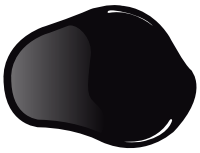
CORPORATE IMPUNITY WITH REGARDS TO HUMAN AND ENVIRONMENTAL RIGHTS VIOLATIONS



THE CHEVRON CASE :

AS A PARADIGM FOR THE NEED OF BINDING RULES TO GUARANTEE THE RIGHT OF ACCESS TO JUSTICE FOR THE VICTIMS OF CORPORATE CRIMES

Executive Summary

Access to reparation mechanisms in the event of human rights violations is a fundamental requirement that continues to raise many questions, especially in the context of the relationship between business and human rights. Obstacles to accessing reparation mechanisms, and access to justice in particular, continue to render victims defenceless whilst the culprits go unpunished.

This situation stems from numerous causes. On the one hand, States are still failing to adopt the necessary reparation mechanisms, both at national and international level, which would avoid the scenario in which the culprits go unpunished and victims are left defenceless. On the other hand, and in view of States' partial or total inability to act, multinational corporations are deploying various strategies, both legal and organisational, to evade their responsibilities in redressing any human rights violations that they may be found to commit. Among the strategies that these corporations use to circumvent the upholding of human rights, particular mention may be made to the prerogatives that trade and investment agreements grant in recognition of foreign investors, especially through the inclusion of Investor-State Dispute Settlement (ISDS) mechanisms. When combined, these factors trigger a "legal armour" effect which can bestow complete impunity upon economic players for any human rights violations they commit.

The existence of a series of Principles and Declarations that set out, in a non-binding manner, States' responsibility to put in place effective reparation mechanisms for human rights has not brought about any improvement in the situations of thousands of victims who, as seen in the Chevron case, have been pursuing effective reparations for decades without success. In fact, the particularly underdeveloped obligations that fall within what is known as the "Third Pillar" of guiding principles on corporate responsibility to respect human rights has been extremely well documented.

Thus, the current relationship between human rights and business reveals an alarming paradox: certain rights, such as access to justice, designed to protect human rights as a whole, are being used to full effect to safeguard the profits of economic entities. This recognition of new rights for economic players has not been accompanied by the corresponding obligations, and it is well known that in the international sphere there is no standard that establishes, in a generalised manner, obligations for economic players to respect human rights.

What is known as the "Chevron Case" is a prime example of the association between disaster, impunity and defencelessness. The human and environmental disaster which occurred in the Ecuadorian Amazon was caused by almost thirty years of toxic waste being dumped thanks to a multinational company's extraction activities. The oil company's constant and deliberate activities, and in particular their extraction model, destroyed a vast expanse of the Ecuadorian rainforest. It was an unprecedented corporate crime which affected the air, water and soil, and which led to forced displacement and violated the right to food and health for thousands of indigenous and rural people. Fifty years after "Ecuadorian Chernobyl" first began, the effects can still be seen in the Rainforest and in the health and the lives of its inhabitants.

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For 25 years, over 30,000 inhabitants of the Ecuadorian Amazon have been waging a legal battle against Chevron, in a journey that has been full of unprecedented obstacles in accessing justice and extremely complex overlapping trials. The Aguinda case, the first complaint from victims against Chevron, started as a class action in New York in 1993 and ended in 2002 with a judge's decision to refer the case back to Ecuador, applying the forum non conveniens doctrine. The corporation's strategy for avoiding North American jurisdiction proved successful but the price was pledging to accept Ecuadorian jurisdiction. The same claimants appeared before the Ecuadorian courts during the following year and continued their lawsuit against Chevron, now known as the Lago Agrio case. The name derives from the city that is home to the Provincial Court of Sucumbíos, which was the first court to rule against Chevron in 2011, a sentence which was ratified in 2012. Subsequently, the company lodged an appeal against the sentence, amounting to 9.5 billion dollars, which was thrown out by the National Court of Ecuador in 2013. Chevron also lost its case before the Constitutional Court

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which, with its July 2018 sentencing, concluded the trial in Ecuador once and for all.

