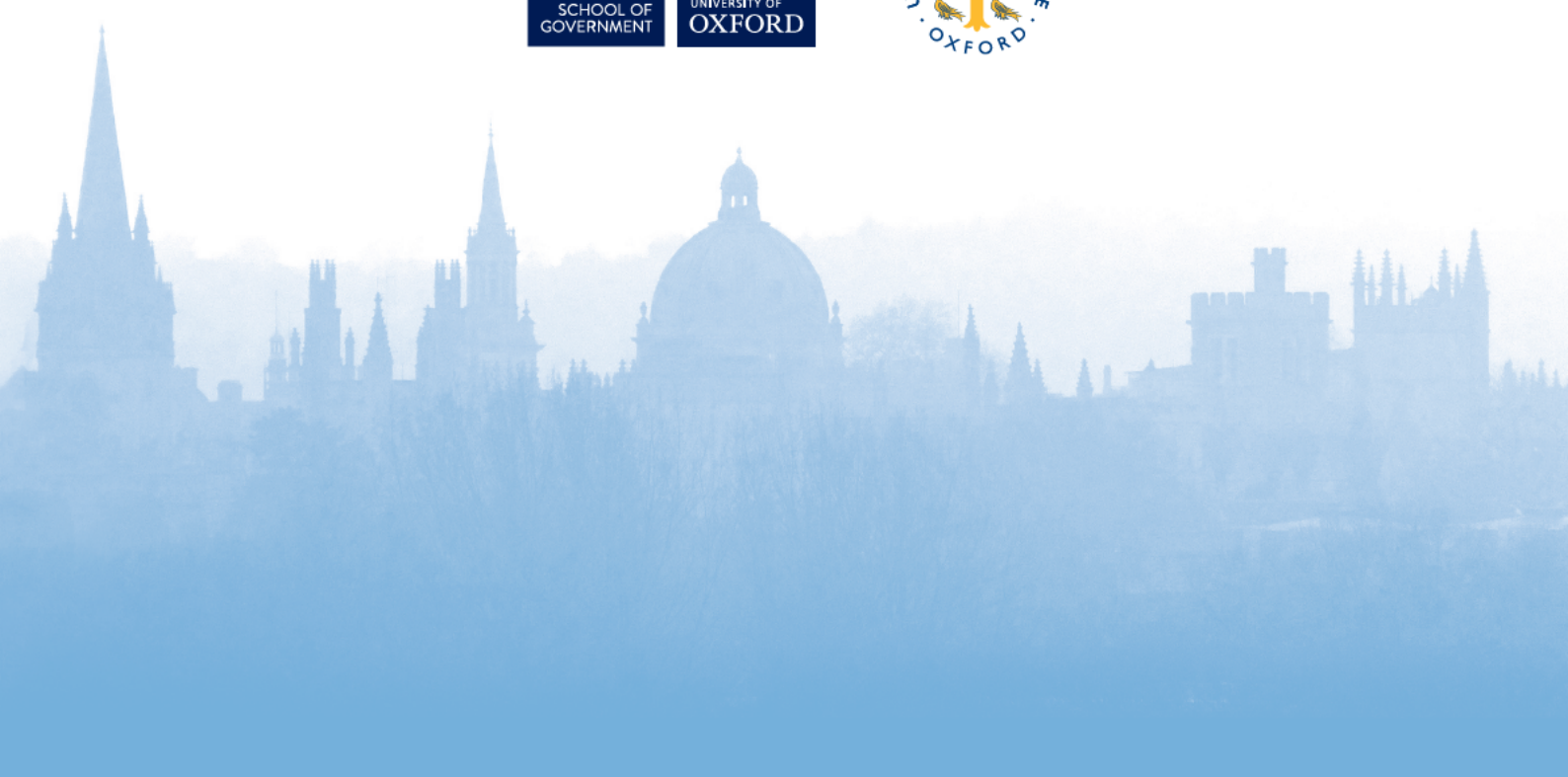
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Legal developments in the enforcement of international environmental commitments

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States commit to protect citizens' rights through international treaties. With globalization, however, cross-border transactions and transnational relationships have increased the role of non-state actors, in particular corporations. While corporations have indeed transformed the international landscape, they are not parties in inter-state treaties. By taking a broad view of international law and international environmental issues, and then narrowing the focus to non-state actors, this paper uses examples of human rights and climate change litigation to argue that even though non-state actors have not formalized their commitments, these commitments can be enforced, especially in the case of environmental protection commitments. The key lies in the new tools made available through developments in private international law; the application of these in the enforcement of such commitments constitutes a new type of enforcement that in this paper it is referred to as 'bottom-up enforcement' of international environmental commitments.

Keywords: Private International Law, Environmental Regulation, Enforcement, Corporate liability, Governance

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1. Introduction

The principles that have been underlying the relationships among states are those established by the Westphalian world order: sovereignty, immunity, non-interference and respect of other countries. These principles have severely enhanced cooperation of states; but the system in which these relationships take place are not limited to states as actors. Globalization has given rise to non-state actors on the international stage.² When state and non-state actors thus relate to one another in this arena, they commit, explicitly and implicitly, to certain rights and obligations. Cross-border transactions and elements of transnationalism are embedded in these relationships. Eventually, this can form a regime, in which law as structure plays a crucial systemic role in a sense to be specified below.

In numerous international agreements, states have committed to protecting human rights and the environment, both in binding and non-binding ways.³ *Rights* relating to the environment are not expressly included in most of these agreements. However, the Universal Declaration of Human Rights *does* state that “[e]veryone has the right to a standard of living adequate for the health and well-being...”.⁴ The International Covenant on Economic, Social and Cultural Rights states, *inter alia*, “The States Parties...recognize the right of everyone to an adequate standard of living for himself and his family...”⁵ Furthermore, the 1972 Stockholm Declaration set principles declaring “that states have 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.”⁶ Some bilateral treaties likewise have similar provisions in their preambles.⁷ Non-state actors can contribute to the implementation of some of these agreements⁸ but international treaties are only entered into by states, and so the commitments therein seem to only oblige states.⁹

² In transnational regulatory spaces, Abbott and Snidal (2009) discussed a ‘governance triangle’ between states, firms and NGOs. K. Abbott and D. Snidal, “The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State” in W. Mattli and N. Woods (eds) *The Politics of Global Regulation* (Princeton University Press 2009).

³ These could be for example conventions, treaties, declarations.

⁴ Universal Declaration of Human Rights, Article 25. See also articles 22 (entitlement to realization of economic, social and cultural rights indispensable for his dignity) and article 27 (right to share scientific advancement and its benefits). See also American Convention of Human Rights, Articles 4, 5, 26 and the recent advisory opinion of the Inter-American Human Rights Courts reinforcing the consideration of human rights and the environment, especially in regard to the right of a healthy environment. Advisory Opinion OC 23/17, November 15, 2017, para 56 and 57.

⁵ International Covenant on Economic, Social and Cultural Rights, Article 11. See also articles 1, 6, 7, 11, 12, 13, and 15.

⁶ A. Nollkaemper ‘Responsibility of transnational corporations in international environmental law: three perspectives’ in G. Winter (ed) *Multilevel Governance of Global Environmental Change*. (Cambridge University Press. 2006.), 182.

⁷ See modern versions of Bilateral Investment Treaties, Free Trade Agreements or Preferential Trade Agreements.

⁸ T. Hale and H. van Asselt. “How non-state actors can contribute to more effective review processes under the Paris Agreement” Stockholm Environment Institute Policy Brief. May 2016; See also T. Hale “All Hands on Deck”: The Paris Agreement and Nonstate Climate Action.’ 16 *Global Environmental Politics* 3.

⁹ Principles of state responsibility for transboundary damage is recognized in treaties like the UN Convention on the Law of the Sea 1982; UN Watercourses Convention 1997; and in other

However, in the following we shall see that non-state actors can be made to comply with the international commitments entered into by states.

