

EXTRATERRITORIAL COURT JURISDICTION IN THE CORPORATE ANTHROPOCENE: A COMPARATIVE ENQUIRY

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ABSTRACT

Corporations are notoriously powerful actors in the current configuration of our globalised economy. As such, they have assumed a key role in shaping a new age of ecological precarity—the Anthropocene. Indeed, the transnational scope of corporate activities often results in environmental harm elsewhere on the planet. Disheartened by host states’ perceived inability to deliver environmental justice locally, several recent lawsuits have tested the willingness of European home state judiciaries to adjudicate the extraterritorial conduct of domestic corporations. The fate of such litigation crucially hinges upon a procedural legal modality: jurisdiction. This thesis investigates when, how, and why European courts assume jurisdiction over civil environmental wrongs centred abroad (extraterritorial jurisdiction). Methodologically, it analyses two legal sagas in the UK (*Lungowe v Vedanta*) and the Netherlands (*Akpan et al. v Shell*) and contrasts these to a third lawsuit in Germany (*Lliuya v RWE*). This comparative enquiry reveals the contingency of extraterritorial jurisdiction as a socio-legal construct, as well as its opportunities and limits in confronting the corporate Anthropocene. Ultimately, the advent of unilateral judicial interventions in the environmental affairs of other countries raises concerns over the international and institutional legitimacy of such an exercise. In order to dispel these concerns, a re-imagination of the role and functionality of jurisdiction within an increasingly polycentric environmental governance landscape is required.

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CFA	Contingency fee agreement
CJEU	Court of Justice of the European Union
DCCP	Dutch Code of Civil Procedure
ECJ	European Court of Justice
EU	European Union
GHG	Greenhouse gases
KCM	Konkola Copper Mines plc
NGO	Non-governmental organisation
OECD	Organisation for Economic Cooperation and Development
RDS	Royal Dutch Shell
SPDC	Shell Petroleum Development Company
TNC	Transnational corporation
UK	United Kingdom
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights
US	United States of America

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CHAPTER 1. LITIGATING ENVIRONMENTAL HARM ACROSS BORDERS

*'They [Shell] never think about the poor man. So, there is no hope that things will get better for us. [...] Only with the help of people all over the world might we be able to recover'.*¹

1. Introduction

Grappling with the adverse effects of a radically globalised world economy is a defining challenge for legal systems in the 21st century. In recent decades, transnationalism has arisen as a multipolar and networked alternative to the perceived shortcomings of consensual approaches in traditional international law. One symptom of this process has captured the imagination of practitioners and scholars alike—a new class of lawsuits is targeting transnational corporations' (TNCs) *global* socio-ecological footprint before *domestic* courts in Europe and North America. The aggrieved claimants in these cases strategically deploy the toolkit of private international law to gain access to the courts. This is a remarkable development, given that so far transnational legal spaces have chiefly served as a catalyst for expanding commerce across borders and are largely inaccessible to marginalised communities bearing the brunt of global production patterns.

As a structuring principle of (international) legal authority, the concept of jurisdiction has been at the forefront of this nascent trend. The concept's transformation away from territorial control and towards *extraterritorial* applications plays an increasingly important role in the environmental litigation landscape.² With varying success have

¹ These are the words of Chief Fidelis, one of the claimants in the Dutch lawsuits against Shell, in reference to his hopes for justice through legal action. Cited in Milieudéfense, 'The Plaintiffs and Their Villages' (*Shell in Nigeria*) <<https://en.milieudéfense.nl/shell-in-nigeria/the-plaintiffs-and-their-villages>> accessed 16 May 2021.

² On the disruptive role of jurisdiction in climate change litigation, see Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *The Modern Law Review* 173, 183–187.

litigants petitioned domestic courts to ‘selflessly’³ extend their jurisdiction beyond socio-political borders to protect environmental legal interests elsewhere. To some commentators,⁴ such unilateral actions provide a welcome opportunity to widen access to environmental justice and amplify the accountability of TNCs, who are notoriously skilful in exploiting loopholes in the regulatory landscape.

The legal developments driving the transnational enforcement of environmental norms are thus frequently invoked in a promotional tone, but more rarely are they analysed in a methodologically conscious and conceptually embedded manner. Perhaps unsurprisingly—given the pace and novelty of these debates—there is a relative dearth of scholarship analysing how exactly extraterritorial jurisdiction is constructed by legal actors. As I hope to show, zooming in on such details does not only lead to a more complete understanding of the direction of jurisdictional expansion in the case law. It also sheds a light on the larger picture unfolding in the polycentric environmental regulatory regime. Akin to their newfound role in climate litigation,⁵ domestic judiciaries dealing with extraterritorial harm are presented with an opportunity to plug some of the gaping holes in global environmental governance frameworks. In seizing this opportunity, however, courts risk shifting the institutional balance away from international and political actors towards domestic and judicial ones.

³ Cedric Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (Oxford University Press 2020).

⁴ E.g., Jodie A Kirshner, ‘A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses’ (2015) 13 *Northwestern Journal of Human Rights* 1. These voices often draw on the normative and ethical framework of cosmopolitan philosophy. See Kwame Anthony Appiah, *Cosmopolitanisms* (NYU Press 2017); Darrel Moellendorf, *Cosmopolitan Justice* (Routledge 2018).

⁵ Anna-Julia Saiger, ‘Domestic Courts and the Paris Agreement’s Climate Goals: The Need for a Comparative Approach’ (2020) 9 *Transnational Environmental Law* 37.

1.1 *The corporate Anthropocene*

There is no comprehensive estimate of the environmental damage caused by corporate actors worldwide, but interspersed studies suggest enormous scales. One report quantifies the economic damage of global environmental degradation by hands of the largest 3000 public companies at a staggering \$2.2 trillion—in 2008 alone.⁶ A more recent study finds that ‘[o]ver half of global industrial emissions since human-induced climate change was officially recognised can be traced to just 25 corporate and state producing entities.’⁷ In order to mark the scale of disruption in a geological epoch dominated by mankind, the term ‘Anthropocene’ has gained traction across disciplinary divides.⁸ Evidently, TNCs’ position at politico-economic power nodes has led them to assert a key role in shaping this new era of ecological precarity.⁹

The law is deeply entangled in this process. On the one hand, it enables, constitutes, and legitimises corporate predation against natural resources by prioritising individual interests over collective ones. This is the reign of corporate, property, and contract law, among others.¹⁰ On the other hand, a contrasting strand of law seeks to

⁶ Juliette Jowit, ‘World’s Top Firms Cause \$2.2tn of Environmental Damage, Report Estimates’ (*The Guardian*, 18 February 2010) <<http://www.theguardian.com/environment/2010/feb/18/worlds-top-firms-environmental-damage>> accessed 16 May 2021. The real number is likely to be significantly higher, given that both economic output and ecological costs have risen dramatically since.

⁷ Paul Griffin, ‘CDP Carbon Majors Report 2017’ (2017) 8 <<https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772>> accessed 16 May 2021.

⁸ Jorge Viñuales, ‘The Organisation of the Anthropocene: In Our Hands?’ [2018] Brill Research Perspectives 1; Louis J Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017). The label is not without criticism, among others for its alleged tendency to brush over the role of dominance within the human species in driving environmental change. See, Andreas Malm and Alf Hornborg, ‘The Geology of Mankind? A Critique of the Anthropocene Narrative’ (2014) 1 *The Anthropocene Review* 62.

⁹ Martin Perry, ‘Corporations and the Anthropocene’, *International Encyclopedia of Geography* (John Wiley & Sons 2017).

¹⁰ This point is poignantly carved out in Katharina Pistor, *The Code of Capital* (Princeton University Press 2019). David Whyte takes this critique to the next level in arguing for the abolition of the corporate legal form as we know it. David Whyte, *Ecocide: Kill the Corporation Before It Kills Us* (Manchester University Press 2020).

empower both individual citizens and the state to protect and preserve our ecological commons. The latter is the empire of environmental law, in all its diversity.¹¹

Legal responses to the corporate Anthropocene appear to have run into two fundamental hurdles. First, hailing from its disciplinary roots, environmental law continues to be deeply embedded in an administrative prism that largely focusses on the environmental responsibility of public actors.¹² The rising importance of private actors in the global system in terms of numbers and power challenges the effectiveness of traditional ‘top-down’ control models. Second, the transnationalisation of corporate activities makes their regulation exceedingly difficult in a state-centred paradigm that consecrates national sovereignty. In the absence of a strong supranational environmental regime, this quagmire suggests that ‘[e]ffective legal governance in the Anthropocene [...] requires state laws to reach further, extending beyond territorial borders to capture transnational corporate conduct.’¹³

1.2 *Objectives and structure*

This thesis intends to tackle the conjoint issues posed by the corporate Anthropocene. In doing so, it builds on a growing body of scholarship in transnational environmental law.¹⁴

¹¹ As a relatively novel legal discipline, environmental law stretches across conventional divides between public and private law, for instance. For a brief and concise snapshot of the colourful diversity of environmental legal norms, see Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (Oxford University Press 2017).

¹² Natasha Affolder, ‘Square Pegs and Round Holes? Environmental Rights and the Private Sector’ in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015). Even market mechanisms are often, although not exclusively, employed as regulatory tools of state control. See, Sanja Bogojević, *Emissions Trading Schemes: Markets, States and Law* (Hart Publishing 2013).

¹³ Sara Seck, ‘Moving beyond the E-Word in the Anthropocene’ in Daniel S Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019) 57.

¹⁴ For an introduction to this vibrant and swiftly evolving line of inquiry, see, among others, Veerle Heyvaert and Thijs Etty, ‘Introducing Transnational Environmental Law’ (2012) 1 Transnational Environmental Law 1; Peter H Sand, ‘The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective Commentary’ (2012) 1 Transnational Environmental Law 183; Cinnamon Carlarne and Daniel Farber, ‘Law Beyond Borders: Transnational Responses to Global Environmental Issues’ (2012) 1 Transnational Environmental Law 13.

The overarching questions pursued are threefold, situated along a logical trajectory from description to prescription. First, how have English and Dutch courts constructed jurisdictional competence over domestic 'TNCs' extraterritorial conduct? Second, to what extent are these approaches reflective of legal and contextual factors? And third, is extraterritorial court jurisdiction an effective and legitimate avenue to enforce transnational environmental norms?

Whereas the first two questions are analytical in nature and seek to understand jurisdiction in its theoretical and applied form as a constructivist concept, the third question assumes a markedly consequentialist lens. In doing so, it echoes some of the instrumentalist arguments explicitly and implicitly made in the literature¹⁵ but seeks to enrich the conversation with a critical viewpoint.¹⁶

As I argue in this introductory chapter, the corporate-driven globalisation of environmental harm connects individual legal systems in unprecedented formations. Among others, this process manifests in the rise of transnational environmental litigation. In order to analytically grasp the character of the swiftly evolving case law, the methodological focus on single jurisdictions needs to be abandoned in favour of comparative approaches.

The second chapter explores the law of jurisdiction as a crucial mechanism by which transnational litigation is enabled or hindered. After clarifying the conceptual content and genealogy of jurisdictional rules, the chapter surveys the legal provisions governing their exercise across public international law, European law, and domestic private international law. Having thus outlined the positivist picture, the chapter concludes by summarising the transformational developments that are increasingly pushing the

¹⁵ See, e.g., Kirshner (n 4).

¹⁶ For persuasive critiques of consequentialist views of the law, see Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292; Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006).

concept's functionality from that of a 'shield' against foreign intrusion to one of a 'sword' in the protection of global values.

The third chapter then describes and dissects the jurisdictional construction of international authority in a comparative selection of two transnational environmental lawsuits in England and the Netherlands. In doing so, it identifies numerous opportunities and challenges for such litigation and explores the limits of current strategies by contrasting them with a similar case from Germany.

Chapter four deals with the desirability of national divergences between jurisdictional regimes in a European context. It argues that a unified European forum for corporate harm may boost transnational access to environmental justice and play a crucial role in regulating the corporate Anthropocene. Such a procedural solution is no magic wand, however, and presumably achieves its full potential only if combined with substantive due diligence obligations. Moreover, expanding the reach of domestic courts through extraterritorial legal proceedings serves to judicialise and de-politicise global environmental governance. This raises concerns about the international and democratic legitimacy of such an exercise. Ultimately, the dizzying pace and volatility of current developments precludes any reliable predictions regarding policy pathways.

Finally, the conclusion summarises the results, points out some pertinent caveats, and suggests directions for future research.

2. The Rise of Transnational Environmental Litigation

At its most basic, litigation describes 'civil legal proceedings in a court between contesting parties'.¹⁷ While most litigation is still confined within one legal system, *transnational*

¹⁷ Trischa Mann, *Australian Law Dictionary* (3rd edn, Oxford University Press 2017) 125.

litigation¹⁸ arose as a distinct subcategory of dispute resolution in the wake of globalisation processes in the second half of the 20th century and has grown exponentially ever since.¹⁹ Broadly defined, its distinctiveness vis-à-vis its domestic sibling is based on ‘the presence of a transnational element, such as a foreign party or evidence located abroad’.²⁰ Proceedings spanning multiple jurisdictions have played a formative role in enabling and shaping the current neoliberal configuration of globalised business and finance in areas ranging from securities, corporate law, bankruptcy, or intellectual property to contract and tort.²¹ However, it was not long before similar claims started being brought over the externalities resulting from globalisation.²² Owing to nature’s propensity to disregard socio-political borders, transnational disputes have become particularly commonplace in environmental law.²³ This holds true in traditional situations of direct pollution, but also for increasingly diffuse responsibility chains underlying large-scale degradation of the global commons. Despite some embryonic attempts,²⁴ a systematic taxonomy of

¹⁸ I use the term transnational, rather than international, to distinguish this type of proceedings from such before international legal tribunals.

¹⁹ See, e.g., Marcus S Quintanilla and Christopher A Whytock, ‘The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law’ (2011) 18 *Southwestern Journal of International Law* 31.

²⁰ Samuel P Baumgartner, ‘Is Transnational Litigation Different’ (2004) 25 *University of Pennsylvania Journal of International Economic Law* 1297, 1300.

²¹ This argument is made by Pistor (n 10). One of the procedural mechanisms enabling the neoliberal transnationalisation of business is the doctrine of forum shopping, allowing corporate actors to choose the most favourable sites to pursue legal action. Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003).

²² Harold Hongju Koh, ‘Transnational Public Law Litigation’ (1991) 100 *The Yale Law Journal* 2347; Hannah L Buxbaum, ‘Transnational Regulatory Litigation’ (2006) 46 *Virginia Journal of International Law* 251.

²³ Ralph Kaye, ‘Transnational Environmental Litigation’ (2007) 24 *Environmental and Planning Law Journal* 35; Tseming Yang and Robert V Percival, ‘The Emergence of Global Environmental Law’ (2009) 36 *Ecology Law Quarterly* 615, 649; Kati Kulovesi, Michael Mehling and Elisa Morgera, ‘Global Environmental Law: Context and Theory, Challenge and Promise’ (2019) 8 *Transnational Environmental Law* 405, 415.

²⁴ Mark B Taylor, ‘Litigating Sustainability – Towards a Taxonomy of Counter-Corporate Litigation’ (2020) *University of Oslo Legal Studies Research Paper Series No. 2020-08* <<https://papers.ssrn.com/abstract=3530768>> accessed 16 May 2021; Navraj Singh Ghaleigh, “Six

transnational environmental litigation is so far missing, and the emerging scholarship is mostly dispersed and piecemeal.

The bulk of the literature focuses on climate change litigation, which inherently exhibits a transnational element due to both the global causes and effects of anthropogenic climate change. Several high-profile cases, including *Urgenda*,²⁵ *Juliana*,²⁶ *Carvalho*,²⁷ and many others²⁸ have brought the legal battles against climate change to public attention far beyond the academy and legal practitioners. Not least because of this exposed position is climate litigation an unabatedly important object of study for building environmental legal expertise in and beyond this vibrant field.²⁹ An exclusive focus on climate change, however, may crowd out a broader analysis of different types of environmental harm,³⁰ including those that are less palpable and less politically salient.³¹

My analysis thus concentrates on another species within the larger genus of transnational environmental litigation: corporate responsibility. Foreign direct liability

Honest Serving-Men”: Climate Change Litigation as Legal Mobilization and the Utility of Typologies’ (2010) 1 Climate Law 31.

²⁵ *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and the Environment)*, Supreme Court of the Netherlands (20 December 2019), ECLI:NL:HR:2019:2006.

²⁶ *Juliana v United States* [2018] 339 F Supp 3d 1062, (D Or 2018).

²⁷ Case T-330/18 *Carvalho and Others v Parliament and Council*, Order of 8 May 2019, ECLI:EU:T:2019:324. See also Gerd Winter, ‘Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation’ (2020) 9 Transnational Environmental Law 137.

²⁸ Columbia University’s Sabin Center for Climate Change Law entertains a comprehensive database of climate litigation at <<http://climatecasechart.com/>>.

²⁹ Elizabeth Fisher, ‘Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*’ (2013) 35 Law & Policy 236, 252–257.

³⁰ A similar argument is made by Kim Bouwer, ‘The Unsexy Future of Climate Change Litigation’ (2018) 30 Journal of Environmental Law 483.

³¹ Perhaps the most powerful critique of the narrow focus adopted by mainstream environmental scholarship and politics is found in Rob Nixon’s ‘slow violence’ hypothesis. Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011). For an intriguing application of this hypothesis to the dreadful Marikana incident in South Africa, see Caiphas Soyapi and Louis J Kotzé, ‘Environmental Justice and Slow Violence: Marikana and the Post-Apartheid South African Mining Industry in Context’ (2016) 49 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 393.

claims against TNCs are a long-standing and well-established phenomenon in the human rights realm.³² Given the fluent spectrum uniting human rights with protecting and conserving the natural world,³³ it comes as no surprise that similar litigation has begun to mushroom around environmental causes. Indeed, since corporations are enormously powerful actors in the current configuration of the global economy, the scholarly and political discourse has radically shifted towards environmental corporate accountability in the past decade.³⁴

At the international level, TNCs are regulated by a close mesh of soft law agreements and international norms mandating environmental due diligence, including the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, and the UN Agenda 2030. But only few multilateral treaties allow for harmed parties to enforce such obligations. Although a small number of agreements dealing with environmental liability envisage private enforceability through litigation,³⁵ these treaties tend to cover specific sectors only and have generally not attracted widespread ratification.³⁶ In light of prohibitive legal and political hurdles in the host states

³² See Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004); Michael D Goldhaber, 'Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard Human Rights Litigation in State Courts and Under State Laws' (2013) 3 UC Irvine Law Review 127; Daniel Augenstein, 'Paradise Lost: Sovereign State Interest, Global Resource Exploitation and the Politics of Human Rights' (2016) 27 European Journal of International Law 669.

³³ Sanja Bogojević and Rosemary Rayfuse, 'Environmental Rights in Europe and Beyond: Setting the Scene' in Sanja Bogojević and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (1st edn, Hart Publishing 2018); Hari M Osofsky, 'Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations Lead Article' (1996) 20 Suffolk Transnational Law Review 335.

³⁴ Elisa Morgera, *Corporate Environmental Accountability in International Law* (Oxford University Press 2020); Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841. Examples of ongoing political initiatives are listed in greater detail in chapter four.

³⁵ See, e.g., Article 9, International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) (adopted 21 March 2001, entered into force 21 November 2008) OJ L 256 (2002).

³⁶ For an enumeration of the treaties concerned and a more in-depth discussion, see Carmen Otero García-Castrillón, 'International Litigation Trends in Environmental Liability: A European Union–United States Comparative Perspective' (2011) 7 Journal of Private International Law 551, 555–558.

where much environmental harm materialises, litigation in the national courts of TNCs' home states thus often remains the only pathway for challenging corporate predation against the environment. A number of interesting and widely followed cases within the circumscribed species have arisen in recent years, sparking a lively scholarly discussion around their jurisprudential contribution and normative desirability. It is this debate that my thesis hopes to enrich.

