

Opening the door a crack: possible domestic liability for North-American multinational corporations for human rights violations by subsidiaries overseas?

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1 Introduction

Corporations have significantly expanded, both in terms of their number and in terms of their size and their international influence.¹ With that expansion has come a sometimes convoluted, and evolving, set of legal standards relating to whether a corporation has rights and responsibilities in various situations that previously might have only been attributed to individuals.² Beyond that, the law continues to evolve relating to how to pursue actions that involve multinationals and multiple jurisdictions.

The idea of implementing corporate social responsibility as a voluntary practice among multinational corporations has expanded in recent years, along with the increased globalisation of business practices.³ The business benefits of this type of voluntary undertaking are obvious, as it is clearly not economically desirable for a business to be associated with human rights violations or destruction of the environment, among other potentially negative actions, domestically or overseas. In the same way, the business benefits for a multinational that has a strong record on human rights or environmental practices are also obvious.

In spite of voluntary standards implemented both across industries or by an individual multinational corporation, however, problems do still occur. Allegations of human rights and environmental violations by multinational corporations, either through the actions of a parent company or those of a subsidiary or agent, can present a number of complications. Logically, legal action for such violations carries the greatest likelihood of advancing when

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1 See L. Westra, *Studies in Critical Social Sciences*, vol 53: *Supranational Corporation: Beyond the Multinationals* (Koninklijke Brill NV 2013) 5–10 (describing a significant rise in the number and reach of corporations in the past 150 years).

2 See *ibid* (giving examples of some of the legal confusion that has arisen from the changing nature of corporations); see also *Citizens United v Federal Election Commission*, Docket no 08-20, 558 US ____ (2010) (a highly controversial decision in the USA, in which the Supreme Court of the USA held that the First Amendment protected some forms of political spending by corporations, associations, or labour unions).

3 See generally A R Harrington, 'Corporate Social Responsibility, Globalization, the Multinational Corporation, and Labor: An Unlikely Alliance' (2011) 75(1) *Albany Law Review* 483. For an overview of efforts to bring about law reform in the area in Canada, see generally C Kamphuis, 'Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account' (2012) 13 *German Law Journal* 1459.

brought against the person or entity directly responsible and in the jurisdiction in which the alleged violation occurred, and in which the parties are located.

It is not always possible for redress to be sought against an individual, however, and some circumstances may call for pursuing an action against a corporation. In some such cases, a parent company may be protected by the corporate veil, under which the parent and subsidiary are generally considered separate legal entities, and the parent is thus protected from liability incurred by the subsidiary.⁴ Piercing the corporate veil can be challenging and difficult.⁵

Yet another complication arises when the alleged violation occurs in one country, and the plaintiffs seek to bring an action, either as an original action or as an enforcement matter, in another jurisdiction, generally the home jurisdiction of the parent corporation. The complication increases when allegations are made that the subsidiary committed human rights, or environmental, abuse, in a jurisdiction with questionable judicial systems, or where the country in which the subsidiary operates hesitates to strictly control the actions of the multinational corporation, for fear that it will move to another country, thus impairing the host country's economic status.⁶

Where parties seek to bring actions in another jurisdiction and against the parent for the alleged conduct of a subsidiary, a number of threshold barriers can arise.⁷ Those barriers are especially apparent when the action is brought in a country that is not the place where the alleged action occurred, and the plaintiffs seek to simultaneously pierce the corporate veil.⁸ As multinational corporations continue to expand in a globalised business world, courts in jurisdictions like Canada and the USA are grappling to set the parameters for what types of actions can be brought and where.

It is not uncommon for commentary surrounding these types of actions to use the metaphor of a door, discussing how far open that door is in relation to whether such actions are viable.⁹ This metaphor illustrates many of the problems in these cases, as it is the

4 See *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414, paras 43–9 (hereinafter *Choc v Hudbay* or *Choc*, explaining the narrow circumstances, under Ontario law, in which the corporate veil may be pierced).

5 See *ibid*. It is not entirely impossible to pierce the corporate veil. See e.g. *United Canadian Malt Ltd v Outboard Marine Corporation*, 48 OR 3d 352, [2000] OJ no 1554 (2000) (allowing an action to proceed against an American parent corporation regarding pollution on private property from undertakings of a Canadian corporation in Canada).

6 See C Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30(78) *Utrecht Journal of International and European Law* 24, 24–6 (arguing for the use of the jurisdiction by necessity doctrine in such cases).

7 See *Choc v Hudbay* (n 4).

8 See *ibid*.

9 See e.g. O Hathaway, 'Kiobel Commentary: The Door Remains Open to "foreign squared" cases,' (2013) online: SCOTUSblog <www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases> accessed 10 September 2014; K Redford, 'Commentary: Door Still Open for Human Rights Claims after *Kiobel*' (2013) online: SCOTUSblog <www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel> accessed 10 September 2014. After a ruling on a motion to strike in *Choc v Hudbay Minerals Inc et al*, 2013 ONSC 998, discussed in this article, a number of commentators suggested that the proverbial door had been opened to claims involving alleged human rights violations overseas by subsidiaries of Canadian multinationals. See e.g. *Ernst v EnCana Corp*, 'Ontario Judgment Opens Door to Increased Risk for Canadian Mining Companies Working Abroad' online blog: <www.ernstversusencana.ca/ontario-judgment-opens-door-to-increased-risk-for-canadian-mining-companies-working-abroad> accessed 10 September 2014; P Collette, 'After *HudBay* Ruling, Canadian Firms on Notice over Human Rights' (24 July 2013) online: theglobeandmail.com <www.theglobeandmail.com/globe-debate/after-hudbay-ruling-canadian-firms-on-notice-over-human-rights/article13386168> accessed 10 September 2014 ('The claims in the *HudBay* case have yet to be proved and the decision may be appealed, but a door that has been so firmly shut to so many victims has finally been opened in Canada.').

threshold issues that have traditionally presented the greatest challenges to such claims – such as questions of jurisdiction.¹⁰ Plaintiffs seeking to bring such actions have traditionally faced significant barriers, or the metaphorical door, as well as confusion as to how far open that door really is, if it is open at all.

This article seeks to analyse some recent cases, particularly in Canada and the USA, with the objective of arguing that some factual scenarios should, and increasingly may, require courts in those countries to remove threshold procedural barriers to some of these cases proceeding in their jurisdictions. It does so by emphasising a high-profile case in Canada, which appears to have expanded the possibilities for such original actions to be brought in Canada, but does so in the context of a number of recent cases from other jurisdictions, which suggest that the law is not necessarily developing in a consistent manner across jurisdictions. The article does not attempt to present a comprehensive analysis on this form of liability, so much as to illustrate some of the questions raised by the recent cases discussed.

Moreover, while this article deals with questions of civil liability in such cases, it recognises the line of argumentation that suggests that increased expansion in the area of criminal liability may be increasingly viable in such cases, where it was not before, and that, overall, pursuing remedies under a criminal law model for ‘unimaginable atrocities that deeply shock the conscience of humanity’ is the better recourse in these cases.¹¹ As Professor James G Stewart notes:

Compensation may be necessary, but can what Raphael Lemkin calls ‘barbarous practices reminiscent of the darkest pages of history’ really be redressed in *purely* monetary terms? Particularly in commercial contexts, the commodification of accountability risks allowing companies to absorb the cost of responsibility for international crimes, then pass this expense on to consumers, who pay incrementally more for weaponry, game consoles, cellphones and engagement rings. The inescapable threat, however, is that limiting accountability to civil recovery might allow corporations to purchase massive human rights violations.¹²

Stewart recognises, however, the reality that, in many cases, the choice can be one of either civil liability or of impunity.¹³ Moreover, even if the criminal law develops in this respect, which is an intriguing, but still evolving, possibility, civil liability could be a viable option accompanying, while not necessarily replacing, the criminal law option, and, thus, has merit in its own right. It is the possibility of pursuing civil remedies that thus forms the main focus of this article.

