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THE CASE OF CHEVRON IN ECUADOR: THE NEED FOR AN INTERNATIONAL CRIME AGAINST THE ENVIRONMENT?

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ABSTRACT

This article discusses the necessity for the establishment of an international environmental crime. There is a growing feeling of impunity regarding serious environmental damage resulting from corporate activity. As a response, numerous scholars and lawyers advocate for the recognition of an international crime against environment. By analysing the environmental and health consequences of Chevron's oil activity in Ecuador and the subsequent legal battle, this article highlights the imbalances that exist between multinational corporations (MNCs), states, and individuals regarding access to justice and remedies, and shows how the international legal framework could be described as 'corporate-friendly' when it comes to serious environmental damages. It then offers an overview of the opportunities and arguments in favour of a separate international crime.

Keywords: Chevron; Environmental Damage; International Criminal Court; International Environmental Crime; Criminal Sanctions; International Repression.

Introduction

In October 2014, an association of Ecuadorian victims of serious environmental damage - caused in Lago Agrio - by the oil company Chevron lodged a complaint against the CEO and other high-ranking officials of Chevron Corporation for crimes against humanity. The complaint was submitted to the Prosecutor of the International Criminal Court (ICC), in order to further investigate and open legal proceedings on the alleged crimes. Such action brought before the ICC against a private person for environmental damage committed on behalf of a multinational company was a first. This original attempt fits within the growing desire to hold corporations and private persons criminally accountable for great and long term damage to the environment,

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common resources and ecosystems due to their economic activity. Criminal law is seen as a tool to put an end to the impunity with which environmental harm is committed. This impunity is strongly decried and results from the absence of ambitious and binding laws and treaties, from the existence of legal loopholes, a lack of accessibility to remedies, a lack of deterrent sentences, as well as an unwilling judiciary.¹

This article examines the necessity of an international criminal liability for enterprises and persons acting on their behalf, for serious environmental damages. It commences with an analysis of the case of Chevron. In doing so, it presents the background of Chevron and its activities in Ecuador. Then, it presents a summary of the subsequent legal proceedings that have been launched so far. This allows us to draw a picture of the available legal remedies for protecting the environment, but also their weaknesses in current domestic mechanisms. This is followed by a presentation of the background and current international legal framework of the protection of the environment. Eventually, this article discusses the main arguments in favour of an international environmental criminal law that should help to put an end to the current corporate friendly climate.

I. The Chevron Case

This chapter will provide an overview of Chevron's activities in Ecuador over a period of over three decades, their consequences on the local environment and population, and the reasons that eventually triggered the legal proceedings initiated against and by the corporation.

I.1 Company's Background and Activities in Ecuador

Chevron Corporation² is the second biggest oil company of the United States.³ In the 1960's, Chevron received approval from the Ecuadorian government to explore and exploit Lago Agrio, an Amazon region rich in biodiversity, for oil. At the time, there were very little environmental regulations in Ecuador, or public awareness on environmental issues.⁴ Over a period of twenty years, Chevron has drilled about 340

¹ A. Sinaï, 'Trente-cinq propositions pour sanctionner les crimes contre l'environnement', 2015 at: <http://www.actu-environnement.com/ae/news/ecocrimes-ecocide-prejudice-environnementale-juristes-23861.php4> (accessed on 1 June 2016).

² In 2001, the company merged with Texaco and became Chevron-Texaco, only to change its name to Chevron in 2005. Throughout this article, the name Chevron will be used for consistency. For more information about Chevron-Texaco, please see Chevron.com, at: <https://www.chevron.com/> (accessed on 1 June 2016).

³ Chevron headquarters are located in the state of California and it has locations in around 180 countries. For more information, see Chevron.com, at: <https://www.chevron.com/>.

⁴ K. Martin-Chenut, 'L'affaire Chevron-Texaco et l'apport des projets de conventions écocrimes et ecocide à la responsabilisation pénale des entreprises transnationales,' in L. Neyret (Ed.), *Des écocrimes à l'écocide: Le droit pénal au secours de l'environnement* (pp. 66-86). Brussels : Bruylant 2015, *supra* note 3, p. 435.

oil wells, built 18 central production stations and extracted nearly 1.5 billion barrels of crude transported by 1.500 km of pipeline.⁵

Among others, Chevron regularly ‘sprayed roads with crude oil for maintenance and dust control, and deliberately dumped tons of toxic drilling and maintenance wastes [...] into the environment without treatment or monitoring,’⁶ acts which constitute a breach of its contractual obligations. Several consequences arise from Chevron’s practices and can be summarised as follows: innumerable rivers and streams were contaminated, which rendered fishing impracticable and polluted the sources of drinking water. Chevron’s activities also negatively impacted the vegetation and polluted the soils. Also, abnormally high levels of TPH (Total Petroleum Hydrocarbon⁷) were found in the area of exploitation, in the soil and water.⁸ Besides, the routinely burning of oil and waste from pits and mills has also extensively contaminated the air with huge plumes of black smoke which entered the ozone layer.⁹

This practice led to the release of noxious gases into the atmosphere, including benzene, a carcinogen, but also sulphur dioxide, nitrogen oxides and carbon monoxide.¹⁰ Eventually, Chevron had to clear forest for access roads, exploration, and production activities. The resulting deforestation was evaluated to a million acres.¹¹ The contamination that occurred in Chevron’s concessions had a negative impact on the environment and the human population living in the area, to the extent that it was said that the remediation, meaning the return of the ecosystem to the natural state is technically impossible.¹² Rates of deadly diseases significantly increased, such as for instance child cancer.¹³ Rises in miscarriages, skin disorders, and digestive and respiratory diseases have also been reported.¹⁴ The health consequences continued as toxic substances spread on land and in the water. Eventually, pollution led to loss of flora and fauna, and soils became sterile.¹⁵

⁵ J. Kimerling, ‘Indigenous peoples and the oil frontier in Amazonia: the case of Ecuador ChevronTexaco, and Aguinda v. Texaco,’ *NYU Journal of International Law and Politics*, 38 2006, p.413-427, *supra* note 4, pp. 449-450.

⁶ *Idem*, p. 451.

⁷ Total Petroleum Hydrocarbons (TPH) is a term used to describe a broad family of several hundred chemical compounds that originally come from crude oil.

⁸ TPH compounds include benzene, toluene, and xylene, chemical substances highly dangerous for both human and ecosystems; for more information, see Agency for Toxic Substances and Disease Registry, ‘Toxicological profile for total petroleum hydrocarbons’, Atlanta: U.S. Department of Health and Human Services, Public Health Service 1999, at: <https://www.atsdr.cdc.gov/ToxProfiles/tp123-c1-b.pdf>

⁹ Amazon Defense Coalition, ‘Summary of Overwhelming Evidence against Chevron in Ecuador Trial. ChevronTexaco: The campaign for justice in Ecuador’, 2012, at: <https://chevrontoxico.com/assets/docs/2012-01-evidence-summary.pdf>.