General Context

In past years, the efforts of the global community in protecting the environment have increased. However, the measure of success has varied. On one hand, the elaboration of international conventions, protocols and declarations,¹⁰ the extension of the duties of the UN Special Rapporteur for Human Rights to also include the environment,¹¹ and efforts to fight climate change have actually lead to a climate change regime.¹² On the other hand, the United States has backed away from such commitments, causing concern in the international community.¹³

It is important to note that the international environmental regime lacks an enforcement mechanism.¹⁴ Keohane and Victor (2011) argue that without such a mechanism, the regime is ineffective. Indeed, with regard to the Kyoto treaty, they conclude: “The Kyoto treaty and its parent, the United Framework Convention on Climate Change, contain no credible compliance mechanism and, unlike the WTO, no mandatory dispute-settlement institutions, which reduce their effectiveness and determinacy.”¹⁵ The Paris Agreement, which came after the Kyoto Protocol, has an improvement by having set-up the Conference of the Parties (COPs) which considers time frames for nationally determined contributions, though as before, it does not count with a formal dispute settlement mechanism.

The literature on negotiation has long pointed out that for commitments to be meaningfully realised, it is crucial for them to be enforceable. In practice, we see that regimes that have persisted for decades are those that illustrate types of top-down enforcement for international commitments, i.e. when the enforcement mechanism is set up explicitly as part

instruments like the ILC 2001 Articles on the Responsibility of States for Internationally Wrongful Acts and UN Security Council Resolution 687/1991.

¹⁰ 1992 Rio Declaration on Environment and Development; 1997 Kyoto Protocol; 1998 UNECE Aarhus Convention; Minimata Convention; Paris Agreement, among others. See further <https://www.unece.org/env/treaties/welcome.html>

¹¹ In 2012, the mandate for an independent expert on Human Rights and the Environment. UN Resolution 19/20. A/HRC/RES/19/10; and in 2015, the decision by the Human Rights council to extend the mandate to a Special Rapporteur in Resolution 28/11.

¹² The Paris Agreement on Climate Change was signed by one hundred and fifty nine states, committing to the environmental obligations contained therein.
http://unfccc.int/paris_agreement/items/9444.php

¹³ P Birnie, A Boyle, C Redgwell *International Law and the Environment* Oxford (University Press 2009), Chapter 3.

¹⁴ Brunnee (2006) states: “The promotion of compliance with international environmental commitments is among the most challenging issues of global environmental governance.” J Brunnee ‘Multilateral environmental agreements and the compliance continuum’ in G Winter (ed) in *Multilevel Governance of Global Environmental Change* (Cambridge University Press 2006), 387; Birnie, Boyle and Redgwell (2009) point to other weaknesses. They mentioned that the ‘the relative weakness of UNEP [UN Environmental Programme] as the principal UN body with general environmental competence’ comes from the ‘fragmentation of existing structures’. This might also have an impact on its effectiveness. Birnie et al., 2009. p. 69

¹⁵ R Keohane and D Victor ‘The Regime Complex for Climate Change’ The Harvard Project on Climate Change Agreements. Discussion Paper 10-33. January 2010. p.20

of the international treaties forming these regimes. For example, the trade regime (WTO)¹⁶ and the international investment regime (IIAs), further to their rules, norms and decision-making processes, they both have clearly defined dispute settlement bodies¹⁷ that allow the parties to the regime to submit claims to these bodies in cases of breaches of the parties' commitments.¹⁸

Another important factor is that an enforcement mechanism needs to encompass all those acting within the arena of the regime in order to be effective, that is, all actors. International law concerns the relationship between states but what about non-state actors, like corporations? When international disputes arise that involve corporations, international law required a corporation to seek diplomatic protection when having a claim against a state; it would then be the home state of the corporation, rather than the corporation itself the one bringing an international claim. Today, the practice of global economic governance has softened the rigidity of traditional approaches to international treaties; for example, international investment treaties are signed and ratified by states, but they confer exclusive benefits to corporations. These treaties allow the latter to directly sue a state before an international arbitral tribunal.¹⁹ However, this granting of benefits is not mutual: states cannot in the same way sue a corporation at international arbitration tribunals for violations of the same treaty obligations committed by corporations in the territory of the state.

Against this background, let us now zoom in on transnational corporations and their actions concerning the environment. Their role in international law and their actions in relation to the

¹⁶ Spaces for reform and improvement in the dispute mechanism remain *vis a vis* the cases. Some scholars question whether the WTO DSU is effective for its lack of use by small and medium size countries. See H Hauser and T Zimmerman 'The challenge of reforming the WTO dispute settlement understanding' (2003) *Intereconomics* 38: 241; S. Charnovitz, 'Should the Teeth Be Pulled? An Analysis of WTO Sanctions', in D. L. M. Kennedy and J. D. Southwick (eds), *Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge, UK: Cambridge University Press) 602-35 at 625.; P. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 2000 *Eur. J. Int'l. Law* 11(4), 763-813. However, there were cases brought by developing countries which have proven the system to be beneficial to them, as the Bananas case brought by Ecuador shows. Thus, counter arguments exist and explain the lack of use of the dispute settlement mechanism by developing countries as a consequence of the differential legal capabilities and export size of countries. See H Horn, P Mavroides, H Nordstrom *Is the use of WTO Dispute Settlement System Biased?* Center for Economic Policy Research, London. 1999.

¹⁷ Presentation of Robert Keohane at the Environmental Institute, Princeton University, Spring 2017.

¹⁸ In trade, there is the Dispute Settlement Understanding and on the topic of investment regime, there are international investment treaties with distinctive dispute settlement mechanisms which also fulfill a key role in the relationships between state and non-state actors like investors. It is not claimed that these mechanisms are perfect. On the contrary, improving them to fit realities is necessary; the remark is placed upon the existence of an enforcement mechanism for international commitments in these areas. For improvements in investment dispute settlement mechanism, see M. A. Gwynn "Balancing the State's Right to Regulate with Foreign Investment Protection: A Perspective considering Investment Disputes of the South American Region" (2018) 6 Groningen Journal of International Law, 1.

¹⁹ This nature of relationships is acknowledged and in case of conflicts further conventions or treaties have created and made possible the use of international arbitration institutions that specialized in solving disputes between a state and a non-state actor, for example the mentioned PCA (after amending its rules to incorporate non-state actors) or the International Centre for Settlement of Investment Disputes (ICSID) and others.

environment has brought about much scholarship.²⁰ Important aspects deriving from this scholarship converge in the necessity of accountability,²¹ and the assessment that transnational corporations are not as accountable as they should be. Attempts to correct this have been made. In 2003, the International Law Commission enacted a report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities.²² In 2011, the Guiding Principles on Business and Human Rights, which apply to states and business enterprises, also sought to establish more corporate social responsibility. Spiesshofer (2018) mentions how the latter was received by different institutions and how it “provided impulse for a series of parallel running processes and regulatory initiatives concerning the development of material requirements and also regarding implementation, above all in the form of due diligence processes.”²³ It does not, however, have a direct and binding enforcement mechanism.²⁴ The provisions in these instruments are not binding (they are ‘soft law’), and they lack a mechanism to hold these actors accountable for harm committed in violation of human and environmental rights. Many scholars have pointed out transnational corporations’ actions contributing to detrimental environmental effects.²⁵ Crawford and Olleson (2003) point out that: “it is doubtful whether any general regime of responsibility has developed to cover them.”²⁶

In light of these problems, Ruggie (2007) has argued that there is an “institutional misalignment” that occurs “between the scope and impact of economic forces and actors” and that “[t]his misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation.”²⁷ Indeed, there is an ongoing trend of bestowing benefits and rights on corporations without making them liable, such as in the recent Organization of American States General Assembly Resolution 2906 of June 2017, which requested to give the broadest possible publicity to the OAS

²⁰ United Nations Conference on Trade and Development, *Companies without borders: transnational corporations in the 1990s* London. International Thomson Business Press. 1996.; M Kamminga and S Zia-Zarifa *Liability of multinational corporations under international law* (The Hague Kluwer 2000); A Nollkaemper ‘Responsibility of transnational corporations in international environmental law: three perspectives’ in G Winter (ed) in *Multilevel Governance of Global Environmental Change* (Cambridge University Press 2006).

²¹ Keohane and Victor (2011) mention the characteristics of a successful regime: coherence; accountability; effectiveness; determinacy; sustainability; epistemic quality.

²² First report by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN Doc A/CN.4/531, 2003

²³ Birgit Spiesshofer *Responsible Enterprise: the emergence of a global economic order* (C.H. Beck; Hart; Nomos Publishing 2018), p. 87

²⁴ Spiesshofer (2018), however, states: “As the UNGP do not have their own enforcement mechanism, they use those of other instruments.” Spiesshofer (2018), p. 87

²⁵ M Kamminga and S Zia-Zarifa *Liability of multinational corporations under international law* (The Hague Kluwer 2000); L Benjamin ‘The Responsibilities of Carbon Major Companies: Are they (and is the Law) doing enough?’ (2016) 5 *Transnational Environmental Law* 2, 353-378.