Section 2 looks to the recent Canadian case, in which a trial court allowed three combined tort actions to proceed to trial against a parent corporation in Canada, even though the alleged incidents occurred in Guatemala. Section 3 looks at the American *Kiobel* case, which appears to have narrowed the scope of such actions in the USA, and examines some possible implications for such cases in the USA. Section 4 briefly examines similar forms of litigation in the UK and the Netherlands. Section 5 looks to still-developing

10 See e.g. *Choc v Hudbay* (n 4).

11 See J G Stewart, ‘The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute’ (2014) 47 NYU Journal of International Law and Politics, at 53, available at SSRN <<http://ssrn.com/abstract=2354443>> or <<http://dx.doi.org/10.2139/ssrn.2354443>> accessed 10 September 2014 (Accepted Paper Series) (quoting the Rome Statute of the International Criminal Court, Preamble).

12 Ibid (citations omitted).

13 Ibid 54.

scenarios regarding enforcement in domestic courts of judgments obtained overseas. Section 6 concludes by suggesting that, regardless of whether the law is settled on these issues, recent cases are having a practical effect on the operations of some multinational corporations. While positive, however, that effect is not enough to bridge the gap that exists in the ability of certain plaintiffs to obtain a fair hearing on their claims.

2 Canada pops open the door?

2.1 ORIGINAL ACTIONS PROCEED TO TRIAL

The case of *Choc v Hudbay Minerals* (*Choc*) has caused a stir in Canada because the trial judge denied motions to strike on a number of grounds, including jurisdiction, and has allowed the case to proceed to trial.¹⁴ The case is at an early stage, so it is not clear what the outcome will be substantively, but with Hudbay announcing that it will not appeal the denial of the motion to strike, the ruling at least provides a lower-court decision in which an original action was allowed to proceed, uninhibited by jurisdictional barriers.¹⁵

The background facts of this case are extensive, as there is a long history of disputes over the land at issue in these actions.¹⁶ Because the threshold issues in these cases can often be highly fact-specific, an exposition of the facts of this case is presented here to clarify the extent of what the trial judge actually decided.

The *Choc* case actually involves three actions, all brought by members of the Mayan Q'eqchi, who live in El Estor in Guatemala.¹⁷ They brought actions against three entities. Hudbay Mining is a Canadian mining company.¹⁸ HMI Nickel Inc (formerly Skye Resources Inc) owned and ran the Fenix Mining Project, a nickel-mining operation, at the time of the alleged actions in the *Caal* lawsuit (see below) and later 'amalgamated with Hudbay Minerals', making Hudbay legally responsible for Skye Resources' legal liabilities.¹⁹ Compania Guatemalteca De Niguel (CGN) owned and operated the Fenix Mining Project and was a 98.2 percent-owned subsidiary of Hudbay. Hudbay sold the Fenix Mining Project, and CGN, in 2011, but as a condition of the sale agreed to retain responsibility for litigation involving CGN in these matters.²⁰

The Mayan Q'eqchi people had long claimed the region as their ancestral land. Some of the dispute stemmed back to the prior conflict in Guatemala, when people were evicted from the same lands.²¹ In 2006, the government of Guatemala issued a mining permit to CGN on the land, the same year that some members of the Mayan Q'eqchi moved back

14 See generally *Choc v Hudbay* (n 4).

15 See C Santry, 'Hudbay Won't Appeal Decision to Send Guatemala Case to Trial' (28 August 2013) online: canadianlawyeromag.com <www.canadianlawyeromag.com/legalfeeds/1648/hudbay-wont-appeal-decision-to-send-guatemala-case-to-trial.html> accessed 10 September 2014.

16 For a much more detailed discussion of the contextual facts around this dispute, see S Imai, B Maheandiran and V Crystal, 'Accountability Across Borders: Mining in Guatemala and the Canadian Justice System' in O Aginam (ed), *Transnational Corporations, Human Rights and Environmental Justice in Latin America* (United Nations University Press: forthcoming); also available online: <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1028&context=clpe>> accessed 10 September 2014; see also A Pedersen, 'Landscapes of Resistance: Community Opposition to Canadian Mining Operations in Guatemala' (2014) 13(1) *Journal of Latin American Geography* 187 (explaining larger disputes in this area).

17 *Choc v Hudbay* (n 4) para 4.

18 *Ibid* para 8.

19 *Ibid* para 9.

20 *Ibid* para 10.

21 Imai et al (n 16) 39.

into the area.²² Members of the community subsequently alleged ‘numerous forced evictions, the burning of hundreds of homes, gunshots and alleged human rights atrocities, including those giving rise to these actions’.²³

Around the time of the first of the incidents that gave rise to these actions, on 7 and 8 January 2007, Steven Schnoor, a PhD student at York University, filmed forced evictions in some El Estor communities.²⁴ Schnoor was in Guatemala, studying the relationship between Canadian mining companies and the local populations, supported by student funding, ultimately provided by the Canadian International Development Agency, to examine these relationships in Guatemala and Honduras.²⁵ The film showed houses being destroyed during the eviction, including still photos of houses being burned down.²⁶ Schnoor later made the film into a nine-minute documentary and posted it on YouTube.²⁷

After the video was released, Ian Austin, chief executive officer and president of Skye Resources, confirmed, on the CBC radio programme, *As It Happens*, that evictions had happened in the area in early January.²⁸ He did not specifically comment on the video, saying he had not seen it, but said that the evictions were carried out by ‘specially trained units of the police’, and he confirmed that some structures were burned.²⁹

Approximately three years later, Schnoor won a defamation action against the former Canadian ambassador to Guatemala, Kenneth Cook, and the attorney general of Canada. Cook had allegedly told an employee of a non-governmental organisation in Guatemala that a woman featured in the video, who expresses anger at the company for the evictions, was a paid actress. He also allegedly said that still photos of burning homes were years old, from a prior conflict and not from the recent evictions.³⁰

2.2 THE THREE SPECIFIC ACTIONS IN *CHOC V HUDBAY*

The *Choc* case actually involves a consolidation of three actions, relating to incidents that took place on different dates, but all three arose out of the series of evictions undertaken at the Fenix Mining Project. The case has not yet gone to trial, as of the publication of this article, and Hudbay has publicly stated that it expects the plaintiffs’ allegations to be disproven at trial.³¹

22 ‘Guatemala: Guatemala Court Makes Landmark Ruling in Indigenous Rights Case’ (21 April 2011) online: <<http://edmortimer.wordpress.com/2011/04/21/guatemala-court-makes-landmark-ruling-in-indigenous-rights-case/>> accessed 10 September 2014; see also *Choc v Hudbay* (n 4) para 13.

23 *Choc v Hudbay* (n 4) para 13.

24 ‘Violent Evictions at El Estor, Guatemala’ online: <www.youtube.com/watch?v=Q20YxkM-CGI&feature=player_embedded> accessed 10 September 2014 (hereafter YouTube Forced Evictions); see also Imai et al (n 16) 14–15.

25 *Schnoor and Attorney General of Canada and Kenneth Murray Cook, Plaintiff’s Amended Claim*, Ontario Court of Small Claims, para 1, online: schoorversuscanada.ca <www.schnoorversuscanada.ca/docs/statement-of-claim.pdf> accessed 10 September 2014.

26 YouTube Forced Evictions (n 24).

27 See *ibid*.

28 *Schnoor, Amended Claim* (n 25) para 13 (in his amended claim, Schnoor refers to an audio recording of this interview, which was attached to his claim, but could not be located in the version currently available online).

29 *Ibid*.

30 Denise Balkissoon, ‘Former Canadian Ambassador Guilty of Slander’ online: [Thestar.com](http://www.thestar.com/news/gta/2010/06/17/former_canadian_ambassador_guilty_of_slander.html) <www.thestar.com/news/gta/2010/06/17/former_canadian_ambassador_guilty_of_slander.html> accessed 10 September 2014.