¹⁰ ‘Burning Oil Threatens Environment’, 2011, at:

<http://www.accuweather.com/en/weather-news/threats-to-burn-oil-threatens-1/46273>.

¹¹ Kimerling 2006, *supra* note 4, pp. 452-464.

¹² United States District Court Southern district of New York, 24 February 2011, *Chevron Corporation v. Steven Donziger*, 11-cv-00691-LAK-JCF, 2011, at:

https://www.earthrights.org/sites/default/files/documents/Lago-Agrio-judgment_0.pdf.

¹³ Kimerling 2006, *supra* note 4, pp.464-466; Amazon Defense Coalition 2012, *supra* note 19.

¹⁴ *Ibid.*

¹⁵ Environmental Justice Organizations, Liabilities and Trade, ‘The Texaco-Chevron Case in Ecuador’, 2015, at:

Damage resulting from oil exploitations poses a threat to the livelihood of the people and the viability and health of the environment. The six indigenous groups that inhabited the region have reportedly been deeply affected: two of the groups became extinct while others are struggling to survive.¹⁶ Chevron's activity has disturbed their peace and harmed their dignity. Thousands of peasants were displaced. Some were victims of inhumane and degrading treatment, including sexual, physical and emotional abuses.¹⁷ The long-term damage caused in Ecuador by Chevron has led to many legal proceedings aiming to hold the company civilly accountable before Ecuadorian and American jurisdictions.

I.2 The Chevron case: legal proceedings

The long-term damage caused in Ecuador by Chevron has led to many legal prosecutions aiming to hold the company civilly accountable before Ecuadorian and American jurisdictions. In turn, these actions led to counter-attack strategies led by Chevron. The following two sections will offer an overview of the legal proceedings in which the oil company was involved in relation to its activities in Ecuador.

I.2.1 Legal Proceedings against Chevron

Legal proceedings against Chevron were initiated before US Courts and took place over a period of eight years, from 1993 to 2001.¹⁸ In its final decision, the US Court however decided that the case fell outside its jurisdiction. Furthermore, in 2001, the lower court of New York dismissed the action and stated that the claim could and should be litigated in Ecuadorian tribunals.¹⁹

In 2003, as a response to the US Federal Court of New York's decision, the plaintiffs turned towards the Ecuadorian Courts. Two lawsuits were filed against Chevron, but only the one filed in the Superior Court of Justice of Nueva Loja (Lago Agrio) led to a trial.²⁰ Following almost seven years of proceedings, the Ecuadorian Court issued,

<http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-42.pdf>.

¹⁶ D. Rogatyuk, 'Ecuador: Chevron's 'Rainforest Chernobyl' - Victims Fight for Compensation' GreenleftWeekly 1 February 2016, available at <https://www.greenleft.org.au/node/60984>, *supra* note 4; See more at Amazon Defenses Coalition, 'Understanding Chevron's Amazon Chernobyl', 2009, at: <http://amazonwatch.org/documents/ecuador-press-kit/detailed-background.pdf>.

¹⁷ See Amazon Defenses Coalition, 'Understanding Chevron's Amazon Chernobyl', 2009, at: <http://amazonwatch.org/documents/ecuador-press-kit/detailed-background.pdf>; See also Rogatyuk 2016, *supra* note 5.

¹⁸ A group of Ecuadorian citizens of the Oriente region filed a class action lawsuit against Chevron - on behalf of the aggrieved indigenous people and residents, representing about 30.000 victims. See more at 'Texaco/Chevron lawsuits (re Ecuador)', at: <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389>.

¹⁹ The decision was upheld on appeal despite the objections raised by the plaintiffs regarding the deficiencies of the Ecuadorian judicial system and the absence of assets of Chevron-Texaco in Ecuador impeding the execution of a potential conviction judgment. See more at Kimerling 2006, *supra* note 4, pp. 449-450; Martin-Chenut 2015, *supra* note 3, pp. 66-86.

²⁰ *Ibid*; See also 'Texaco/Chevron lawsuits (re Ecuador)', at: <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389>: The plaintiffs alleged that

on 14 February 2011, a ruling against Chevron ordering it to pay 8.6 billion dollars in damages. Moreover, 8.6 billion dollars for moral damages had to be awarded to the victims, unless Chevron apologised within 14 days of the opinion's issuance, which they did not. Instead, they claimed that the ruling was illegitimate and unenforceable. The decision was upheld by both the Appeal Court and the national Court of Justice of Ecuador, but removed the compensation for moral damages.²¹ After about 20 years of proceedings, the Court decision was applauded by NGO's and environmental activists. However, since Chevron had no more assets in Ecuador, the victims initiated several procedures of seizure of Chevron's assets, in particular in Brazil, Argentina and Canada.²²

1.2.2 Legal Proceedings Taken by Chevron

On its part, Chevron launched a strategy of counter-attacking aimed at ensuring that court cases established in other jurisdictions, particularly international and American cases, cannot be implemented in the countries in which it has assets. The company did this by claiming that Ecuador's decision is unlawful and that it arises from a fraudulent procedure.²³ In 2017, the Ontario Supreme court ruled that the decision passed in the 'the Ecuadorean judgment could not be enforced against Chevron's subsidiary, Chevron Canada, because it is a separate entity.'²⁴

Among the legal procedures launched by Chevron was a criminal procedure before the US District Court. On 4 March 2014, the Court ruled that the Ecuadorian condemnation of Chevron was the product of a fraud and racketeering and therefore unenforceable.²⁵ On 8 August 2016, a US Court of Appeals upheld the lower court's ruling and confirmed that the Ecuadorian judgment was obtained by corrupt means. Further appeal options are now being examined by the lawyers for the Ecuadorian plaintiffs.²⁶

contamination resulted from Chevron's activities in Ecuador 'led to increased rates of cancer as well as other serious health problems for the residents of the region.'

²¹ Business and Human Rights Research Centre, 'Texaco/Chevron lawsuits (re Ecuador). In Business and Human Rights Resource Centre, available at <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389>.

²² The Supreme Court of Canada allows enforcement action in Ontario. Rogatyuk 2016, *supra* note 4; Supreme Court of Canada, *Chevron Corp. v. Yaiguaje*, 2015 SCC42, No 35682, Appeal Decision, 4 September 2015, at: <http://chevrontoxico.com/assets/docs/2015-09-04-chevron-v-yaiguaje-canada-decision.pdf>.

²³ Martin-Chenut 2015, *supra* note 3, pp. 66-86.

²⁴ 'Texaco/Chevron lawsuits (re Ecuador)', at:

<http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389>.