Despite the global diffusion of transnational environmental litigation, proceedings in TNCs' home states often get stuck at the procedural stages and never reach a merits judgment.³⁷ This seemingly puzzling situation is mostly owed to a legal doctrine that has traditionally been understood to restrain courts from transgressing into foreign sovereigns' spheres of authority—jurisdiction. Clearing the jurisdictional hurdle often requires courts to hypothesise about a case's merit without pronouncing a definitive judgment. It involves a careful balancing act between multiple judicial values such as access to justice, expediency, and legal certainty. This bottleneck thus presents an intriguing amalgam of procedural, substantive, and political aspects. It offers an inviting point of entry to explore the intricacies of complex litigation.³⁸

3. Parameters of Enquiry

Before delving deeper into the substance of the research questions, some methodological challenges need to be confronted. Environmental legal scholarship is often accused of methodological indifference, imprecision, or ignorance, as is doctrinal research more

³⁷ Paul R Dubinsky, 'Is Transnational Litigation a Distinct Field - The Persistence of Exceptionalism in American Procedural Law' (2008) 44 *Stanford Journal of International Law* 301.

³⁸ Fisher, Scotford and Barritt (n 2) 183–187.

generally.³⁹ Increasingly, the discipline has woken up to this perception. As Liz Fisher and her co-authors remarked more than a decade ago:

Maturity is sobering. But, for environmental law scholarship to come of age, scholars need to reflect critically on their research methodology. This is particularly necessary in relation to the speed and scope of regulatory change, interdisciplinarity, diverse governance regimes and the multi-jurisdictional nature of the subject.⁴⁰

Perhaps because these four issues aggravating methodological anxieties are also constitutive features of transnational environmental law, that strand of the literature has extensively engaged with its *modus investigandi*.⁴¹ In doing so, it has employed a plurality of approaches, *inter alia*, doctrinal, historical, and sociolegal. Above all, however, comparative methodology stands to contribute the most.⁴² For instance, comparative methods are particularly useful to address the gamut of challenges identified by Fisher and others: they directly produce expertise beyond and across jurisdictional boundaries;⁴³ they can accommodate diverse governance arrangements, legal and non-legal alike;⁴⁴ they allow for inter-and transdisciplinary contributions and perspectives;⁴⁵ and they elucidate answers not

³⁹ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.

⁴⁰ Elizabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 213, 250.

⁴¹ Veerle Heyvaert and Leslie-Anne Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar 2020).

⁴² Elisa Morgera, 'Global Environmental Law and Comparative Legal Methods' (2015) 24 *Review of European, Comparative & International Environmental Law* 254.

⁴³ Emanuela Orlando, 'From Domestic to Global? Recent Trends in Environmental Liability from a Multi-Level and Comparative Law Perspective' (2015) 24 *Review of European, Comparative & International Environmental Law* 289.

⁴⁴ Louis J Kotzé, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32 *Journal of Energy & Natural Resources Law* 121.

⁴⁵ For example, Louisa Parks and Elisa Morgera, 'Research Note: Reflections on Methods from an Interdisciplinary Research Project in Global Environmental Law' (2019) 8 *Transnational Environmental Law* 489.

just about the relative speed and scope, but also about the direction of regulatory change.⁴⁶

Against this backdrop, it is all the more unfortunate that ‘environmental law scholarship and comparative law have not had a great love affair—in fact, the two rarely speak.’⁴⁷

In cognisance of these pertinent debates, I approach the research questions with a blend of doctrinal and comparative methods. At the heart of my analysis lies a comparative study of three strands of transnational litigation in England & Wales (*Vedanta v Lungowe*)⁴⁸, the Netherlands (*Akpan v Shell*)⁴⁹, and Germany (*Llunya v RWE*)⁵⁰. Why focus on this trilogy of cases in particular?⁵¹ Since most transnational claims against businesses are lodged at the latter’s place of incorporation, it is sensible to spotlight countries that are home to a significant number of ‘global players’. Following several high-profile rulings by the US Supreme Court, the American legal system has grown increasingly hostile to transnational liability claims.⁵² Litigants have therefore recently turned towards European courts in their

⁴⁶ In addition, trends of environmental policy diffusion are best understood through a comparative perspective, see Natasha Affolder, ‘Contagious Environmental Lawmaking’ (2019) 31 *Journal of Environmental Law* 187.

⁴⁷ Sanja Bogojević, ‘Trading Schemes’ in Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2019) 932.

⁴⁸ *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20.

⁴⁹ *Akpan et al v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD*, The Hague Court of Appeal (29 January 2021), ECLI:NL:GHDHA:2021:134 (*Akpan*).

⁵⁰ *Luciano Llunya v RWE AG*, Landgericht Essen (District Court of Essen, 16 December 2015), Case-No 2 O 285/15.

⁵¹ On the value of comparative case studies in environmental law, see Jane Holder and Donald McGillivray, ‘Bringing Environmental Justice to the Centre of Environmental Law Research: Developing a Collective Case Study Methodology’ in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar 2017); Parks and Morgera (n 45); Sand (n 14). The merit of comparing civil litigation systems is highlighted in Beth Stephens, ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations’ (2002) 27 *Yale Journal of International Law* 1.

⁵² *Kiobel v Royal Dutch Petroleum Co* [2013] 569 US 108; *Jesner v Arab Bank, PLC* [2018] 138 SCt 1386; *Bonoto v Chevron Corp* [2010] 621 F3d 1116. See also Jodie A Kirshner, ‘Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe: Extraterritoriality, Sovereignty, and the Alien Tort Statute’ (2012) 30 *Berkeley Journal of International Law* 259.

quest for civil justice.⁵³ Faced with this trend, the courts in England and the Netherlands have developed an evolving body of case law with regards to jurisdictional competence, whereas the German courts have trod a different path. Ostensibly, these differences do not run along the traditional dividing line between the civilian legal tradition (the Netherlands, Germany) and the common law (England) but spring from a range of legal and extra-legal factors.⁵⁴ Notwithstanding the differences in national context, a European analysis of these trends is highly topical against the backdrop of a unifying EU private international law regime.⁵⁵ EU law also seems to have discovered its appetite for extraterritoriality more generally,⁵⁶ a process that is likely to rub off on litigation and adjudicative practice. In the face of the United Kingdom's departure from the European Union on 31 December 2020, my analysis moreover contributes to the question of what is lost and gained in the wake of this legal earthquake from an environmental liability perspective.

Although a narrow focus on landmark rulings may neglect the bigger picture unfolding in lower courts and less conspicuous instances,⁵⁷ this risk is somewhat mitigated by the inherent visibility of extraterritorial cases, owed to their relative novelty, scarcity, and disruptive nature. These exposed cases thus offer a fairly representative snapshot of

⁵³ Matthias Weller and Alexia Pato, 'Local Parents as "Anchor Defendants" in European Courts for Claims against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends' (2018) 23 *Uniform Law Review* 397.

⁵⁴ H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Fifth Edition, Oxford University Press 2014).

⁵⁵ Xandra E Kramer, 'Harmonisation of Civil Procedure and the Interaction with Private International Law' in XE Kramer and CH Rhee (eds), *Civil Litigation in a Globalising World* (TMC Asser Press 2012).

⁵⁶ Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *The American Journal of Comparative Law* 87; Ioanna Hadjiyianni, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors' (2017) 2 *European Papers* 519.

⁵⁷ For a persuasive critique of the 'landmark' methodology for case selection, see Stefan Theil, 'Excavating Landmarks—Empirical Contributions to Doctrinal Analysis' (2020) 32 *Journal of Environmental Law* 221; Ernest Lim, 'Of "Landmark" or "Leading" Cases: Salomon's Challenge' (2014) 41 *Journal of Law and Society* 523.

the direction, potential, and pitfalls of ongoing developments.⁵⁸ However minimal their role may be in quantitative terms, their qualitative outlier position warrants a careful look.

A final methodological anxiety worthy of iteration here concerns the enormous speed of legal change in the realm of corporate accountability. Studying the topic against the backdrop of unfolding litigation and quickly evolving policy debates means studying a moving target.⁵⁹ This situation presents the researcher with various difficulties. For one, it invites a focus on certain privileged aspects—such as jurisdiction—because the larger picture proves too amorphous to grasp. It also implies that some of the subsequent findings may soon be invalidated by later case law, legislation, or other institutional changes. While these risks are impossible to mitigate against entirely, due care has been undertaken to situate the legal mechanisms under study in a larger social and normative context that seems less prone to the ravages of time.

⁵⁸ Similarly, the comparative study of landmark court decisions has been pursued with regards to climate litigation, see Saiger (n 5).

⁵⁹ Again, this issue is a recurring theme in environmental law scholarship more broadly. Fisher and others (n 40) 228–231.

CHAPTER 2. EXPOUNDING AND EXPANDING JURISDICTION

Jurisdiction serves a crucial gatekeeping function in transnational litigation. It requires courts to dismiss cases that are not sufficiently connected to their legal system as a matter of deference to other nations' judicial authority. In order to better understand this pivotal role, a sketch of the concept's content, legal significance, and varied applications becomes necessary, for the term is often used in different contexts and with different meanings in mind. As such, clarifying conceptual boundaries provides the theoretical backdrop against which both international and domestic legal disputes must be understood. This is the task taken up in this chapter, which asks what jurisdiction is, which rules govern its exercise, and how recent developments appear to be transforming how jurisdiction is interpreted and employed.

1. What Is This Thing Called Jurisdiction?

Despite its centrality in jurisprudence and legal practice, jurisdiction remains a somewhat convoluted concept that appears in many guises. As a starting point, it is worth recalling its etymological roots in the Latin *ius dicere*, 'to speak the law'. This semantic origin hints at jurisdiction's constitutive function in organising legal relations as a 'meta-ordering doctrine'.⁶⁰

Three forms of jurisdiction may be distinguished.⁶¹ *Enforcement* jurisdiction describes the executive's authority to implement legal rules and prosecute transgressions. It is relatively uncontroversial from an international law perspective if applied

⁶⁰ Charlotte E Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford University Press 2019) 12.

⁶¹ Michael Akehurst, 'Jurisdiction in International Law' (1972) 46 *British Yearbook of International Law* 145. Comprehensive definitions of all three forms of jurisdictions can also be found under, Restatement (Third) of US Foreign Relations Law, s. 401 (a)-(c).

domestically, but it has prompted significant uproar in cross-border situations.⁶² *Prescriptive* jurisdiction entails the traditional understanding of legislatures and governments as generating binding norms. Finally, *adjudicative* jurisdiction covers the judiciary's authority to interpret laws and issue enforceable rulings in the context of concrete disputes. Although closely related, prescriptive and adjudicative jurisdiction do not necessarily go hand in hand.⁶³ It may well be the case that a given piece of legislation prescribes rules that escape the reach of domestic courts, for example because the defendants are not sufficiently connected to the home forum.⁶⁴ In the majority of instances, however, both jurisdictional modes tend to be congruent. After all, the force of norms is significantly weakened if their application by courts is precluded *ex ante*. Transnational environmental liability claims reside within the purview of adjudicative jurisdiction, but they are often interspersed with prescriptive elements relating to international norm-setting, a process that is addressed in more detail in chapter four.

2. *De Lege Lata*: Jurisdictional Rules in Transnational Litigation

Transnational liability litigation, in environmental law and elsewhere, disrupts our understanding of the international legal order as a sophisticated system of clear-cut jurisdictions. Accommodating this anxiety lies at the heart of theoretical endeavours in 'global law'⁶⁵ and its environmental corollary.⁶⁶ In Neil Walker's words,

⁶² One of many infamous cases revolves around the abduction from Mexico and arrest by US law enforcement of a Mexican national, *Sosa v Alvarez-Machain* [2004] 542 US 692.

⁶³ Cedric Ryngaert, 'The Concept of Jurisdiction in International Law' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Elgar 2015) 54–60.

⁶⁴ An interesting case is provided by the EU data protection regime, see Christopher Kuner, 'The Internet and the Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019).

⁶⁵ Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015).

⁶⁶ Orlando (n 43); Kulovesi, Mehling and Morgera (n 23).

the idea of global law demands that we reach beyond the old ‘Westphalian duo’ of national and international—in this case the domestic law of the state and its citizens and denizens on the one hand, and international law as traditionally confined to relations between states on the other. [...] We should comprehend legal space not as a series of self-contained and clearly demarcated jurisdictions both between different states and their respective municipal laws (internal–internal) and between this general domain of national law and an international law (internal–external) whose own horizons are limited to the statist point of view (external–external), but as a pattern of heavily overlapping, mutually connected and openly extended institutions, norms and processes.⁶⁷

To understand the nature and degree of this disruption, I first outline the positive account of the plethora of jurisdictional rules across different levels of authority, before turning to normative push- and pull-factors calling for a re-assessment of doctrinal wisdoms. According to positivists, the public international law doctrine of state sovereignty and derivative rules of non-interference circumscribe the exercise of adjudicative jurisdiction by setting the framework within which private international law operates. Whereas the former aim at protecting sovereignty, the latter seeks to provide legal certainty and predictability through a close mesh of technical rules. As a distinct legal order, the EU has enshrined an extensive collection of such provisions in its Brussels I Recast Regulation. Ultimately, however, jurisdictional questions are often parochial ones, that is, they reside in domestic law.

2.1 *Public international law*

Orthodox public international law stands on a quasi-axiomatic ‘holy trinity’ of jurisdiction, sovereignty, and territory. Disentangling this trinity is not a straightforward exercise because the three concepts are mutually constitutive. For instance, jurisdiction is both an integral and a derivative of sovereign power. Similarly, it is typically delineated by territorial boundaries, while at the same time redrawing or reproducing these very boundaries. To

⁶⁷ Walker (n 65) 15–16.

understand current challenges to the territoriality of sovereignty and jurisdiction, it is fundamental to recognise the historical contingency of this holy trinity, most notably its roots in the geopolitical reshuffling of authority after the Peace of Westphalia in 1648:

The centrality of territoriality in the law of jurisdiction [...] need not be a logical necessity. [...] It only rose to prominence in the seventeenth century owing to the centralisation of administrative power within the state, as well as the rise of the science of cartography that allowed for more certain borders to be drawn. In premodern times, sovereignty was conceived of in a more tribal or community sense: people were subject to the laws of the community or tribe to which they belonged, rather than those of the territory on which they resided at a given moment.⁶⁸

The prohibitive, external dimension of jurisdiction is reflected in the principle of non-interference, which aims at protecting states from arbitrary interventions of foreign powers and maintaining peace and stability in the international system.⁶⁹ Within international case law, the Permanent Court of International Justice's 1927 *Lotus* judgement⁷⁰ enshrines that principle in a notoriously ambiguous decision.⁷¹ In response to the global interconnectedness of social ills, however, three exceptions to the rule of territorial jurisdiction have gained a firm foothold: the personality principle, the protective principle, and the universality principle.⁷² Personality-based jurisdiction allows states to employ their legal powers by virtue of a personal link—typically nationality—connecting the legal subject to the state. This occurs most frequently in criminal law contexts. The protective principle authorises state action over acts that undermine or threaten the

⁶⁸ Ryngaert, 'The Concept of Jurisdiction in International Law' (n 63) 51–52.

⁶⁹ David J Gerber, 'Beyond Balancing: International Law Restraints on the Reach of National Laws' (1984) 10 *Yale Journal of International Law* 185.

⁷⁰ *The Case of the SS Lotus* [1927] PCIJ Series A, No 10 (Permanent Court of International Justice).

⁷¹ Hugh Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?' (2007) 29 *Michigan Journal of International Law* 71; An Hertogen, 'Letting Lotus Bloom' (2015) 26 *European Journal of International Law* 901.

⁷² Cedric Ryngaert, 'Jurisdiction' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019).

security, integrity, or political independence of that state, regardless of where these acts take place and who undertakes them.⁷³ Finally, another exception to territoriality is posed by the universality principle, which is generally defined to apply to acts directed against all of mankind, such as genocide, war crimes, or—more controversially⁷⁴—terrorism. By far the most pertinent and doctrinally refined version of universality can be found in international criminal law and its institutional infrastructure.⁷⁵ There have been calls to expand the universality principle to cover novel types of conduct seen to threaten all of humanity, such as ‘ecocide’,⁷⁶ international money laundering,⁷⁷ and even civil injustices.⁷⁸ To date, none of these exceptions have been applied to cover the transnationality of responsibility chains for environmental harm. They are a prime example of the type of wrongs being trapped in the limbo that territorial jurisdiction generates.

2.2 *Private international law and European Union law*

Although public international law enshrines jurisdiction as the ordering principle of peaceful state coexistence and sets some important yardsticks delineating its exercise, it cannot and does not rule out overlaps in legal authority altogether. The regulatory finetuning over civil matters is left to the adjacent field of private international law (or ‘conflict of laws’, as it is known in the common law world). Its thick catalogue of

⁷³ Monika B Krizek, ‘The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice’ (1988) 6 Boston University International Law Journal 337.

⁷⁴ Luz E Nagle, ‘Should Terrorism Be Subject to Universal Jurisdiction’ (2010) 8 Santa Clara Journal of International Law 87.

⁷⁵ Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 Journal of International Criminal Justice 735.

⁷⁶ Mark Allan Gray, ‘The International Crime of Ecocide’ (1995) 26 California Western International Law Journal 215.

⁷⁷ Michael Anderson, ‘International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction’ (2012) 53 Virginia Journal of International Law 763.

⁷⁸ Christopher Y Nyinevi, ‘Universal Civil Jurisdiction: An Option for Global Justice in Climate Change Litigation’ (2015) 8 Journal of Politics and Law 135.

procedural rules has been credited with spearheading the transformation of jurisdiction away from the protection of state interests and towards the protection of individual rights.⁷⁹ As a result, private international law lays the turf upon which jurisdictional disputes over transnational environmental harm are fought out.

What private international rules determine the exercise of court jurisdiction in transnational disputes, then? At an international level, the provisions are found in several multilateral accords, and—within the EU—in the Brussels I Recast Regulation.⁸⁰ Although there have been various efforts to reconcile jurisdictional rules in a comprehensive treaty, most notably by the Hague Conference on Private International Law,⁸¹ national differences in approach have largely frustrated any hopes at reaching consensus. As a result, these rules are dispersed in a plethora of treaties with limited substantive scope.⁸² One of the many gaps left unfilled by the treaty landscape concerns tort litigation. This means that in the absence of an internationally valid choice of forum clause, domestic private international law takes effect.

⁷⁹ An extensive account of this process is provided in Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009).

⁸⁰ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) [2012] OJ L351. The so-called Brussels Regime is complemented by the 2007 Lugano Convention between the EU and all states of the European Free Trade Association except for Liechtenstein. Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) (adopted 30 October 2007) OJ L 339 (2007).

⁸¹ García-Castrillón (n 36) 557.

⁸² Notable examples are the Hague Protection Convention, which has received relatively broad ratification, and the Hague Choice of Court Convention, which has only six parties at the time of writing. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (Hague Protection Convention) (adopted 19 October 1996, entered into force 1 January 2002) Hague XXXIV; Convention on Choice of Court Agreements (Hague Choice of Court Convention) (adopted 30 June 2005, entered into force 1 October 2015) Hague XXXVII.

For cases in which the defendant is domiciled in the EU,⁸³ the Brussels I Recast Regulation lays out detailed provisions regarding the exercise of jurisdiction in ‘civil and commercial matters’, including environmental torts.⁸⁴ The main rule applicable to this type of litigation is found in Article 4 of the Regulation and allocates jurisdiction to the courts where the defendant is domiciled. Although Article 4 encompasses both natural and legal persons, the Regulation sets out a particularly broad interpretation of what constitutes the corporate ‘domicile’ in Article 63. Domicile can thus be established by the physical location of either a company’s ‘statutory seat’, its ‘central administration’, or its ‘principal place of business’. Importantly, despite this broad interpretation, the complex legal structures in corporate groups typically require claimants to show that the EU-domiciled parent company has breached its duty of care towards a foreign subsidiary if jurisdiction under Article 4 were to be established, as the analysis in the following chapter shows.

In addition to the general *forum domicilii* rule in Article 4, the Brussels I Recast Regulation knows several special grounds of jurisdiction, which may be relied upon as alternatives to the main rule if the claimant wishes to do so. Article 7(1) allows for the jurisdiction of the place of performance in disputes arising from a contractual relationship. Although perhaps rather unlikely, it is not impossible for environmental damage to result from a transnational contract, especially where such contracts concern extractive business operations. Article 7(2) introduces the possibility of suing tortfeasors in the *locus damni*, where ‘the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it’.⁸⁵ This option will appear rather unattractive to claimants in South–North litigation, since access to justice may be blocked

⁸³ In such a scenario, the application of Brussels I Recast is exclusive and prevents member states from asserting jurisdiction in accordance with their domestic laws. Case C-281/02 *Onusu v Jackson* [2005] ECR I-1383.

⁸⁴ Brussels I Recast, Article 1(1).