31 Santry (n 15).

Caal v Hudbay Minerals Inc

In *Caal v Hudbay (Caal)*, the plaintiffs are 11 women, who are members of the Mayan Q'eqchi. According to their amended statement of claim, in January 2007, during a forced eviction of Mayan Q'eqchi people, they were gang-raped by police, military and mine security personnel.³² They allege that the security personnel 'were deployed at Skye Resources' Fenix Mining Project and were under the control and direction of Skye Resources'.³³ Skye Resources, they further allege, 'amalgamated with and is now a part of Hudbay Minerals'.³⁴ The statement of claim describes a series of violent forced evictions, followed by announcements by Skye Resources about the evictions.³⁵

The plaintiffs allege that, on 17 January 2007, 'hundreds of members of the police and military and Fenix Security Personnel' returned to their village for another round of forced evictions, again, they assert, 'at the request of Skye Resources'.³⁶ The plaintiffs allege that the men of the village were not present, and that the plaintiffs tried to escape, some with their children, but that they were trapped.³⁷ Each of the 11 women says they were then gang-raped, and that some of the men participating in the rapes were wearing uniforms that had the logo 'CGN'.³⁸

Rosa Elbira Coc Ich says she was sexually assaulted by nine men, and she said that several of them were wearing the uniforms of Fenix Security Personnel. Before the assault, she said that one of them held a gun to her head and threatened to kill her. She has alleged that she is no longer able to have children because of the attack.³⁹ In an interview, shown on Canadian television in late 2012, Ich told her story, crying and saying 'they destroyed my body'.⁴⁰

Margarita Caal says that she was six months pregnant when she was raped by 10 men, including some who wore the uniform of Fenix Security Personnel. She alleged that she had difficulty walking after the attacks and, three months later, gave birth to a stillborn child.⁴¹

Irma Yolanda Choc Cac says that she 'was with her ten-year-old daughter when four police officers, four soldiers and four uniformed Fenix Security Personnel seized her', after which, she says, all 12 of them raped her. She was three months pregnant at the time and she subsequently suffered a miscarriage.⁴²

Elena Choc Quib, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chún, Luisa Caal Chún, Carmelina Caal Ical, Elvira Choc Chub and Irma Yolanda Choc Quib each alleged that they were 'physically assaulted and raped by several police, military and uniformed Fenix Security Personnel'.⁴³ The plaintiffs further alleged that, that same day, the Skye Resources president

32 See *Caal v Hudbay Minerals Inc, Amended Statement of Claim*, Court File no CV-11-423077 online: <www.chocversushudbay.com/wp-content/uploads/2010/11/Amended-Statement-of-Claim-Caal-v.-HudBay-FILED.pdf> para 1, accessed 10 September 2014.

33 Ibid para 1.

34 Ibid (original emphasis removed).

35 Ibid paras 48–61.

36 Ibid para 62.

37 Ibid para 63.

38 Ibid para 64.

39 Ibid para 65.

40 Ich was interviewed, along with Angelina Choc and German Chub Choc, in 2012, in anticipation of the upcoming court proceedings; The National, 'Seeking Justice' (2012) online: YouTube <www.youtube.com/watch?v=0fkT3vLA6qg> accessed 10 September 2014.

41 *Caal Amended Statement of Claim* (n 32) para 66.

42 Ibid para 67.

43 Ibid paras 68–75.

issued a letter stating that Skye Resources was working with CGN to resolve issues regarding the dispute, acknowledging the dispute and saying ‘[t]he company did everything in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights’.⁴⁴

Hudbay has subsequently posted a statement concerning its operations in Guatemala. Relating to the events alleged in the *Caal v Hudbay Amended Statement of Claim*, their representatives wrote:

In January 2007, pursuant to court orders, the Guatemalan prosecutor conducted several legal evictions on the CGN property with assistance from the National Civilian Police and National Army. Hudbay does not believe the allegations that sexual assaults occurred during these evictions [are] credible and no complaints of this nature have been filed with the authorities in Guatemala. In fact, on the date the plaintiffs claim the sexual assaults took place, the police report indicates that no illegal occupiers were present when the prosecutor and members of the Police and Army attended to implement the eviction.⁴⁵

Choc v Hudbay Minerals Inc

The next of the three actions was brought by Angelina Choc, individually and as the widow and personal representative of the estate of Adolfo Ich Chamán. The plaintiff alleges that, on 27 September 2009, her husband was ‘hacked and shot to death by private security forces employed by a subsidiary of Canadian mining company Hudbay Minerals Inc’.⁴⁶

According to the Statement of Claim, Adolfo was a respected leader in the Mayan Q’eqchi community, as well as a teacher.⁴⁷ He was also outspoken on the issue of Mayan Q’eqchi land rights, and he had five children.⁴⁸ After the forced evictions in 2006 and 2007, the plaintiff alleged that she and Adolfo, along with their children, returned to the land from which they had been evicted.⁴⁹ Two weeks before he died, Adolfo held a meeting with representatives of the government at different levels, asserting that they had failed to consult with the Mayan Q’eqchi people ‘as required under international and Guatemalan law’, and he spoke against the previous violent evictions.⁵⁰

Community fears over another forced eviction led to a series of protests on 27 September, and Adolfo participated in the protests.⁵¹ Angelina says that, after Adolfo returned home, he heard the sounds of gunshots from the direction of the Fenix Mining Project, and he went to investigate what was happening and was not armed.⁵² She says that, as he approached the area, the head of security appeared to recognise him and ‘approximately a dozen armed members of the Security Forces came through a gap in the fence, surrounded Adolfo Ich and immediately began to beat him’.⁵³

44 *Caal Amended Statement of Claim* (n 32) para 76 (emphasis in Statement of Claim).

45 Hudbay, ‘The Facts: Hudbay’s Former Operations in Guatemala’ online: hudbayminerals.com/English/Responsibility/CSR-Issues/The-facts-Hudbays-former-operations-in-Guatemala/default.aspx#link1 accessed 10 September 2014.

46 *Choc v Hudbay Minerals Inc, Second Amended Fresh as Amended Statement of Claim*, Court File no CV-10-411159 online: www.chocversushudbay.com/wp-content/uploads/2010/11/Second-Amended-Fresh-as-Amended-Choc-v-HudBay-FILED.pdf para 1, accessed 10 September 2014.

47 *Ibid* para 8.

48 *Ibid*.

49 *Ibid* para 43.

50 *Ibid* para 47.

51 *Choc Second Amended Fresh as Amended Statement of Claim* (n 46) paras 52–3.

52 *Ibid* para 54.

53 *Ibid* para 56.

After then dragging him through the gap in the fence, Angelina alleges that ‘a member of the Fenix Security Forces struck Adolfo Ich on the right forearm with a machete, nearly severing his arm from his body’.⁵⁴ She alleges that the head of security then approached Adolfo and shot him in the head.⁵⁵ The security forces then dragged him back to the Fenix Mining Building as he cried for help. People were prevented from intervening by gunfire, and Adolfo later died from his injuries.⁵⁶ Later it was learned that his injuries included ‘a bullet wound to his throat, fragmented left ear bones, a shattered jaw, a partially severed right forearm, a broken right arm, blunt force trauma wounds to his head and skull and a lacerated left shoulder’.⁵⁷ Angelina further alleges that, at the time Adolfo was attacked, he was not physically present at the protests and was, in fact, separated from them by physical structures.⁵⁸

The plaintiff alleges that Peter Jones said, on behalf of Hudbay and in response to Adolfo’s death, ‘[o]ur number one priority is to ensure the safety and security of all residents and employees in El Estor . . . We remain committed to working with local residents to reach a fair and equitable solution to land claims and resettlement’.⁵⁹

Chub v Hudbay Minerals Inc

Another incident, also occurring on 27 September 2009, gave rise to the third action in these combined claims. This third action was brought by German Chub Choc (‘Chub’), alleging that he was shot in the head, ‘at close range’ on that day, and that the attack ‘left him paralyzed and without use of his left lung’.⁶⁰ Mr Chub alleged that he was watching a soccer game when a number of Fenix Security forces drove up, some of whom were wearing CGN uniforms, and carrying a variety of weapons, including ‘handguns, shot-guns, machetes, pepper-spray and tear gas’.⁶¹ Chub also alleged that he was not involved with the protests that day and that there were no protests near where the game was being played.⁶²

Chub says that some of the security guards approached him as he was standing next to the soccer field, which was a few metres from the Fenix Compound.⁶³ He said he saw one of them, identified as Padilla, take out a handgun and aim it at him and that, as he turned to run, Padilla shot him.⁶⁴ The bullet ‘entered Mr. Chub’s left shoulder, *punctured his left lung*, travelled through his chest cavity and *badly damaged his spinal column*’.⁶⁵ He alleged that Padilla and the other security guards did not try to help him after he had been shot, but instead left.⁶⁶ After extensive medical treatment, Chub was left without the use of his left lung, and as a paraplegic, and the bullet is still lodged in his chest.⁶⁷

54 *Choc Second Amended Fresh as Amended Statement of Claim* (n 46) paras 56–7.