²⁵ The judge also found Steven Donziger, the lead American lawyer behind the Ecuadorian lawsuit, guilty of violation of the RICO Act for committing extortion, money laundering, wire fraud, Foreign Corrupt Practices Act violations, witness tampering and obstruction of justice; See United States District Court Southern district of New York, *Chevron Corporation v. Steven Donziger*, 11-cv-00691-LAK/JCF, 3 March 2014, at:

<http://www.theamazonpost.com/wp-content/uploads/Chevron-Ecuador-Opinion-3.4.14.pdf> (accessed on 26 November 2016); Chevron.com, at:

<https://www.chevron.com/>

²⁶ 'Texaco/Chevron lawsuits (re Ecuador)', at:

<http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389>.

Besides, in 2009 – before being sentenced by the Ecuadorian Court – Chevron successfully sought to hold Ecuador accountable for their role in denying them justice through an international arbitration tribunal in The Hague. The company claimed that Ecuador, by prosecuting Chevron, had violated the agreement signed in the 1990's that releases it from liability for all public interest or collective environmental claims. The Dutch District Court made a decision in favour of Chevron in January 2016.²⁷ Ecuador declared it would appeal the judgment. In June 2016, the US Supreme Court dismissed the requested appeal. A month later, Ecuador indicated that it had executed the decision of the Permanent Court of Arbitration and paid the 112 million dollars compensation to Chevron.²⁸

I.3 Observations and comments

Despite a legal wrestling that has lasted over twenty years and over which no court has ever held that Chevron is not responsible for the obvious massive contamination of the Ecuadorian Amazon, the company has still not been effectively and executively condemned. On the contrary, the numerous agreements concluded between Chevron and the Ecuadorian government seem to guarantee its perfect impunity at the civil level. Such conclusion is all the more bitter given that the multinational violated the exploitation contract which bound them and did not take the adequate precautions as regard to oil extraction activity. Actually, Chevron never even attempted to prove that they were not responsible for the environmental disaster.²⁹

The Chevron case in Ecuador is thus emblematic of the difficulties to render effective the accountability of transnational companies and managers for serious environmental damages, as well as to provide some sort of redress. Besides, it also highlights the current imbalances between the rights, obligations and legal remedies accessible to states, multinational companies (MNCs) and victims. The Chevron case shows gross imbalances between state and corporate liability under international law and this will be further discussed in the following section.

I.3.1 Imbalances between States and MNCs International Liability Systems

Under domestic law, states usually grant companies the status of legal persons which means that each one is subjected to the national law of its incorporation and can be held accountable whenever it inflicts harm to a third party. This usually involves civil and/or administrative sanctions. In a growing number of countries it also involves criminal liability.³⁰

²⁷ District Court of The Hague, *The Republic of Ecuador v. Chevron Corporation (USA) and Texaco Petroleum Company*, C/09/477457 / HA ZA 14-1291, 20 January 2016, at: <http://www.italaw.com/sites/default/files/case-documents/italaw7104.pdf> (accessed on 26 November 2016); 'Chevron hails int'l court's ruling in Ecuador pollution case', 2016, at: <http://latino.foxnews.com/latino/news/2016/01/23/chevron-hails-intl-court-ruling-in-ecuador-pollution-case/>.

²⁸ 'Texaco/Chevron lawsuits (re Ecuador)', at:

<http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389>.

²⁹ Martin-Chenut 2015, *supra* note 3, pp. 66-86.

³⁰ Ecocide is already recognised as a crime in ten countries such as Vietnam, Belarus, Ukraine and Russia. See 'Eradicating Ecocide', at: <http://eradicatingecocide.com/the-law/existing-ecocide-laws/> (accessed on 15 May 2016); A. Pigrau, S. Borrás, A. Cardesa-Salzmán & J. Jaria, 'The Interplay of National, Transnational and International Litigation for

Nevertheless, under international law, it is a different story. Indeed, states are reluctant to make transnational corporations directly liable. MNCs are not traditionally considered as subjects of international law, unlike states, even though they are fully part of the international scene and are prime actors of international governance. As a result, they are not directly bound by international conventions. By contrast, as subjects of international law, international conventions create obligations on states and thus create rights on which MNCs could rely on before a court of justice.³¹ While states are the debtors of obligations, the MNCs are, to some extent, their creditors.

Such an asymmetrical pattern is obviously in favour of MNCs. While liberalisation of international trade³² and investment protection agreements are proliferating, there is a huge resistance to creating direct obligations for corporations.³³ If we look at the international legal framework, there are at first sight no binding rules for corporations regarding environmental protection.³⁴ Therefore, although MNCs can be involved in serious violations of international standards applicable to states and individuals, it seems impossible to make them liable under international law.³⁵ For instance, an enterprise may prosecute a member state for violating the European Convention on Human Rights, but not the other way around.³⁶ Only from the perspective of investment disputes MNCs might face liability before an international institution, such as the International Centre for Settlement of Investment Disputes or the Permanent Court of Arbitration.³⁷ However, these mechanisms of responsibility are frequently instrumentalised by corporations to question ambitious judicial decisions regarding their accountability,³⁸ just as in the case of Chevron.

I.3.2 Imbalances between the Access to Remedies and Redress between Victims and Corporations

Environmental Justice: Seeking Effective Means of Redress for Grave Environmental Damage', ISEE Conference 2012-Ecological Economics and Rio+ 20: Challenges and Contributions for a Green Economy 2012, pp. 2-4, at:

<http://www.isecoeco.org/conferences/isee2012-versao3/pdf/p751.pdf>.

³¹ Pigrau, Borrás, Cardesa-Salzmán, Jaria 2012, *supra* note 45, pp. 2-4.

³² See the list of free trade agreements in Asia at: <https://aric.adb.org/fta-country>.

³³ A. Pigrau, A., S.Borrás, A. Cardesa-Salzmán, J. Jaria, *The Interplay of National, Transnational and International Litigation for Environmental Justice: Seeking Effective Means of Redress for Grave Environmental Damage*, 2012 (Unpublished), pp. 2-4, available at <http://www.isecoeco.org/conferences/isee2012-versao3/pdf/p751.pdf>, *supra* note 45, pp. 2-4.

³⁴ United Nations Human Rights Council (2008). 8th Sessions, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum 2: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse (A/HRC/8/5/Add.2 2008).

³⁵ Pigrau, Borrás, Cardesa-Salzmán, Jaria 2012, *supra* note 45, pp. 2-4.

³⁶ *Comingersoll s.a. v. Portugal*, Decision of 6 April 2000, [2000] ECHR.

³⁷ *Martin-Chenut 2015*, *supra* note 3, pp. 66-86.

³⁸ Pigrau, Borrás, Cardesa-Salzmán, Jaria 2012, *supra* note 45, pp. 2-4.