²⁶ J Crawford and S Olleson ‘The nature and forms of international responsibility’ in M Evans (eds) *International Law* (Oxford University Press 2003), 447

²⁷ John Ruggie. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and transnational Corporations and Other Business Enterprises. UNCA doc. a/hrc/4/35, 2007, p.3.

Model Law on Simplified Corporations. The model law promotes further limiting the liability of corporations.²⁸

The lack of accountability of these non-state actors in the international arena is an important issue. Actions of international corporations, sometimes by themselves, sometimes in conjunction with state actions, can bring about great harm, especially regarding the environment. And yet, as Mattli and Woods show “at a global level, the institutional context is more complex: there is no unitary regulator with a coercive fiat.”²⁹

While some might argue that responsibility should be left to the states, because states implement international obligations and regulate conduct of natural or legal persons in their territory through their laws, leaving enforcement to states where the respective environmental damage occurred encounters the following problem: some states are unwilling to enforce regulations that they have committed to. This can be due to various reasons, as Anderson (2002) points out: they could be “due to low administrative capacity, fear of driving away foreign investment, or collusion with the MNC.”³⁰

Is there a way to enforce international environmental commitments even though an enforcement mechanism has not been formalized, i.e. even though top-down enforcement is not possible? In the following sections, we shall refer to the possibility of enforcement coming from the ‘bottom-up’. Its defining characteristic is that rather than having explicit rules that are then enforced by the top of the hierarchy (institutions created through mechanism of dispute settlement in treaties), here the enforcement process starts with the bottom of the hierarchy, the ordinary citizen, a group of citizens or NGOs. In the absence of explicitly binding commitments and enforcement mechanism, citizens can use new legal tools like class actions to seek redress at courts in countries where they may not even be citizens, and sue for redress of violations of human rights and environmental protection. If successful, they can thereby solidify originally vague and soft commitments by states and corporations; they can bring about legally binding structures and commitments from the bottom-up.

All this becomes possible through the blurring of the private-public legal divide, resulting from transnational activities that in turn allow for the application of private international law, as described in Section 1. Section 2 gives some specific examples from human rights and climate change litigation, and shows the different jurisdictional approaches of the US and the EU. In Section 3, describes the possible explanations of these different approaches, and the paper concludes with some reflections about the paths opened up by the new developments in this area.

²⁸ Though the model establishes in Art. 27 a provision on liability of directors and managers, there is a possibility to opt out of this if not included in the by-laws. Furthermore, there is no mention of duty of care. OAS General Assembly Resolution 2906 (XLVII-0/17) of June 20, 2017.

²⁹ In reference to J Wiener “Global Environmental Regulation: Instrument Choice in Legal Context” (1999) 108 Yale Law Journal 4; W Mattli and N Woods ‘In whose Benefit? Explaining Regulatory Change in Global Politics’ in W Mattli and N Woods (eds) *The Politics of Global Regulation* (Princeton University Press 2009), 39

³⁰ M Anderson ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer’ (2002) 41 Washburn L.J. 399, 409

2. The Blurring of the Public-Private Divide and Private International Law

The international framework contains universally accepted rights, *ius cogens*, some of which concern human rights, and norms that can have *erga omnes* effect like those concerning the protection of the environment.³¹ International law does indeed form part of the structure of this system and, in some form or another, both enables and constrains the relationships between actors.³² The protection of these rights, especially human rights and connected to that international environmental rights, is crucial in light of the ‘no harm principle’ in international law.³³ This is particularly so because the negative consequences of over exhausting the planet’s resources will not stay within the territorial borders of those responsible. Actions concerning the environment necessarily have a holistic impact and inter-generational consequences.

International law is traditionally divided into public and private. In public international law, the main actors are sovereign states. While public international law is applied to relationships between sovereigns, the international element can also impact non-state actors like companies and private persons. These non-state actors are subjects of private law. Private international law, also known as conflict of law rules, is mainly regarded as the rules of law applicable to private relationships that contain a foreign element.

The Universal Declaration of Human Rights states that “All are equal before the law and are entitled without any discrimination to equal protection of the law”³⁴; and furthermore that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.³⁵ Similarly, the Rio Declaration provides the principle of ‘effective access to judicial proceedings, including redress and remedy’.³⁶

Many domestic constitutions further grant a person the right to live in a healthy and clean environment.³⁷ It is very obvious that to fulfil this right, the environment has to be protected. Environmental damage can be caused by either states or non-state actors, but it is

³¹ In *Gabcikovo-Nagymaros* case there was reference that norms of environmental law are not *ius cogens*. Birnie et al point to this remark and make the distinction that the norms apply *erga omnes* “but it does not follow that they are therefor also *ius cogens*”. Birnie et al, 2009. p.110

³² International law can be formed by customary practices or by rights and obligations established in treaties. On how it can constrain or enable actors’ behaviour see M Gwynn ‘Structural Power and International Regimes’ (2016) GEG Working Paper. Blavatnik School of Government, Oxford University.

³³ Even if states cannot be made responsible they have a duty to mitigate. Birnie et al, 2009. p.147.

³⁴ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), article 7

³⁵ *Idem*, article 8.

³⁶ Principle 10 Rio Declaration. See also 1996 Helsinki Articles on International Watercourses.

³⁷ National Constitutions, such as that of Paraguay, article 6, 7, and 8; South African Constitution, section 24; India’s Constitution, article 48A; Nigerian Constitution, Section 20; Dutch Constitutions, article 21. Also supported by many national environmental laws. See also Kyle Burns. 2016. ‘Constitutions and the Environment: Comparative Approaches to Environmental Protection and the Struggle to translate Rights into Enforcement. *Georgetown Environmental Law Review*. <https://gelr.org/2016/11/12/constitutions-the-environment/>

communities and individuals who experience the damages as a consequence of tortious actions.³⁸ For these tortious actions individuals can seek redress. Normally these actions are brought at the forum where the damage occurred, but sometimes the liability of the damage is not limited to a particular territorial boundary or the claim cannot be brought where the damage occurred; the actions could derive from subsequent sets of actions connecting a subsidiary with its parent company. There may be national laws that differ between those applicable to the subsidiary or the parent company. Also, the effect of the action itself may have impacts across borders.³⁹ All these issues are matter of private international law to be solved by domestic courts.⁴⁰

So, while the default form continues to be seeking redress and relief at domestic courts, which as organs of states are normally confined to national matters within their jurisdiction, due to globalization, however, these courts are now facing increasing numbers of disputes involving an international, transnational or foreign law element. Here is when we see the important role of private international law. In such situations, when the private individuals bring tort or other type of claims to courts, because the claim will concern transnational elements, the courts will use private international law rules and methods to determine whether they have *jurisdiction* over individual claims that contain a foreign element. Following that, courts then decide which will be the *applicable law* (national or foreign law) to solve the dispute that individuals have brought before them.

The application of private international law in the light of globalized relationships is becoming increasingly common. In this sense, the hope for enforcing international commitments, whether or not they have been formalized into directly binding obligations, might lie within the sphere of private international law.

In this context, the traditional legal divide, the very distinctions between public and private law, between domestic and international law have become weakened, blurred. As Birnie, Boyle and Redgwell (2009) argued: “there has since the Stockholm Conference been a remarkable growth not only in legally binding measures of environmental protection, but also in new legal concepts and principles which increasingly call into question traditional boundaries between ‘public’ and ‘private’ international law, and between national and international law.”⁴¹ While on the one hand, this blurring can be seen as a weakness in a

³⁸ In some jurisdictions, individuals can seek redress both in civil courts based on tort claims and in administrative courts based on environmental and zoning laws. Tort and environmental laws usually implement human and environmental rights. See Spiesshofer (2018).

³⁹ There is a vast literature on extraterritorial liability. See for example Jennifer A. Zerk. *Multinationals and corporate social responsibility: limitations and opportunities in international law* (Cambridge University Press 2006); N Craik ‘Transboundary Pollution, Unilateralism, and the Limits of Extraterritorial Jurisdiction: The Second Trail Smelter Dispute’ in R Bratspies and R Miller (eds) *Transboundary harm in international law: lessons from the Trail Smelter arbitration* (Cambridge University Press 2006); *Duties across border: advancing human rights in transnational business* Bård A. Andreassen, Võ Khánh Vinh (eds) (Cambridge: Intersentia 2016). The scope herein is not to review the literature, but to remark the role of private international law in such circumstances, therefore, I will focus only on civil liabilities, though criminal liabilities are also plausible in these contexts.