55 *Ibid* para 57.

56 *Ibid* paras 58–9.

57 *Ibid* para 59.

58 *Ibid* para 60.

59 *Ibid* para 86.

60 *Chub v Hudbay Minerals Inc, Amended Statement of Claim*, Court File no CV-11-435841 online: <www.chocversushudbay.com/wp-content/uploads/2010/11/Amended-Statement-of-Claim-Chub-v.-HudBay-FILED.pdf> para 2, accessed 10 September 2014.

61 *Ibid* para 49.

62 *Ibid* para 50.

63 *Ibid* para 52.

64 *Ibid*.

65 *Ibid* (emphasis in original).

66 *Ibid*.

67 *Ibid* para 54.

As to the incidents of 27 September 2009, Hudbay wrote that protestors attacked participants in a meeting, designed to resolve the dispute, and that they also continued a blockade in the area. Hudbay asserted that the blockade set off a number of disputes, including destruction of newly constructed homes on CGN property and an attack on a CGN-sponsored community hospital on CGN property. Hudbay further alleges that protestors broke into the local police station and stole weapons that were later used in the hospital attack. 'Throughout the attacks', Hudbay representatives wrote:

CGN security and other personnel showed extraordinary restraint and acted only in self defence. Their measured response to the various attacks helped to prevent a further escalation of violence, thus limiting the number of injuries on both sides of the confrontation.⁶⁸

Hudbay noted that five CGN security personnel were injured during the incidents. Finally, Hudbay representatives stated '[u]nfortunately, a protestor died that day. Based on internal investigations and [eyewitness] reports, Hudbay believes that CGN personnel were not involved with his death'.⁶⁹

Throughout the statements from both sides, certain narratives emerge. The plaintiffs repeatedly assert that they have a right to the land from which they were evicted as it is their ancestral land.⁷⁰ Hudbay consistently refers to the plaintiffs and the others evicted from the lands as 'illegal occupiers' or as 'squatters'.⁷¹ On 8 February 2011, after the events at the heart of this action, the Constitutional Court of Guatemala found that the Mayan Q'eqchi had stated a valid claim to the land and ordered the government to recognise their 'collective property rights'.⁷² Hudbay sold the Fenix Mining Project to Solway Investment Group in September 2011, and there have been reports of escalating violence since then.⁷³ Some sources indicate that the case from the Constitutional Court applies, not to the land at issue in this dispute, but to the land just next to the site of the 2007 evictions that are at issue in this case.⁷⁴ Either way, it is sufficiently relevant to have been mentioned as important by the Ontario Superior Court in its ruling on the motion to strike.⁷⁵

2.3 OPENING THE DOOR A CRACK?

The plaintiffs in these three actions did not initiate the cases in Guatemala, where the incidents occurred, because of concerns over corruption in the Guatemalan judicial system, which would make proceeding there difficult if not impossible.⁷⁶ In addition to corruption within the judicial system, there have been reports of significant violence among those

68 Hudbay (n 45).

69 Ibid.

70 See e.g. *Choc Second Amended Fresh as Amended Statement of Claim* (n 46) para 38.

71 See e.g. Hudbay (n 45).

72 *Choc v Hudbay* (n 4) para 12 (the *Hudbay* court referred to this decision without citing it). For an English language discussion of the case, see Imai et al (n 16) (citing *Expediente* 934-2010 (8 February 2011)).

73 Indian Law Resource Center, 'Center Secures Protection for Leaders in Guatemala Case,' online: <www.indianlaw.org/content/IACHR_grants_precautionary_measures> accessed 10 September 2014.

74 See Imai et al (n 16) 36 (discussing *Expediente* 934-2010 (8 February 2011)).

75 *Choc v Hudbay* (n 4) para 12.

76 Ibid para 24. This conclusion is supported by reports describing impunity for perpetrators of human rights violations in Guatemala. See e.g. Human Rights Watch, 'World Report 2013: Guatemala' online: <www.hrw.org/world-report/2013/country-chapters/guatemala> accessed 10 September 2014 (noting that there had been some progress relating to human-rights violations in Guatemala in 2012, but that 'impunity remains the norm in Guatemala'); Amnesty International, 'Guatemala Human Rights' online: Amnesty International <www.amnestyusa.org/our-work/countries/americas/guatemala> accessed 10 September 2014): 'Guatemala continues to be crushed by the rule of impunity.'

either going against the military, or, more recently, those vocal opponents of mining operations in Guatemala.⁷⁷

The plaintiffs alleged both direct responsibility of Hudbay Minerals, under tort theory, and also that the corporate veil should be pierced, or that vicarious liability should be found against Hudbay.⁷⁸ The trial court allowed Amnesty International to intervene in the case, and it presented to the court extensive material on voluntary and international agreements regarding corporate social responsibility.⁷⁹ The ultimate outcome of the case will depend on the upcoming trial, but in July 2013, the Ontario Superior Court heard Hudbay's motion to strike.

The plaintiffs had generally alleged that security personnel worked for Hudbay's subsidiaries and that the subsidiaries were 'under the control and supervision of Hudbay' in committing the human rights abuses.⁸⁰ In relation to all three claims, the defendants brought a motion to strike, essentially arguing that plaintiffs had failed to state a case on which relief could be granted. There were several factual arguments underlying this assertion, but the one relating to the separate corporate personality of the parent versus the subsidiary will be highlighted here.⁸¹

In assessing a motion to strike, the court must decide whether 'assuming the facts in the statement of claim can be proven, it is plain and obvious that no reasonable cause of action is disclosed'.⁸² Thus, the facts alleged are assumed to be true for the purpose of the motion, and the question is whether the facts as alleged are sufficient to support a cause of action – a standard that strongly favours the plaintiff.⁸³

The court noted that the majority of the plaintiffs' claims were based on direct liability of Hudbay, based on its own conduct.⁸⁴ It was only in relation to the *Choc* action that the argument was made that the corporate veil should be pierced, and this was in addition to an assertion of direct liability for certain torts.⁸⁵

'Piercing the corporate veil' is, generally, based on the idea that a parent corporation is considered a separate legal entity from a subsidiary. Thus, generally, a parent cannot be sued for the actions of the subsidiary unless a way can be found to pierce the corporate veil.⁸⁶

The court noted that Ontario courts have recognised three situations in which the corporate veil may be pierced:

- (a) where the corporation is 'completely dominated and controlled and being used as a shield for fraudulent or improper conduct' . . .
- (b) where the corporation has acted as the authorized agent of its controllers, corporate or human . . . and
- (c) where a statute or contract requires it.⁸⁷

⁷⁷ Imai et al (n 16) 3–4.

⁷⁸ *Choc Second Amended Fresh as Amended Statement of Claim* (n 46) para 1.

⁷⁹ *Choc v Hudbay* (n 4) paras 32–9.

⁸⁰ Ibid para 4.