Besides economic considerations and the procedural costs,³⁹ there is an asymmetry between victims and corporations concerning the access to an international jurisdiction in order to defend their respective rights and interests. Individuals and corporations do not have access to the same legal remedies. Corporations can directly defend their interests before an international authority such as the Permanent Court of Arbitration of The Hague, as mentioned above, while victims of violations of their environmental rights⁴⁰ will only have the possibility to claim their rights against legal persons before national courts. It is only if national courts do not agree with them that they could bring a complaint before higher instances such as the Inter-American Court of Human Rights. However, the Court only has jurisdiction over cases against states, and not legal persons, for not ensuring plaintiff's rights against infringements caused by companies. As subjects of international law, states have to make sure that the behaviour of transnational companies that are under their jurisdiction complies with international standards. It is an indirect obligation on states, not companies themselves.⁴¹ Furthermore, there are many obstacles within the context of transnational justice. Yet, when it comes to corporation's involvement in environmental disasters, transnational justice is often used. In such cases, the challenge is to enhance effectiveness and efficiency of the enforcement of court decisions.⁴²

II. Towards an International Crime Against the Environment

In the Chevron case, not only did the victims not obtain adequate compensation, but also the criminal liability of the company or its managers was not considered.

In the current international legal framework, there is only one legal instrument that provides for individual criminal liability at the international level: The Rome Statute of the International Criminal Court (ICC). Faced with the legal loophole, associations representing forest communities in the Ecuadorian Amazon lodged a complaint with the Prosecutor of the ICC, Fatou Bensouda. They argued that the consequences of Chevron oil activities constitute a crime against humanity under Article 7 of the Rome Statute.⁴³

Another approach to address environmental issues would be to establish a separate international crime against the environment. Numerous scholars agree that individual criminal liability should be possible for persons who cause serious damage to the environment.⁴⁴

³⁹ Chevron has stated 'We will fight [the lawsuit] until hell freezes over. And then fight it out on the ice showing that they have the means to do it'.

⁴⁰ Environmental Rights Are Human Rights', at: <http://www.foei.org/what-we-do/environmental-rights-human-rights>.

⁴¹ Martin-Chenut 2015, *supra* note 3, pp. 66-86.

⁴² *Ibid.*

⁴³ P. Fajardo Mendoza & E. Toledo, 'Situation in Ecuador. Request with Mrs. Fatou Bensouda Prosecutor, Office of the Prosecutor ICC', 2014, at: <http://chevrontoxico.com/assets/docs/2014-icc-complaint.pdf> (accessed on 26 November 2016).

⁴⁴ See for instance P. Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet*. London: Shephard-Walwyn 2010; L. Neyret, *Des écocrimes à l'écocide*, Bruylant 2015; A. Gauger, M-P. Rabatel-Fernel, L. Kulbicki, D. Short & P.

II.1 Environmental Damage as a Crime Against Humanity

First of all, it has to be noted that in the international framework, corporations can only be held criminally accountable for international crimes via the individual criminal liability of their managers. For instance, Carl Krauch and twenty-two high-ranking officials of IG Farben Industries were indicted for war crimes and crimes against humanity before the tribunal of Nuremberg. The company itself was not indicted but the prosecution alleged that the accused committed through the instrumentality of Farben, crimes against humanity, crimes against peace and war crimes.⁴⁵ The case of the Prosecutor v. Nahimana Barayagwiza and Ngeze, which took place before the International Criminal Tribunal for Rwanda, serves as another example.⁴⁶ Although the final draft of the Rome Statute of the ICC included a provision that provided the direct criminal liability of corporations, this was from the definitive version.⁴⁷ The reasons given for withdrawing such a proposal were its potentially premature nature⁴⁸ and the little time given to discuss and consider it.⁴⁹ However, it is also likely that other elements such as the novelty of corporate exposure to criminal responsibility,⁵⁰ the risk to imperil the ratification of the treaty,⁵¹ as well as judicial-dogmatic objections to extending the ICC's jurisdiction to legal entities⁵² also contributed to the decision to remove the proposal. Therefore, at the time of writing this article, the ICC only has jurisdiction over natural persons.

In the Chevron- case, the Ecuadorian communities and legal representatives of the victims have shown originality in the face of the weaknesses of the international legal framework as regard to corporations' and individuals' criminal liability of Chevron's high-ranking officers and the protection of environment. Indeed, they claimed that the decisions made by Chevron's CEO and managers of obstructing the court-mandated clean-up of toxic contamination in the Amazon contributed towards and maintained the situation of contamination in the Amazon region and resulted in life-threatening disease and death of thousands of people.⁵³ They argued that the damage caused by Chevron's activity brought various consequences, including 'water contamination, ground contamination, cancer, forced displacement, extermination of two ethnic groups, and many other disastrous conditions'.⁵⁴

Higgins, *The Ecocide Project: Ecocide is the missing 5th Crime Against Peace*. London: University of London 2012.

⁴⁵ The United Nations War Crimes Commission (1949). *Law reports of trials of war criminals*. Vol. x. London.

⁴⁶ Prosecutor v. Nahimana and others, Judgment, Case No. ICTR-99-53T, T.Ch. I, 3 December 2003.

⁴⁷ W. Huisman, *Business As Usual? Corporate involvement in international crimes, The Hague: Eleven International Publishing* 2010, p.50.

⁴⁸ *Idem*, p.51.

⁴⁹ D. Scheffer, 'Corporate Liability under the Rome Statute', *Harvard International Law Journal* 2016, pp.35-39.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² See C. Chiomenty, 'Corporations and the International Criminal Court', *Transnational Corporations and Human Rights*, Ed. O. de Schutter, Portland: OR Hart, 2006. Cited in Huisman 2010, *supra* note 62, p.51.

⁵³ P. Fajardo Mendoza, & E. Toledo, Situation in Ecuador, Request with Mrs. Fatou Bensouda Prosecutor, Office of the Prosecutor ICC.

⁵⁴ *Ibid.*

In their opinion, the foregoing clearly constitutes a ‘widespread or systematic attack against any civilian population’⁵⁵ and the managers of Chevron were fully aware of the situation in Ecuador. Therefore, the acts rise to the threshold of a crime against humanity under international law.⁵⁶

The legal representatives of the victims draw on the consistent interpretation of ‘attack’ in international criminal law. It includes an ‘unlawful act of the kind enumerated in Article 3(a) to (i) of the [ICTR] Statute, including murder, extermination and enslavement, among others. An attack may also be non-violent in nature, such as imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973. Exerting pressure on a population to act in a particular manner also may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.’⁵⁷

Unfortunately, the Prosecutor did not agree with the arguments presented by the legal representatives of the victims and decided that the information available at that time did not appear to fall within the jurisdiction *ratione temporis* and *ratione materiae* of the ICC.⁵⁸ Concerning the *ratione temporis*, the Court has jurisdiction over crimes against international law that occurred in or after the year 2002. However, Chevron has not operated in Ecuador since 1993. Furthermore, the Prosecutor recalled that the subject-matter jurisdiction of the ICC only includes genocide, crimes against humanity, war crimes. By no means, the Prosecutor stated, did it extend to claims of environmental damage.⁵⁹

Interestingly, however, in September 2016, the Office of the Prosecutor of the ICC declared its intent to address environmental abuses. It stated that ‘[it] will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.’⁶⁰ Therefore, in the near future, cases concerning environmental damage may be successfully prosecuted at the Court in the Hague.