⁸⁵ Case C-21/76 *Bier v Mines de potasse* [1976] ECR 1735 [19].

at the *locus damni* forum for a number of reasons that are discussed in more detail in the case analysis. Third, a competent criminal court may assume civil jurisdiction where the national laws allow for it (Article 7(3)), as e.g., in France or Spain.⁸⁶ Again, because of the well-known difficulties in establishing the criminal liability of legal persons,⁸⁷ this provision is of little use in counter-corporate litigation.

Finally, Article 6 of the Regulation provides for residual jurisdiction in accordance with domestic law for cases where the defendant is *not* domiciled in any EU member state. Although the wording suggests considerable leeway for the exercise of residual jurisdiction, it has been argued that Article 6 only grants derivative discretion.⁸⁸ This implies that member states are constrained in determining grounds of jurisdiction in two crucial ways. First, such action must not be inconsistent with the principles of primary EU law (i.e., the Treaties and the Charter of Fundamental Rights) and the policy goals outlined therein. Second, any exercise of adjudicative authority may be reviewed by the Court of Justice for compliance with the first condition. In practice, however, such a review has not yet materialised.

2.3 *Domestic law*

To a large extent, private international law is domestic. Despite the existence and growing popularity of international treaties and multilateral agreements, the bulk of jurisdictional rules is found in national codes and case law.⁸⁹ Even EU member states—who have largely

⁸⁶ García-Castrillón (n 36) 559–560.

⁸⁷ William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2008); Cedric Ryngaert, ‘Accountability for Corporate Human Rights Abuses: Lessons from the Possible Exercise of Dutch National Criminal Jurisdiction over Multinational Corporations’ (2018) 29 Criminal Law Forum 1.

⁸⁸ Mariangela La Manna, ‘Residual Jurisdiction under the Brussels I Bis Regulation: An Unexpected Avenue to Address Extraterritorial Corporate Human Rights Violations’ in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction - Which Way Forward?* (Brill Nijhoff 2020).

⁸⁹ Dubinsky (n 37).

surrendered their prescriptive authority in the field—retain the right to allocate jurisdiction in accordance with national rules where the defendant is not domiciled in the EU under Article 6 of Brussels I Recast. Although the types of transnational disputes are presumably roughly similar across countries, differing policy interests, legal culture, and institutional factors have contributed to a diversified landscape.⁹⁰

It would likely require an entire monograph to map and compare the variety of jurisdictional grounds recognised in national provisions, and some country-specific questions resurface in the case analysis in chapter three. Suffice to say for present purposes that a main dividing line runs between common law and civil law systems. Whereas the latter tend to emphasise the *forum domicilii* as a general rule and allow special jurisdiction for cases where the suit has a significant connection with another forum, the common law tends to be more flexible. For instance, common law courts may find jurisdiction where they have physical power over a defendant, even if she is only temporarily present in the territory (transient jurisdiction). In principle, any nexus—even seemingly irrelevant or tenuous ones—may suffice for a case to be entertained by a common law court.⁹¹ This permissive stand is curtailed by a number of doctrines that aim at preventing forum shopping and international discord. The most notable ones include *forum non conveniens*,⁹² international comity,⁹³ and exhaustion of local remedies.⁹⁴

⁹⁰ Arthur T von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 6 Tel Aviv University Studies in Law 50.

⁹¹ Kevin M Clermont and John RB Palmer, 'Exorbitant Jurisdiction' (2006) 58 Maine Law Review 474.

⁹² Alexander Reus, 'Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany' (1993) 16 Loyola of Los Angeles International and Comparative Law Journal 455.

⁹³ William S Dodge, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071.

⁹⁴ Emeka Duruigbo, 'Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection' (2005) 29 Fordham International Law Journal 1245.

These differences, however, must not be exaggerated. The policy considerations underlying both legal traditions are often similar, with the difference that civil law tends to restrict court jurisdiction *ex ante*, whereas the common law equips courts with the discretion to consider the wider implications *ad hoc* in relation to a specific case. Ostensibly, both systems often produce similar results.⁹⁵

3. Necessary and Selfless Jurisdiction?

There is growing appreciation of the fact that conventional jurisdictional doctrines are woefully inadequate both as descriptive and normative devices in today's world.⁹⁶ For instance, contrary to the *Lotus* principle, the exercise of state jurisdiction is no longer purely discretionary from an international legal perspective, but becomes mandatory in certain cases.⁹⁷ Moreover, jurisdictional duties are increasingly owed not only to state actors, but may also be invoked by private entities and parties. Bilateral investment treaties are a case in point.⁹⁸ Finally, private international law equips the parties to a legal relationship with the capacity to autonomously determine an authoritative forum under the 'choice of court' doctrine. Taken together, Alex Mills argues,

these developments suggest the necessity of rethinking the concept of jurisdiction in international law, to reflect the more complex realities of an international legal order under which states possess both

⁹⁵ Hans Smit, 'Common and Civil Law Rules of in Personam Adjudicatory Authority: An Analysis of Underlying Policies' (1972) 21 *International and Comparative Law Quarterly* 335.

⁹⁶ Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187.

⁹⁷ This is the case in international criminal law, for example, which requires state parties to the Rome Statute to enforce arrest warrants issued by the ICC against individuals present on their territory. Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13 *Journal of International Criminal Justice* 1027.

⁹⁸ Julian Arato, 'Corporations as Lawmakers' (2015) 56 *Harvard International Law Journal* 229.

jurisdictional rights and obligations and are no longer the exclusive actors.⁹⁹

In a similar vein, Cedric Ryngaert observes that the formerly inseparable umbilical cord between territory and jurisdiction may be in the process of being severed.¹⁰⁰ The functional logic of jurisdiction, he contends, appears to be moving away from its traditional footing in the allocation of authority between states towards a thick normative objective: global accountability.

3.1 *From universality to extraterritoriality*

In criminal law, the trend towards universalising jurisdiction over particularly appalling crimes has been ongoing for many decades, with a preliminary culmination in the adoption of the Rome Statute in 1998 and the establishment of the International Criminal Court four years later. In the field of private law, universal jurisdiction has not seen the same kind of success. Although pampered and promoted as academia's darling,¹⁰¹ universal civil jurisdiction has run into vehement opposition among states.¹⁰² In addition, the idea received some heavy blows in a number of high-level domestic fora, most notoriously by the US Supreme Court in *Kiobel*¹⁰³ and *Jesner*.¹⁰⁴ Whereas the 1990s and early 2000s were marked by optimism about the effectiveness and feasibility of universal jurisdiction, the unmaking of such hopes in past years has shifted debates about strengthening the global

⁹⁹ Mills, 'Rethinking Jurisdiction in International Law' (n 96) 187.

¹⁰⁰ Cedric Ryngaert, 'Territory in the Law of Jurisdiction: Imagining Alternatives' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (TMC Asser Press 2017).

¹⁰¹ See, e.g., Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *American Journal of International Law* 142; Nyinevi (n 78).

¹⁰² Abhimanyu George Jain, 'Universal Civil Jurisdiction in International Law' (2015) 55 *Indian Journal of International Law* 209.

¹⁰³ *Kiobel* (n 52).

¹⁰⁴ *Jesner v. Arab Bank, PLC* (n 52).

rule of law to extraterritorial measures. In this vein, the nation state is resurging as an ever-powerful ally with far-reaching arms.

With rising sea levels and other ecological risks looming large, the underlying motives for widening jurisdiction increasingly extend to environmental concerns as well. A fine example of this are the EU's recent efforts to globalise its environmental policy through extraterritorial instruments.¹⁰⁵ A similar trend towards extraterritoriality can be perceived in international environmental treaty law.¹⁰⁶ For instance, Draft Principle 11 of the International Law Commission's 2019 Draft Principles on the Protection of the Environment in Relation to Armed Conflict recommends that states

take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including such harm [...] caused by its subsidiary acting under its de facto control.¹⁰⁷

The law of jurisdiction then provides the primary legal gateway for states to adopt unilateral action in furtherance of global values.¹⁰⁸ Grounded in a renewed cosmopolitan impetus, but frustrated by the perceived inability of 20th-century multilateralism to protect community interests in a fragmented international legal sphere effectively, this jurisdictional expansion has received the label of 'selfless intervention' in a recent monograph.¹⁰⁹ Cedric Ryngaert employs theories of global justice and cosmopolitan

¹⁰⁵ Hadjiyianni (n 56); Sanja Bogojević, 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme' (2012) 24 *Journal of Environmental Law* 345.

¹⁰⁶ Markus Vordermayer, 'The Extraterritorial Application of Multilateral Environmental Agreements' (2018) 59 *Harvard International Law Journal* 59.

¹⁰⁷ International Law Commission (ILC), Protection of the Environment in Relation to Armed Conflicts, UN Doc A/CN.4/L.937 (6 June 2019).

¹⁰⁸ Duncan French and Verónica Ruiz Abou-Nigm, 'Jurisdiction: Betwixt Unilateralism and Global Coordination' in Verónica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018).

¹⁰⁹ Ryngaert, *Selfless Intervention* (n 3).

thought to shine a light on empirical trends in both prescriptive and adjudicative jurisdiction. Contrary to criminal law, he contends, civil jurisdiction is not and should not be evolving towards universality. Rather, the concept of territoriality itself is being transformed and expanded:

This renders universality, as it is currently understood, ill-suited to address the range of global governance challenges confronting humanity such as climate change, unsustainable fishing practices, or corporate human rights abuses. Territoriality then emerges as an unlikely saviour for the cosmopolitan project as its capaciousness allows states to ‘territorialize the extraterritorial’ and contribute to the realisation of global justice.¹¹⁰

Simultaneously, he recognises that:

[u]nilateral prescriptive jurisdiction in pursuit of the common interest is located between the celestial and the immediate. Intent on realizing global values and protecting common concerns, it may reach for the sky but it needs an anchor in actual law to be effectively exercised.¹¹¹

Ryngaert goes on to examine the realities of selfless jurisdiction in connection with the environmental harm of business activities, among other examples. His analysis focuses mostly on *prescriptive* and *enforcement* jurisdiction in this respect. Again, this is not a particularly surprising choice, given the heated debates around extraterritorial modes of regulation and norm-setting in policy circles. Nonetheless, the same questions and their cosmopolitan baggage are also articulated in concrete legal disputes, ostensibly more so than ever before. Today, it has become almost trite to contend that states should provide civil remedies in situations of serious cross-boundary harm as a matter of access to justice.¹¹² In contrast to universality, extraterritorial court jurisdiction is usually both *residual* as well as *qualified*. The former is true because it presents an exceptional, *ultima ratio*

¹¹⁰ *ibid* 211.

¹¹¹ *ibid* 138.

¹¹² Kirshner (n 4).

mechanism. In addition, this mechanism is also qualified as it hinges upon the presence of a link to the domestic legal system (*forum connexitatis*) or upon the impossibility of litigation elsewhere (*forum necessitatis*).

3.2 *The right to an effective remedy, the UNGP and necessity-based jurisdiction*

In international law, at the immense pressure of civil society, states have woken up to transnational corporate operations' disastrous impacts on fundamental rights. Arguably, the UN Guiding Principles on Business and Human Rights (UNGP) are the most prominent result of that realisation.¹¹³ Although not legally binding, the UNGP were unanimously endorsed by the UN Human Rights Council in 2011 and exert considerable normative power. For instance, the Guiding Principles triggered legislative action to improve domestic corporate accountability instruments in several countries.¹¹⁴ These measures are typically formulated under the human rights heading, but the debate's wider impetus has led them to address environmental harm even where it does not directly infringe on human rights.¹¹⁵ In particular, Article 26 of the UNGP addresses the need for states to

take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses,

¹¹³ UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (UN Guiding Principles on Business and Human Rights), UN Doc. A/HRC/17/31 (21 March 2011). An overview over implementation across states through National Action Plans (NAPs) can be viewed at <<https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx>> accessed 16 May 2021.

¹¹⁴ Damiano de Felice and Andreas Graf, 'The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights' (2015) 7 *Journal of Human Rights Practice* 40.

¹¹⁵ For an example of a national response that goes beyond human rights and also incorporates wider sustainability standards, see Antoine Duval and Enrico Partiti, 'The UN Guiding Principles on Business and Human Rights in (National) Action: The Dutch Agreement on Sustainable Garment and Textile' in Fabian Amtenbrink, Denise Prévost and Ramses A Wessel (eds), *Netherlands Yearbook of International Law 2017: Shifting Forms and Levels of Cooperation in International Economic Law: Structural Developments in Trade, Investment and Financial Regulation* (TMC Asser Press 2018).

including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Among others, territorial jurisdiction may constitute such a legal barrier in the meaning of Article 26. One answer to this issue lies in connection-based grounds of jurisdiction that authorise courts to seize a particular matter by virtue of a sufficient link or connection (*forum connexitatis*). Examples range from provisions allowing for a joint trial of multiple defendants if one is resident in the home state¹¹⁶ to the notoriously nebulous requirement for claims to ‘touch and concern the territory of the United States [...] with sufficient force’.¹¹⁷

Necessity may provide another extraterritorial ground of jurisdiction for cases with little or even no connection to the forum, but with a significant danger of justice being denied due to the unavailability of alternative fora.¹¹⁸ Such a rule can be found both in codes and in case law, and a number of countries know some variation of *forum necessitatis*, including France, Switzerland, Belgium, and the Netherlands.¹¹⁹ The concept arises from the human right to an effective remedy codified in Article 2(3) of the International Covenant on Civil and Political Rights and in a multitude of regional instruments. Until recently, there had been an argument that member states of the Council of Europe were required to provide such a necessity forum to fulfil their fair trial obligations under Article 6 of the European Convention on Human Rights,¹²⁰ but the European Court of Human

¹¹⁶ See, e.g., Article 8(1) Brussels I Recast.

¹¹⁷ *Kiobel* (n 52) [124]–[125].

¹¹⁸ Chilenye Nwapi, ‘A Necessary Look at Necessity Jurisdiction’ (2014) 47 U.B.C. Law Review 211.

¹¹⁹ Lucas Roorda and Cedric Ryngaert, ‘Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction’ (2016) 80 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* / *The Rabel Journal of Comparative and International Private Law* 783.

¹²⁰ A number of domestic cases seemed to suggest so much, see Kirshner (n 4) 24–26.

Rights rejected that idea in its 2018 decision *Nait-Liman v Switzerland*.¹²¹ Nevertheless, or perhaps in response to that ruling, the idea seems to be taking off in terms of legislative activity: a number of states mention the development of extraterritorial jurisdiction in their National Action Plans under the UNGP.¹²²

As we can now see, adjudicative jurisdiction is still linked to the notion of territory, but this link is both weakening and changing. Universality provides one exception to the territorial rule, although its substantive scope remains rather narrow. Instead, necessity may pave the ground for courts to hear a foreign dispute in the interests of strengthening the global rule of law and enforcing the human right to a fair trial. The least disruptive modification comes in the guise of connection-based jurisdiction. Because *forum connexitatis* still emphasises the territorial link, it is better conceptualised as relying on an expansive interpretation of ‘territory’ in times of global interconnection, rather than constituting a genuine anathema to territorial jurisdiction.

¹²¹ *Nait-Liman v Switzerland* App no 51357/07 (ECtHR, GC, 15 March 2018). The ruling has been heavily criticised, inter alia, for confusing private and public international law. Paul David Mora, ‘Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in *Nait-Liman v. Switzerland*’ (2018) 65 *Netherlands International Law Review* 155.

¹²² ‘Extraterritorial Jurisdiction’ (*National Action Plans on Business and Human Rights*, 3 November 2017) <<https://globalnaps.org/issue/extraterritorial-jurisdiction/>> accessed 16 May 2021.

CHAPTER 3. EXTRATERRITORIAL COURT JURISDICTION IN COMPARATIVE PERSPECTIVE

If the doctrinal debates are to be believed, jurisdiction is caught up in a process of extra-territorialisation, triggered by a radically transnational economic system and a legal landscape struggling to grapple with the externalities of that machinery. What drives this process—is it ‘selflessness’ or something else? This chapter highlights the nuts and bolts of extraterritorial jurisdiction by dissecting recent case law from England and the Netherlands. Recognising that the jurisdictional question hinges upon several contextual variables, the comparison further investigates the respective legal, political, and cultural context. The limits and opportunities proffered by such cases become visible when contrasting them to the German regime, which emphasises substantive questions over jurisdictional haggling. Before embarking on this comparative analysis, I offer a tentative taxonomy of transnational environmental litigation more generally that serves to better position my analysis in the muddled litigation landscape.

1. Three Species of Transnational Environmental Litigation

So far, I have referred to civil transnational litigation against corporations as a monolithic concept. Of course, this is a convenient simplification. To assess the intricacies of extraterritorial jurisdiction, one must further distinguish between at least three sets of facts. This distinction rests on the nature of the connection between the claims with the forum in which they are brought.

First, litigants may challenge a TNC in its European domicile for environmental damage it has directly caused abroad, for example through transboundary pollution originating in the home state but causing damage elsewhere,¹²³ or through managerial

¹²³ Listiningrum makes the case for resolving transboundary pollution through civil litigation in the state of origin rather than pursuing the issue as a matter of international environmental law, which was traditionally the preferred option. Prisca Listiningrum, ‘Transboundary Civil Litigation for Victims of Southeast Asian

decisions that have been taken at the corporate headquarters and directly produce adverse consequences elsewhere.¹²⁴ In such cases of immediate liability, issues of causation usually feature centre stage owed to difficulties in establishing a direct line of responsibility over complex environmental damage.

A second class of cases concerns so-called ‘anchor jurisdiction’,¹²⁵ where a corporate parent is targeted for the acts or omissions of a subsidiary. In this corporate group mode, jurisdiction can only be established if two conditions are fulfilled. First, there must be some kind of recognised legal doctrine that would allow for the cases against parent and subsidiary to be jointly heard in the parent’s domicile. And second, the claims lodged against the parent must have some chance of success for there to be a credible case. Usually, this requires that the parent assumed a duty of care over the subsidiary’s operations through the business law tools of ownership and control. In contrast to the substantive focus of the direct liability mode, the corporate group mode imposes considerable burdens on claimants at the procedural stage.¹²⁶

A third type of litigation is appearing on the horizon, one that does not rest on a relationship within corporate groups, but merely on TNCs’ purchasing power over other actors along their value chains.¹²⁷ Given that many small and medium-sized enterprises in the Global South manufacture almost exclusively for one customer, that customer does

Haze Pollution: Access to Justice and the Non-Discrimination Principle’ (2019) 8 Transnational Environmental Law 119.

¹²⁴ For instance, under the US Alien Tort Statute, a corporation’s US-based conduct can give rise to direct liability, even if the harm materialises elsewhere. See *Licci by Licci v Lebanese Canadian Bank, SAL* [2016] 834 F3d 201, 217 (2d Cir 2016). In addition to the corporate entity’s liability, the domestic conduct of corporate directors may also give rise to (criminal) individual liability, thereby piercing the corporate veil. This was one of issues at stake in the *Trafigura* case, expounded upon in more detail in footnote n 173.

¹²⁵ Weller and Pato (n 53).

¹²⁶ *ibid.*

¹²⁷ Carolijn Terwindt and others, ‘Supply Chain Liability: Pushing the Boundaries of the Common Law?’ (2018) 8 Journal of European Tort Law 261.

not need to obtain ownership rights to exercise effective control over the upstream company. But what happens if the local manufacturer causes serious environmental damage? Can a supply chain relationship suffice to give rise to a duty of care, and allow such a case to be heard in the forum of the downstream purchaser? These questions are largely unexplored in case law so far, but legislative developments establishing duties of care along the entirety of the value chain suggest that this may be the next frontier in transnational environmental litigation.¹²⁸

Both cases under study in the following sections fall within the second camp of corporate group liability, making their comparison particularly pertinent. Moreover, the factual patterns underlying *Vedanta* and *Akpan* are fairly similar—in both cases, a European-domiciled TNC’s subsidiary caused environmental pollution through extractive operations, hurting local communities in the process.

2. Two Tales of Transnational Environmental Harm

2.1 *Vedanta v Lungowe*

Long awaited and widely commented upon, the Supreme Court’s ruling in *Vedanta* in April 2019 sent shock waves through the legal community in the United Kingdom and beyond.¹²⁹ In the lead-up, several similarly framed cases had raised the anticipation of an authoritative decision by the Supreme Court to clarify when, why, and how exactly claims brought by foreign defendants over foreign damage could succeed.¹³⁰

¹²⁸ See chapter four for more detail.