⁴⁰ Though there are some supranational instances like that of the European Court of Human Rights that also provide a forum to solve disputes concerning human rights, it still requires first the exhaustion of available domestic procedures and it is limited to violations of the European Convention on Human Rights. This is the case also for the Inter-American Court of Human Rights.

⁴¹ Birnie et al, 2009. p. 37

legal system, because it can push us back from the law's aim of providing clarity and ultimately certainty, it can also be seen as a strength. For this blurring has as a consequence that legal tools that thus far were only available in one area, under certain conditions, be used in another area, and even be used to counter under-regulation and loopholes in said area. In particular, the blurring between private and international can empower *private* individuals to seek redress for violations of states and non-state actors' obligations and in that way make them comply with *international* obligations or commitments independently of any territorial confinement.

Some of these aspects manifest in the role of private international law when enforcing international environmental commitments. Scholars have mentioned private international law issues in transboundary environmental litigation,⁴² and claimed that there were advantages and disadvantages in its application.⁴³ However, new developments in this area, as we will see in the following, allow this to be a possible avenue for enforcing international commitments, whether or not they have been formalized into directly binding obligations.

Some of these developments concern legal techniques to make transnational actions more enforceable, for example the use of class actions. Normally, it is state authorities and regulators who should enforce the compliance of regulations to protect civil society. In practice, this does not always happen. Individuals and NGOs are gaining a more important role in this regard, and it is interesting to see how. It might not be worth for an individual to claim or seek redress for a damage, if doing so involves great cost and an asymmetric position.⁴⁴ However, if the very same action affected more than one individual, the opportunity to make a collective claim becomes possible. This is the case for class actions, which involve seeking collective rather than individual redress. The individual would not be representing him/herself but the class.⁴⁵ Class actions arguably have long term positive effects because by submitting such claims, private parties are preventing such tortious actions that could harm other individuals to continue. But it is important to note that through

⁴² For different approaches of choice of law in transboundary environmental claims and liability see Hague Conference on Private International Law 'Note on the Law Applicable to Civil Liability for Environmental Damage' 1992; Von Bar, 268 Recueil des Cours (1997) 303; Bernasconi, Hague YIL (1999) 35; Beaumont, Juridical Review (1995) 28; Birnie et al 2009, p 311-315, provide a summary of private international law in transboundary environmental damages. However, new developments of private international law, such as recent US Supreme Court cases or EU regulations applicable to this area, might change how actions develop in this field. These are described in Section 2.

⁴³ Birnie et al mention disadvantages because of a lack of consensus, particularly in Europe, for transboundary litigation. Birnie et al 2009, p.312. New EU legislation in this area has been implemented overcoming this disadvantage. See Section 2.

⁴⁴ For example, if a transnational company has a product that turned out to be deficient, and one consumer experienced damage as a consequence of using that product, it could be that the cost of pursuing a claim, paying attorneys' fees, etc, is greater than the actual damage he/she experienced through the deficient product. This already disincentives him/her to pursue the claim.

⁴⁵ Class actions have the requirement of commonality, i.e. it is demanded that the same action has affected each member of the class, and that the conduct produced loss or damage. There are also certain conditions of Class Actions: i. Certification ii. Numerosity iii. Commonality iv. Superiority v. Adequate representation vi. Notice vii. Opt-out opportunity. M Karayanni 'The Private International Law of Class Actions' The Hague Academy of Private International Law. Summer 2017

class actions claims, private parties, rather than governments, are actively enforcing regulations.⁴⁶

In the case of international human rights and environmental violations, it is normally the same action that affects communities or large groups. Class actions are therefore a good instrument for the enforcement of international human rights or obligations not to damage to the environment. The instrument of class actions was born out of a procedural necessity for redress, but it has also come about due to the blurring of the private/public divide that has forced the law to adapt and that created new mechanisms for individuals to enforce the violation of commitments towards them.

However, though class actions can be used to bring claims to seek redress for transnational actions that violate human rights or the environment, it is still up to the different legal systems to accept jurisdiction over transnational claims. For this reason, it is valuable to look at cases in order to see the applicability of the legal mechanisms described above, and the role of private international law in the enforcement of international environmental commitments.

The next section describes human rights cases relating to environmental pollution and climate change litigation that illustrate individuals or NGOs suing:

- a) transnational corporations whose actions polluted the environment and consequently detrimentally affected the individual (harm), and
- b) the state, to make the state liable for their commitments to reduce gas emissions (public good protection).

The cases against non-state actors reflect how individuals attempt redress for human rights and environmental violations, in countries of which they are not nationals, and which are different from where the damage occurred, so in other words, these actions were committed in a territory different than where relief is sought. The cases against a state actor reflect how private individuals attempt to make a state comply with environmental commitments, though sometimes referring to domestic and sometimes referring to international commitments.

In order to reflect on the different approaches in how the respective courts react when victims submit their claims in order to seek redress for violations of international human rights and environmental obligations, the next section describes two particular jurisdictions: the US and the EU.

⁴⁶ M Karayanni 'The Private International Law of Class Actions' The Hague Academy of Private International Law. Summer 2017; Anderson, 2002.

3. Redress for International Human Rights and Environmental Violations: Approaches from the US and the EU

In relation to both human rights and climate change, there is rich literature concerning non-state actors lobbying governments to avoid liabilities for international commitments.⁴⁷ Difficulties in litigation remain in the areas of human rights and environment, specifically when determining the causation of tortious actions.⁴⁸ The following does not intend to explore causation issues of claims, but rather, to offer a brief overview of recent existing litigation that reflects the uses and developments of private international law to enforce international environmental commitments and exhibits features of bottom-up enforcement. Below, I shall describe first the US and then the EU jurisdictional approaches to these matters.

In the United States

In the US seeking redress for tortious actions committed abroad was promising because of the existence of the US Alien Torts Statute (ATS). This statute states: “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.”⁴⁹

However, though the statute proved to be applicable in some past cases,⁵⁰ the US Supreme Court has now set the parameters for the application of this statute. This was done in a relevant case that reached the US Supreme Court in 2013: *Kiobel v Royal Dutch Petroleum Co.(Shell)*.⁵¹ It concerned human right violations against Nigerian citizens by Dutch, British and Nigerian oil corporation. The case was submitted by class action suit based on the application of the ATS.⁵²

While this statute could have been the hope for granting jurisdiction in a case like this, the US Supreme Court was concerned about the extraterritorial reach of domestic courts in view

⁴⁷ S Macleod, D Lewis ‘Transnational Corporations Power, Influence and Responsibility’ (2004) 4 *Global Social Policy* 1; E Morgera ‘The UN and Corporate Environmental Responsibility: between International Regulation and Partnership’ (2006) 15 *RECIEL* 1; D Egan ‘The Limits of Internationalization a neo-Gramscian Analysis of Multilateral Agreement on Investment’ (2001) 27 *Critical Sociology* 3; Ruggie’s reports were also criticized for not reflecting hard law obligations on corporations. See C Lopez The ‘Ruggie process’: From legal obligations to corporate social responsibility? In S. Deva & D. Bilchitz (eds) *Human Rights obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013), 58-77.

⁴⁸ D Grossman ‘Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation’ (2003) 28 *Colum. J. Envtl. L.* 1; S Steel *Proof of Causation in Tort Law* (Cambridge University Press 2015); A Michael ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer, (2002) 41 *Washburn L.J.* 399, 426.

⁴⁹ 28 US Code §1350

⁵⁰ Roger P. Alford 2014. ‘The Future of Human Rights Litigation after *Kiobel*’ 89 *Notre Dame Law Review* 1749-1772.