II.2 Environmental Crimes as a Separate International Crime

⁵⁵ Rome Statute, Art.7.

⁵⁶ P. Fajardo Mendoza, & E. Toledo, Situation in Ecuador, Request with Mrs. Fatou Bensouda Prosecutor, Office of the Prosecutor ICC.

⁵⁷ *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, §581.

⁵⁸ L. Markay, ‘ICC Won’t prosecute Chevron’, 2015, at:

<http://freebeacon.com/issues/icc-wont-prosecute-chevron/> (accessed on 14 May 2007); ‘Texaco/Chevron lawsuits (re Ecuador)’, at:

<http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389> (accessed on 1 June 2017).

⁵⁹ ‘Texaco/Chevron lawsuits (re Ecuador)’, at:

<http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c24389> (accessed on 1 June 2017).

⁶⁰ Office of the Prosecutor of the International Criminal Court. (2016 September, 16). Policy paper on case selection and prioritisation.

There is a strong debate on whether the most serious environmental offences that have major impact on the ecosystems and human health should be recognised as separate and full international crimes.

II.2.1 Short Background to Environmental Crimes as International Crime

The criminal liability at the international level as an essential measure for combating serious environment damage is not new. In the 1970's, Arthur W. Galtson used the concept of 'ecocide' at the Conference on War and National Responsibility in Washington to describe the harm inflicted upon South Vietnam following the use of Agent Orange, a strong chemical defoliant produced by Monsanto, by the US Army during the Vietnam War. He proposed a new international agreement to ban ecocide.⁶¹

However, it was not until the 1980's that severe damage to environment was seriously considered as an international crime. While working on the Draft Code of Crimes against the Peace and Security of Mankind, the UN's International Law Commission considered criminalising the conduct of 'an individual who wilfully causes or orders another individual to cause widespread, long-term and severe damage to natural environment.'⁶² Eventually, the final version of the text withdrew such an ambition and only consecrated the criminalisation of environmental damages committed during warfare.⁶³

The same approach was taken for the final version of the Rome Statute despite proposals to include ecocide among the ICC's jurisdiction. Instead, crimes against environment are only specifically listed under the definition of a war crime. Article 8(2)(b)(iv) of the Rome Statute provides that intentionally launching an attack with the 'knowledge that such attack will cause [...] long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' constitute a war crime.⁶⁴ Not only the liability is conditioned by the existence of an international armed conflict, but the consequences need to result from an intentional attack, and the harm to the environment has to be disproportionate to the military objective anticipated.⁶⁵

The approach of environmental protection under the Rome Statute is thus particularly restrictive. The acts committed by MNCs, such as Chevron in Ecuador, are unlikely to fit with the definition of war crimes under Article 8(2)(b)(iv). First of all, war crimes have to be committed in a context of an armed conflict, and environmental crimes most of the time occur in peacetime. Even if environmental crimes are committed in the context of an armed conflict, there must be a link with the armed conflict. In the case of Chevron, this would not be the case. Furthermore, environmental disasters resulting from corporate activity, such as Chevron's activities,

⁶¹ M. Crook & D. Short, 'Marx, Lemkin and the genocide-ecocide nexus', *The International Journal of Human Rights* 2014-18(3), pp. 298-319.

⁶² 1996, Draft Code of Crimes against the Peace and Security of Mankind, Art.26.

⁶³ 1996, Draft Code of Crimes against the Peace and Security of Mankind, Art.22.

⁶⁴ Rome Statute, Art. 8(2)(b)(iv).

⁶⁵ *Ibid.*

do not usually result from an intentional attack. Rather, they are the collateral damage of a policy of profit maximisation, loss minimisation or also gross negligence.⁶⁶

II.2.2 Emergence of an International Crime of Destruction of Environment

Currently, there are a number of international legal documents that aim to protect the environment from severe forms of degradation. They are scattered through various international conventions such as the Protocol I of the Geneva Convention, the International Convention for the Prevention of Pollution from Ships or the Convention on the Prevention of Marine Pollution. They pave the way for criminal sanctions, however their scope is too restricted and specific to address the global threat to environment.⁶⁷

The Council of Europe has also contributed to a criminal approach to protecting the environment by adopting the Convention on the Protection of the Environment through Criminal Law in 1998.⁶⁸ It was followed by the European Parliament that claimed in a 2008 directive that

‘experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.’⁶⁹

The European Parliament further stated that

‘in order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.’⁷⁰

⁶⁶ See for instance in Chevron case, the plaintiffs have argued that ‘Chevron built its vast network of oil production facilities in the delicate ecosystem with the intent to discharge toxic waste as a way to increase its profits. It was clearly foreseeable such intentional practices would subject the local population to life-altering conditions, including cancers and other diseases, according to the document’. This argument is supported by the fact that, at the time, the MNC itself had patented a technology which reduces the impact of hydrocarbons but did not use it in Ecuador. This choice was made with no other apparent reason than limiting production costs. ‘The People of Ecuador v. Chevron (2014, October 23). Rainforest Communities Seek Criminal Investigation of Chevron CEO Watson Before International Court’, 2014, at:

http://www.csrwire.com/press_releases/37461-Rainforest-Communities-Seek-Criminal-Investigation-of-Chevron-CEO-Watson-Before-International-Court (accessed on 20 May 2016).

⁶⁷ F. Mégret, *The Challenge of an International Environmental Criminal Law*, McGill University: Faculty of Law 2010, pp. 3-4.

⁶⁸ *Ibid.*

⁶⁹ European Parliament, Directive 2008/99/EC, The Protection of the Environment Through Criminal Law, Official Journal of the European Union, 19 November 2008.

⁷⁰ *Ibid.*

Furthermore, it stipulates that when the offences are committed on behalf of a legal person by any individual who has a leading position or is subjected to the authority of the legal person, member states have to hold accountable both, the physical person and the legal person. Although it seems ambitious at first, it is once again too restrictive. It targets specific behaviours, but more importantly it is directed to the attention of member states to take measures within domestic law.⁷¹

None of these initiatives really seem to be able to deal with what are arguably the gravest threats to environment and humankind. Nevertheless, although periodic and limited in scope, they reflect the acknowledgement that criminal law is an instrument to consider regarding the fight against harm to the environment due to corporation activity. Suggestions have been made to go further and take an international approach of criminal liability to protect the environment. In 1995, the UN member states were urged by the United Nations Economic and Social Council to ‘consider acknowledging the most forms of environmental crimes in an International Convention.’⁷² In the same vein, some argue for a general offence of environmental degradation, ecocide⁷³ or genocide.⁷⁴ Despite objections of international criminal lawyers who claim that the environment is not suitable for both criminalisation and international repression, this call for an International Environmental Criminal Law has strong arguments in its favour which are set out in the section below.