¹²⁹ Tara Van Ho, ‘Vedanta Resources Plc and Another v. Lungowe and Others’ (2020) 114 American Journal of International Law 110; Carrie Bradshaw, ‘Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court’ (2020) 32 Journal of Environmental Law 139; Samvel Varvastian and Felicity Kalunga, ‘Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe’ (2020) 9 Transnational Environmental Law 323; Carlos Lopez, ‘Vedanta v Lungowe Symposium Wrap Up’ (*Opinio Juris*, 26 April 2019) <<http://opiniojuris.org/2019/04/26/vedanta-v-lungowe-symposium-wrap-up/>> accessed 16 May 2021.

¹³⁰ Prominent examples before the Court of Appeal included *AAA & Ors v Unilever Plc & Anor* [2018] EWCA Civ 1532; *Chandler v Cape Plc* [2012] EWCA Civ 525; *Okpabi & Ors v Royal Dutch Shell Plc & Anor (Rev 1)* [2018] EWCA Civ 191. All three cases dealt with the duty of care owed by English-domiciled

Vedanta revolves around the severe environmental pollution caused by the Nchanga copper mine in Zambia, at the time of litigation the second largest mine of its type in the world.¹³¹ The case was brought by 1,826 individuals residing in the mine's immediate and mediate surroundings. The claimants belong to materially underprivileged communities, earning well below the national average income (against the backdrop of Zambia being one of the world's poorest countries) and basing most of their livelihoods on subsistence farming. To that end, they are critically dependent on the resources provided by nearby waterways. On the other side of the dispute stand Konkola Copper Mines plc (KCM), the Zambian-based owner and operator of the mine, and Vedanta Resources plc (Vedanta), KCM's London-based majority shareholder. The remaining minority stake in KCM is owned by the Zambian government.¹³² The claimants allege that KCM frequently and knowingly discharged harmful substances arising from the mining operations into local rivers, leading to 'personal injury, damage to property, loss of income and loss of amenity and enjoyment of land'.¹³³ These claims are based in the common law of negligence, nuisance, trespass, and breach of statutory duties as mandated by Zambian law.¹³⁴ In addition, the parent company Vedanta was sued for breaching the duty of care it had assumed in exercising close oversight and control over KCM.¹³⁵

corporate defendants to foreign claimants affected by activities carried out by their subsidiaries abroad. *Unilever* concerned the failure to protect Kenyan employees on a tea plantation against ethnic attacks and human rights violations. *Chandler* dealt with asbestos litigation by a South African claimant, and *Okpabi* relates to Shell's oil pollution in Nigeria.

¹³¹ *Vedanta* (n 48) [2].

¹³² *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines Plc* [2016] EWHC 975 (TCC) [9]–[15].

¹³³ *ibid* [1].

¹³⁴ *ibid* [37]. Zambian law was agreed to be roughly equivalent to English law in this regard.

¹³⁵ *ibid* [31]–[34].

2.2 *Akpan v Shell*

Akpan is one of many instances of transnational litigation arising from the decade-long conflict and environmental devastation caused by Shell's oil extraction operations in Nigeria's Ogoniland region.¹³⁶ After suffering a decisive defeat before the US Supreme Court in *Kiobel*,¹³⁷ affected communities and individuals turned to the UK¹³⁸ and the Netherlands in their quest for compensation. The actions before the Dutch Courts were initiated by four Nigerian farmers resident in the villages of Goi, Ikot Ada Udo, and Oruma. Each had suffered economic damages as a consequence of several oil leaks attributed to Shell's local installations.¹³⁹ The claims were brought before the courts in three parallel lawsuits due to considerable differences in the respective fact patterns.¹⁴⁰ I focus on only one of them here, *Akpan v Shell*, but all cases have developed analogously and with identical outcomes in relation to jurisdictional questions.¹⁴¹ Legally, the *Akpan* saga commenced in 2008. It would take another five years until the Hague District Court issued its judgment in 2013.¹⁴² The case was then appealed by both parties to the Court of

¹³⁶ Liesbeth FH Enneking, 'Transnational Human Rights and Environmental Litigation: A Study of Case Law Relating to Shell in Nigeria' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds), *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer International Publishing 2019).

¹³⁷ *Kiobel* (n 52). *Kiobel* concerned alleged human rights violations in connection with protests over the harmful environmental effects of Shell's Nigerian subsidiary's activities. The plaintiffs claimed that the defendant had aided and abetted the Nigerian government in thwarting these protests by means of beating, raping and killing Ogoni residents and looting their properties.

¹³⁸ *Okpabi v Shell (EWCA)* (n 130). The Court of Appeal dismissed the claims for lack of jurisdiction in 2018. In February 2021, the UK Supreme Court overturned that decision and allowed the claims to proceed in England. *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2021] UKSC 3.

¹³⁹ A portrait of the claimants can be found at, Milieudefensie (n 1).

¹⁴⁰ The three cases are: *Akpan* (n 49); *Doob et al v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD*, The Hague Court of Appeal (29 January 2021), ECLI:NL:GHDHA:2021:133 ('Doob'); *Oguru and Ejanga et al v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD*, The Hague Court of Appeal (29 January 2021), ECLI:NL:GHDHA:2021:132 ('Oguru and Ejanga').

¹⁴¹ See also Christine Salamanca Mandap, 'Jurisdiction of Parent Companies' Home State Courts over Foreign Subsidiaries Abroad: A Comparative Approach between the Netherlands and the United Kingdom' (2019) 11 Amsterdam Law Forum 40.

¹⁴² *Akpan et al v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD*, The Hague District Court (30 January 2013), ECLI:NL:RBDHA:2013:BY9854.

Appeal, which issued an interlocutory decision in 2015¹⁴³ and awarded final judgment in January 2021.¹⁴⁴

The claimant Elder Friday Alfred Akpan is a farmer and fisherman in Ikot Ada Udo.¹⁴⁵ On two separate occasions in 2006 and 2007 respectively, large quantities of oil leaked into the surrounding environment, contaminating soil and waterways, and exterminating local fish stocks. The effects on the population were disastrous. Many residents were forced to leave the highly polluted area for health reasons and because their livelihoods had been based on a healthy environment that was no more. An investigation quickly found that the spills had originated from the nearby oil installations of Shell Petroleum Development Company of Nigeria Ltd (SPDC), the wholly-owned Nigerian subsidiary of Royal Dutch Shell Plc (RDS), a public limited company registered in the UK and headquartered in the Netherlands.¹⁴⁶ The claimant alleged that the defendants had acted negligently in causing, reacting to, and remediating the oil pollution and sought civil remedies in tort. These included compensation for incurred losses, as well as injunctions to repair the defective installations and to engage in a large-scale clean-up of any remaining oil pollution.¹⁴⁷

3. Extraterritoriality in Context

No litigation takes place on a blank slate. In order to acquire an understanding of not just the *content*, but the *meaning* of a given ruling, one therefore needs to account for the legal, institutional, and social context within which legal battles are fought.

¹⁴³ *Akpan et al v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD*, The Hague Court of Appeal (18 December 2015), ECLI:NL:GHDHA:2015:3587 (interlocutory appeal judgement).

¹⁴⁴ *Akpan* (n 49).

¹⁴⁵ *Akpan (District Court)* (n 142) [2.3].

¹⁴⁶ *ibid* [2.2]–[2.14].

¹⁴⁷ *ibid* [3.1].

3.1 *England and Wales*

The *Vedanta* decision followed a long and rich history of counter-corporate civil liability litigation in England. Several factors—substantive, procedural, and contextual—have been conducive to creating an environment that appears attractive to foreign litigants, so much so that Lord Denning famously offered the following observation in *The Atlantic Star*:

No one who comes to these courts asking for justice should come in vain. The right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this ‘forum shopping’ if you please, but if the forum is England, it is a good place to shop in both for the quality of the goods and the speed of service.¹⁴⁸

For decades, English law has offered a markedly claimant-friendly regime when it comes to extraterritorial nuisance claims.¹⁴⁹ What is more, the duty of care of corporate actors has evolved in quantum leaps in English courts—in contrast to their American counterparts, who have shown much more reluctant to peek behind the ‘corporate veil’.¹⁵⁰ Basing the expansion of jurisdiction in the eminent common law of negligence has proven more fertile than constructing similar claims in corporate law or even in customary international law in this respect.¹⁵¹ Traditionally, these permissive doctrines had been mitigated by the restricting force of *forum non conveniens*, which equipped courts with wide discretionary powers to dismiss cases if another forum was deemed more appropriate.

¹⁴⁸ *The Atlantic Star* [1973] 1 QB 364 (CA) [381]–[382].

¹⁴⁹ Elena Merino Blanco and Ben Pontin, ‘Litigating Extraterritorial Nuisances under English Common Law and UK Statute’ (2017) 6 *Transnational Environmental Law* 285.

¹⁵⁰ See *Chandler v Cape Plc* (n 130). Although Arden LJ was adamant that this decision did not amount to ‘piercing the corporate veil’, its effects were similar in that it allowed a parent to be held liable for the actions of a subsidiary. *ibid* [69].

¹⁵¹ Ekaterina Aristova, ‘Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction’ (2018) 14 *Utrecht Law Review* 6, 7.

Since the ECJ reined in these powers in *Omnius*,¹⁵² though, the previous balance has somewhat shifted to claimants' benefit.

In addition to jurisdictional law, several procedural features of England's civil justice system bear on its attractiveness for extraterritorial litigation.¹⁵³ Broadly, these can be subdivided into rules dealing with collective litigation schemes on the one hand, and such rules relating to the cost of litigation on the other. With regards to the former, the English system offers three different mechanisms: a group litigation order, a representative action, or a consumer protection action.¹⁵⁴ Out of the three, only the group litigation order seems available to foreign claimants and has in fact been used in the High Court trial of *Vedanta*.¹⁵⁵ Although the group litigation order falls short of the comprehensive US class action regime,¹⁵⁶ it provides claimants with an alluring pathway to accelerate the expediency of proceedings, recruit adequate legal representation, and use their collective weight to pressure tortfeasors into settlements.¹⁵⁷ Despite the increasing globalisation of collective redress mechanisms, these highly complex legal creatures are still absent in many other jurisdictions.¹⁵⁸ In addition to collective redress, and in stark contrast to most civil

¹⁵² *Omnius* (n 83).

¹⁵³ The boundaries between substance and procedure are not always clear-cut and are contingent upon the specificities of the case at hand. For example, jurisdictional authority is sometimes considered a procedural rather than substantive question (and I refer to it as a procedural matter in preceding and subsequent chapters). As the analysis in *Vedanta* shows, however, jurisdiction usually tends to lie somewhere in the middle between the two. Here, my preoccupation is with those rules that are chiefly procedural.

¹⁵⁴ Alexia Pato, *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective* (Hart Publishing 2019) 276–278.

¹⁵⁵ *Lungowe v Vedanta Resources Plc & Ors* [2020] EWHC 749 (TCC).

¹⁵⁶ For a (slightly outdated) general comparison of the vices and virtues of the US system vis-à-vis the English system, see, Christopher J Maley, 'Toxic Torts: Class Actions in United States and England Surveys' (1995) 19 *Suffolk Transnational Law Review* 523.

¹⁵⁷ The UK government keeps a sporadically updated register of granted group litigation orders. 'Group Litigation Orders' (GOV.UK) <<https://www.gov.uk/guidance/group-litigation-orders>> accessed 16 May 2021.

¹⁵⁸ For example, in 2016, Deborah Hensler counted only one comparable instrument on the African continent. Deborah R Hensler, 'The Global Landscape of Collective Litigation' in Deborah R Hensler,

law countries, the English civil justice system allows for so-called contingency fee agreements, a funding model under which legal representatives may recover part of the damages awarded in case of success but go empty-handed in case of an unfavourable ruling. For the claimants, this reduces the financial risk involved in such litigation, but it may also deter legal practitioners from taking on cases where no significant damages stand to be recovered, or where the action is perceived as unlikely to succeed. The contingency fee model is a relatively recent innovation in England, having only been introduced in 2013 under the heading of ‘damages-based agreements’.¹⁵⁹ On the other hand, the English ‘loser-pays rule’ exposes claimants to a significant financial risk and is therefore generally seen as having a chilling effect on tort litigation.¹⁶⁰

Finally, the English common law has a long history of judicial independence and is held in high regards internationally, as evidenced in the choice for English courts that has become commonplace in business contracts.¹⁶¹ These forces attracting businesses to the English legal system presumably also appeal to claimants looking for environmental justice.¹⁶²

3.2 *The Netherlands*

The uptick in extraterritorial cases is a relatively novel turn in Dutch litigation. In 2008, Jägers and van der Heijden found that ‘no transnational human rights case against a

Christopher Hodges and Ianika Tzankova (eds), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing 2016) 5.

¹⁵⁹ Neil H Andrews, ‘Multi-Party Litigation in England’ (2013) *University of Cambridge Faculty of Law Research Paper No 39/2013* 9 <<https://papers.ssrn.com/abstract=2330329>> accessed 16 May 2021.

¹⁶⁰ Marie Gryphon, ‘Assessing the Effects of a Loser Pays Rule on the American Legal System: An Economic Analysis and Proposal for Reform’ (2011) 8 *Rutgers Journal of Law & Public Policy* 567.

¹⁶¹ Stefan Vogenauer, ‘Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence’ (2013) 21 *European Review of Private Law* 13.

¹⁶² Emil Petrossian, ‘In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England’ (2007) 40 *Loyola of Los Angeles Law Review* 1257.

corporation has been brought before the Dutch courts.¹⁶³ But shortly thereafter, some early cases directed at public officials tested the ground of extraterritoriality.¹⁶⁴ Business-targeted litigation soon followed suit.¹⁶⁵ The timing of this sprawl during the last decade is somewhat peculiar, as it does not coincide with any noteworthy development within the Dutch or EU legal landscape that might have served as a pull factor. Instead, it seems plausible that it was set in motion by the momentum of a rapidly growing international business and human rights discourse, combined with the downfall of extraterritoriality in the US after *Kiobel*.

What may have contributed to and shaped these lawsuits in the Dutch context beyond international drivers? For one, the Netherlands offers a relatively liberal jurisdictional regime. Article 7(1) of the Dutch Code of Civil Procedure (DCCP) stipulates that

[i]f [...] a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency.¹⁶⁶

¹⁶³ Nicola Jägers and Marie-Jose van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands' (2008) 33 *Brooklyn Journal of International Law* 833, 870.

¹⁶⁴ Perhaps the most notorious—although not the only—case in this group concerns the responsibility of the Dutch State for the Srebrenica Massacre during the Balkan war, see Andre Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 *Journal of International Criminal Justice* 1143. After multiple lengthy proceedings, including a ruling by the European Court of Human Rights, the litigation saga came to a preliminary end when the Dutch Supreme Court issued a decision holding the Netherlands responsible for ten percent of the damage suffered by surviving relatives of the massacre, reflecting the estimated ten percent chance that a victim could have escaped the massacre had the Dutch military acted differently. *Mothers of Srebrenica v The Netherlands*, Supreme Court of the Netherlands (19 July 2019), ECLI:NL:HR:2019:1284.

¹⁶⁵ Aristova (n 151).

¹⁶⁶ Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) (DCCP), Book 1, Article 7(1). English translation available at <<http://www.dutchcivillaw.com/civilprocedureleg.htm>> accessed on 16 May 2021.

The DCCP thus recognises a *forum connexitatis* avenue, and courts have been generous in joining claims lodged against multiple defendants in corporate groups if at least one of those has a domicile in the Netherlands, triggering the residual jurisdiction domino under Article 6(1) Brussels I Recast. What is more, the DCCP also allows for *forum necessitatis* jurisdiction in Article 9,¹⁶⁷ although authoritative case law in relation to this provision is exceedingly rare. A 2015 ruling by the Dutch Supreme Court suggests that Article 9(b) is to be construed narrowly and may only be invoked where bringing the case elsewhere is virtually impossible (as in situations of war or natural disasters). In contrast, Article 9(c) offers an avenue for such cases that are likely to give rise to serious fair trial concerns if litigated in their home forum. In contrast to the ‘absolute impossibility’ rule contained in 9(b), ‘relative impossibility’ in 9(c) cannot evoke jurisdiction by itself in that it requires a ‘connection with the Dutch legal sphere.’¹⁶⁸ In addition, the Supreme Court highlighted that *forum necessitatis* represents an *ultima ratio* for establishing jurisdiction and stressed the link to the right to a fair trial as guaranteed under Article 6 of the European Convention on Human Rights.¹⁶⁹

It is therefore little surprising that litigation under the ‘necessity’ heading has been sparse in foreign direct liability claims against TNCs. A case in point is the recent verdict in the Dutch variant of *Kiobel*, the long and arduous search for justice by four Nigerian widows who lost their husbands in the wake of environmental protests that were violently suppressed by the Nigerian government with Shell’s aid in 1995. After the US Supreme

¹⁶⁷ *ibid*, Article 9: ‘When Articles 2 up to and including 8 indicate that Dutch courts have no jurisdiction, then they nevertheless have if: a. [...]; b. a civil case outside the Netherlands appears to be impossible, or; c. the legal proceedings, which are to be initiated by a writ of summons, have sufficient connection with the Dutch legal sphere and it would be unacceptable to demand from the plaintiff that he submits the case to a judgment of a foreign court.’

¹⁶⁸ *Llanos Oil Exploration Ltd v Republiek Colombia & Ecopetrol SA*, Supreme Court of the Netherlands (20 February 2015), ECLI:NL:PHR:2014:2344 [2.5].

¹⁶⁹ *ibid* [2.6].

Court's unfavourable 2013 decision,¹⁷⁰ the plaintiffs brought a substantially similar claim against Shell before the Dutch Courts. In their writ of summons, the plaintiffs invoked Article 9(c) as an alternative ground of jurisdiction in addition to Article 7(1), citing the severe corruption riddling the Nigerian justice system in support.¹⁷¹ Although the case is still pending on the merits, the Hague District Court issued an interlocutory judgment on 1 May 2019 in which it seized jurisdiction to hear the claims.¹⁷² Notably, it based its decision exclusively on the close connection between defendants under Article 7(1) DCCP and did not touch upon the *forum necessitatis* argument under Article 9(c) whatsoever.

In sum, Article 9 DCCP spans a safety net in case Article 7 fails to justify the exercise of Dutch jurisdiction. The scope and reliability of this safety net has not yet been tested in transnational environmental or human rights litigation, but existing guidance suggests that the provision has a rather narrow application.

In addition to substantive law, Dutch legal culture plays an important role in co-determining why and how transnational civil litigation develops. Some economic obstacles are noteworthy in this regard. Like other European countries, the Netherlands operates on a 'loser pays' rule, shifting the costs of litigation to the unsuccessful party and thereby deterring unresourceful claimants who do not want to incur such a risk. In addition, the Dutch system does not allow for contingency fees or 'no win—no pay' arrangements, making such cases financially unattractive to lawyers. The widespread availability of legal aid and, less common, third-party funding options alleviates this fact only marginally. Next to legal financing, instruments for collective redress are rather limited in the Netherlands

¹⁷⁰ *Kiobel* (n 52).

¹⁷¹ Writ of Summons by Esther Duke Kiobel, Victoria Bera, Blessing Ken Nordu and Charity Vureka Levula against Royal Dutch Shell Plc, Shell Petroleum NV, Shell Transport and Trading Company Limited and Shell Petroleum Development Company of Nigeria Limited (Writ of Summons by Kiobel), Sect. 6.3, available at <<https://earthrights.org/wp-content/uploads/Writ-of-summons.pdf>> accessed 16 May 2021.

¹⁷² Rechtbank Den Haag (1 May 2019), ECLI:NL:RBDHA:2019:4233.

and have not been applied to transnational environmental litigation.¹⁷³ Even if a claim is brought, the damages that can be awarded are capped at the harm suffered, i.e., no punitive damages can be granted, in opposition to many common law systems.¹⁷⁴

All of this led Jägers and van der Heijden to conclude that an

activist approach to private law is uncommon in the Netherlands. Private law is highly individualistic and neither judges (who traditionally play a more passive role in the Netherlands) nor lawyers (given the economic disincentives) take an active stance. Victims of human rights violations will therefore have a hard time finding a lawyer willing to take on their case, effectively blocking their access to the courts.¹⁷⁵

Has that analysis from 2008 passed the test of time? The evidence of multiple successful litigations might suggest otherwise. But the weight of the past decade's case law has clearly been qualitative rather than quantitative. Whether legal representation has proven a hurdle is difficult to evaluate. Clearly, some cases have been able to proceed, mostly supported by resourceful NGOs and civil society actors. On the other hand, it is impossible to estimate if that number would have been higher in a different litigation environment.