⁵¹ *Kiobel v Royal Dutch Petroleum Co.(Shell)* (2013 US Supreme Court)

⁵² The suit was brought by Nigerian citizens against the parent company incorporated in the US which aided by the government of Nigeria, repressed resistance for oil development in the Ogoni river.

of this statute. The US Supreme Court held that there was a presumption against the extraterritorial application of ATS and that the case mentioned did not sufficiently touch and concern the territory of the US. Thus, the Supreme Court rejected jurisdiction to hear the case based on the extraterritorial effect of the ATS.⁵³

The presumption against extraterritoriality has the function of avoiding unintended clashes between US laws and those of other nations. The Supreme Court argued with respect to this case that the US Congress had not intended causes of action derived from the ATS to have extraterritorial reach.⁵⁴

This view was reinforced by another case that reached the US Supreme Court in 2014. In *Daimler vs Bauman*,⁵⁵ which concerned a claim over human rights violations by the corporation in Argentina. The California District Court, where the claim was initially submitted because of the activities of Daimler's subsidiary in the US, decided that it had jurisdiction over the case.⁵⁶ The decision was appealed, and it reached the US Supreme Court. It decided to overturn the district court's decision, arguing that neither the parent company nor the subsidiary was incorporated in California. This was consistent with the view of the Supreme Court regarding the establishing of jurisdiction over foreign subsidiaries: the corporate link is not sufficient, the foreign company must have contact with the forum state that must be "continuous and systematic".⁵⁷

Further to these views for rejecting extraterritorial claims, even if jurisdiction is accepted, the US courts can nevertheless reject claims against US corporations that occur outside the US in virtue of the doctrine of *forum non conveniens*. *Forum non conveniens* means that the forum where the claim is sought is not the best forum to solve that claim; so even though the court could have jurisdiction to hear the claim they might reject it because of the existence of another forum more convenient to settle the claim.⁵⁸ However, the ineffectiveness of this doctrine for transnational relations can be seen in how it was applied in the *Chevron* case.

In this case, which lasted a decade,⁵⁹ the claim was brought by a community in Ecuador against the US company Texaco for oil pollution. The claim was brought at the forum where the company had its registered domicile in the US. Because Chevron later acquired Texaco, Chevron carried on with the litigation. As a defendant before the courts of the US, Chevron alleged the defence of *forum non conveniens* and asked the court to reject the case based on it. The US court said that their forum was indeed *forum non conveniens* and that the claim should be brought to the courts in Ecuador. The plaintiffs, victims seeking redress, then submitted again the claim to the courts of Ecuador and they received a favourable

⁵³ R Alford 'Human Rights after Kiobel: Choice of Law and the Rise of Transnational Tort Litigation' (2014) 63 *Emory Law Journal*; see also C Vazquez 'Things we do with Presumptions: Reflections on Kiobel v Royal Dutch Petroleum' (2014) 89 *Notre Dame L.Rev.* 1719-1748

⁵⁴ Kiobel, 133 S. JCT. 1659, 1664; Alford, 2014. p.1753

⁵⁵ Daimler AG v Bauman et al, 134 S. Ct. 746 (2014)

⁵⁶ Due to California long arm statute, CA courts can exercise jurisdiction (personal) over any basis not inconsistent with the constitution of California or the United States.

⁵⁷ Goodyear Dunlop Tires Operations S.A. v Brown, 131 S. Ct. 2846 (2011).

⁵⁸ The 2005 Hague Choice of Court Convention excludes *forum non conveniens*.

⁵⁹ Initial lawsuit started in 1993 and the case was dismissed from improper venue in 2001. 'Chevron case: Ecuador's Defense on the claimants abuse of Process in international investment arbitration' Report of the State Attorney's General Office of Ecuador. Administration 2008-2005.

judgment, which made Chevron liable for the environmental pollution. Thus, Chevron was obliged to pay compensation to the community for the environmental damages caused. Chevron assets started to get seized worldwide as a result of the enforcement of this judgment. To avoid this, Chevron, which had previously requested the *forum non conveniens* to reject this claim at US courts, then complained at the US courts again and requested a stay of the judgment's enforcement worldwide for finding deficiencies in the Ecuadorian domestic court system. Not only did the US courts grant that stay/injunction, but Chevron then also sued the Ecuadorian State for this judgment at an arbitral institution alleging *inter alia* denial of justice. The decision of the arbitral tribunal, after finding procedural deficiencies and corruption in the domestic court, made the Ecuadorian State liable for such events. This made the Ecuadorian initial judgment against the corporation unenforceable in other countries. Though these related to procedural deficiencies, for an environmental damage produced by a corporation, the Ecuadorian state became liable to the corporation; one award established compensation to the corporation of US\$77 million,⁶⁰ and more recently, an arbitral tribunal also ordered Ecuador to "take corrective measures, of its own choosing, to "wipe out all the consequences" of all the Respondent's internationally wrongful acts in regard to the Lago Agrio Judgment..."⁶¹

On the other hand, bottom-up enforcement is also shown in climate change litigation in the US. For instance, *American Electrical Power vs Connecticut*⁶² concerned a claim derived from eight states, the city of New York and non-profit organizations suing gas emitting companies in 2004; it related to the Clean Air Act and the EPA as authority to regulate. The District Court rejected the claim based on not being the appropriate forum, but the Appeal Court reversed the decision, and the case was heard by the Supreme Court in 2011.⁶³ The decision of the Supreme Court, though acknowledging that federal common law covers environmental protection, stated that a statute displaces federal common law, when such statute addresses the topic directly.⁶⁴ This displacement is seen as a barrier for the use of common law for environmental protection or climate change torts.⁶⁵ In another case, *Juliana vs the United States*, a claim was filed in 2015 by a group of youth and NGOs against the

⁶⁰ Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I) (PCA Case No. 34877)

⁶¹ Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II) (PCA Case No. 2009-23, pa. 10.13 (vi)). The Chevron litigation was very complex and involved many awards. For full details of the procedural history of the case see Annex of Part I in this award. The final decision on the exact compensation to be paid is pending.

⁶² Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011). See also Phillip Divisek, 'Climate Change Torts: American Electric Power v Connecticut' 7 Macquarie J. Int'l & Comp. Envtl. L. 108 (2011)

⁶³ For a complete analysis of this case, see David R. Brody 'American Electric Power Company v Connecticut' Harvard Environmental Law Review. Vol 36 (1) 2012 p297-304

⁶⁴ Brody 2012 further summarizes the findings: "environmental protection is generally a proper arena for federal common law. Second, the Court reiterated that a statute displaces federal common law when it "speaks directly" to the issue. And third, when determining whether a statute speaks directly to the issue, courts will consider "whether the field has been occupied." The latter meant the situation in which a statute would provide the same remedy under federal law. In relation to this, Brody (2012) suggests that since the US has different statutes covering different areas of environmental protection, environmental claims will not easily proceed under federal law. Brody 2012 p.301.

⁶⁵ The Status of Climate Change Litigation. A Global Review UN Environmental Programme May 2017. p.34; See also Divisek 2011.

US for causing dangerous carbon dioxide concentration and thereby violating the plaintiff's constitutional rights. Though the case is still pending, and only if it is allowed to go to trial will the federal court hear the case,⁶⁶ it shows that though it might depend on the jurisdictional approach, protecting commitments relating to climate change can emerge from bottom-up enforcement.

In the European Union

In a case that concerned Nigerian farmers affected by oil pollution of Royal Dutch Shell,⁶⁷ the EU had a different perspective on jurisdiction even though it was based on similar factual and international grounds to that of the Kiobel case described above.

In the EU,⁶⁸ the Brussels I Regulation recast determines jurisdiction or the right of a court to hear a claim. The general jurisdiction rule is that the courts will have jurisdiction if the defendant is domiciled in the EU, regardless of their nationality.⁶⁹ Furthermore, it states that a person domiciled in a member state may be sued in another member state,⁷⁰ and in its provisions regarding special jurisdiction it establishes that for matters relating to tort, the jurisdiction will be placed on the courts of the place where the harmful event occurred.⁷¹

Regarding the applicable law on cases concerning tort, the Rome II Regulation determines the law applicable to non-contractual obligations (torts).⁷² For tort cases the general rule in Article 4(1) of Rome II Regulation states: "[T]he law applicable to a non-contractual

⁶⁶ 217 F.Supp 3d 1224 (D.Or.2016). Juliana vs the US, a claim submitted by youths and NGOs in 2015 at the District Court of Oregon against the US for violating the public trust with its carbon emissions. The novelty is that the claimants are pursuing their standing based on public trust rather than torts. The case is still pending. <http://climatecasechart.com/case/juliana-v-united-states/> ; <https://insideclimatenews.org/news/17112017/climate-change-lawsuit-kids-donald-trump-administration-our-childrens-trust> (last accessed Jan 3, 2017)

⁶⁷ In November 2008, four Nigerian farmers filed claims against Royal Dutch Shell (RDS, parent) and SPDC (Shell Petroleum Development Company, its Nigerian subsidiary) before the District Court (Rechtbank) in The Hague. Rechtbank 's-Gravenhage, 30-12-2009 / 330891 - HA ZA 09-579 (District Court The Hague).