⁸¹ Ibid paras 17–18.

⁸² Ibid para 40.

⁸³ See ibid para 42.

⁸⁴ Ibid para 43.

⁸⁵ Ibid (n 4) para 43.

⁸⁶ Ibid para 44.

⁸⁷ Ibid para 45 (internal citations omitted).

In the *Choc* action, the plaintiffs did plead that ‘CGN is an agent of Hudbay Minerals.’ In so doing, the court said, they pleaded the second exception, and, while the court did not find the first exception to have been successfully pleaded, and did not find the third to be applicable, it did accept that the second exception was properly pleaded. Thus, if proven, the pleadings contained enough to pierce the corporate veil.⁸⁸

The plaintiffs also argued that a parent can be liable in tort for its ‘own acts or omissions in another country’ and ‘jointly and severally liable’ with a subsidiary if its actions so suggest.⁸⁹ The court noted that the plaintiffs were not arguing that Hudbay was responsible for the actions of the security personnel, but, rather, that it was, itself negligent in failing to anticipate and avoid the situation.⁹⁰ The court then went through each element of the torts alleged and explained why the pled facts, if proven, would be adequate to state the claim. For example, the court said that the plaintiffs pleaded sufficient facts to support their claim in tort and, if proven, enough to establish that the:

harms were a reasonably foreseeable consequence of the defendants’ act because:

- * Hudbay/Skye knew or should have known that in Guatemala, violence is frequently used by security personnel during the forced evictions of Mayan Q’eqchi’ communities;
- * Hudbay/Skye executives specifically knew that violence had been used at the previous forced evictions of Mayan Q’eqchi communities requested by Hudbay/Skye;
- * Hudbay/Skye knew that there was a higher risk that more extreme forms of violence would be used during the eviction of remote communities;
- * Hudbay/Skye knew that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms;
- * Hudbay/Skye knew or should have known that the level of violence and rape against women in Guatemala is very high; and
- * Hudbay/Skye knew that Guatemala’s justice system suffers from serious problems and the vast majority of violent crime goes unpunished.⁹¹

Hudbay had argued that some of the facts pled by the plaintiffs would be proven false, and the court noted that the facts are presumed true for the purpose of a motion to strike.⁹² The court cannot make determinations at the stage of a motion to strike as to whether the facts are proven or true, but just as to whether they are adequately pled, so the actual findings of fact in this case remain to be seen and, as of the writing of this article, none of the allegations have yet been proven at trial.⁹³

CGN had asked, in the event that the allegations against Hudbay and HMI were stricken, that the action against it be permanently stayed for lack of jurisdiction, saying the Ontario court had no jurisdiction over a Guatemalan company. Because the court had not stricken the actions against Hudbay and HMI, this request was also denied.⁹⁴

88 *Choc v Hudbay* (n 4) paras 47-49.

89 *Ibid* para 50.

90 *Ibid* para 52.

91 *Ibid* para 60.

92 *Ibid* para 42.

93 See *ibid*.

94 *Ibid* para 85.

The result of the court's ruling is that this action can proceed to trial, and, again, that there is now a decision, *albeit* from a lower court, that says that, should the facts in the statements of claim be proven, they would be adequate to establish Hudbay's liability for its direct actions in Guatemala, as well as to pierce the corporate veil. Whether the facts will be proven, of course, is another matter. Even if the plaintiffs do not succeed at trial, the fact that Hudbay has elected not to appeal the Ontario decision suggests that this case will still stand for the proposition that there are some factual scenarios under which plaintiffs can sue a Canadian parent corporation and its subsidiaries for human rights violations committed overseas – at least in the province of Ontario, and at least according to a lower court. So, even in Ontario, this may not be the last word on that point more generally.⁹⁵

3 Closing, but not locking, the door in the USA

3.1 ORIGINAL ACTION BARRED BY THE SUPREME COURT OF THE UNITED STATES

There is some difficulty in extrapolating a clear rule on when or whether these types of actions can be brought, in part because the issue continues to evolve. One rule that recently emerged from the US Supreme Court appeared to close the door on one previously promising avenue, but, as at least one subsequent case suggested, the door remains unlocked.⁹⁶ Prior to this decision, and because of specific provisions under US law, so-called 'foreign-cubed' cases, 'in which foreign defendants are sued by foreign plaintiffs for torts committed on foreign soil', could sometimes be brought in the USA.⁹⁷

In *Kiobel v Royal Dutch Petroleum Co et al*, a group of Nigerian-born plaintiffs, who were living in the USA, attempted to bring an action against Royal Dutch Petroleum, Shell Transport and Trading Company, and Shell Petroleum Development Company of Nigeria Ltd, asserting that the companies had aided the Nigerian government in committing acts that amounted to violations of customary international law.⁹⁸ The companies involved are incorporated in the Netherlands, the UK and Nigeria.⁹⁹ Specifically, the plaintiffs alleged that the corporations had assisted the Nigerian government in a violent crackdown on peaceful opposition to expanded oil development in the region.¹⁰⁰ During the government's crackdown, Nigerian military and police forces attacked Ogoni villagers, and there were allegations of beatings, rapes, killings, arbitrary detentions and destruction or looting of property.¹⁰¹ The plaintiffs alleged that the corporations 'aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks'.¹⁰² Esther Kiobel is the widow of one of the so-called 'Ogoni nine', a group of activists who were executed by hanging by the military dictatorship in

⁹⁵ See Santry (n 15).

⁹⁶ See *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013). Compare *In Re South African Apartheid Litigation*, 02 MDL 1499 (SAS) (SDNY 2014) (listing actions involved) online: Opinio Juris <<http://opiniojuris.org/wp-content/uploads/17-Apr-SDNY-Opinion.pdf>> accessed 10 September 2014.

⁹⁷ Stewart (n 11) 7, note 10.

⁹⁸ *Kiobel* (n 96) 1662.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid* 1662–3.

Nigeria.¹⁰³ All of the plaintiffs are now residents of the USA.¹⁰⁴ The three corporations were named in the action, because, as the court explained:

When the complaint was filed, respondents Royal Dutch Petroleum Company and Shell Transport and Trading Company, plc, were holding companies incorporated in the Netherlands and England, respectively. Their joint subsidiary, respondent Shell Petroleum Development Company of Nigeria, Ltd (SPDC), was incorporated in Nigeria, and engaged in oil exploration and production in Ogoniland.¹⁰⁵

The action was brought under the Alien Tort Statute, which, prior to the *Kiobel* decision, was a long-standing mechanism for allowing so-called ‘aliens’ to gain jurisdiction before US courts. The statute dates back to 1789.¹⁰⁶ The statute provide that ‘[t]he 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’.¹⁰⁷

Prior to the *Kiobel* ruling from the Supreme Court, the lower circuits had been in some disarray as to whether a corporation could face liability under the Alien Tort Statute before a US court relating to human rights violations allegedly committed abroad.¹⁰⁸ It appeared, initially, as if the *Kiobel* court had decidedly answered the question in the negative when it ruled that the general presumption against extraterritorial application of US law included the Alien Tort Statute, thus precluding this recourse for these plaintiffs.¹⁰⁹ The court did appear to leave the door open for some future cases, requiring that, in order to overcome the presumption, the claims must ‘touch and concern the territory of the United States, [and that] they must do so with sufficient force to displace the presumption against extraterritorial application’.¹¹⁰ In making this ruling, the court appeared to eliminate a significant avenue for plaintiffs to bring actions for human rights violations committed overseas.

In another case, issued the year before *Kiobel*, the Supreme Court ruled that the Torture Victim Protection Act did not apply to the actions of organisations, because the term ‘individual’, as used in the Act, only included natural persons and not organisations.¹¹¹ That case had related to allegations of torture by the Palestinian Liberation Organization and was brought against the Palestinian Authority and the Palestinian Liberation Organization by a

103 Center for Constitutional Rights, ‘Factsheet: The Case Against Shell’ online: ccrjustice.org <<http://ccrjustice.org/learn-more/faqs/factsheet%3A-case-against-shell-0>> accessed 10 September 2014.