II.2.3 Arguments in favour of an International Environmental Criminal Law

There are strong arguments that support both the criminalisation and the establishment of international repression of deliberate and egregious environmental damage.

II.2.3.A The Criminalisation of deliberate and egregious environmental damage

What can first be pointed out in favour of the criminalisation deliberate and egregious environmental damage is the deterrent effect of criminal prosecutions. The economic theory of criminal behaviour assumes that the perpetrator of a crime weighs the costs and benefits of committing a crime and does not undertake criminal activity if the expected costs of the crime exceed the expected benefits. It is assumed that the offender acts rationally. In calculating the expected costs there are two important factors: the probability of prosecution, and the applicable sanctions.⁷⁵

⁷¹ *Ibid.*

⁷² ECOSOC, Resolution 1994/15, The Role of Criminal Law in the Protection of Environment, 25 July 1994.

⁷³ See e.g. M. A. Gray, ‘The International Crime of Ecocide’, *California Western International Law* 1995-26, pp. 215-272; R. A. Falk, *Environmental warfare and ecocide. Facts, appraisal and proposals*. Princeton University 1973-4, pp. 80-96.

⁷⁴ See e.g. L. Berat, ‘Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law’, *Boston University International Law Journal* - 2, pp.327-348.

⁷⁵ G. Becker, ‘Crime and Punishment: An Economic Approach’, *Journal of Political Economy* 1968-2, pp. 169-217.

In order to enforce environmental regulations, civil and administrative remedies are generally preferred.⁷⁶ Yet in practice, civil fines, when given, are often modest considering the financial gains that individuals choosing to break the law benefit from⁷⁷ and the turnover of multinationals.⁷⁸ Regarding administrative penalties, although they include serious consequences such as suspension, revocation and prohibition of licences, they are rarely used.⁷⁹ This, combined with the low probability of detection of environmental offences⁸⁰ gives rise to pessimism about the effectiveness of these sanctions in terms of deterrence. Domestically, it is believed that, at a certain level of action, these remedies have limited deterrence effect.⁸¹ Faced with the limits of civil and administrative sanctions, there is growing interest for adopting criminal sanctions in environmental issues among states.⁸²

While no empirical data are available to verify the general deterrent effect of environmental criminal prosecutions, it is believed that criminal law has a great potential for deterrence, at least in the cases where the environmental offence is intentional and the result of a cost-benefit assessment.⁸³ From the economic theory perspective, the criminal law would be used to increase the expected costs in order to deter individuals from committing environmental offences.⁸⁴ Even though the probability of being caught remains low, the expected sanction has the advantage of being theoretically high and targeting individuals. Susan Smith writes that the 'record of criminal prosecutions for pollution has sometimes been presented as good, having a very substantial effect in terms of deterrence, and reinforcing systematically other areas of compliance.'⁸⁵ She concludes that the market incentive approaches to environmental regulation face numerous enforcement problems and that the prospect of criminal sanctions is an important tool.⁸⁶ Accordingly, the protection of the environment should remain above all an issue for civil and administrative remedies, however their limitations must be acknowledged.⁸⁷

⁷⁶ C-N. Robert, *Limites du droit pénal*, Genève: CETEL 1989, pp.13-23; A. Frate, A. Benjamin, & G. Heine, *Environmental Protection at National and International Levels: Potentials and Limits of Criminal Justice: An Overview of the Empirical Study*, *Environmental Protection - Potentials and Limits of Criminal Justice. Evaluation of legal structures*, Eds. G. Heine, M. Prabhu & A. Alvazzi del Frate, Roma: United Nations Interregional Crime and Justice Research Institute (UNICRI), 1997, pp.19-57.

⁷⁷ M. Watson, 'The Enforcement of Environmental Law: Civil or Criminal Penalties', *Environmental Law and Management* 2005-1, pp. 3-6.

⁷⁸ See for instance P. Collet, 'Benzène: Total, une nouvelle fois condamné à Carling-Saint-Avoid', 2015, at: <http://www.actu-environnement.com/actu/news/condamnation-total-arling-saint-avoid-pollution-benzene-24534.php4> (accessed on 26 May 2016).

⁷⁹ *Ibid.*

⁸⁰ In the Netherlands, it was estimated that less than ten percent of offences are detected.

⁸¹ Mégret, *supra* note 82, pp.11-15. See also Watson 2005, *supra* note 92, pp.3-6.

⁸² This solution is usually preferred as it is less expensive than increasing control.

⁸³ B. Cho, 'Emergence of an International Environmental Criminal Law', *Journal Environmental Law and Policy* 2000-1, pp.11-47.

⁸⁴ M. Faure, & J. Johnston, 'The Law and Economics of Environmental Federalism: Europe and the United States Compared', *Virginia Environmental Law Journal* 2008, pp. 205-274.

⁸⁵ Mégret 2010, *supra* note 82, p. 12.

⁸⁶ S. Smith, 'Changing Corporate Environmental Behaviour: Criminal Prosecutions as a Tool of Environmental Policy', *Markets, the State, and the Environment: Towards Integration*, Ed. R. Eckersley, Australia: Palgrave MacMillan, 1995, pp.261-274.

⁸⁷ Watson 2005, *supra* note 92, pp. 3-6.

Secondly, criminal law is traditionally used to preserve social stability and protect the human person. It has been built mainly around the protection of individual interests, such as life, health and property.⁸⁸ Yet, the access to a healthy environment is a precondition to the respect of many of these fundamental rights. The recognition of the interdependence between healthy environment and human rights can be traced back to the UN Conference on the Human Environment held in Stockholm in 1972. In its Preamble, the Stockholm Declaration proclaims that '[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself.'⁸⁹ Since then, there has been a growing recognition of the fundamental character of the right to a healthy environment and its indissoluble link with human dignity.⁹⁰ By causing long-term and widespread damage to our environment, corporations interfere with international balance and threaten to jeopardise indirectly our fundamental rights. Environmental crimes pose a threat to the survival of human beings and hence, of the society itself.⁹¹ If criminal law aims to protect traditional individual interests, it should also be used to preserve a healthy environment in the absence of which individual interests cannot be enjoyed.

Another argument that can be raised in favour of criminalisation is the search for normative and moral consistency of international criminal law. International criminal law already represses 'widespread, long-term and severe damage to the environment'⁹² when resulting from an attack in the context of an armed conflict. It would hardly be arguable that the environment should not enjoy the same protection in peacetime. This is even more incomprehensible when one considers that greater devastations are sown by corporate activity. Rather than the context in which it occurs, the gravity of the harm has to be predominant determining criteria.⁹³

Fourthly, there is an argument related to the criminal law in general. More than its retributive and utilitarian purpose, Professor David Uhlmann claims that criminal law has an expressive function. He states that scholars usually focus too much on the two first at the expense of its expressive function and the societal need for condemnation,

⁸⁸ Robert 1989, *supra* note 91, pp. 13-23.