Despite the fact that the final ruling was passed in 2012, it was never enacted. Chevron left Ecuador in 1992 leaving behind just 360 US in its bank accounts. For this reason, and with the aim of obliging the company to pay the compensation owed, the claimants were forced to seek execution of the sentence in the countries where Chevron had been found to have assets. Efforts were made to have the sentence recognised and enacted in Brazil, Argentina and Canada but the company was never caught: the setting up of various company structures, subsidiaries and fictitious companies in different countries, combined with Chevron's constant interfering with the process, political lobbying and corporate capture continue to impede effective remediation. Clearly, the judicial history of the Chevron case demonstrates that the multinational corporation has availed itself of all types of legal strategies to place obstacles in the way of their victims in the Amazon accessing justice. The 'forum non conveniens' doctrine aimed at avoiding extraterritorial law enforcement has been the most effective method of preventing courts in the company's country of origin from hearing the case. The drawing of the corporate veil and company latticework have been options that Chevron has resorted to repeatedly to shelter its capital from attempts to enforce a final ruling.

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The history of obstacles, however, stretches beyond those put in place by the company to prevent the victims taking legal action against it. Chevron countered with an offensive, by waging corporate warfare against the State of Ecuador and against the victims, their lawyers and representatives, who had garnered support from over two thousand lawyers and lobbyists along the way.

On the one hand, in 2011, Chevron launched a direct attack on the victims' lawyers and representatives, whom the company was suing in the United States under the Racketeer Influenced and Corrupt Organisations Act (known by its acronym RICO), accusing them of extortion.

On the other hand, and of fundamental importance, Chevron has been using commercial arbitration mechanisms to protect its interests as a foreign investor in Ecuador since 2004, eluding Ecuadorian justice and hampering access to justice for victims. The company filed three complaints against the State for having violated the Bilateral Investment Treaty signed between Ecuador and the United States. The treaty was signed in 1993 but did not enter into force until 1997, years after Chevron had stopped investing in Ecuador and left the country. In all three cases, use of the investment arbitration mechanism was the company acting in defence, pursuing the objective of using the arbitration route to obtain impunity when faced with repeated sentences from ordinary jurisdiction.

The Chevron III case began on 23 September 2009. This time, the company's fundamental objective was not to press for compensation in the event of a potential conviction in Ecuador's ordinary jurisdiction (in the Lago Agrio case), but rather to ask for the State to intervene by not demanding the implementation of a sentence that was still pending at the time of bringing the arbitration claim. The case generated a huge amount of legal wrangling. The court was considered competent under a treaty that was not in force at the time the investment was made. To that end, it broadened the concept of protected investment to the extent of incorporating it as part of it the signing of a series of contracts between the company and the Ecuadorian Government in power dated 1995, 1996 and 1998. Some contracts, bearing all the hallmarks of corporate capture, committed the company to carrying out minimal reparation works. In exchange for a token amount of clean-up work, irrespective of the scale of the disaster, the State agreed not to bring proceedings against it relating to the well-known and well-documented contamination of the Rainforest. In other words, they were exonerated from all responsibility in the public case being brought against them. At no point, however, did they engage with the cases of private individuals against Chevron.

Considering itself untouchable thanks to these contracts releasing them from responsibility, and protected in the company's opinion by the BIT, Chevron affirmed that the Republic of Ecuador had behaved in an "atrocious and unlawful" manner by allowing the victims to bring their case in Lago Agrio. Subsequently, right in the middle of the trial, the company changed its underlying claim, stating that the sentence should not be carried out because it had dictated by the victims to the judges who were familiar with the case, as part of a corruption plot. The ruling of August 2018 confirmed both the all-encompassing scope of the BIT, the "investment" nature of the contracts signed in the 1990s and the supposed corruption engineered to obtain a sentence that was favourable to the victims in the Lago Agrio case. For these

reasons, the court considered that the State of Ecuador was guilty of denying justice to the company, which violated the contracts clearing them and the BIT. On this basis, the ruling ordered the State of Ecuador, among other measures, to withdraw the "enforceability" of the Lago Agrio sentence (from the first instance through to subsequent rulings); to adopt measures, including against individuals, to prevent the enforcement of part of said judgement, by any means and in any part of the world, and to pay full damages to Chevron for a still undisclosed sum.