104 *Kiobel* (n 96) 1662.

105 Ibid.

106 Alien Tort Statute, or, alternatively, Alien Torts Claims Act of 1789, 28 USC §1350.

107 Ibid.

108 For some background on this case and on the issue in the USA, see M Theophila, “Moral Monsters” under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after *Kiobel v Royal Dutch Petroleum Co*’ (2011) 79(6) Fordham Law Review 2859; J M Stanisiz, ‘The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of *Kiobel v Royal Dutch Petroleum Co*’ (2010–2011) 5 Brook Journal of Corporate Finance and Company Law 573 (both published prior to the ruling from the Supreme Court).

109 *Kiobel* (n 96) 1669.

110 Ibid. One commentator described this as ‘[t]he federal courthouse doors are now shut for these cases’, but noted that ‘the keys may still be in the door’, if a degree of connection can be shown with the USA, consistent with the language in *Kiobel*: Donald Childress, ‘*Kiobel* Commentary: An ATS Answer with Many Questions (and the Possibility of a Brave New World of Transnational Litigation)’ (18 April 2013) online: SCOTUSblog <www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation> accessed 10 September 2014.

111 *Mohamad v Palestinian Authority*, 132 S Ct 1702, 182 L Ed 2d 720 (2012) [2012 BL 95451].

naturalised US citizen.¹¹² Presumably, this decision limits actions against corporations under this Act.

Thus, while the trend of US Supreme Court decisions seems to have recently disfavoured bringing actions against corporations, current jurisprudence does not necessarily preclude such actions entirely. First, the decisions relate to actions under particular statutes, and the decisions are crafted to the parameters of the particular case. In *Kiobel*, for example, the court ruled that there was a presumption against extraterritorial application, not that there was an absolute bar.¹¹³ The court did not suggest that there was a bar to liability of corporations, a question it did not expressly answer, but some believe the opinions operate under the assumption that there is this potential for some liability.¹¹⁴ There are, as well, certain circumstances under which the presumption against extraterritoriality can be overcome.¹¹⁵ The court did allow for the possibility that a matter could overcome the presumption if it relates to the territory and a concern of the USA with 'sufficient force'.¹¹⁶ Anupam Chander, a professor at the University of California, Davis, has made a persuasive argument that, in practice, this connection requirement could mean that foreign corporations are not normally likely to fall under the Alien Torts Statute, but that American corporations are much more likely to meet this connection test.¹¹⁷

A question over what this means in the USA for these cases after *Kiobel* has arisen after a subsequent ruling by the US District Court for the Southern District of New York.¹¹⁸ In *In Re South African Apartheid Litigation*, the court was faced with the question of an extraterritorial claim, under the Alien Torts Statute, against Daimler, Ford and IBM, alleging that these corporations aided the South African government in human rights violations.¹¹⁹

The trial court declined to dismiss the case, finding instead that the burden of overcoming the presumption against such extraterritorial application had been met in this case, and also finding that the Alien Torts Statute could, indeed, apply to corporations.¹²⁰

112 *Mohamad v Palestinian Authority* (n 111).

113 See e.g. K Redford, 'Commentary: Door Still Open for Human Rights Claims after *Kiobel*' (17 April 2013) online: SCOTUSblog <www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel> accessed 10 September 2014.

114 Ibid.

115 Ibid.

116 *Kiobel* (n 96) 1669.

117 A Chander, 'Unshackling Foreign Corporations: *Kiobel*'s Unexpected Legacy' (2013) 107 American Journal of International Law 829, 830–2. The *Kiobel* case has generated considerable commentary, most speculating as to its long-term impact. See e.g. C Kaeb and D Scheffer, 'The Paradox of *Kiobel* in Europe' (2013) 107(4) American Journal of International Law 852 (suggesting that Europe may not be as aligned with the majority position in *Kiobel* as it may seem, specifically noting that the UK and the Netherlands took positions in *amicus* pleadings against extraterritoriality, but that this does not exactly align with their own handling of these cases); V Curran and D Sloss, 'Reviving Human Rights Litigation after *Kiobel*' (2013) 107(4) American Journal of International Law 858; Zachary D Clopton, '*Kiobel* and the Law of Nations' (2013) 107(4) American Journal of International Law E1; S H Cleveland, 'The *Kiobel* Presumption and Extraterritoriality' (2013) 52(1) Columbia Journal of Transnational Law 8; F R Teson, 'The *Kiobel* Decision: The End of an Era' (2013) 8(1) New York University Journal of Law and Liberty 161.

118 For an interesting analysis of this controversy, see J Ku, 'The Case That Won't Die: US Court Revives South Africa Apartheid Alien Tort Statute Lawsuit' (18 April 2014) online: Opinio Juris <<http://opiniojuris.org/2014/04/18/case-wont-die-u-s-court-revives-south-africa-apartheid-ats-lawsuit>> accessed 10 September 2014.

119 Human Rights@Harvard Law, '*In Re South African Apartheid Litigation*' online: <<http://hrp.law.harvard.edu/areas-of-focus/alien-tort-statute/in-re-south-african-apartheid-litigation>> accessed 10 September 2014).

120 *In Re South African Apartheid Litigation* (n 96) (listing actions involved).

This latter finding is especially intriguing as, in the lower-court *Kiobel* case, the Second Circuit Court of Appeal had specifically found that it did not so apply.¹²¹ Although, as the lower court in the same federal circuit, the trial court should have been bound by the Second Circuit Court of Appeal, it expressly declined to follow that ruling because the Supreme Court had subsequently decided the *Kiobel* case on different grounds and had implied that the Alien Torts Statute could, in some cases, apply to corporations.¹²² The plaintiffs have subsequently filed a motion for leave to file amended complaints, arguing that there are adequate facts to meet the ‘touch and concern’ portion of the *Kiobel* test.¹²³ Thus, even in that district, this question is by no means settled, but the ruling does suggest some willingness among certain courts to find a way to allow such cases to proceed in US courts, even after the seemingly dispositive handling of the issue by the Supreme Court in *Kiobel*.

The configurations for original actions may vary, and this may have a direct impact on jurisdictional and other threshold questions. The Canadian *Choc* case relates to the bringing of an original action in the jurisdiction that is the home of the parent company, even though the alleged violations took place overseas and involved varying degrees of connection among the parties to the country in which the action is to be brought.¹²⁴

In *Kiobel*, the configuration was quite different, involving entities incorporated in three foreign jurisdictions, but not in the USA, where the action was brought. The actions at the heart of that lawsuit also happened outside of the USA and, although the plaintiffs subsequently moved to the USA, the connection to the USA in the *Kiobel* matter is arguably more tenuous than that presented in the Canadian *Choc* case.¹²⁵ If not for the existence of the Alien Torts Statute, a particular statutory tool, it is unlikely that the plaintiffs would have even attempted to bring the action in the USA. Canada has no such comparable statute, so it is unlikely that such an original action would have been attempted in Canada without a further connection to help meet threshold tests. This is an issue that will continue to develop.

4 Original actions in other jurisdictions

Courts in other jurisdictions also continue to struggle with when and how such actions can be brought in their domestic courts. In the UK, Shell Petroleum Development Company of Nigeria Ltd has avoided a High Court case that was about to start by agreeing to a £55m settlement.¹²⁶ The dispute is the result of two oil spills in Nigeria in 2008, which 15,000 members of Nigeria’s Bodo community have said caused extensive environmental damage and significantly harmed their subsistence livelihood, including undermining their fishing operations. Shell has admitted responsibility for the oil spills, but does not agree as to the

121 Human Rights@Harvard Law (n 119).

122 Ibid.

123 Ibid referring to *Kiobel* (n 96) 1669.

124 *Choc v Hudbay* (n 4) paras 8–10.