⁸⁹ Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment (Stockholm, 5-16 June 1972), UN Doc. A/CONF.48/14/Rev.1, New York, United Nations, 1973, pp. 3-5.

⁹⁰ See e.g. *Tatar v. Romania*, Decision 27 January 2009, [2009] ECHR; European Court of Human Rights (June 2016), 'Press Release. Environment and the European Convention on Human Rights', at: http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (accessed on 2 June 2016): 'pollution could interfere with a person's private and family life by harming his or her well-being, and that the State had a duty to ensure the protection of its citizens by regulating the authorizing, setting-up, operating, safety and monitoring of industrial activities, especially activities that were dangerous for the environment and human health'. See also D. R. Boyd, *The Environmental Rights Revolution - A Global Study of Constitutions, Human Rights and the Environment*, Vancouver: UBC Press 2012, p. 3; V. Barral, 'National Sovereignty over Natural Resources, Environmental Challenges and Sustainable Development', *Research Handbook on International Law and Natural Resources*, Eds. E. Morgera, K. Kulovesi, Cheltenham: Edward Elgar Publishing, 2016, pp. 3-25.

⁹¹ A. Vercher, 'Some Reflections on the Use of Criminal Law for the Protection of the Environment', *Environmental Liability* 2002-3, pp. 103-125.

⁹² Rome Statute, Art.8(2)(b)(iv).

⁹³ *Mégret* 2010, *supra* note 82, p.14.

accountability, and justice when crime occurs. This last function plays an even more essential role when it comes to corporations. Indeed, corporations have significant benefits, which create public expectations. When a corporation exploits these benefits and engages in illegal conducts, it violates public trust. Criminal liability is there to express that their behaviour is unacceptable under societal rules. Besides, 'the distinctive feature of corporate criminal prosecution is its ability to label corporate lawlessness as criminal, which is qualitatively different than labelling misconduct as a civil or administrative violation and critical to assuring society that corporate criminals are brought to justice.'⁹⁴ The expressive function of corporate criminal liability gathers three elements: it affirms the primacy of the law, it tarnishes the enterprise's reputation and gives the feeling that justice has been done. Furthermore, contrary to fines and lost business, '[s]ocietal condemnation and the resulting reputational harm are sanctions that cannot be monetized and therefore can have more enduring effects'.⁹⁵ Civil and criminal sanctions thus have different implications and send different messages. David Uhlman expresses this perfectly: '[w]hen we sanction corporate misconduct with a deferred prosecution or civil penalties that do not involve the same degree of societal condemnation, we minimise corporate misconduct and may risk condoning it [...] we express a societal judgment that the conduct is less egregious' and, to those affected by it 'that any harm they suffered is less significant'⁹⁶.

II.2.3.B The International Approach Concerning Deliberate and Egregious Environmental Damage

In addition to national regulations, there are arguments in favour of a common and international approach of environmental criminal law.

The strongest argument raised to undermine efforts for protecting the natural environment on an international level is the principle of state sovereignty.⁹⁷ States have authority over their territory. In other words, a state is 'not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law.'⁹⁸ The principle of sovereignty thus includes the freedom to legislate with respect to environment on its territory and regardless of any outside aspirations. States are only bound to observe and respect the norms they have consented to.⁹⁹ This attachment to the sovereignty principle in environmental issues is expressed in several international conventions.¹⁰⁰

⁹⁴ D. Uhlmann, 'The Pendulum Swings: Reconsidering Corporate Criminal Prosecution', *Uc Davis Law Review* 2016-4, p.1243.

⁹⁵ *Idem*, p.1265.

⁹⁶ *Idem*, p.1266.

⁹⁷ Barral 2016, *supra* 105, pp.2-25; Q. Hamdan, *Towards International Criminalisation of Transboundary Environmental Crimes*. Pace University of Law: SJD dissertation 2014.; Mégret 2010, *supra* note 82, pp.14-20.

⁹⁸ H. Steinberger, 'Sovereignty', Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia for Public International Law*, 1987, p. 414.

⁹⁹ G. Simpson, 'Crime, Structure, Harm', *Sustainable Development, International Criminal Justice, and Treaty Implementation*, Ed. In S. Jodoin, Connecticut: Cambridge University Press, 2013, pp. 36-49.

¹⁰⁰ See e.g. 1992, Convention on Biological Diversity, Art.3; 1992, Rio Declaration, Principle 2.

In addition, obstacles are exacerbated when it comes to criminal justice as some states believe that criminal law is a symbol of state sovereignty.¹⁰¹

Despite the general attachment to the principle of sovereignty, the idea of ‘absolute sovereignty’ is outdated.¹⁰² As such, states have agreed to internationally criminalise certain specific behaviours. The argument typically invoked is that there are conducts which are too grave and serious to be entirely delegated to states and domestic laws. They are considered as ‘inherently international’.¹⁰³ So far, three grounds have been traditionally used to justify international criminalisation: (i) the transnational character of a crime, meaning an offence that is cross-border *stricto sensu* (e.g. human trafficking); (ii) the inter-states crimes which affect the functioning of the international system (e.g. crime of aggression); (iii) and, the crimes which shock the conscience of mankind and impact fundamental rights (e.g. crime of genocide, crimes against humanity, and war crimes).¹⁰⁴

Although not every environmental crime is strictly transnational, inter-state, or may shock mankind, the gravest harms to the environment seem to be likely to correspond to at least one of these categories. Serious environmental damage is likely to impact more than a state. In some circumstances, it can even go beyond being transnational: it is borderless as it poses a threat to the global communal life.¹⁰⁵ Moreover, the protection of the environment is linked to numerous fundamental values of the international system, such as the protection of human rights¹⁰⁶ and international peace and security.¹⁰⁷ In addition, eventually, serious environmental damage can involve more than one state. The Chevron case involves an American company whose exploitation of oil in Ecuador caused grave environmental damage that, in turn, negatively impacted upon the lives of those in and around the affected areas.

Secondly, the implementation of an international justice system for serious environmental damage responds to a functional need.¹⁰⁸ At this point, there is a lack of incentives for states to adopt strict domestic criminal legislation to protect the environment, and a lack of willingness to enforce the existing standards.¹⁰⁹ The absence of harmonisation of laws and the lack of enforcement mechanisms may create incentives for ‘environmental dumping.’¹¹⁰ With globalisation, the strengthening of competitiveness has become an overriding goal for countries, at the

¹⁰¹ R. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden: Brill/Nijhoff 2009, pp. 91-141.

¹⁰² M. Ferraira-Snyman, ‘The Evolution of State Sovereignty: A Historical Overview’, *Fundamina* 2006 - 2, pp. 1-28.

¹⁰³ Mégret, F. (2010), *supra* note 82, pp.14-20.