Nevertheless, the Dutch forum is and remains highly relevant for transnational environmental litigation. Given the country's small size and population, the Netherlands punches above its weight in economic terms and has established itself as a global trade hub. Paired with a (controversially) business-friendly tax regime and its status as an

¹⁷³ Ianika N Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands' (2012) 8 *Journal of Law, Economics & Policy* 549. The Dutch civil lawsuit concerning toxic waste dumping by 'Trafigura' in Cote d'Ivoire speaks to the difficulties of litigating collective redress in the Netherlands. The claim for compensation on behalf of more than 100,000 Ivorians was dismissed by a Dutch court in 2016 on grounds of a lack of representativeness of the leading claimant, a Dutch foundation. Sarah Dezalay and Simon Archer, 'By-Passing Sovereignty: Trafigura Lawsuits (Re Ivory Coast)' in Horatia Muir Watt and others (eds), *Global Private International Law: Adjudication without Frontiers* (Elgar 2019). The case continues on the merits. See *Stichting Victimtes des Dechets Toxiques Cote D'Ivoire v Trafigura Bebeer BV et al*, Amsterdam Court of Appeal (14 April 2020), ECLI:NL:GHAMS:2020:1157.

¹⁷⁴ John Y Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 *Columbia Journal of Transnational Law* 391.

¹⁷⁵ Jägers and van der Heijden (n 163) 861–862.

influential EU member state, these factors have rendered the Netherlands a popular residence to many TNCs.¹⁷⁶ On the other hand, the country takes pride in its long-standing commitment to harbouring the institutional architecture of international accountability, *inter alia*, the International Court of Justice and the International Criminal Court. It also knows a thick network of civil society actors who are closely following and exposing corporate misconduct. It is no coincidence that the Dutch academy has featured prominently in the debates surrounding business and human rights as well.¹⁷⁷ All of this suggests that the Netherlands deserve the close attention of anyone interested in transnational litigation.

4. Establishing Jurisdiction

4.1 *Vedanta v Lungowe*

The dispute in *Vedanta* quickly stalled at the jurisdictional level. After an initial ruling in favour of the claimants in the High Court, the defendants immediately appealed to the Court of Appeal,¹⁷⁸ and—upon losing there—to the UK Supreme Court.¹⁷⁹ Writing for a unanimous Supreme Court, Lord Briggs voiced his frustration with the disproportionate weight attached to jurisdictional issues and bemoaned the excessive scope of almost 300 pages of written submissions and roughly 9000 pages of electronic documents, all ‘in relation to an appeal which, on final analysis, involved only one difficult point of law’.¹⁸⁰

¹⁷⁶ Roelof Gerritsen and Ivo Kuipers, ‘The Post-BEPS Advantages of the Netherlands’ (*International Tax Review*, 25 January 2017) <<https://www.internationaltaxreview.com/article/b1f7n5vnf6xrck/the-post-beps-advantages-of-the-netherlands>> accessed 16 May 2021.

¹⁷⁷ For example, a group of five Dutch law professors submitted an *amici curiae* brief to the U.S. Supreme Court in the *Kiobel* case in support of the plaintiffs. Supplemental Brief of Professor Alex-Geert Castermans et al. as Amici Curiae in Support of Petitioners (13 June 2012) *Kiobel* (n 52).

¹⁷⁸ *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines Plc* [2017] EWCA Civ 1528.

¹⁷⁹ *Vedanta* (n 48).

¹⁸⁰ *ibid* [10].

Vedanta sorely illustrates the extent to which jurisdictional questions require a balancing assessment of substantive issues in the form of a ‘mini-trial’¹⁸¹—which puts judges in the difficult position of having to credibly establish the claims’ hypothetical merit without pronouncing a definitive verdict. Four main legal questions were addressed by the Court in deciding whether the case could proceed in England: (i) whether there was a real, triable issue against Vedanta, (ii) whether KCM was a proper party to the claim against Vedanta, (iii) what the proper place was for the claim to be heard, and (iv) how substantial justice could be ensured.¹⁸²

Regarding (i), the Court was asked to evaluate whether Vedanta had breached its duty of care and was therefore an appropriate ‘anchor defendant’ to ground jurisdiction in its home state England pursuant to Article 4 of Brussels I Recast (the *forum domicilii* rule). This was answered in the affirmative. Lord Briggs argued that the reach of a parent’s duty of care towards third parties hinged upon ‘the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary’.¹⁸³ Ownership is therefore merely relevant as a means for the parent to control the operations of the subsidiary, but does not in itself create an assumption or duty to that effect—effective control is the decisive element.¹⁸⁴ The submitted evidence showed that Vedanta was responsible for the establishment and implementation of group-wide environmental standards and could therefore be held accountable for the harmful consequences of KCM’s conduct. On the flipside, this reasoning suggests that corporate tortfeasors can easily free themselves from liability risks by refraining from exercising comprehensive

¹⁸¹ *ibid* [57].

¹⁸² *ibid* [22]; Bradshaw (n 129) 141.

¹⁸³ *Vedanta* (n 48) [49].

¹⁸⁴ Bradshaw (n 129) 146–147.

control. The same Court recently widened this interpretation in *Okpabi*, however, noting that ‘control is just a starting point’ and considering a wider range of factors that may give rise to a duty of care.¹⁸⁵

The second question related to the propriety of dragging KCM, the ‘foreign defendant’, in front of an English court. As will be recalled, foreign defendants fall under Article 6 of Brussels I Recast, leaving member states with residual jurisdiction to pronounce their own rules in this respect. In England, the applicable provisions are found in Practice Direction 6B of the Civil Procedure Rules, which allow for jurisdiction to be established if the foreign defendant is a ‘necessary and proper party’ to the dispute.¹⁸⁶ Ever since the ECJ’s restriction of the *forum non conveniens* doctrine in *Onusu v Jackson*,¹⁸⁷ however, courts’ ability to decline jurisdiction over such defendants is severely curtailed. Faced with the likely risk of irreconcilable judgments in Zambia and England, Lord Briggs saw ‘one hand tied behind [the Court’s] back’ and ‘the other [...] effectively paralysed’ in staying proceedings, so as long as there was ‘a minimum level of triable issue [...] against an English incorporated parent.’¹⁸⁸ Although the defendants cried foul and alleged an abuse of EU law in that claimants had only pursued the claim against Vedanta as a Trojan horse to target KCM, the intervention was dismissed for not clearing the high hurdles set for such an abuse. In short, the claim against Vedanta was found to be genuine and tenable even in separation from any action against KCM.

The third issue then invariably evoked the question whether England was the proper venue for the entire case to be heard at all. The High Court’s decision had found that the mere risk of irreconcilable judgments was sufficient to establish England as the

¹⁸⁵ *Okpabi* (UKSC) (n 138) [147].

¹⁸⁶ *Vedanta* (n 48) [20].

¹⁸⁷ *Onusu* (n 83).

¹⁸⁸ *Vedanta* (n 48) [39].

proper venue, a conclusion that had been upheld by the Court of Appeal. The Supreme Court disagreed. Although it recognised the risk of conflicting decisions as an important factor to consider, this risk was not a ‘trump card’,¹⁸⁹ or, as one commentator put it: ‘[t]he risk of irreconcilable judgments does not transform the right to sue one defendant in English courts into a right to sue all defendants in England.’¹⁹⁰ In addition, Lord Briggs’s opinion stressed that the claimants had a choice as to whether to pursue one claim against both defendants in Zambia or separate cases in Zambia and England. In fact, given the case’s overwhelming connection to Zambia (considering the provenance and residence of the claimants, the applicable law, the locus of causation and harm, the location of witnesses and evidence, etc.), ‘it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England’.¹⁹¹ But there was another, decisive factor that barred the Court from requiring the claimants to move their case to Zambia: substantial justice.

The fourth question proved to pose the crucial litmus test to the outcome of the jurisdictional dispute. Both the High Court and the Court of Appeal had recognised the appreciable risk that substantial justice may not be attainable in the Zambian system.¹⁹² The principle that proceedings shall not be stayed if there is another forum ‘in which the case may be tried more suitably for the interests of all the parties and *the ends of justice*’ was authoritatively established in *Spiliada Maritime Corporation v. Cansulex Ltd*,¹⁹³ although it has older roots in English law. In line with the *Spiliada* doctrine, the Supreme Court upheld the lower courts’ analysis of the hurdles to justice faced in Zambia, stressing two particular

¹⁸⁹ *ibid* [82].

¹⁹⁰ Van Ho (n 129) 112.

¹⁹¹ *Vedanta* (n 48) [87].

¹⁹² *ibid* [22].

¹⁹³ *Spiliada Maritime Corporation v Cansulex Ltd* [1986] UKHL 10, emphasis added.

obstacles. The first barrier concerned the lack of adequate legal funding arrangements in Zambia, where contingency fee agreements (CFAs) are prohibited and legal representation with the capabilities to adequately litigate such a complex case is therefore nearly impossible to come by for the poverty-stricken claimants. The Court largely relied on a previous case concerning asbestos litigation in South Africa, *Lubbe v Cape*,¹⁹⁴ in reaching this conclusion. In *Lubbe*, the House of Lords had found that access to justice was impaired despite the maturity of the South African justice system and the availability of CFAs. Since the Zambian claimants were in a significantly worse position compared to those in *Lubbe*, no other conclusion than a denial of justice could be reached in *Vedanta*, so the Court's reasoning. The second barrier touched upon the poor track record of similar environmental litigation before Zambian courts, quashing any 'confidence that these cases would be appropriately managed and resolved.'¹⁹⁵ After reviewing the High Court's detailed analysis of two previous litigation instances which had both failed for a lack of available technical expertise, the Supreme Court reinforced these findings and dismissed the defendants' appeal for good.¹⁹⁶

Arguably, the cosmopolitan appeal of the Court's jurisdictional verdict is present throughout the entire ruling, but it surfaces most visibly in its discussion on access to justice. Although there is nothing radical or particularly progressive about the judgment, the extent to which the Court upheld the discretion for English judges to assess the institutional circumstances in a different, potentially more appropriate forum, opens the door to future claimants relying on a denial of justice. Notably, the Court does so unilaterally—the Zambian Attorney General had supported the defendants in claiming

¹⁹⁴ *Lubbe and others v Cape Plc* [2000] UKHL 41.

¹⁹⁵ *Lungowe* (n 132) [194].

¹⁹⁶ *Vedanta* (n 48) [100]–[102].

that the Zambian system was very much capable and willing to hear the case.¹⁹⁷ This shows exemplarily how the protection of global values may crystalise in domestic jurisdictional rules.

Tampering jurisdictional optimism is the high hurdle set for a denial of justice to be found under the *Spiliada* test. As repeatedly rehearsed in the judgment, Zambia is an exceptionally poor country with weak formal institutions.¹⁹⁸ That leaves one wondering how a similar scenario would have played out in a different country, or with slightly more privileged claimants bringing the suit. One answer to this question was recently provided by the High Court in *Mariana v BHP Group Plc*¹⁹⁹ concerning the involvement of English domiciled BHP in a devastating dam collapse in Brazil. The case was dismissed on grounds of abuse of process, mostly owed to the fact that proceedings were underway in Brazil and that parallel proceedings in England ‘would lead to utter chaos’.²⁰⁰ In his *dicta*, however, Justice Turner made clear that he saw no reason why justice could not be done in Brazil.²⁰¹

At the time of writing, it is uncertain how the jurisdictional regime in England will change after the country’s exit from the European Union, and consequently from the Brussels I Recast Regulation, in January 2021.²⁰² The UK applied to re-join the Lugano Convention in April 2020 and is currently awaiting the contracting parties’ approval. The Brussels Regulation and the Lugano Convention are to a large extent identical; among others, the Convention contains the same main rule (*forum domicilii*, Article 2) and the same

¹⁹⁷ *ibid* [92].

¹⁹⁸ *ibid* [1], [89].

¹⁹⁹ *Município De Mariana & Ors v BHP Group Plc & Anor* [2020] EWHC 2930 (TCC).

²⁰⁰ *ibid* [92].

²⁰¹ *ibid* [247].

²⁰² For a detailed account of the arising legal issues, see, Mateusz Pilich, ‘Brexiteering EU Private International Law: May the UK Stay In?’ (2017) 24 *Maastricht Journal of European and Comparative Law* 382.

provision regarding third-country defendants (Article 4). Irrespective of whether the UK's application to Lugano is successful, the case law of the CJEU will cease to exercise binding authority and become persuasive material.²⁰³ This is particularly relevant for the prohibition of *forum non conveniens* under *Onusu*, which built on the no longer applicable Brussels I Regulation. *Forum non conveniens* may therefore well make a comeback in the post-Brexit jurisdictional landscape and threaten the *Vedanta* legacy. Nevertheless, courts will continue to be bound by established features of English jurisdictional law such as the 'substantial justice' test, regardless of whether the UK constitutes a *forum conveniens*.²⁰⁴

4.2 *Akpan v Shell*

Unsurprisingly, the Dutch courts' jurisdiction over the claims in *Akpan* proved a similarly contentious issue. The District Court proceeded in three steps. It first investigated to what extent the claim against the parent company could succeed under the Brussels I Recast Regime. Second, it applied the Dutch Code of Civil Procedure (DCCP) to determine whether jurisdiction over the foreign defendant could be grounded in the Dutch anchor defendant, given the connection between the claims against RDS and SPDC. Finally, the Court briefly inquired if finding jurisdiction would amount to an abuse of procedural law.

Establishing jurisdiction over RDS was a relatively straightforward exercise. The company had its headquarters, and thus its domicile, in the Netherlands in accordance with Article 63 Brussels I Recast. This gave the Court full and undisputed jurisdiction over

²⁰³ Article 1 of Protocol 2 of the Lugano Convention demands that 'due account' be paid to the CJEU's decisions. On 4 May 2021, however, in a twist of fate the European Commission issued a communication recommending EU member states to reject the UK's application for accession to Lugano. European Commission, 'Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention' (4 May 2021) COM(2021) 222 final. Available at <https://ec.europa.eu/info/sites/default/files/1_en_act_en.pdf> accessed 16 May 2021.

²⁰⁴ Jamie Curle and Sarah Ellington, 'The Vedanta decision and EU law: a post-Brexit outlook on parent company liability' (*DLA Piper*, 25 April 2019) <<https://www.dlapiper.com/it/italy/insights/publications/2019/04/the-vedanta-decision-and-eu-law/>> accessed 16 May 2021.

the claims lodged against RDS under the *forum domicilii* rule in Article 4 of the Regulation. In order to avert this foregone conclusion, the defendants argued that the action was bound to fail from the outset as there was no credible claim against RDS in the first place. This reasoning was rejected by the Court, which resisted any deeper exploration into the case's merit and was satisfied with finding that

beforehand it could be defended that under certain circumstances, based on Nigerian law, the parent company of a subsidiary may be liable based on the tort of negligence against people who suffered damage as a result of the activities of that (sub-)subsidiary.²⁰⁵

Interestingly, to support the District Court's conclusion, the Court of Appeal later cited a number of landmark rulings regarding the duty of care in English law, stressing that Nigerian law was based on the common law and that English precedents were likely to be influential in a Nigerian context.²⁰⁶

The thrust of the Court's jurisdictional argument relied on the close connection between the two defendants, however, which was later confirmed and expanded in the 2015 Court of Appeal's interlocutory ruling. As in *Vedanta*, jurisdiction over non-EU domiciled defendants resides with domestic law according to Article 6(1) Brussels I Recast. Article 7(1) of the DCCP then allows the claims against two separate defendants to be joined for efficiency reasons if they exhibit a sufficient connection, as explained in the preceding section.

After having confirmed its domicile-based jurisdiction over RDS, the Court of Appeal's analysis then turned to whether such a link between the defendants was present in the case at hand. In upholding the previous ruling, it concluded that there was indeed a sufficiently close connection to join both cases and quoted a number of factors to support

²⁰⁵ *Akpan (District Court)* (n 142) [4.3].

²⁰⁶ *Akpan (interlocutory judgement)* (n 143) [2.2].

this finding, including that (i) the defendants were held both jointly and severally liable; (ii) the claims lodged against both defendants were identical; (iii) the factual pattern was identical and concerned the same oil spill; (iv) the legal question centred around the cause of the spill and potential negligence on the defendants' part; (v) further investigations are necessary; and (vi) these investigations should be undertaken by one court only so as to reduce the risk of divergent results.²⁰⁷ Next to expediency concerns, the Court also saw a clear risk of irreconcilable judgements if the action against SPDC was moved to Nigeria.²⁰⁸ In addition, the Court of Appeal confirmed the District Court's assertion that the connection between the defendants need only be proven at the jurisdictional level and will remain in place throughout the proceedings in disconnection from any substantive findings in line with the *perpetuatio fori* principle:

[T]he *forum non conveniens* restriction no longer plays any role in today's international private law. The District Court is of the opinion that the jurisdiction of the Dutch court in the matter against SPDC based on Section 7 DCCP does not cease to exist in the event that the claims against RDS were to be dismissed, not even if subsequently, in fact, no connection or hardly any connection would remain with Dutch jurisdiction.²⁰⁹

The jurisdictional gateway thus continues to tie the case to the Dutch forum even if the underlying claims later turn out to be unfounded.

The defendants countered by claiming that they could not have foreseen being sued in the Netherlands, building on the ECJ's ruling in *Painer*,²¹⁰ in which the EU court had stressed that case joinders under Article 8 Brussels I Recast must exhibit a sufficient degree of foreseeability where the underlying claims arise from different legal bases. RDS

²⁰⁷ *ibid* [2.4].

²⁰⁸ *ibid* [2.6].

²⁰⁹ *Akpan (District Court)* (n 142) [4.6].

²¹⁰ Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR I-12533.

and SPDC argued that this reasoning should be extended by analogy to Article 7(1) DCCP. The Court firmly rejected these contentions. It noted that *Painer* did not apply to the case at hand in the first place, because the claims against RDS and SPDC had an identical legal basis in Nigerian tort law. In addition, it questioned the applicability of *Painer* to cases against non-EU defendants (which do not fall within the scope of Brussels I Recast) but acknowledged the need to mitigate the risk of divergence between European and national standards in this regard. Ultimately, the Court of Appeal also found that the defendants could have very well expected being sued in the Netherlands, given the rise of transnational litigation and ‘anchor’ jurisdiction across the globe.²¹¹

Finally, the defendants contended that the case against RDS amounted to an abuse of Dutch procedure and served the sole purpose of dragging SPDC before a Dutch court. The hurdles for such an allegation to succeed are high: the claimants must know or be expected to know that their legal and factual arguments are incorrect, have no chance of success, and are entirely unsound, to the extent that the case against RDS can only be regarded as a ‘sham procedure’.²¹² Ostensibly, these requirements were not fulfilled since the Court had already established earlier that RDS could potentially incur liability for the alleged actions under Nigerian law.

In contrast to their UK counterpart, the Dutch courts fall short of recognising a formal ‘necessity’ or ‘selflessness’ rationale in *Akpan*, although such thinking seems to motivate at least parts of the decisions. Particularly revealing in this regard is the Court of Appeal’s explicit referencing of similar lawsuits against multinationals in other jurisdictions,²¹³ which suggests that the Court is acutely aware of the transnational dimension of the case as well as of related legal developments elsewhere.

²¹¹ *Akpan (interlocutory judgement)* (n 143) [2.6].

²¹² *ibid* [2.7].

²¹³ *ibid* [2.6].

At the time of writing, Akpan has not yet received a final verdict. The Hague Court of Appeal's judgement of 29 January 2021 established that the oil spills had likely been caused by sabotage, but it deferred a decision on Shell's liability subject to the provision of further factual evidence.²¹⁴ Its two sibling lawsuits, however, received a favourable ruling and were widely praised by commentators.²¹⁵ Moreover, the first impacts of these decisions are already showing in the litigation landscape.²¹⁶

5. Comparative Analysis: Legal Pluralism and Different Shades of 'Selflessness'

At first glimpse, both *Vedanta* and *Akpan* seem to suggest that English and Dutch courts are expanding their geographic reach to capture global corporate environmental harm. But a closer look evinces important nuances in this process. One must begin by questioning its alleged novelty. In England, the Supreme Court's extended analysis in *Vedanta* epitomises a long-standing inclination to interpret the territorial boundaries of English jurisdiction generously.²¹⁷ This tendency may be traced to the historical contingencies of the colonial Empire, which was partly founded upon the forced export of the common

²¹⁴ *Akpan* (n 49).