⁶⁸ The European legislation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was formed by the original Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters adopted on September 27 1968. It was then replaced by Council Regulation (EC) No 44/2001 (Brussels Regulation I), adopted on December 22, 2000 and came into force on March, 1 2002. Then, Council Regulation (EC) No 1215/2012 (Brussels Regulation I Recast) was adopted on December 12, 2012 and it applies from January 10, 2015. For full details on these European instruments, see Hartley, Trevor *Civil Jurisdiction and Judgments in Europe - The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* OUP 2017

⁶⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Art 4(1). Hereinafter referred to as Council Regulation (EC) No 1215/2012 (recast Brussels I Regulation).

⁷⁰ Council Regulation (EC) No 1215/2012 (recast Brussels I Regulation), Art 5.

⁷¹ Council Regulation (EC) No 1215/2012 (recast Brussels I Regulation), Art 7 (2); For a scholarly account on the interpretation of these Regulations by English Courts see J Harris 'Understanding the English Response to the Europeanisation of Private International Law' (2008) 4 *J. Priv. Int'l L.* 347.

⁷² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Herein after Rome II Regulation.

obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”⁷³ This is the principle of *lex loci damni* - the law of the place where the damage occurred. It is also important to remark upon the special provision for environmental damages expressly addressed in the Rome II Regulation. In its article 7, it states: “The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.”⁷⁴

The case of *Royal Dutch Shell* was submitted to the Dutch courts because the parent company was a company incorporated in The Netherlands and so the Dutch courts accepted jurisdiction based on the Brussels I Regulation recast. Since it was a tort case, the Dutch District Court determined that the applicable law was Nigerian law based on the Rome II Regulation. As a result, and under Nigerian law, the court decided that the parent company was not liable, because it did not breach its duty of care. However, the Dutch court also found that the subsidiary in Nigeria was indeed liable for the environmental damage and breached its duty of care to prevent oil spills and sabotage.⁷⁵ The case was later appealed and the Court of Appeals of The Hague reversed the decision in part, in that the Court of Appeal found that the parent company was liable, and that some of the farmers deserved

⁷³ Rome II Regulation, Art 4 (1); see also below footnote.

⁷⁴ Rome II Regulation, Art 7; The recitals of the Rome II Regulation also state important remarks: Environmental damage is defined by an adverse change in a natural resource, or an impairment of a function performed by that resource (Recital 24). Recital 25 also states that “Regarding environmental damages, Article 174 of the Treaty [European Union], which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.”; In a scholarly commentary of Article 7, it is pointed out that this choice given to the victim, follows from the principle of prevention: “If the conflict of law rule pointed only in one direction, be it the place of injury or the place of conduct, there would be the risk that the operator could take advantage of the different protection levels by operating in or close-by a low-protection county” and also that “The decision for the principle of ubiquity and the victim’s option to choose the law of the place of conduct strengthens the effectiveness of EU environmental law...” In Huber, P *Rome II Regulation: Pocket Commentary* Sellier European Law Publishers 2011; For a description of the treatment of Art 7 of the Rome II Regulation, see Dickinson, Andrew *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* OUP 2008, p.429-441

⁷⁵ Carballo Pineiro and Kramer describe the jurisdiction approach. They state: “In its interim judgment regarding the question of international jurisdiction, the Hague District Court accepted jurisdiction on the basis of Art. 2 Brussels I Regulation, since the first defendant was domiciled in the Netherlands (registered office in London and principal place of business in the Hague) and in relation the second, Nigerian, defendant on the basis of Art. 7 of the Dutch Code of Civil Procedure regarding multiple defendants and related claims” In L Carballo Pinero and X Kramer ‘The Role of Private International Law in Contemporary Society: Global Governance as a Challenge’ (2014) 3 *Erasmus Law Review* 1-4; District Court The Hague (Rechtbank ’s-Gravenhage), 30 December 2009, ECLI:NL:RBSGR:2009:BK8616 and 24 February 2010, ECLI:NL:RBSGR:2010:BM1470.

compensation for Shell's oil spills on their land.⁷⁶ Shell had other related cases, in which it settled out of court for US\$82 million.⁷⁷

In 2015, *Stichting Urgenda v The State of the Netherlands* was another case illustrating the effectiveness of bottom-up enforcement to establish accountability in the climate change regime.⁷⁸ The case was brought by more than 800 individuals and a Dutch NGO against The Netherlands. The claim was to obtain an injunctive relief by obliging the state to reduce its greenhouse gas emissions, which the plaintiff claimed was one of the highest per capita emissions in the world, and that thus the conduct of the state was unlawful.⁷⁹ The court accepted jurisdiction and gave standing to the NGO by recognizing that its by-laws stated that the NGO in question represented global interests. The court invoked international instruments and stated that the 1992 UNFCCC, the EU legislation and the ECHR had a 'reflex effect' upon the duty of care of the Dutch civil code. The Netherlands had set its reduction target to 30%, but it had only reduced its emissions by 17%. The court acknowledged this but said that the state has a duty of care to ensure that by 2020 the emission level was reduced by 25-40%.⁸⁰ It held that the State was not respecting the international law "no harm" principle and breaching its obligation to mitigate the damage, thereby committing an unlawful conduct by dismissing the duty of care obligation stated in the national tort law. The court "order[ed] the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least by 25% at the end of 2020 compared to the level of the year 1990."⁸¹ It thus, granted the injunction and obliged the Netherlands to reduce its greenhouse gas emissions.⁸²

Also commenting on this landmark decision, Galvao Ferreira (2016) stated its significance as being "the first time a national court has expressly used the international environmental law (IEL) principle of common but differentiated responsibilities and capabilities...to interpret the scope of a state's climate obligations under domestic law."⁸³ This is an example where a

⁷⁶ This was after the Court of Appeal granted the Claimants request for Shell's disclosure of the maintenance of the relevant oil pipelines. Cees van Dam - Preliminary judgments Dutch Court of Appeal in Shell Nigeria case. See also <https://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria>

⁷⁷ The Bodo Communities also sued Shell Nigeria and the parent companies for oil pollution in the High Court of London. They settled the case out of court for £35 million of affected individuals and £20 for the Bodo community. <https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>

⁷⁸ The Hague District Court. June 24, 2015. ECLI:NL:RBDHA:2015:7196

⁷⁹ ECLI:NL:RBDHA:2015:7196. Section 3

⁸⁰ "In the period 2007-2009, the Netherlands initially focused its climate policy on a reduction target of 30% in 2020 compared to 1990, which was therefore higher than the EU's target of 20%. However, this reduction target deviated at a later stage. In these proceedings, the State has stated that the Dutch climate policy is based on a minimum reduction target of 16% in 2020 (compared to 2005) for the non ETS sectors and 21% in 2020 (compared to 2005) for the ETS sectors. At the hearing, the State confirmed that the combined reduction for both sectors is expected to be 14 to 17% in 2020 compared to 1990." In ECLI:NL:RBDHA:2015:7196. Reduction targets section 4.23.

⁸¹ ECLI:NL:RBDHA:2015:7196. Section 5.

⁸² See H Van Loon 'Global Horizon of Private International Law' (2016) 380 *Recueil des Cours* 9, p 99-102.

⁸³ P Galvanos Ferreira 'Common but Differentiated Responsibilities' in the National Courts: Lessons from *Urgenda v The Netherlands* (2016) 5 *TEL* 2, p.329

domestic court, by enforcing domestic law is actually enforcing compliance of international law. It is an example of bottom-up enforcing of international commitments.

Though the different legal systems are concerned with enforcing international commitments, *vis a vis* states international environmental commitments or transnational corporate actions that affected individuals or communities, we have seen that there are some clear differences arising from different legislations and interpretation given by the judges. More specifically, the two jurisdictional approaches show the degree to which the application of private international law contributes to the enforcement of those international environmental commitments.