¹⁰⁴ Mégret 2010, *supra* note 82, pp.14-20.

¹⁰⁵ *Ibid.*

¹⁰⁶ See e.g. 1972, Stockholm Declaration.

¹⁰⁷ E. Knight, ‘Global Environmental Threats: Can the Security Council Protect Our Earth?’, *N.Y.U. Law Review* 2005-5, p. 1549; L.A. Malone, ‘Green Helmets: A Conceptual Framework for Security Council Authority in Environmental Emergencies’, *Michigan Journal of International Law* 1996, pp. 515-536.

¹⁰⁸ F. Mégret, *The Case for a General International Crime Against the Environment, Sustainable Development, International Criminal Justice, and Treaty Implementation*, Ed. S. Jodoin, Connecticut: Cambridge University Press, 2010, pp. 36-49.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

expense of environmental considerations. Not only do states not seem to be willing to adopt and enforce strict and exigent standards aimed at preserving the environment, they are also likely to delay the implementation of the existing international norms in order to increase their competitiveness and attract transnational companies and foreign investment.¹¹¹ This phenomenon has been observed at European level where there is a form of competition between member states. Since a number of Eastern European countries have joined the European Union, a race to the bottom can be observed. Those states tended to transpose European environmental law into their national law but showed little enthusiasm in actually applying it. They remained lenient in order to protect their economy and enhance industrial development. Ultimately, Western countries started following Eastern countries' path.¹¹²

The above phenomenon is partly related to the market liberalisation and lower transport costs that accompanies the current era of economic globalisation and that both benefit to corporations.¹¹³ The polluting industries have the opportunity to relocate from the developed countries to developing countries, in which the environmental regulation is usually more lenient. Thus, the extra costs of the regulation, when they are important enough, modify traditional comparative advantages in favour of countries in which regulations are more flexible. Among those regulations is also the choice to criminalise corporation and manager(s) behaviour for serious damage inflicted to the environment. This phenomenon of relocation based on regulation system is called the 'pollution haven hypothesis.' However, the empirical validation of this theory is delicate and, so far, there is no real consensus among scholars. Other factors are considered in the geographical position of corporations such as the availability of natural resources.¹¹⁴

Although the phenomenon of 'environmental dumping' and the theory of 'pollution haven' are not unanimously shared by scholars, they are interesting as the lobbies often blackmail governments or European institution to influence the legislative process, using relocation and competitiveness as arguments. For instance, the agriculture lobby has threatened the European Union to relocate in case the European deputies will vote to reduce the greenhouse gas emissions.¹¹⁵ In March 2016, the French National Assembly adopted in second reading the legislative proposal on parent company duty of care. However, the proposal has nearly failed

¹¹¹ *Ibid.*; M. Faure, & J. Johnston, 'The Law and Economics of Environmental Federalism: Europe and the United States Compared', *Virginia Environmental Law Journal* 2008, pp. 205-274.

¹¹² See Faure 2008, *supra* note 126, pp. 205-274.

¹¹³ F. Darrigues, J-M. Montand, 'Localisation géographique des firmes multinationales et environnement: entre contrainte imposée et responsabilité incitée', *Revue d'économie politique* 2012-5, pp. 767-795; S. Monjon, 'Développement, croissance et environnement. Mondialisation et environnement', *Développement et environnement Cahier français* 2007, pp. 34-40.

¹¹⁴ *Ibid.*

¹¹⁵ J. Crisp, 'Les agriculteurs menacent les eurodéputés de délocaliser', 2015, at: <http://www.euractiv.fr/section/developpement-durable/news/les-agriculteurs-menacent-les-eurodeputes-de-delocaliser/> (accessed on 2 June 2016).

to become real due to the argument of threat to the competitiveness raised by the opponents. Ultimately, the adopted law was less ambitious than first expected.¹¹⁶

Eventually, the recognition of the most serious damage to environment as constitutive of an international crime would allow emerging countries to prosecute and effectively apply penalties imposed.¹¹⁷ Indeed, as the Chevron case has shown, within transnational frameworks, the enforcement of a court judgment may be hazardous.

Conclusion

Chevron allowed us to highlight several levels and scales of difficulty in holding accountable multinational companies and their managers for serious harm to the environment. After more than twenty years of proceedings and a historical condemnation, the victims have still not been compensated and the Lago Agrio area has still not been cleaned up. Chevron representatives warned the plaintiff that if they continued to pursue their claims they would face ‘a lifetime of appellate and collateral litigation.[...]’ and that the company would ‘fight until hell freezes over and then will fight it out on the ice.’¹¹⁸ Despite the fact the company admitted to dumping billion gallons of wastewater in the Ecuadorian Amazon, impunity continues. Yet, this is even more unbearable considering the scale of the damage that should be recognised as a real crime.

Despite the fact that as of now there are no international binding treaties to protect the environment against extensive damage and destruction of ecosystems, voices are raised on the emergency of a new law. This includes those who defend the international criminalisation of the ecocide. Such idea spills progressively over into the legal instruments and official statements from several regional or international institutions since all recognise the legal loophole and the inadequacy of the current legal framework. There are numerous arguments in favour of an international criminal environmental law. Mostly, the international criminal liability of both companies and persons acting on their behalf would allow to strongly strengthen the existing mechanisms of accountability, which would increase their deterrent effect and eventually impact the behaviour of MNCs. Preference shall be given to a complementary approach. Boycott would influence corporations’ policy before they

¹¹⁶ O. Petitjean, ‘Sous pression des lobbies, le Sénat examine la proposition de loi sur le devoir de vigilance des multinationales’, 2015 at: <http://multinationales.org/Sous-pression-des-lobbies-le-Senat-examine-la-proposition-de-loi-sur-le-devoir> (accessed on 2 June 2016); T. Oster, ‘La loi sur le devoir de vigilance des sociétés mères donneuses d’ordre ‘recèle encore de nombreuses incertitudes’, 2017, at:

http://www.lemonde.fr/idees/article/2017/03/01/la-loi-sur-le-devoir-de-vigilance-des-societes-meres-donneuses-d-ordre-recele-encore-de-nombreuses-incertitudes_5087707_3232.html (accessed on 13 July 2017) ; Mégret, F. (2010), *supra* note 79, pp.14-20.

¹¹⁷ G. Dode, ‘L’écocide: la difficile reconnaissance des crimes environnementaux’, 2013, at: <http://www.actu-environnement.com/ae/news/ecocide-difficile-reconnaissance-crimes-environnementaux-18174.php4> (accessed on 28 May 2016).

¹¹⁸ E. M. O’Hagan, ‘In the Chevron court case, ordinary Ecuadorians’ voices don’t seem to count’, 2014, at : <https://www.theguardian.com/commentisfree/2014/mar/18/chevron-court-case-ecuadorians-toxic-waste> (accessed on 2 July 2017).

act, while civil, administrative and criminal sanctions would be used once the misconduct occurs.