²¹⁵ Elian Peltier and Claire Moses, 'A Victory for Farmers in a David-and-Goliath Environmental Case' *The New York Times* (29 January 2021) <<https://www.nytimes.com/2021/01/29/world/europe/shell-nigeria-oil-spills.html>> accessed 16 May 2021; Lucas Roorda, 'Wading through the (Polluted) Mud: The Hague Court of Appeals Rules on Shell in Nigeria' (*Rights as Usual*, 2 February 2021) <<https://rightsasusual.com/?p=1388>> accessed 16 May 2021; Linus Unah and Iruoma Kelechukwu, 'Nigerian Farmers Hail Shell Ruling, but Future Remains Uncertain' (*Al Jazeera*, 31 January 2021) <<https://www.aljazeera.com/news/2021/1/31/nigerian-farmers-hail-shell-ruling-but-future-remains-uncertain>> accessed 16 May 2021.

²¹⁶ See, e.g., a recent dispute over the polluting activities by Norsk Hydro's subsidiaries in the Amazon. Bryan Harris, 'Norsk Hydro Blamed for Birth Defects in Amazon Forest Pollution Case' (*Financial Times*, 28 February 2021) <<https://www.ft.com/content/78566e6b-f280-438e-9465-40105693504d>> accessed 16 May 2021.

²¹⁷ Blanco and Pontin (n 149).

law to large parts of the world,²¹⁸ and to its impact on the current post-Brexit politics of global reorientation.²¹⁹ Quite different from the English context, where extraterritorial jurisdiction seems to have reached a considerable degree of maturity, it presents a relatively new and swiftly evolving doctrine in the Netherlands.

Another striking difference concerns the overall importance conceded to jurisdictional questions, and the capacities devoted to such an analysis. Perhaps most powerfully, this surfaces in the extent to which the courts inquired into substantive issues at the procedural stage. In England, whether territorial jurisdiction may be set aside in a given case hinges upon a highly detailed, casuistic analysis. Even though the *Vedanta* ruling adds some clarity to the general guiding lines of such an exercise, lower courts are left with considerable leeway in hearing extraterritorial claims, as Lord Briggs was keen to stress.²²⁰ As a result, judges are inclined and even required to conduct a full-fledged mini trial before establishing contentious jurisdiction, especially in complex cases with high stakes. In order to contain the risk of getting lost in substantive details at the jurisdictional stage, due regard is to be held to the requirements of proportionality, which Lord Briggs elaborated at some length so as to save the court from ‘beating its head against a brick wall’.²²¹ Despite paying lip service to the demands of proportionality, jurisdictional disputes continue to be litigated so fiercely that courts will hardly be able to avoid swallowing the bitter pill of investigating pivotal questions of fact and law before grounding jurisdiction.

²¹⁸ Ronald J Daniels, Michael J Trebilcock and Lindsey D Carson, ‘The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies’ (2011) 59 *The American Journal of Comparative Law* 111.

²¹⁹ For this kind of argument, see Caroline Koegler, Pavan Kumar Malreddy and Marlena Tronicke, ‘The Colonial Remains of Brexit: Empire Nostalgia and Narcissistic Nationalism’ (2020) 56 *Journal of Postcolonial Writing* 585; John Agnew, ‘Taking Back Control? The Myth of Territorial Sovereignty and the Brexit Fiasco’ (2020) 8 *Territory, Politics, Governance* 259.

²²⁰ *Vedanta* (n 48) [12].

²²¹ *ibid* [14].

What is more, the mere possibility of being found liable to pay compensation (and potentially punitive damages, which are allowed—although rarely awarded—under English law) to a large group of claimants may well induce corporate defendants to enter into settlement negotiations. Given that the likelihood of incurring such a liability increases if a claim succeeds at the procedural stage, jurisdictional questions carry a whole different weight than they do in the Netherlands. For example, in *The Bodo Community*,²²² Shell decided to settle with the claimants after the High Court had refused to throw out the case on procedural grounds.²²³ Ultimately, the *Vedanta* claimants encountered the same fate and settled for an undisclosed amount in January 2021.²²⁴

The Dutch approach in *Akpan* is indicative of a more restrained stance. Dutch courts acknowledge the thorny issue of international competence and identify its legal sub-components *in abstracto*, but—in emancipation from their English counterparts—they resist the temptation to scrutinise whether these requirements are fulfilled *in facto*. The factual analysis only serves to ascertain that the necessary procedural elements are present and that there is no abuse of law, that is, that the chances of the substantive claims succeeding are greater than zero.²²⁵

Pressed to resolve complex transnational environmental disputes equitably, the courts in *Vedanta* and *Akpan* have resorted to different constructions of and rationales for extraterritoriality. To apply Cedric Ryngaert’s vocabulary, the jurisdictional assessments

²²² *The Bodo Community & Ors v The Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).

²²³ John Vidal, ‘Shell Announces £55m Payout for Nigeria Oil Spills’ (*The Guardian*, 7 January 2015) <<http://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>> accessed 16 May 2021.

²²⁴ ‘Legal Claim by More than 2,500 Zambian Villagers in a Case against Vedanta Resources Limited’ (*Leigh Day*, 19 January 2021) <<https://www.leighday.co.uk/latest-updates/news/2021-news/legal-claim-by-more-than-2-500-zambian-villagers-in-a-case-against-vedanta-resources-limited/>> accessed 16 May 2021.

²²⁵ *Akpan (interlocutory judgement)* (n 143) [3.2]: ‘[D]e “toets” die moet worden aangelegd is of er een mogelijkheid bestaat dat de vorderingen bij voorbaat evident kansloos zijn’ [‘The “test” that should be applied is whether the claims could possibly be awarded’].

espouse different shades of ‘selflessness’.²²⁶ For instance, the English courts justify their extraterritorial reach by reference to ideals of ‘substantial justice’, whereas the *Akpan* courts have preferred to cite ‘efficiency’ reasons when dealing with compensation claims brought by foreign subjects over foreign harm. These constructions arise from more (England) or less (the Netherlands) established and litigated formulations in both jurisdictions’ respective procedural laws.

If one thus looks behind the commonalities and undoubtedly arresting signals of a burgeoning development towards ‘selfless jurisdiction,’ highly idiosyncratic path dependencies, differences in procedural laws, and socio-legal peculiarities reveal themselves. Indeed, the current landscape of jurisdictional practice is perhaps best characterised by the label of ‘legal pluralism’. To borrow Brian Tamanaha’s words, the differences in the law(s) of extraterritorial jurisdiction may be more accurately construed ‘as fundamental, ineradicable, and important characteristics central to the operation and functioning of these systems’, rather than ‘complicated arrangements to be solved or managed’.²²⁷ Understanding the laws of jurisdiction as legally pluralistic means taking parochialism seriously.

Table 1 summarises the analysis undertaken in the preceding sections. It highlights the main differences and commonalities among the English and Dutch approaches to extraterritorial jurisdiction in their institutional context.

²²⁶ Ryngaert, *Selfless Intervention* (n 3).

²²⁷ Brian Z Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Sydney Law Review* 375, 389.

Table 1. Comparative Overview of *Vedanta* and *Akpan*.

	<i>Vedanta</i>	<i>Akpan</i>
1 Legal system	England & Wales	The Netherlands
2 Legal tradition	Common law	Civil law (Napoleonic)
3 Jurisdictional regime (EU)	Articles 4 and 6(1), Brussels I Recast Regulation	
4 Jurisdictional regime (national)	Practice Direction 6B of the Civil Procedure Rules, para 3.1 (3)	Dutch Code of Civil Procedure, Article 7(1)
5 Depth of jurisdictional assessment	Extensive	Restrained
6 Rationale for exercising extraterritorial jurisdiction	‘Substantial justice’	‘Efficiency reasons’
7 Connection to forum	Subsidiary relationship within corporate group	
8 Collective redress options	Attractive (Group Litigation Order)	Scarce
9 Financial Regime	Attractive (CFAs allowed)	Unattractive (No CFAs, cost-shifting), but legal aid available

6. Beyond Jurisdiction: *Lliuya* and the Limits of Extraterritoriality

The legal contribution of extraterritorial case law along the lines described in preceding sections is perhaps best understood through a candid appreciation of its inherent limits. *Akpan* and *Vedanta* are telling a straightforward story about transnational environmental harm—one with clear culprits, direct causation, and jurisdictional disputes at the centre. But the corporate Anthropocene is much more pervasive than the narrative conveyed in such cases, both with regards to legal and environmental specificities. Extraterritorial jurisdiction is not a panacea for addressing transnational environmental harm. Indeed, its usefulness to litigants crucially depends upon a country’s legal culture on the one hand, and on the type of environmental harm dealt with on the other. To illustrate this point,

this section contrasts the previous analysis with a slightly distinct case that is currently pending before the German courts: *Lliuya v RWE*.

‘A Peruvian corn farmer is taking on one of the world’s biggest polluters,’ titled Vice magazine in reaction to the case’s launch in 2015.²²⁸ *Lliuya* was one of the first transnational suits in history to target an energy giant for its global carbon emissions and has attracted much popular and media attention, not least for its appreciable potential to inspire similar developments elsewhere.²²⁹

The claimant Saúl Luciano Lliuya lives with his family in Huaraz in the Andean region of Peru. The city of roughly 112,000 inhabitants is threatened by the nearby Palcacocha lake, which has grown dangerously in volume as a result of the surrounding glaciers melting rapidly in a warming climate. A glacial avalanche may cause the lake to burst at any time and devastate Mr. Lliuya’s home in the resulting flood wave. Similar incidents have occurred in the past, with disastrous consequences. The likelihood of such a flood wave has been described as one of ‘when’ rather than ‘if’.²³⁰ Mr. Lliuya seeks to recover a portion of the costs of various adaptation measures required to safeguard his property against future flooding from German energy company RWE AG, Europe’s largest emitter of greenhouse gases (GHG). As RWE is estimated to be responsible for

²²⁸ Lauren Rothman, ‘A Peruvian Corn Farmer Is Taking on One of the World’s Biggest Polluters’ (*Vice*, 17 March 2015) <<https://www.vice.com/en/article/ezq9vj/a-peruvian-corn-farmer-is-taking-on-one-of-the-worlds-biggest-polluters>> accessed 16 May 2021.

²²⁹ The transplantation machinery is already up and running. See this recent assessment of how such a case could play out under English nuisance law, Vedantha Kumar and Will Frank, ‘Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like Lliuya Succeed under English Nuisance Laws’ (2018) 2018 Carbon & Climate Law Review (CCLR) 110. The authors explicitly encourage other scholars to engage in similar studies for other jurisdictions, *ibid* 112.

²³⁰ A more detailed description including pictures and maps can be found in Will Frank, Christoph Bals and Julia Grimm, ‘The Case of Huaraz: First Climate Lawsuit on Loss and Damage Against an Energy Company Before German Courts’ in Reinhard Mechler and others (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Springer International Publishing 2019). The risk of flooding is reported, among others, in Christian Huggel and others, ‘Anthropogenic Climate Change and Glacier Lake Outburst Flood Risk: Local and Global Drivers and Responsibilities for the Case of Lake Palcacocha, Peru’ (2020) 20 Natural Hazards and Earth System Sciences 2175.

roughly 0.47 percent of historical GHG emissions since 1854,²³¹ the damages claimed amount to the commensurate percentage of the expected cost of protection measures, a sum of roughly 20,000 EUR. The case was brought under §1004 of the German Civil Code (*Bürgerliches Gesetzbuch*), which grants injunctive relief in cases of private nuisance, i.e., an interference with another's ownership rights. Legally, the issues at dispute in *Lliuya* gravitate towards the question of causation.

In first instance, the District Court of Essen rejected the case for lack of a justiciable causal chain between the disturber's emissions and the incurred damages.²³² Undeterred by the setback, the claimant appealed to the Higher Regional Court of Hamm, where the case is currently pending at the evidentiary phase. Although the proceedings are currently on hold due to the ongoing COVID-19 pandemic, the appellate court's 2017 decision²³³ to allow the case to move forward to the evidentiary stage was celebrated as a watershed moment by many commentators.²³⁴

Despite the foreign element of the claims, the question of jurisdiction has not played a heightened role in *Lliuya*. Pursuant to the *lex domicilii* rule contained in Articles 63(1) and 4 of Brussels I Recast, the claimants contended that German courts were the proper forum to hear the case against German-domiciled RWE.²³⁵ This line of reasoning was not disputed by the defendant in its written response, and both courts tacitly assumed

²³¹ Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 *Climatic Change* 229.

²³² *Lliuya* (n 50). An unofficial translation is available at <<https://germanwatch.org/sites/germanwatch.org/files/announcement/20823.pdf>> accessed 16 May 2021.

²³³ *Luciano Lliuya v RWE AG (Indicative Court Order and Order for the Hearing of Evidence)*, Oberlandesgericht Hamm (Higher Regional Court of Hamm, 30 November 2017). An unofficial translation is available at <<https://germanwatch.org/sites/germanwatch.org/files/announcement/20812.pdf>> accessed 16 May 2021.

²³⁴ Frank, Bals and Grimm (n 230) 475.

²³⁵ Statement of Claim (submitted to the Court on 23 November 2015), 20. Available at <<https://germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf>> accessed 16 May 2021.

jurisdiction without addressing the issue in more detail, although Peruvian courts could theoretically seize the dispute under the *forum locus damni* logic.²³⁶

There may be two reasons for the absence of jurisdictional disputes in *Llunya*, beyond the technical particularities of German court decisions.²³⁷ First, the legal landscape in Germany espouses a different topography compared to English or Dutch law; and second, the type of harm dealt with (climate change) may call for a radically different approach. Both factors speak to the limits of extraterritorial jurisdiction as a catch-all instrument for addressing transnational harm.

6.1 *Legal culture*

On the jurisdictional front, German law tends to be territorially conservative and wary of hauling foreign defendants before its tribunals. The Code of Civil Procedure (*Zivilprozessordnung*) generally lacks provisions dealing with the international competence (*direkte internationale Zuständigkeit*) of German courts, including a national mechanism comparable to the English and Dutch ‘gateways’ that would allow cases between a German-domiciled parent and a foreign subsidiary to be joined under the umbrella of Article 6(1) Brussels I Recast.²³⁸ On the flipside, the lack of a case joinder in German procedure means that only direct claims against German or other EU parties can be brought, largely pre-empting the type of litigation seen in *Vedanta* and *Akpan* that is fundamentally aimed at subsidiary operations. In contrast to English and Dutch judges,

²³⁶ Peruvian law allows for its domestic courts to seize matters related to patrimonial rights under Article 47 of the Peruvian Civil Code (Código Procesal Civil) of 8 January 1993 in connection with Article 2058 of the Peruvian Civil Code (Código Civil) of 24 July 1984.

²³⁷ For instance, German judgments are rather concise and minimalist in style and rarely attain the level of detail seen in English decisions. Basil Markesinis, ‘Judicial Style and Judicial Reasoning in England and Germany’ (2000) 59 The Cambridge Law Journal 294. From this perspective, it is unlikely that the courts would analyse an undisputed question of law *proprio motu*.

²³⁸ One exception may be found in Article 8(1) of the Brussels I Recast Regulation, which allows for cases against two defendants with different domiciles to be treated jointly where the court has jurisdiction over one defendant. Importantly, both defendants need to be domiciled in the EU, however, which severely restricts the rule’s extraterritorial reach.

German courts seem to reserve a minimal role for jurisdictional issues and will address difficulties arising from foreign elements at the trial stage. Even academic literature on the topic is scarce within the German legal community. What is more, legal pathways for environmental litigation in general are limited,²³⁹ so much so that the lack of standing rights for NGOs and affected individuals has been heavily criticised both by the Aarhus Convention Compliance Committee²⁴⁰ and the European Court of Justice.²⁴¹

The fact that extraterritoriality has entered German human rights and environmental litigation at all can largely be accredited to the work of NGOs who are actively seeking to expand the reach of German courts so as to hold to account some of Germany's economic TNC heavyweights.

6.2 *Diffuse transboundary harm*

Lliuya is not only emblematic of the obstacles posed by legal culture—at its heart lies an environmental problem that is fundamentally different from those in *Vedanta* and *Akpan*: climate change. In the English and Dutch cases, the damage was more or less locally contained and specific in time, its causes were clear, and responsibility was relatively simple to assign. None of these features applies to the ultimate ‘wicked’ problem of climate change.²⁴² Although Mr. Lliuya's claims are transnational in nature, they lie close to territorial heads of jurisdiction, most notably the ‘place of origin’ logic according to which

²³⁹ Maximilian Amos, ‘Umweltklagen: Was können sie bewegen? [What potential for Environmental Litigation?]' (*Legal Tribune Online*, 15 May 2018) <<https://www.lto.de/recht/hintergruende/h/umweltschutz-klimaschutz-rechtsbehelfe-umweltklagen-weltweit-buerger-ngos-gegen-regierungen-unternehmen/>> accessed 16 May 2021.

²⁴⁰ UNECE ‘Decision V/9h on compliance by Germany with its obligations under the Convention’ (14 October 2014) <https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9h_Germany/Decision_V9h.pdf> accessed 16 May 2021.

²⁴¹ Case C-137/14 *Commission v Germany*, ECLI:EU:C:2015:683.

²⁴² Kelly Levin and others, ‘Overcoming the Tragedy of Super Wicked Problems: Constraining Our Future Selves to Ameliorate Global Climate Change’ (2012) 45 *Policy Sciences* 123; Elinor Ostrom, ‘Polycentric Systems for Coping with Collective Action and Global Environmental Change’ (2010) 20 *Global Environmental Change* 550; Fisher, Scotford and Barritt (n 2).

disputes may be dealt with where the damage originated. In contrast to *Vedanta's* and *Akpan's* focus on subsidiary relationships, *Lliya* pertains to a rather different type of claim, as described in the opening section of this chapter: transboundary pollution. The complexity of climate change litigation as a transboundary pollution issue lies not only in overlapping spheres of judicial authority, but in the diffuse causal chains underlying such environmental harm, also known as the 'problem of the many hands'.²⁴³ Expanding jurisdiction does not do anything to resolve the thorny challenges this poses to material causation requirements.²⁴⁴ *Lliya* may thus be read as a cautionary tale, attesting to the imperfect nature of—and qualifying hopes placed in—jurisdictional developments for effective environmental governance. In this sense, private climate litigations' transnational contribution stretches beyond the jurisdictional models surveyed above; it represents a different piece in the jigsaw puzzle that is the regulation of the corporate Anthropocene.²⁴⁵

Undoubtedly, the environmental threats faced by the claimants in *Vedanta*, *Akpan* and *Lliya* are heinous. Whether and how extraterritorial jurisdiction offers a lever to compel judiciaries to address these wrongs is not merely contingent upon the palette of procedural provisions available in each country. It also crucially depends on the environmental problem at stake and its legal cladding. Finally, a range of secondary factors affecting environmental litigation more generally—such as the legal finance regime or opportunities for collective redress—bear an impact on the role ultimately played by jurisdictional disputes.

²⁴³ Ganguly, Setzer and Heyvaert (n 34); Marc A Loth, 'Too Big to Trial? Lessons from the Urgenda Case' (2018) 23 Uniform Law Review 336.

²⁴⁴ Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst (Part II)' Journal of Environmental Law & Practice
<https://academic.oup.com/jel/advance-article/doi/10.1093/jel/eqaa021/5921709> accessed 16 May 2021. According to *sine qua non* theories of causation, an act can only be causal to a given outcome if the same result would not have occurred without it. Clearly, this does not hold for climate change.

²⁴⁵ On the nature of this contribution, see Hari M Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 Washington University Law Quarterly 1789.

CHAPTER 4. RE-IMAGINING JURISDICTION FOR ENVIRONMENTAL GOVERNANCE?

While the previous chapter sought to make sense of emerging trends in transnational environmental liability descriptively, chapter four moves toward a prescriptive model. Although extraterritorial jurisdiction has limited applicability, it opens up new spaces for legal contestations of the corporate Anthropocene. In order to maximise these spaces as avenues for justice, recognition, and regulation, legislative developments can and should empower courts to play a more active role in addressing transnational environmental harm. Arguably, the most promising level for such intervention is the European Union, who already dictates much of the rules regarding adjudicatory jurisdiction and seems both willing and likely to assume a reformist role in the future.