According to the content of the ruling, investor rights, enshrined in the BIT, ought to be considered superior and take precedence over the human rights laid down by international treaties or national legislation. This affirmation has extremely serious fallout, both with regard to access to justice for victims as well as respect for Rule of Law in Ecuador and in general respect for the relationship between Human Rights and trade and investment standards.

The 2018 ruling ordered the Republic of Ecuador to adopt a decision which would mean requiring the judiciary to interfere in a case between private individuals. This decision would require the State to come to the defence of one of the parties (the most powerful to be precise; the one that is not a human being), ensuring its assets are untouchable and that it goes unpunished for the crime committed and the flagrant violation of the human right to access justice, and indirectly many others, for thousands of victims. The terms of the ruling collided head on with Ecuador's domestic legal system and the State's international commitments. In order to comply, and faced with the absence of an appropriate legal channel, the State was being asked to contravene its own legislation, its constitution and various provisions under international human rights law, including the most basic legal principles such as the principle of legality, of lex posterior, constitutional supremacy or separation of powers, not to mention respect for national sovereignty. In this respect, the Chevron case proves that even when a multinational company is tried and convicted, even when a State's judiciary can extricate it from the mighty corporate capture of one of the world's most powerful multinationals, reparations can still be thwarted with the use of a parallel avenue, open solely for the defence of corporate interests: the well-known ISDS.

We cannot allow a repeat of the Chevron case. It is imperative to use the lessons learned in the Chevron case to prove the need for a quantum leap and for companies to be disciplined for their actions under the rules of the International Law on Human Rights. This quantum leap, essential for avoiding a repeat of the Chevron case, could be achieved by adopting a Binding Treaty as part of the framework of Resolution 26/9. The role of the European Union in the journey towards a Binding Treaty is fundamental. The Union is linked to the protection of human rights throughout the world and this mandate is defined in its basic values (Article 2 TEU) as well as in its stance on international relations (Article 3.5 and Articles 21.1 and 21.1.b TEU) and in the mandate to promote coherence among the Union's various policies (21.3 TEU). Faced with the clearly insufficient content of the Third Pillar, the European Union must respond to its mandate to promote global human rights, a mandate laid down in its ordinary law, and launch an instrument that will make

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it possible to guarantee respect and reparations alike. Specifically, the process of Resolution 26/9 is currently the only one seeking the introduction of this type of measure with any binding character. The Union must heed the European Parliament (Resolution of 4 October 2018) and re-think its position with regard to the Binding Treaty. Similarly, in the light of the statements issued by government representatives from all of the EU's Member States on the legal consequences of the Achema issue on protecting investments in the European Union, there needs to be a corresponding discussion on its stance with regard to use of ISDS and its consequences on human rights in the rest of the world.

Chevron cannot be allowed to remain unpunished. The battle goes on and the final chapter in the story of the case against Chevron has not yet been penned. It could mark the introduction of a system of (in)justice that would allow multinationals to operate along the fringes of human rights (with the implicit message that it is possible to inflict harm upon the planet and human lives for 30 years and evade all consequences). But it could also mark the beginning of a new age for judicial relations which guarantee that human rights take precedence over investor rights.

Article 3.5 of the TEU does not so much as permit the Union but rather obliges it to defend the environment and Human Rights in the world. In this sense, and whilst still on a declaratory level, the European Parliament would have to issue a critical opinion of the arbitration process and the potentially dire consequences for the victims, for the planet and for all Human Rights.

Complete report (only available in Spanish): https://lolasanchez.eu/