125 See *Kiobel* (n 96) 1662.

126 ‘Shell Announces £55 Million Payout for Nigeria Oil Spills’ (7 January 2015) online: theguardian.com <www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills> accessed 1 April 2015; see also AFP, ‘Nigerian Community Fights Shell in UK Court over Oil Spills’ (29 April 2014) online: theguardian.com <www.theguardian.com/environment/2014/apr/29/nigerian-community-shell-uk-court-oil-spills> accessed 10 September 2014; *The Bodo Community, Gokana Local Government Area, Rivers State, Nigeria and the Shell Petroleum Development Company of Nigeria Ltd*, Claim no HQ11X01280, Particulars of Claim, in the High Court of Justice, Queen’s Bench Division, online: Platform London <<http://platformlondon.org/wp-content/uploads/2012/06/The-Bodo-Community-and-The-Shell-Petroleum-Development-Company-of-Nigeria-Ltd.pdf>> accessed 10 September 2014.

assertions regarding liability for and the amount of the damage.¹²⁷ Earlier attempts to settle the matter had failed, and the case was set for a pre-trial hearing where, among other things, Shell's position that the cases should be heard in Nigeria was to be presented.¹²⁸ Early indications had been that the court was open to hearing certain threshold issues on the merits, and the case was expected to proceed to trial in 2015.¹²⁹

A case has been proceeding in the Netherlands against Shell relating to oil spills in Nigeria, and it has met with success so far.¹³⁰ The case is ongoing, at the appellate level, and this article mentions it, and commentary surrounding this case, merely for the proposition that the Netherlands may turn out to be one jurisdiction in which courts may allow for such liability for alleged human rights violations abroad.¹³¹ It appears that there may even be some circumstances in which criminal liability might be found.¹³²

5 Enforcement actions for foreign judgments

Another line of controversy exists, though, involving cases in which the original action is brought in the country in which the alleged abuses took place, and the parties then seek to enforce the foreign judgment in another national jurisdiction afterwards. Again, it is not so clear what the parameters of such actions are.

A US federal court recently issued a scathing 485-page ruling in an action that began as a request for enforcement of a judgment entered in Ecuador for alleged environmental abuses by the Chevron Corporation.¹³³ Chevron had brought a separate action against Steven Donziger, the lead attorney for the plaintiffs, seeking to block the enforcement and alleging that various actions in the obtaining of the underlying Ecuadorian judgment were fraudulent.¹³⁴ The federal trial court agreed with Chevron and prohibited Donziger or the others from seeking to enforce the Ecuadorian judgment in the USA.¹³⁵ In April 2014, Donziger, sought, unsuccessfully, to stay enforcement of the ruling.¹³⁶ The Chevron ruling

127 *The Bodo Community* (n 126); see also 'Letter to the Financial Times from SPDC MD Mutiu Sunmonu' (22 March 2012) online: static-shell.com <<http://s01.static-shell.com/content/dam/shell/static/nga/downloads/pdfs/our-response/mutius-letter.pdf>> accessed 10 September 2014; 'Bodo Oil Spills and Compensation' online: shell.com <www.shell.com/ng/environment-society/our-response/bodo-spills.html> accessed 10 September 2014.

128 *The Bodo Community* (n 126).

129 Leigh Day, 'London High Court Rules that Shell Nigeria Could be Legally Liable for Bunkering' (20 June 2014) online: Leigh Day <www.leighday.co.uk/News/2014/June-2014/London-High-Court-rules-that-Shell-Nigeria-could-b> accessed 10 September 2014.

130 N Jägers, K Jesse and J Verschuuren, 'The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell' 107(4) *American Journal of International Law* E36, E37 (citing *Akpan v Royal Dutch Shell plc*, Arrondissementsrechtbank Den Haag [District Court of the Hague] 30 January 2013, Case no C/09/337050/HA ZA 09-1580 [ECLI-NL-RBDHA-2013-BY9854]).

131 Ibid E38 (distinguishing the Dutch scenario from that of the USA in *Kiobel* based on the unique nature of the American Alien Torts Statute, 28 USC §1350); see also A Smith, 'Shell Lied to Dutch Court about Oil Spills in Nigeria, Say Friends of the Earth' (17 November 2014) online: Newsweek <www.newsweek.com/shell-lied-dutch-court-about-oil-spills-nigeria-says-friends-earth-284900> accessed 1 April 2015.

132 Jägers et al (n 130) (citing Article 51 of the Dutch Criminal Code [Wetboek van Strafrecht]).

133 *Chevron Corp v Donziger*, 11 Civ 0691 (LAK)(SDNY 2013).

134 Ibid.

135 Ibid.

136 Mica Rosenberg, 'Chevron Wins a Round in US Suit against Lawyer in Ecuador Case' (25 April 2014) online: Reuters <www.reuters.com/article/2014/04/26/us-chevron-ecuador-appeal-idUSBREA3P00220140426> accessed 10 September 2014.

has been appealed.¹³⁷ In July 2014, 17 civil society groups filed a request to file an *amicus* pleading before the appellate court in the enforcement action, arguing that Chevron's practices, as well as the trial judge's ruling, violated the First Amendment rights of advocates, arguing that Chevron was trying to use the US legislation to intimidate and silence its critics.¹³⁸

The original case had related to claims by people living near the site of oil excavation by Texaco, later acquired by Chevron, that they were suffering ill-health effects of environmental contamination caused by the operations there.¹³⁹ Chevron had asserted that Texaco cleaned up the area before the transfer to Chevron, which the plaintiffs dispute.¹⁴⁰

Because of the allegations of fraud, however, even if enforcement is not ultimately allowed in the USA, the value of the case as precedent on this issue is likely to be somewhat limited. The plaintiffs have not limited their enforcement attempts to the USA, however, and are also attempting to enforce the judgment against Chevron holdings in Canada, Argentina and Brazil.¹⁴¹ Reports suggest that Chevron will try to use the US ruling to fight enforcement actions in the other jurisdictions in which the plaintiffs are trying to collect.¹⁴²

In the Canada enforcement action, the Ontario Court of Appeal overturned a ruling of a lower court that barred enforcement by the same group of Ecuadorian plaintiffs.¹⁴³ The court quoted a Chevron spokesman, who said, if Chevron lost, '[w]e're going to fight this until hell freezes over. And then we'll fight it out on the ice.'¹⁴⁴ The court responded: 'Chevron's wish is granted. After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction.'¹⁴⁵ The Ontario Court of Appeal, however, is not the last word on the issue, as the Supreme Court of Canada has granted Chevron leave to appeal.¹⁴⁶ Moreover, the timing of the two decisions suggests that the Canadian court was not influenced by the ruling in the USA.¹⁴⁷ In light of Chevron's stated intention of bringing the US ruling to the courts' attention in the other jurisdictions, and the ongoing nature of the litigation in both countries, it remains to be seen how much influence one will have on the other.

The Canadian case looks likely to be contentious and, as of August 2014, motions for leave to intervene were pending from the Canadian Bar Association, the US Chamber of

137 Rosenberg (n 136) 1; see *Chevron Corporation v Donziger et al*, no 14-0826-CV (2d Cir 2014); *Chevron Corporation v Naranjo*, no 14-0826 (L)(2d Cir 2014).

138 *Chevron Corporation v Hugo Gerardo Camacho Naranjo et al*, no 14-0826 online: chevrontoxico <<http://chevrontoxico.com/assets/docs/2014-07-08-amazon-watch-brief.pdf>> accessed 10 September 2014.

139 *Donziger* (n 133) 1.

140 Ibid.

141 Rosenberg (n 136).

142 Paul M Barrett, 'Chevron RICO Fallout: What Happens to the Losing Lawyer?' (7 March 2014) online: Businessweek <www.businessweek.com/articles/2014-03-07/chevron-rico-fallout-what-happens-to-the-losing-lawyer> accessed 10 September 2014.

143 *Yaiguaje v Chevron Corporation*, 2013 ONCA 758.