4. The Enforcement confronted with Legal, Political and Economic Factors

The cases show some of the different barriers that the transnational claims may entail depending on whether the cases are against the state or non-state actors and whether they are cases concerned with environmental pollution or climate change. For instance, further to the differences in jurisdictional approaches discussed above, common barriers are the difficulty in establishing causation in torts or the displacement of common law by existence of a statute. Also, proof of harm is easier to assess in cases concerning pollution than in climate change cases.⁸⁴

There can also be legal, political and economic explanations for the differences in the aforementioned approaches. For instance, the *forum non conveniens* is rejected by the Brussels I Regulation recast. Whether the foreign subsidiary can also be subject to jurisdiction depends on the law of each state. Most EU member states' corporate law recognise the duty of care of parent companies to their subsidiaries; they thus recognize a strong link between the two entities. Connecting them in this way, as Van Loon (2015) has expressed, is also aligned with them being accountable with transnational activities as expressed by the Guiding Principles on Business and Human Rights.⁸⁵

Carballo and Kramer (2014) have argued that the application of private international law in these cases show two different approaches that are derivative of differences between common law and civil law countries. While the US courts focused on extraterritoriality, and rejected the jurisdiction to resolve a case regarding actions in Nigeria, the civil law country accepted jurisdiction and applied private international law rules to determine a foreign law to be applicable to the case.⁸⁶

The United Kingdom courts have also rejected jurisdiction in related cases like the *Okpavi v Royal Dutch Shell Plc* on common law grounds.⁸⁷ The determination of whether a parent

⁸⁴ These common barriers may change over time as litigation against these issues is changing fast.

⁸⁵ H Van Loon 'Global Horizon of Private International Law' (2016) 380 *Recueil des Cours* 9

⁸⁶ L Carballo Pinero and X Kramer 'The Role of Private International Law in Contemporary Society: Global Governance as a Challenge' (2014) 3 *Erasmus Law Review* 1-4

⁸⁷ In the case *Okpavi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC). See full explanation in John Ogilvie, Claire Stirrup, Dan Kenny 'Successful challenge to English Court Jurisdiction over claims against UK domiciled parent company in relation to acts of subsidiary abroad' Feb. 2017. Available at:

company has a duty of care over acts of subsidiaries in UK common law depends on three requirements: i) Damage should be foreseeable; ii) Relationship of Proximity; iii) The situation should be fair, just and reasonable to impose a duty on the parent company to benefit the claimants.⁸⁸ The UK court said that not all these requirements were met in the aforementioned Shell case. The case was appealed, and the court confirmed the decision.⁸⁹

However, in October 2017, in the case *Lungowe and others v Vendata Resources Plc*,⁹⁰ which involved a claim brought by farmers of Zambia against the parent UK company for having its subsidiary in Zambia polluting the waters, the UK Court of Appeals upheld jurisdiction over the claim.⁹¹

Thus, to draw the conclusion that the differences are derivative of the common law/civil law divide might fall short. Though the general principle of legal separation (the company as legal person and upon particularities of its registration can limit its liability),⁹² the UK's statutory provisions of the obligations of the duty of care,⁹³ decisions of other EU courts on the cases in light of the third requirement and alignment to the Principles on Business and Human Rights might also play a role. Thus, rather than using legal system divisions to explain these differences, we should also look for possible political or economic reasons behind these different approaches.

The two legal approaches, that of the US and that of the EU, to the seeking of redress for corporate actions committed abroad, can offer important insights for the enforcement of obligations deriving from a transnational relationship.

From a human rights perspective, the approach of the US to reject claims that sought redress for the violation of human rights in spite of the territory where the actions took place might not find much support in other countries.⁹⁴ However, it is important to bear in mind the political reasons that may lie behind such decisions.

<http://hsfnotes.com/litigation/2017/02/02/successful-challenge-to-english-court-jurisdiction-over-claims-against-uk-domiciled-parent-company-in-relation-to-acts-of-subsi-dary-abroad/>

⁸⁸ *Caparo Industries plc v Dickman* [1990] AC 605. Normally, further to *Salomon v Salomon* the parent company is not liable for the activities of the subsidiary. See M Anderson 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2002) 41 *Washburn L.J.* 399, 426. There are other cases in the UK concerning parent and subsidiaries and their responsibilities, see *In Re Southard & Co. Ltd* [1979] 1 W.L.R. 1199 and *Adams v. Cape Industries PLC* [1990].

⁸⁹ *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191. See full decision at <http://www.bailii.org/ew/cases/EWCA/Civ/2018/191.html> (last accessed July 30, 2018)

⁹⁰ <http://www.bailii.org/ew/cases/EWCA/Civ/2017/1528.html>

⁹¹ G Holly 'Access to Remedy under the UNGPs: Vedanta and the Expansion of Parent Company Liability' *EJIL:Talk*. October 31, 2017.

⁹² See Spiesshofer (2018) on Group responsibility, p.393-403.

⁹³ 2006 UK Companies Act. For a comment on the jurisprudence resulting from it, see Hogan Lovells 'Update on the responsibility to respect and parent company liability: what the Court of Appeals' judgment in *Okpabi and others v Royal Dutch Shell Plc and another* means for UK multinationals' *Oxford Business Law*, 8 March 2018 <https://www.law.ox.ac.uk/business-law-blog/blog/2018/03/update-responsibility-respect-and-parent-company-liability-what-court> (last accessed July 31, 2018).

⁹⁴ Alford, 2014; H Muir-Watt "Frontiers and Distributions: Discourse on the Methods of Private International Law" *The Hague Academy of Private International Law*. Summer 2017.

The cases described involve an international element or foreign actions. These actions were committed abroad. In the cases submitted to courts in the EU, the defendants did have domicile in their territory. In the case of the US, however, there was no direct link⁹⁵ to the defendant or its action to the US. In the US, as in every country, the legal apparatus is supported by American tax-payers. One might argue that it is not the role of American tax-payers to supplement and bear the burden of the deficient legal systems of other countries. The American system also has punitive damages that other national systems do not have. Thus, there is a danger of claimants seeking redress at US forums motivated by the high pecuniary remunerations. Furthermore, if the application of an American statute applies extraterritorially, then the US might be accused of interfering with another country's affairs,⁹⁶ which can lead to protest if American law applies too far, say, to impose obligations on a state which its own legislature did not legislate.

Thus, the US adjudicators might have found it reasonable to accept jurisdiction involving international element or foreign actions only within tight constraints, precisely because of the political consequences. Surely economic considerations will also have played a role, for accepting cases involving foreign actions could become very costly.

As for the EU approach, the reason courts in the EU are accepting jurisdiction for cases involving international elements or foreign actions is because of the domicile of the corporations. However, it is because of the flexibility of the court's interpretation that concepts like 'duty of care' are applied as to include the subsidiaries of those corporations that do not have domicile in the EU as part of their jurisdiction.⁹⁷

Furthermore, though the European legislation follows the principle of *lex loci damni* and opens the possibility of a court hearing a case and apply foreign law, depending on the facts of the case, the precise place of the transnational environmental damage might be difficult to determine. Anderson (2002) and Betlem (1993) noted the different reasons for this: first, the tortious activity might have taken place in many countries; second, the activity and the manifestation of harm may be in different countries; third, the legal effects of the tortious act may be in a country other than that of the tortfeasor; fourth, there might be manifestation of harm in many countries; and fifth, the tortious act may be in an area beyond national jurisdiction, like the high seas.⁹⁸

As for economic reasons, which tend to focus only on profit motivations, Anderson (2002) disclosed the content of the memo of the Chief Economist of the World Bank in preparation for the 1992 Rio Summit (Summers memo). There it was argued that from an economical point of view, migrating activities that could damage the environment to poor countries was more efficient because the compensation for damages would be less. The memo stated: "The measurements of the costs of health impairing pollution depends on the foregone earnings from increased morbidity and mortality. From this point of view, a given amount of

⁹⁵ No continuous and systematic contact with the forum state.

⁹⁶ The US also has the Act of State doctrine which prohibits this interfering.

⁹⁷ The reference to a flexible approach in this context is expressed by the comparison to the US which restricts the acceptance of jurisdiction for transnational claims upon finding a 'direct link' between parent companies and subsidiaries. See comments above and those that follow in this section.