1. A European Forum for Transnational Harm: An Idea Whose Time Has Come (Again)?

The courts' jurisdictional assessments in *Vedanta* and *Akpan* are not only innovative expansions of the legal imagination,²⁴⁶ they are also indicative of the challenges and opportunities arising for future litigation. Featuring prominently among the challenges for prospective litigants are the highly diverse national pathways leading to extraterritoriality, undergirded by a complex interlinkage of domestic and supra-/international norms, of legal and contextual elements. Against this backdrop, the hope for organic convergence across EU member states appears misplaced.²⁴⁷ For example, a 2017 review by Matthias Weller and Alexia Pato finds that the case law around 'anchor jurisdiction' varies greatly

²⁴⁶ The notion of expanding legal imagination as opposed to granular, incremental reform is borrowed from Fisher (n 11) ch 5. She argues that an engagement with legal imagination is particularly important in environmental law due to the interconnected nature of, the scientific uncertainty surrounding, and the socio-political conflict inherent in environmental problems.

²⁴⁷ The same observation is offered by Ryngaert, who sees territoriality as both enabling and delimiting the exercise of jurisdiction in what he terms 'the common interest.' Ryngaert, *Selfless Intervention* (n 3) ch 6.

within the EU and that governments have been reluctant to widen procedural mechanisms for judicial redress.²⁴⁸ Any attempt at a critical re-examination of the laws of jurisdiction must take this empirical reality into account.

Contemplating the jurisdictional patchwork across Europe then almost inevitably invites discussions about its normative desirability. A number of scholars have long advocated for states in the Global North to step up their responsibility in adjudicating the harmful consequences of corporations domiciled within their territory.²⁴⁹ To be sure, there is legislative precedence for such measures. The EU has repeatedly utilised its sweeping competences in the fields of private and procedural law for the attainment of economic and social objectives.²⁵⁰ In the name of enhancing access to justice,²⁵¹ European private international law has firmly replaced party autonomy with an overruling logic of weaker party protection.²⁵² Similar tendencies may be observed with regard to environmental objectives.²⁵³ For instance, Article 7 of Regulation No 864/2007 ('Rome II')—a prominent European private international law instrument—gives the claimant a choice as to the applicable law in cases of environmental damage. Recital (25) of the same regulation elaborates the rationale behind this rule by reference to the environmental policy of the

²⁴⁸ Weller and Pato (n 53).

²⁴⁹ Kirshner (n 4); Augenstein (n 32).

²⁵⁰ Johan Meeusen, 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?' (2007) 9 *European Journal of Migration and Law* 287. In fact, the role of public policy considerations in private international law is a conundrum almost as old as the discipline itself. See, Ernest G Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1924) 33 *The Yale Law Journal* 736.

²⁵¹ The legal underpinnings of the human right dimension of private international law jurisdiction more generally are aptly fleshed out in, Louwrens R Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Springer 2014) ch 5.

²⁵² Giesela Rühl, 'The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy' (2014) 10 *Journal of Private International Law* 335.

²⁵³ Uglješa Grušić, 'International Environmental Litigation in EU Courts: A Regulatory Perspective' (2016) 35 *Yearbook of European Law* 180; Geert van Calster, 'Environmental Law and Private International Law' in Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2019).

EU, in particular its commitments to sustaining ‘a high level of protection’, the precautionary principle, and the ‘polluter pays’ principle.²⁵⁴

Why is it then, that claimants’ access to European courts against third-country defendants is entirely left to the patchwork of domestic rules, ranging from hostile to favourable? Arguably, the lack of a uniform approach comes at a hefty price. It invites forum shopping within the European Union and devolves sensitive questions of international relevance to domestic courts with little further guidance by the CJEU or the European legislator. Perhaps most crucially, the overall indeterminacy of jurisdictional rules has so far worked to the benefit of corporate tortfeasors, who can drag out and delay disputes at the jurisdictional level in order to wear down victims of human and environmental rights abuses. In both *Vedanta* and *Akpan*, those strategies seem to have been employed with some success by the defendants.²⁵⁵ What is more, the legal tapestry exposes TNCs to different kinds of liability risk within the EU, depending on the country of domicile. It goes without saying that this bears the potential to inhibit core EU principles, not least the free movement of goods and services.²⁵⁶

In light of these apparent drawbacks, the European Commission’s 2010 proposal for recasting the Brussels I Regulation already recognised the need to harmonise the jurisdictional rules with regard to third-country claims, particularly invoking concerns about a level playing field for defendants, as well as a unified, appropriate gateway to justice

²⁵⁴ Michael Bogdan, ‘The Treatment Of Environmental Damage In Regulation Rome II’ in William Binchy and John Ahern (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Brill Nijhoff 2009). The claimant in *Lluya* (n 50) made use of this provision to opt for the application of German law instead of Peruvian law to his claims.

²⁵⁵ In both cases, the claimants spent many years waiting for justice. In *Vedanta*, it took the courts four years to reach a definitive verdict on the jurisdictional question. Whereas the polluting activities have been ongoing since 2005, the case was only settled in 2021. Similarly, *Akpan* was finally resolved some 15 years after the environmental damage in dispute had occurred.

²⁵⁶ Johannes Weber, ‘Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation’ (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* / *The Rabel Journal of Comparative and International Private Law* 619.

for claimants.²⁵⁷ The proposal suggested a geographical extension of the Regulation's reach to external situations, in which foreign defendants were subjected to the Brussels I special grounds of jurisdiction (Articles 7-24 under the later Recast Regulation). It also laid down two grounds of subsidiary jurisdiction, including a *forum necessitatis* provision, and outlined some guiding principles under which courts may decline jurisdiction in such cases.²⁵⁸

The case for—partially and carefully—opening European courts to claims against foreign defendants is thus far from new.²⁵⁹ In his comment on the recasting process of the Brussels I Regulation, Johannes Weber convincingly argues in favour of the EU's competence over and interest in harmonising the jurisdictional rules governing such situations. Regarding a potential *forum necessitatis*, he remarks:

The introduction of a *forum necessitatis* [...] guarantees a right of access to justice and is indispensable in an instrument of full harmonisation. Even if a *forum necessitatis* has to be couched in broad terms, an autonomous rule at the European level appears to be the lesser evil compared to leaving negative competence conflicts to the fragmented and equally uncertain national provisions.²⁶⁰

Despite widespread academic endorsement, however,²⁶¹ political opposition among the Member States prevented the Commission proposal's comprehensive reforms

²⁵⁷ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)' (16 December 2010) COM(2010) 748 final. Available at <https://consult.justice.gov.uk/digital-communications/brussels_i_regulation/supporting_documents/europeancommissionslegislativeproposallbrusselsIregulation.pdf> accessed 16 May 2021.

²⁵⁸ Weber (n 256) 621. With regards to its rather progressive vision of extraterritorial jurisdiction, the Commission proposal drew heavily on reports and studies conducted by academic groups or individuals in the preceding years. Peter Arnt Nielsen, 'Current Developments: The State of Play of the Recast of the Brussels I Regulation' (2012) 81 *Nordic Journal of International Law* 585, 586–590.

²⁵⁹ Lorna Gillies, 'Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I: Back to the Drawing Board?' (2012) 8 *Journal of Private International Law* 489.

²⁶⁰ Weber (n 256) 641.

²⁶¹ In addition to Johannes Weber, another powerful defence of total harmonisation of the rules regarding foreign defendants comes from Burkhard Hess, 'The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission's Proposed Recast' (2012) 49 *Common Market Law Review*.

from adoption.²⁶² As a compromise, the jurisdictional rules concerning certain consumer contracts,²⁶³ employment contracts,²⁶⁴ exclusive jurisdiction²⁶⁵ and choice of court²⁶⁶ are now applicable regardless of the defendant's domicile. Since the negotiation process within the Council took place behind closed doors, there is little information indicating the political rationale behind this watered-down compromise of the ambitious original proposal. Nonetheless, some hints as to the motivations of blocking countries can be extracted from the *amici curiae* briefs filed by the governments of the UK and the Netherlands²⁶⁷ in support of defendants in *Kiobel*, just a few months after the recasting process of the Brussels Regulation. There, they contend that:

The Governments have maintained over a long period of time their opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged activities in foreign jurisdictions that caused injury. This position is not one that has been lightly adopted by the Governments. It is based on their concern that such exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts.²⁶⁸

Such concerns over jurisdictional overreach in violation of international law may or may not have been exaggerated in the *Kiobel* context, but they are definitely uncalled for

²⁶² Peter Arnt Nielsen, 'The New Brussels I Regulation' (2013) 50 Common Market Law Review 503, 512–513.

²⁶³ Brussels I Recast (n 80) Article 18(1).

²⁶⁴ *ibid* Article 21(2).

²⁶⁵ *ibid* Article 24.

²⁶⁶ *ibid* Article 25.

²⁶⁷ Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Respondents (3 February 2012). *Kiobel* (n 52). Available at <<https://harvardhumanrights.files.wordpress.com/2012/02/brief-of-the-governments.pdf>> accessed 16 May 2021.

²⁶⁸ *ibid* [2].

in relation to *forum necessitatis*, as academics have been eager to point out.²⁶⁹ Given the lacking persuasiveness of the international law defence, one might rightly question the authenticity with which it is employed. Rather than a genuine worry over impinging on others' sovereignty, it has been suggested that home states are driven by vested economic and political interests in shielding their corporations from civil liability.²⁷⁰

2. Environmental Due Diligence and Civil Litigation – Towards a Synergistic Conception

One decade after the Commission proposal, the policy and litigation landscapes have altered significantly. Except for the United Kingdom, no Member State had a significant record of transnational rights litigation at the time of adoption of the Brussels I Recast Regulation in 2012. Those policy debates had therefore largely taken place in a hypothetical realm. In addition to the thorny legal problems having since arisen in case law, the discourse on business and human rights has exploded during the past decade in terms of academic attention, social activism, and legislative activity, as described in chapter two.

In light of this renewed normative debate, the lack of political will to extend jurisdiction during the recast negotiations can hardly be interpreted to have closed the door permanently. Although civil litigation mechanisms are widely recognised to play a role in enforcing existing soft and hard law obligations,²⁷¹ current discussions have largely been tied to substantive 'due diligence' reform and legislation.²⁷² According to this binary

²⁶⁹ Lucas Roorda and Cedric Ryngaert, 'Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters' in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction: Which Way Forward?* (Brill Nijhoff 2020). In the US, the international law defence against extraterritoriality is also known as the doctrine of international comity, see, Joel R Paul, 'The Transformation of International Comity' (2008) 71 *Law and Contemporary Problems* 19.

²⁷⁰ Sara Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining' (2008) 11 *Yale Human Rights and Development Law Journal* 177.

²⁷¹ Daniel Augenstein, 'Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union' (2018) 9 *Global Policy* 254.

²⁷² Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 *European Journal of International Law* 899; Nicolas

narrative, legislators wishing to address transnational corporate wrongdoing have two options at their disposal: (1) expanding their general laws of civil procedure so as to allow for jurisdiction over extraterritorial environmental harm, e.g., through a *forum necessitatis/connexitatis* rule, or (2) equipping substantive due diligence legislation with a civil litigation mechanism. Both pathways ultimately conflate the private international law understanding of jurisdiction with thicker public law considerations, but they do so in different ways.

Within an EU context, some guidance as to the core policy choices in designing transnational liability instruments can be extracted from domestic examples. After years of political haggling, France now subjects large companies to stringent due diligence obligations in its Duty of Vigilance Law of 2017.²⁷³ The law requires companies to draw up, publish, and implement a comprehensive vigilance plan in order to identify and prevent human rights and environmental harm. Notably, these obligations are not restricted to the company's own activities, but extend to subsidiaries and suppliers under its *de facto, de jure*, or contractual control. In order to ascertain compliance, courts may impose injunctions at the request of any interested party.²⁷⁴ In addition, the law amends the French Commercial Code with Article L.225-102-5 to introduce a civil liability regime that can be accessed by victims of violations of vigilance duties. By virtue of its connection to the domestic duty of care, Article L.225-102-5 voids such litigation of jurisdictional hurdles—the link to French courts is provided by the control exercised by the French company over its

Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 *International & Comparative Law Quarterly* 789; Weller and Pato (n 53).

²⁷³ Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317.

²⁷⁴ Cannelle Lavite, 'The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence' (*Verfassungsblog*, 16 June 2020) <<https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/>> accessed 16 May 2021.

international operations. As such, it lifts the ‘corporate veil’ to assimilate the liability regime with the economic realities.²⁷⁵ Nonetheless, the law only encompasses failures to implement a vigilance plan. Since the latter only constitutes a duty of means, it may turn out excessively difficult for claimants to prove that companies failed to take all steps in their power to prevent harm.²⁷⁶ It is therefore unsurprising that no civil liability case under Article L.225-102-5 has been filed to date.²⁷⁷

In order to avoid this shortcoming of the French law, the Swiss Responsible Business Initiative, a popular initiative aimed at amending the Swiss constitution, foresaw a strict liability rule in cases where a controlling organisation was responsible for harm arising out of a controlled company’s operations. Contrary to the French rule, this provision shifted the burden of proof to the defendant, who could then invoke due diligence as a defence to free itself of liability.²⁷⁸ In a referendum on 29 November 2020, the Swiss population narrowly voted in favour of the proposed constitutional amendment, but the law failed to garner the necessary support among the cantons, the country’s powerful subnational units. As a result, the parliamentary counterproposal—a watered-down version of the popular initiative without civil liability mechanisms—will likely come into force within the next years.²⁷⁹

²⁷⁵ Claire Bright, ‘Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Duty of Vigilance Law the Way Forward?’ (2020) EUI Working Paper <<https://cadmus.eui.eu/handle/1814/65957>> accessed 16 May 2021.

²⁷⁶ Almut Schilling-Vacaflor, ‘Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?’ (2021) 22 Human Rights Review 109.

²⁷⁷ However, the first cases for injunctions under Article L.225-102-4 have been launched and ruled upon. See, Rebecca Rosman, ‘French Judges Tilt in Favour of Total in Landmark Ruling’ (*Al Jazeera*, 30 January 2020) <<https://www.aljazeera.com/economy/2020/1/30/french-judges-tilt-in-favour-of-total-in-landmark-ruling>> accessed 16 May 2021.

²⁷⁸ Bueno and Bright (n 272) 804–806.

²⁷⁹ Noele Illien, ‘Plan to Hold Corporations Liable for Violations Abroad Fails in Switzerland’ (*The New York Times*, 29 November 2020) <<https://www.nytimes.com/2020/11/29/world/europe/switzerland-vote-referendum-corporate-responsibility.html>> accessed 16 May 2021.

In contrast to the French and Swiss policies that aim at creating new substantive obligations, a reform of the Brussels I Regulation along the lines suggested in the 2010 Commission Proposal seeks to empower victims of transnational harm by establishing a direct and accessible gateway to the European courts.²⁸⁰ There are plausible arguments in favour of such an approach over a due diligence spin-off. For instance, it would feed into ongoing trends of harmonising civil procedure across the Union through private international legal instruments.²⁸¹ A coherent procedural reform could also establish uniform legal expectations and risks for European businesses and claimants alike. As a cross-sectoral instrument, amending the *forum* rules provides for a flexible basis upon which any meritorious claim could theoretically succeed, regardless of its pedigree. In relation to transnational environmental harm, which tends to be polycentric and may not neatly fit due diligence categories,²⁸² this flexibility in accommodating different types of claims appears particularly valuable. There is a real danger that exclusive reliance on corporate duties of vigilance may cast too narrow a scope to capture the complexity of environmental damage resulting from business activities. On the flipside, litigation only provides an *ex post* mechanism to remedy harm that has already occurred. Its functionality in deterring environmental wrongdoing in the first place seems inferior to the comprehensive obligations of precautionary conduct imposed under the due diligence approach.

Of course, the decisive element in *forum necessitatis/connexitatis* legislation concerns the presence of a ‘sufficient connection’ of the claims to the domestic territory—indeed,

²⁸⁰ For the increasingly salient external relation dimensions of EU private international law in general, see, Alex Mills, ‘Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local’ (2016) 65 *International & Comparative Law Quarterly* 541.

²⁸¹ Kramer (n 55).

²⁸² Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases & Materials* (2nd edn, Oxford University Press 2019) ch 2. In relation to climate change, this argument is fleshed out in, Fisher, Scotford and Barritt (n 2).

this is a perennial issue in territorial jurisdiction more generally.²⁸³ The 2010 Commission proposal mysteriously did not specify what constitutes a ‘sufficient connection’, leaving it to the CJEU and domestic courts to carve out the details of this requirement. In both *Vedanta* and *Akpan*, the courts recognised such a link chiefly by virtue of the home corporations’ control over their subsidiaries’ activities in host states. This stance is indicative of a circumscribed understanding of ‘connection’ that recognises *de jure* control within corporate groups but fails to extend similar considerations to cases of *de facto* (e.g., purchasing or contractual) control over actors downstream the supply chain. Arguably, such an interpretation is out of touch with the economic realities of all-powerful TNCs, whose leverage extends far beyond formalised channels of ownership and control. In fact, this very disbalance is recognised in the growing number of due diligence laws, as the French and Swiss examples highlight.

The underlying predicament facing legal reform is thus that due diligence legislation runs danger of curtailing the scope private litigation, whereas procedural reform alone does not tackle the all-important question of a ‘sufficient connection’ to the home forum in addition to bare necessity.

To resolve this dilemma, we must understand these legislative pathways not as mutually exclusive alternatives, but as complementary.²⁸⁴ In order to achieve a shared objective of incentivising environmental care, the alleged breach of authoritatively established duties of due diligence may serve a catalysing function in presenting the sufficient link to activate *forum necessitatis/connexitatis* home state jurisdiction—and, in doing

²⁸³ See, e.g., the famous pronunciation on the topic by the US Supreme Court in *International Shoe Co v Washington* [1945] 326 US 310 [316]: ‘[D]ue process requires only that in order to subject a defendant to a judgment [...], if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”.’ The same question was the central issue at stake in *Kiobel* (n 52).

²⁸⁴ Thomas O McGarity, ‘Regulation and Litigation: Complementary Tools for Environmental Protection’ (2005) 30 *Columbia Journal of Environmental Law* 371; Jack Weinstein, ‘Procedural Reform as a Surrogate for Substantive Law Revision’ (1993) 59 *Brooklyn Law Review* 827.

so, lift one of the core procedural obstacles faced by claimants. Although all eyes currently seem to rest on the supply chain laws underway in various countries, the Business and Human Rights agenda may be better served by additionally amending its private international laws to allow for necessity-based jurisdiction. Laudably, a 2020 draft proposal of the European Parliament regarding the future corporate due diligence directive followed this path and proposed connection- and necessity-based grounds of jurisdiction to the Brussels I Recast Regulation.²⁸⁵ The European Parliament largely adopted these recommendations in form of a resolution on 10 March 2021—without the proposed amendments to the Brussels I Recast Regulation.²⁸⁶

Whether the European Parliament’s resolution remains the final word in the heated policy debates is uncertain. More generally, the high pace of regulatory change and the dismantling of long-standing paradigms suggest that even educated guesses may soon fall prey to changing political tides. Aside from the methodological challenges discussed in the introduction, this leaves a mark on the substance of the law. A re-politicisation of transnational economic and social structures in relation to the natural environment has made corporate accountability regimes a rewarding and pertinent, but also a difficult and volatile object of legal scholarship. Paradoxically, that volatility stands in sharp contrast to the protracted and lengthy legal proceedings observed in the previous chapter. The current state of affairs thus exhibits an unsettling tension that creates legal uncertainty for all actors involved.

²⁸⁵ European Parliament, ‘Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability’ (11 September 2020) 2020/2129(INL) <[https://www.europarl.europa.eu/RegData/commissions/juri/projet_rapport/2020/657191/JURI_PR\(2020\)657191_EN.pdf](https://www.europarl.europa.eu/RegData/commissions/juri/projet_rapport/2020/657191/JURI_PR(2020)657191_EN.pdf)> accessed 16 May 2021. For a critical comment on the draft proposal, see Chris Thomale, ‘Chris Thomale on the EP Draft Report on Corporate Due Diligence’ (*Conflict of Laws*, 27 October 2020) <<https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/>> accessed 16 May 2021.

²⁸⁶ Thalia Kruger, ‘European Parliament Resolution on Corporate Due Diligence and Corporate Accountability’ (*Conflict of Laws*, 14 April 2021) <<https://conflictoflaws.net/2021/european-parliament-resolution-on-corporate-due-diligence-and-corporate-accountability/>> accessed 16 May 2021.