144 Ibid para 74.

145 Ibid para 75.

146 *Chevron Corporation et al v Daniel Carlos Lusitande Yaiguaje et al* (Ontario) (Civil) (By Leave) no 35682 (Yaiguaje, SCC), case updates, online: Supreme Court of Canada <www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35682> accessed 1 April 2015. Oral arguments were heard in December 2014. Ibid.

147 *Yaiguaje* (n 143); *Donziger* (n 133).

Commerce, the Justice and Corporate Accountability Project and the International Human Rights Program of the University of Toronto Faculty of Law.¹⁴⁸

6 Conclusions: perhaps a Dutch door?

The varying results on whether these cases can initially be brought in different jurisdictions, or enforced after an order in the original jurisdiction, coupled with the somewhat fact-specific nature of such questions, suggests more of a metaphor of a Dutch door. The top may or may not be open, while the bottom portion remains certainly closed.

What is apparent, however, is that the changing nature of corporate functioning, reach, and influence means that courts in the various jurisdictions must find a way to ensure that those who are subject to human rights or environmental abuses overseas have some way of accessing legitimate judicial proceedings to have their claims heard.¹⁴⁹ That need is especially compelling when those allegations arise in jurisdictions that have questionable judicial systems, or where enforcement actions in other jurisdictions are necessary. In Canada, former Supreme Court Justice Ian Binnie has spoken out on this issue, not specifically relating to the *Choc* case, but on the larger issue of corporate accountability, saying '[e]ventually, the courts are going to have to face up to the fact that in any responsible legal system people have a right to a day in court. And if the only court available is in Canada then that's where the problem should be faced.'¹⁵⁰

Regardless of the ultimate outcome on the merits, the Canadian *Choc* case, for instance, is still limited in its scope, as a trial court ruling from one province within Canada, and also as based on rather specific facts. Paul Champ, a lawyer who intervened in the *Choc* case for Amnesty International, has expressed the view that, even if the *Choc* case serves as precedent that such cases can proceed to trial in Canada, the number of such cases is likely to be limited because of the costs involved and the difficulty of bringing plaintiffs forward from areas that may be affected by conflict, although he did believe there would be some similar cases.¹⁵¹

The decision is making some difference as a cautionary tale for Canadian multinational corporations that they may not be entirely protected from liability in such cases. Indeed, a number of Canadian law firms issued advisories, after the decision, for multinational corporations to address the type of conduct that could lead to such actions.¹⁵² Some warned against the specific type of factual scenario that led the Ontario court to rule that the case against the parent could proceed. Bennett Jones, for instance, noted in its commentary:

This decision serves as an important reminder for Canadian corporations with foreign subsidiaries. The advantages made available by incorporating foreign subsidiaries can be undermined if employees of the Canadian parent are directly involved in operating the foreign subsidiary, including developing its policies,

148 *Yaignaje, SCC* (n 146).

149 See V Crystal, S Imai and B Maheandiran, 'Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala' (2014) 35(2) *Canadian Journal of Development Studies* 286–303.

150 Public Radio International, 'Guatemalan Villagers Make Long Journey to Canada in Search of Justice' (2012) online <<http://culturine5.rssing.com/browser.php?indx=4035254&item=378>> accessed 10 September 2014.

151 P Koven, 'HudBay Case Raises Litigation Risk for Canadian Resource Companies' (30 October 2013) online: *Legal Post* <<http://business.financialpost.com/2013/10/30/hudbay-case-raises-class-action-risk-for-canadian-resource-companies>> accessed 10 September 2014.

152 See e.g. A J Gray and J R Lambert, 'A Warning for Canadian Corporations with Foreign Subsidiaries' (30 July 2013) online: Bennett Jones <www.bennettjones.com/Publications/Updates/A_Warning_for_Canadian_Corporations_with_Foreign_Subsidiaries> accessed 10 September 2014.

speaking on its behalf, or directly engaging in on-the-ground activities. The advantages of separate corporate personality are only enjoyed where separate corporate personality is respected in theory and practice.¹⁵³

While this commentary relates to ensuring the distinct nature of a parent from a subsidiary for liability purposes, others warned about taking greater care to minimise the risk that subsidiaries will commit human rights or other violations overseas.¹⁵⁴ Gowlings suggested:

We recommend that every company that operates outside Canada should take the following minimum steps to practice due diligence with respect to its foreign operations:

- Carry out human rights, violence and corruption risks assessment that prioritize high risk geographical and functional areas.
- Adopt a global code of business conduct and anti-corruption policy that sets a very clear tone that human rights violations, violence and bribery will not be tolerated, and provide ample and frequent training to both employees and third party intermediaries/business partners to reinforce the message.
- Adopt specific procedures and internal systems and controls to monitor operations in foreign countries.
- Develop processes for the effective conduct of tiered, risk-based due diligence for the retention and monitoring of third party intermediaries and business partners in foreign jurisdictions.
- Anti-corruption due diligence should also figure prominently in any merger or acquisition activity.¹⁵⁵

Even the mere possibility of success of such an action, regardless of the ultimate parameters of that possibility, may, on its own, bring about some changes in the way Canadian multinationals do business in developing countries. It is less clear, however, that the case will bring about similar changes in practices in other jurisdictions, so even that benefit is limited.

Moreover, changes in voluntary multinational practices, while important, are not enough to address the shortcomings in access to justice that can arise where abuses are nonetheless alleged. A gap remains for those cases in which allegations still emerge that a multinational corporation from one country, on its own or via a subsidiary, is responsible for human rights or environmental abuses in a developing country that does not have adequate recourse to judicial resources. It is not clear, even within Canada, that the *Choc* case opens the door to these claims far enough. Moreover, the trend in the USA actually appears to be to keep the door closed to such actions as much as possible, as evidenced by the *Kiobel* ruling, and, to a lesser extent, by the current litigation in the *Chevron* matter. This trend may ultimately influence Canada's approach, although that remains to be seen.

Because of the nature of how multinationals operate, courts and perhaps legislatures in the home jurisdictions of such companies must work towards avoiding impunity for human

153 Gray and Lambert (n 152); see also R Williams and T Bottomer, 'Dodging the Corporate Veil – Recent Attempts to Hold Companies Liable for the Actions of their Foreign Subsidiaries' The Resource online: BLG Energy Law Blog (January 2015) <http://blog.blg.com/energy/Lists/Posts/Post.aspx?ID=289&utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original> accessed 1 April 2015 (describing two cases filed after the *Choc* ruling, with plaintiffs apparently inspired by that case to pursue direct actions against parent corporations, entirely avoiding the issue of the corporate veil – both actions have been filed in British Columbia in Canada).

154 See e.g. Gowlings, 'Knowledge Centre: Enhanced Liability abroad for Canadian Corporations' (August 2013) online: <<http://m.gowlings.com/knowledgecentre/article.asp?pubID=2975>> accessed 10 September 2014.

155 Ibid.

rights and environmental abuses overseas. This article does not engage with the issue of exactly how these mechanisms must look, as the threshold issue of the necessity of such mechanisms at all has not been accepted yet in most jurisdictions. There has, however, been long-term academic discussion of how courts might tailor existing doctrines to better allow for access to justice in such cases, and opinions vary widely as to how and whether this can be accomplished.¹⁵⁶ At the very least, the current hurdles in jurisdiction may need to be reassessed, and some of the recent cases in this area suggest that courts are doing just that, at least in some instances. Much more needs to be done, but with some of the recent rulings across jurisdictions, there is growing evidence that some courts may at least be leaving the door unlocked for some of these cases.

¹⁵⁶ See e.g. Nwapi (n 6) (advocating for application of the jurisdiction by necessity doctrine for some such cases and providing a useful discussion of other possible scenarios); Patrick Macklem, 'Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction' (2005) 7(4) *International Law FORUM du droit international* 281 (writing '[s]educed by cosmopolitan fantasies of a truly global legal order righteously meting out justice against lawless transgressors, the international legal imagination has begun a misguided and risky quest for universal jurisdiction over human rights violations by multinational corporations').