⁹⁸ See Anderson p. 416 and G Betlem 'Civil Liability for Transfrontier Pollution: Dutch Environmental Tort Law in International Cases in the Light of Community Law' (Graham and Trotman. 1993), 171, also mentioned in Anderson 2002.

health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.”⁹⁹

An awareness of political and economic factors would allow courts more flexibility in assessing jurisdiction for victims seeking redress in these transnational cases. Indeed, in June 2017, Esther Kiobel, after being denied jurisdiction in the US, started to pursue the same claim in The Hague, Netherlands.¹⁰⁰

Flexibility in the rigid assessment of jurisdiction of particular cases would allow the law to adapt more to fit transnational relationships. It could happen, for example, that it is impossible for the party seeking redress to access justice in its due forum. Countries around the world are implementing the concept of ‘*forum necessitatis*’ or forum of necessity, implying that a court has to embrace jurisdiction in cases where the party has no access to justice in its local forum. Kirshner (2013), pursuant to some interpretations of the article providing for ‘fair trial’ in the European Convention on Human Rights, has mentioned that “Article 6 of the European Convention on Human Rights offers a potential pathway to jurisdiction over extraterritorial corporate human rights claims.”¹⁰¹ Similarly, the recent advisory opinion of the Inter-American Court of Human Rights has also considered the extraterritorial application of the American Convention of Human Rights in regard to human rights and environment related rights.¹⁰²

For the same reason, the courts should also consider being flexible when determining the applicability of foreign law. Traditionally, the application of foreign law was avoided because a foreign lawmaker could never oblige the court of another country. Today, with the uses of private international law, it is acknowledged that application of foreign law by a national court derives from the rules of forum law, without involving any conflict of sovereignty.¹⁰³ This is because the own national law establishes rules that the court should follow in cases of conflict of laws (private international law rules). With international relations, the legislative bodies of countries, by use of private international law rules in statutes, find it reasonable that certain cases with transnational elements should be subject to foreign law. The Rome II Regulation obliging courts to apply the law of where the damage occurs makes this particularly manifest.

There are some changes in the law *vis a vis* enforcement as a consequence of transnational activities. Normally, while general jurisdiction is based on the defendant’s domicile (or in common law where the defendant has been served) and specific jurisdiction where the

⁹⁹ Quoted by Anderson 2002 from Lawrence Summers’ Memo leaked to the press in 1991.

¹⁰⁰ District Court of The Hague, June 2017.

¹⁰¹ J Kirshner, ‘The Role of the European Convention on Human Rights in the Wake of Kiobel’ EJIL: Talk. July 25, 2013.

¹⁰² Article 26 of the American Convention of Human Rights relates to ‘Progressive Development’. The IACHR in its advisory opinion have stated that the right to a healthy environment has to be included within the social, economic and cultural rights established in the American Convention. Advisory Opinion, OC 23/17 dated November 15, 2017, pa 57. Though it is still a debated opinion, the consequence of it is that it would render the violation of human rights and environmental related rights justiciable under the IACHR. For a detailed commentary on the implication of the advisory opinion, see Vega-Barbosa, G and Aboagye, L ‘Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights’ EJIL: Talk. February, 26, 2018.

¹⁰³ Diverse national legislations allow for this in their private international law rules.

cause of action has contact to the forum state (eg place of contract or damage), these jurisdiction assessments seek to bring the suit to the defendant. But we already saw how class actions have been used as devices that reverse the traditional approaches of jurisdiction: here, determining jurisdiction focuses on the plaintiffs rather than the defendant. The rationale behind this is to develop more effective procedures¹⁰⁴ that meet the reality of an actors' transnational activities. But the consequences range far more widely than a mere increase in effectiveness. It brings about a whole new way of turning non-binding commitments into *de facto* binding commitments – binding through the decisions of the courts following class actions (bottom-up) rather than directly through the treaties that had been signed by states (top-down).

These developments are not necessarily a detriment for corporations. For example, it could be argued that the downside of class actions is that it is preclusive because once a class action representing a class is submitted, an individual, if he/she has not opted out, he/she cannot bring a claim for the same purpose elsewhere. However, it is precisely there where it can balance the interests of the different actors to agreeing to such changes and do not challenge jurisdiction. Thus, it might be in the interest of the defendant (tortfeasor), especially if they are corporate enterprises with customers all over the world, to agree to the class action procedure, because the preclusive effect is an incentive for the defendant to accept the jurisdiction. For in that way, they avoid the risk of being sued for such actions multiple times at multiple jurisdictions around the world.

Reputation is also an element to be considered. Just like concerns regarding reputation influence a state's behaviour,¹⁰⁵ concerns about reputation play a role for corporations. Corporations are likely to settle cases concerning actions that caused environmental harm quickly because of the negative impact on their reputation that those actions might cause. Van Loon (2016) states: "The mere possibility of exposure to such environmental legal action, with the risk of high damages and/or reputation damage, may influence the conduct of economic actors concerning the environmental effects of their operations, lead them to settle lawsuits and pay damages in an early stage, or reduce or end activities which may harm the environment."¹⁰⁶ Indeed, we have seen how Shell has been shifting towards settling many of such cases.

¹⁰⁴ M Karayanni 'The Private International Law of Class Actions' The Hague Academy of Private International Law. Summer 2017

¹⁰⁵ J Kelley *Scorecard Diplomacy: Grading States to Influence their Reputation and Behaviour* (Cambridge University Press 2017)

¹⁰⁶ H Van Loon 'Global Horizon of Private International Law' (2016) 380 *Recueil des Cours* 9, 85

5. Conclusion

New challenges arise from state decisions of deregulation and decentralization, and these decisions paved the way for the rise of non-state actors, new institutions, and new kinds of interactions. These interactions are now mixed together with state relationships and do not stop at national borders. Indeed, the structures and networks formed by these mixed interactions give rise to transnational relationships. It is natural that these new challenges brought about by globalization will affect international law too.

However, all actors, independent of their nature, with relations in a framework that acknowledges the guarantee of fundamental rights, must meet the same standards of accountability. With every right there is responsibility, and accepting the different forms of regulations that allow corporate actors to perform transnational activities necessarily entails liability for violations of international standards, including violating human and environmental rights, and causing damage to individuals or communities.

Actors can only commit when there is an adequate mechanism of enforcement, making them accountable to those affected by such violations. If there are no such mechanisms, then all we have is cheap talk. Legal systems, as custodian of these rights, are not only enforcers – they too must take a role in preventing actions from causing damages.

Scholars have remarked upon the need for enforcement, and traditional forms of enforcement mechanism (top-down) are not yet available to endure the protection of international environmental rights in the transnational regime. At the same time, we have seen that the law itself is evolving, overcoming traditionally rigid mechanisms through its own tools like the conflict of law rules typical of private international law, or by making feasible the use of new mechanisms like class actions for victims that seek redress for damages. This bottom-up enforcement through private international law rules has come to the rescue to make actors liable for violations.

As it stands, the enforcement of commitments of the protection of *ius cogens* like some human rights or norms with *erga omnes* effect like those protecting the environment can only be guaranteed if for such enforcement new elements fitting these transnational realities are taken into account, for example, the hospitality towards different cultures,¹⁰⁷ the awareness of global economic networks, and the extraterritoriality of corporate social responsibility. This is part of the role of legal systems: they are not static systems and must adapt to new realities.

So far, there are still different legal system approaches that render different results. Anderson has correctly called for caution pointing out that there are also disadvantages in using just ‘tort law to substitute for environmental regulation’.¹⁰⁸ The nature of the rights, which are the object of protection, and the actors’ accountability for violations of these rights make it plausible to establish a unified mechanism of enforcement for these claims, or better

¹⁰⁷ Muir-Watt makes a clear distinction on how the law should consider stopping the idea of tolerance (which denotes bearing a burden) and shift towards hospitality (acceptance of the other party’s as it is). H Muir-Watt “Frontiers and Distributions: Discourse on the Methods of Private International Law” The Hague Academy of Private International Law. Summer 2017.

¹⁰⁸ In tort law damages are assessed based on property, with environmental damages the resources are not owned by the claimant. This might make the damage difficult to quantify in terms of awarding the right compensation. See Anderson 2002.

yet, a supranational treatment. At the end of the day, when we speak of environmental damage, nationalities and borders are relativized; the negative consequences of polluted air or water will not stop at the border of a particular country. But until we have such a unified framework that allows top-down enforcement of obligations, instruments like class actions and private international law allow for a bottom-up enforcement. It may be more difficult to climb up a mountain than to look down from the top; but at least with these mentioned instruments, local communities and individuals that otherwise could never hold a state or transnational corporation responsible for violating their rights have *some* weapon to hand.

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