3. Domestic Courts and Global Environmental Governance: The Beginning of a Beautiful Friendship?

The picture painted thus far has been a rather fine-grained one. It depicts the legal and factual particularities faced by litigants when seeking redress for environmental wrongs in a foreign forum. Drawing on this, I have suggested that part of the jurisdictional mess should be reformed at a European level so as to harmonise the national patchwork, clarify legal expectations, and boost transnational access to justice. All of this has hinged on the individual and collective rights pursued in litigation—with the aim of achieving compensation, injunctive relief, or some pronouncement of wrongdoing and recognition of harm.

But there is another story to be told about this kind of litigation, one that only emerges when zooming out to contemplate the picture from afar. Contrary to more traditional fields, the distinction between law and policy is blurred in transnational environmental law.²⁸⁷ The judges in *Vedanta* and *Akpan* are not operating in a purely legal universe. Through the innovative use of doctrine, they are subtly weighing in on the normative debate surrounding corporate accountability. Indeed, both rulings are likely to change the operations of large companies to shield themselves from environmental liability risks.²⁸⁸ I do not mean to suggest that this process is necessarily deliberate or even conscious. But when adjudicating disputes centred elsewhere in the world, domestic courts inevitably become co-opted in the political and regulatory struggle for effective global

²⁸⁷ Veerle Heyvaert, 'The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation' (2017) 6 *Transnational Environmental Law* 205.

²⁸⁸ Peter Nestor and Jonathan Drimmer, 'How Companies Should Respond to the Vedanta Ruling' (*BSR Blog*, 30 April 2019) <<https://www.bsr.org/en/our-insights/blog-view/how-companies-should-respond-to-the-vedanta-ruling>> accessed 16 May 2021.

governance.²⁸⁹ Ostensibly, the choices they make have ripple effects beyond the affected litigants. As Christopher Whytock observes:

Domestic court decisions affect the behavior of transnational actors, including strategic behavior such as transnational bargaining and forum shopping. These decisions can either increase or reduce global economic welfare. They also can either foster or hinder the effectiveness of international institutions, such as international law and international courts, and private institutions, such as transnational contracting and transnational arbitration.²⁹⁰

In this sense, extraterritorial jurisdiction performs a vital role in judicialising and de-politicising environmental governance by re-allocating legal authority over environmental problems.²⁹¹ In addition, it provides an attractive route around shortcomings of global and national frameworks, particularly where there is lacking consensus and/or lacking political will to address specific manifestations of environmental harm.²⁹² Adjudicative jurisdiction thus reaches into the more troubled waters of its prescriptive cousin by conflating the worlds of private law and public governance.²⁹³ Naturally, this begs the legitimacy question:²⁹⁴ should judges police the environmental impact of corporate activities worldwide, or—to put it in the words of Dan Bodansky—

²⁸⁹ The political science literature is fraught with models that attempt to capture the ‘multi-levelness’ and ‘post-sovereign’ character of contemporary environmental governance. See, e.g., Joanne Scott, ‘Multi-Level Governance of Climate Change’ (2011) 2011 *Carbon & Climate Law Review* 25; Liesbet Hooghe and Gary Marks, ‘Unraveling the Central State, but How? Types of Multi-Level Governance’ (2003) 97 *The American Political Science Review* 233; Bradley C Karkkainen, ‘Post-Sovereign Environmental Governance’ (2004) 4 *Global Environmental Politics* 72.

²⁹⁰ Christopher A Whytock, ‘Domestic Courts and Global Governance’ (2009) 84 *Tulane Law Review* 67, 72.

²⁹¹ *ibid.* See also more generally Louis J Kotzé and Alexander R Paterson, *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International BV 2009).

²⁹² Gregory Shaffer and Daniel Bodansky, ‘Transnationalism, Unilateralism and International Law’ (2012) 1 *Transnational Environmental Law* 31.

²⁹³ Horatia Muir Watt and others (eds), *Global Private International Law: Adjudication without Frontiers* (Elgar 2019); Whytock (n 290).

²⁹⁴ Steven Bernstein, ‘Legitimacy in Global Environmental Governance’ (2004) 1 *Journal of International Law and International Relations* 139.

‘what’s so bad about unilateral action to protect the environment?’²⁹⁵ Two corollaries may be deduced from this question. The first concern arises over European courts’ international legitimacy: is their new-found fondness for extraterritoriality all but an imperial encroachment on other states’ affairs in a new guise? In addition, there is also a concern about democratic legitimacy—why should it be courts, rather than the executive or legislative branches, who get to decide on important questions of corporate conduct and environmental harm? There are no obvious or easy answers to either question, but the following sections attempt a first sketch delineating why and when courts’ interference with foreign environmental affairs may be legitimate.

3.1 *International legitimacy*

With regards to the first concern, Sara Seck draws on the critical ‘Third World Approaches to International Law’ school to argue that the legitimacy of such interventions is contingent upon the extent to which they give a voice to—and respect the voice of—subaltern claimants from the Global South.²⁹⁶ Civil adjudication may nominally provide such a procedural avenue for empowering local communities, but there are often insurmountable extra-legal hurdles diminishing its potential. For starters, the legal transaction costs surveyed in the preceding chapter prevent many materially underprivileged claimants from accessing European court systems. Beyond financial impediments, such claimants are likely to lack the knowledge and understanding of European judicial institutions required to bring proceedings. Even if and once an action has been initiated, victims’ unique and subjective experiences of suffering need to be translated into the legal grammar of the Northern system, which frames the dispute

²⁹⁵ D Bodansky, ‘What’s so Bad about Unilateral Action to Protect the Environment?’ (2000) 11 *European Journal of International Law* 339.

²⁹⁶ Seck, ‘Home State Responsibility and Local Communities’ (n 270); Sara Seck, ‘Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations’ (2011) 3 *Trade, Law & Development* 164; Sara Seck, ‘Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?’ (2008) 46 *Osgoode Hall Law Journal* 565.

regardless of later rulings on applicable law. What is more, this exercise of translation often occurs against the backdrop of an epistemological abyss separating Southern and Northern ways of knowing and experiencing the world.²⁹⁷ In order to overcome these financial, practical, and epistemic hurdles, victims are crucially dependent on Northern NGOs and law firms who are capable and willing to take their cases. Many potential claimants will simply fail to pass this first stage of garnering Northern support. Even where a relationship between claimants and their representatives is established, it is invariably one marked by dependency and stark power imbalances. This dynamic becomes all the more problematic where the interests of both parties diverge—for example, it may be beneficial for claimants to settle a case and receive the cash-out, whereas NGOs or activist lawyers often prefer a substantive judgment that can only be attained at the merits stage. This is not to say that extraterritorial court jurisdiction is an ineffective regulatory tool—it may well be the case that the mere risk of liability deters companies from engaging in environmentally harmful behaviour. But it is clearly a poor instrument for attaining environmental justice and empowering victims.

Whereas Seck's focus lies on legitimacy vis-à-vis foreign claimants, that issue is largely separate from the international *legality* of unilateral court interventions against foreign states. For instance, in *Vedanta* the claimants sought to bring their case in the UK, whereas the Zambian attorney general was keen to see it referred to the Zambian courts. These conflicts between foreign claimants and foreign state institutions are built into much of transnational environmental litigation. Ostensibly, claimants often choose to go the extra mile and seek judicial redress in a foreign country *because* of the perceived or real deficiencies of the domestic court system. Within the purview of public international law,

²⁹⁷ Among the leading theorists on this abyssal rift is Portuguese sociologist Boaventura de Sousa Santos. See Boaventura de Sousa Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) 30 *Review (Fernand Braudel Center)* 45; Boaventura de Sousa Santos, 'The Resilience of Abyssal Exclusions in Our Societies: Toward a Post-Abyssal Law' (2017) 22 *Tilburg Law Review* 237.

however, civil adjudicatory jurisdiction is only lightly curtailed by the doctrine of state sovereignty, as Lucas Roorda and Cedric Ryngaert meticulously point out.²⁹⁸ Foreign states' allegations of illegitimate meddling thus have little currency in terms of settled international law. Some scholars go beyond the boundaries of positive international law in arguing that environmental protection has become so universal an interest that it amounts to an *erga omnes* obligation,²⁹⁹ and by its corollary, that violations of that obligation may be redeemed by unilateral intervention.³⁰⁰ The judgments in *Vedanta* and *Akpan* show that courts are acutely aware of the international legitimacy problem, to the extent that Coulson J sought to dispel any allegations of 'colonial condescension' in *Vedanta*.³⁰¹ The downfall of *forum non conveniens* in Europe, however, largely eliminated deference to foreign states and their judicial systems as a matter of international comity. As a result, courts are left with little discretionary space for factoring in the international *legitimacy* of their activities beyond questions of *legality*.

3.2 *Separation of powers*

Concerns over legitimacy also arise with respect to the judiciary's authority in deciding on questions of transnational environmental governance that could more adequately be

²⁹⁸ Roorda and Ryngaert (n 269) 93: 'Provided that such [extraterritorial adjudicatory] jurisdiction has a legal basis in domestic private law, home States actually exercising it are unlikely to step beyond the limits of jurisdiction under public international law. This is in line with our aforementioned general position that, in practice, public international law does not tend to constrain the exercise of adjudicatory jurisdiction in civil matters. Home State adjudicatory jurisdiction may at times even be preferable to host State jurisdiction, although it may go too far to state that there is an obligation under current public international law to provide access to court for foreign plaintiffs in respect of extraterritorial human rights harm.'

²⁹⁹ Robinson remarks that the recognition of such an obligation within the 'coming years' is 'realistic' rather than 'optimistic'. Nicholas A Robinson, 'Environmental Law: Is an Obligation Erga Omnes Emerging?' (IUCN 2018) <https://www.iucn.org/sites/dev/files/content/documents/2018/environmental_law_is_an_obligation_erga_omnes_emerging_interamcthradvisoryopinionjune2018.pdf> accessed 16 May 2021.

³⁰⁰ Joel Colón-Ríos, 'Constituent Power, the Rights of Nature, and Universal Jurisdiction' (2014) 60 McGill Law Journal / Revue de droit de McGill 127. He contends that nature's constitutive function for humanity justifies the exercise of universal jurisdiction over serious environmental harm.

³⁰¹ *Lungowe* (n 132) [198].

addressed through diplomatic channels, or by means of legislative action. Despite legislatures' lamentable inertia in addressing transnational harm, it may rightly be asked why environmental *adjudication* should be spearheading policy action in the field. After all, judges are unelected decisionmakers whose own political convictions weigh in on their judgements as a matter of fact.³⁰² These debates over separation of powers are not new, but as the environmental agenda gains increasing political traction and authoritative enforcement, the legitimacy issue looms larger than ever before—a challenge that many scholars have addressed head on. For example, with regards to climate litigation, Laura Burgers engages Jürgen Habermas's political theory of deliberative democracy in arguing that environmental rights to a sound environment are so constitutive of and fundamental to our democratic system that their protection by courts—even against the opposition of majoritarian institutions—is sufficiently legitimised.³⁰³ Ceri Warnock similarly observes with respect to specialist environmental courts that legitimacy is constructed through an interactional process in which judges respond to the nature of environmental problems, acknowledge their complexity, and develop a legal toolkit that can address these challenges.³⁰⁴

In relation to private law litigation, it is often assumed that concerns over separation of power feature less prominently than in such cases with a substantial public law component, given that the empire of tort law is believed to be firmly rooted in the judicial power. This is not necessarily true. The tort paradigm has proven to be a flexible

³⁰² This departure from the ideal of judicial impartiality is also present in environmental litigation. Chelsea Liu, 'Judge Political Affiliation and Impacts of Corporate Environmental Litigation' (2020) 64 *Journal of Corporate Finance* 101670. On the attitudinal model of judicial decision-making more generally, see Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002).

³⁰³ Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 *Transnational Environmental Law* 55.

³⁰⁴ Ceri Warnock, 'Reconceptualising Specialist Environment Courts and Tribunals' (2017) 37 *Legal Studies* 391; Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart Publishing 2020).

one that theoretically lends itself to all kinds of disruptive judicial activism.³⁰⁵ Rather than ducking their uncomfortable might, however, Benjamin Ewing and Douglas Kysar suggest that courts should live up to their institutional responsibility vis-à-vis other branches by engaging with complex issues of environmental causation, attribution, and liability at the merits stage, ‘even—and sometimes precisely—when they must reject allegations of harm because they do not fit the scheme of proof and liability established by tort’.³⁰⁶ Courts’ constitutional mandate does not only require them to ‘check and balance’ against executive and legislative overreach, it also empowers the judiciary to ‘prod and plead’ with the other branches where a social ill is left unaddressed and demands attention. If conceived in this way, the English and Dutch courts were not so much creating global standards of conduct for corporations as they were ‘prodding and pleading’ for legislative action to address the pervasive issue of transnational environmental harm, thereby fulfilling their constitutional task to spotlight a regulatory gap.

³⁰⁵ For instance, the landmark ruling in *Urgenda* (n 25)—essentially a tort law case—was met with fierce criticism over perceived judicial overreach or worse, ‘judicial activism’. Bernhard W Wegener, ‘Urgenda – World Rescue by Court Order? The “Climate Justice”-Movement Tests the Limits of Legal Protection’ (2019) 16 Journal for European Environmental & Planning Law 125.

³⁰⁶ Benjamin Ewing and Douglas Kysar, ‘Prods and Pleas: Limited Government in an Era of Unlimited Harm’ (2011) 121 Yale Law Journal 356.

CONCLUSION

The global reach of transnational business operations often produces dire consequences for local environments and for those reliant on them. Judicial bodies have struggled to address such harms through civil remedies. Local courts are frequently unwilling or incapable of resolving these disputes, whereas the courts in TNC's home jurisdictions are restricted in their geographical reach by public and private international law in general, and by the principle of territorial jurisdiction in particular. And yet, these legal shackles seem to be eroding at the base. Victims of environmental harm have challenged European courts to open their gates to transnational claims and expand their jurisdictional authority by strategically engaging the thick mesh of jurisdictional laws contained within the European and national legal systems. Crucially, this creeping process has so far largely been driven by litigation, rather than legislation, although it currently seems that legislatures are waking up from a slumber of inertia and inaction.

In this thesis I have attempted to offer a nuanced and detailed description of the jurisdictional challenges inherent in the legal remediation of transnational environmental harm. The two landmark rulings under study indicate that these challenges are neither uniform nor peripheral. Rather, the question of jurisdiction is central to the outcome of these disputes and to a clarification of corporations' due diligence duties more generally. Nevertheless, *Vedanta* and *Akpan* cannot be read as a user manual for addressing the corporate Anthropocene, which raises a host of legal questions that go far beyond questions of adjudicative authority.

It is important to distinguish this descriptive finding from prescriptive pronouncements, although the two are often being conflated in the literature. Some analysts seem to endorse the view that the extraterritorial trend in court jurisdiction is desirable only because it is occurring. Quite the opposite is true. Courts' co-optation in the global environmental governance landscape may serve an important regulatory function, but the

struggles courts confront when constructing extraterritorial jurisdiction also point to fundamental issues of international and democratic legitimacy in doing so. These issues cannot be easily eradicated by appeals to ‘selflessness’ and cosmopolitan ideals, even though the normative and legal frameworks in which they are embedded seem to be evolving in quantum leaps. In full consciousness of this dilemma, I have suggested that there are convincing reasons for the EU to facilitate transnational environmental litigation by establishing a *forum necessitatis* or *connexitatis* rule. To unleash its full regulatory potential such a mechanism is best viewed in conjunction with corporate due diligence obligations that serve to strengthen the legitimacy of extraterritorial jurisdiction and clarify the scope and content of environmental rights and duties across borders.

Admittedly, an MPhil thesis can only ever offer a narrow snapshot of the legal richness of institutions and analyses in the field of transnational environmental litigation. My analysis thus hopefully opens up a range of related research avenues worth pursuing. For instance, a core question that I have addressed only tangentially is whether tort law is the right tool at all for preventing environmental harm of the sort discussed.³⁰⁷ A connected but logically distinct query concerns the focus on individual and collective rights that is emphasized under a private law paradigm. This rights perspective offers an inherently anthropocentric approach to the question of corporate pollution, one that fails to capture non-human or less salient types of suffering.³⁰⁸ Presumably, there are innumerable cases in which transnational environmental harm is so diffuse as to not affect

³⁰⁷ See, e.g., Michael Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer’ (2001) 41 Washburn Law Journal 399; Keith Hylton, ‘When Should We Prefer Tort Law to Environmental Regulation?’ (2002) 41 Washburn Law Journal 515; Benjamin Ewing, ‘The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility’ (2015) 8 Journal of Tort Law 1; Robert L Rabin, ‘Environmental Liability and the Tort System’ (1987) 24 Houston Law Review 27.

³⁰⁸ Colin Reid, for example, contends that environmental protection may be more effectively conceived of as a ‘trump card’ that has priority over other rights. Colin T Reid, ‘Pitfalls in Promoting Environmental Rights’ in Sanja Bogojević and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018).

any one group of persons' rights substantially but where the natural environment is severely impacted nonetheless.³⁰⁹

Finally, commentators invariably boggle at the effectiveness question: Is transnational environmental litigation against corporate actors actually any good? Answers to this question habitually fall into two camps. On the one hand lies the regulatory, forward-looking understanding of effectiveness whose yardstick is measurable change in corporate attitudes and behaviour. There are few systematic studies that have attempted to answer this question, but preliminary evidence suggests that businesses do adapt their policies and internal structures in the wake of high-profile litigation.³¹⁰ Whether this is just window-dressing or has tangible effects is another issue requiring further research.³¹¹

On the other hand, effectiveness may also be understood from a backward-looking perspective and measured by the degree of attainment of environmental justice. A closer look at the three cases studied intimates that litigation has not fared so well in this respect. First, the temporal dimension deserves critical highlighting. In *Vedanta*, *Akpan*, and *Linyu*, the litigated environmental harm occurred many years ago and the aggrieved claimants have had to endure the adverse consequences ever since, while awaiting the outcome of protracted legal battles thousands of kilometres away from their daily lives and concerns. In keeping with a proverbial wisdom, justice delayed may well be experienced as justice denied. Second, the remedies available in tort may be insufficient to address the scale of suffering and misery imposed by severe environmental harm. Complete environmental

³⁰⁹ Such harm may also escape the legal confines by virtue of its 'slow' and creeping nature, see Nixon (n 31).

³¹⁰ For an example from business and human rights more generally, see Judith Schrempf-Stirling and Florian Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies' (2017) 145 Journal of Business Ethics 545.

³¹¹ Against the backdrop of the perceived inadequacy of adjudicative institutions, Jeffrey Bone has suggested a non-judicial grievance mechanism to mediate between extractive business practices and local communities Jeffrey Bone, *Governing the Extractive Sector: Regulating the Foreign Conduct of International Mining Firms* (Hart Publishing 2020).

restoration is often impossible to bring about, and economic compensation is a painfully inadequate tool for quenching affected communities' thirst for environmental justice. Even though the Nigerian and Zambian claimants ultimately succeeded in their cases against Vedanta and Shell, the monetary relief attained fades in comparison to the existential harm endured. Third, as argued in the previous section, pursuing litigation in the Global North forces subaltern communities' grievances into the legal and cultural frames available in a foreign jurisdiction that is utterly oblivious to their concrete plight. Seen from this perspective, Northern adjudication over transnational environmental harm exercises a type of epistemic violence that silences and suppresses the experiences of affected claimants and opens new sites of post-colonial domination.³¹² In order to shine a brighter light on this understudied and overlooked aspect of transnational environmental law, scholars need engage with its 'missing people'³¹³ through socio-legal and anthropological approaches.³¹⁴

Transnational environmental litigation is thus no 'magic wand'³¹⁵—neither in the regulatory sense nor for the delivery of substantial justice. Embracing this fact and enriching current conversations with critical voices is a core responsibility of scholars going forward on the ever-stony, yet indispensable path towards rendering our legal institutions fit for the corporate Anthropocene.

³¹² Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers 2014).

³¹³ Natasha Affolder, 'Transnational Environmental Law's Missing People' (2019) 8 *Transnational Environmental Law* 463.

³¹⁴ For a laudable first venture into this field, see Angela Lindt, 'Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?' (2020) 4 *Journal of Legal Anthropology* 57.

³¹⁵ Fisher (n 11) 127.

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