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ARTICLE

Litigating Extraterritorial Nuisances under English Common Law and UK Statute

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Abstract
English common law and United Kingdom legislation provide various – overall liberal – jurisdictional grounds for hearing foreign tort claims. The article examines these grounds with reference to recent and ongoing oil pollution nuisance litigation involving Royal Dutch Shell Plc and its Nigerian subsidiary operating in the Niger Delta. Particular attention is given to the factors taken into account by the court in exercising its discretion to allow service out of the jurisdiction in cases of pollution taking place abroad under the principle of *forum non conveniens*. Following the widely commented decision of the United States Supreme Court in *Kiobel* v. *Royal Dutch Petroleum Corporation*, which ruled against the extraterritorial application of the Alien Tort Statute, it is easy to forget that the rules of jurisdiction vary from country to country and that different legal systems apply similar concepts in often radically different ways. Attention is also given to the future development of English jurisdictional law and practice in the context of environmental nuisance.

Keywords: Extraterritorial environmental litigation, Foreign nuisance, Service out of the jurisdiction, *Forum non conveniens*, Shell, Natural forum

1. INTRODUCTION

English nuisance law is an area of tort law which remedies interferences with the use and enjoyment of land in accordance with the principle of 'good neighbourliness'.[1] For many centuries, it has tackled air and water pollution, with one commentator characterizing it aptly as 'among the earliest forms of environmental protection the world has known'.[2] English nuisance law has historical importance as a mode of

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The authors are grateful to Martyn Day for access to records relating to the unreported Shell nuisance litigation addressed in this article.

1 See, e.g., Lord Millett in *Southwark London Borough Council* v. *Mills* [2001] AC 1, 20 ('Good neighbourliness, involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him').

2 R. Palmer, 'Common Law Environmental Protection: The Future of Private Nuisance, Part 1' (2014) 6(1–2) *International Journal of Law in the Built Environment*, pp. 21–42, at 21. For case studies on the

remedying industrial-scale pollution across 40% of the world's territory during the height of the British empire, often 'supplementing' local laws and regulations to this end.[3] Against this backdrop, this article examines a current problem: English judges sitting in English courts hearing 'foreign' nuisance claims of an environmental nature.[4]

The focus of the discussion is the ongoing extraterritorial nuisance litigation based on the exploitation of oil in the Niger Delta by Shell Petroleum Development Company of Nigeria Ltd (SPDC) and Royal Dutch Shell Plc (Shell)[5] in the English courts (the Shell litigation). This litigation began with a claim brought by 15,000 members of the Ogoni people, whose land and livelihoods were (and continue to be) damaged by oil spills associated with the defendant's works in 2008 and 2009. The claim was initially brought against both Shell and its Nigerian subsidiary, SPDC, in respect of liabilities under English law (in the Shell case) and Nigerian law (in respect of SPDC) but the parties agreed that it would proceed in respect of the subsidiary alone. The claim was settled after a hearing of preliminary issues in *The Bodo Community and Others* v. *Shell Petroleum Development Company of Nigeria Ltd*.[6]

Two further significant group claims were commenced in 2015 by inhabitants of the Ogale and Bille communities, respectively.[7] The claims are against both Shell

application of nuisance law in an environmental setting see B. Pontin, *Nuisance Law and Environmental Protection* (Lawtext, 2013).

3 E.g., in the British Mandate Palestine case of *Heller* v. *Taasiyah Chemith Tel Aviv Co. Ltd* (1944) SCJ 37, Judge Windham granted an injunction against a polluting chemical factory located near Tel Aviv (Israel). He held that Art. 1200 Mejelle Code – the local law addressing nuisance – was supplemented by substantive English common law nuisance provisions and the equitable remedy of an injunction (p. 38). Reference is made to a 'long line of English cases to the effect that it is no defence to a civil action for nuisance to show that the benefit to the general public [of the polluting activity] exceeds the detriment to the plaintiff' (p. 43). See further D. Schorr, 'A Prolonged Recessional: The Continuing Influence of British Rule on Israeli Environmental Law', in D. Orenstein, C. Miller & A. Tal (eds), *Between Ruin and Restoration: An Environmental History of Israel* (University of Pittsburgh Press, 2013), pp. 209–28.

4 Foreign nuisance-like litigation against Shell is not exclusive to England. Four Nigerians and the campaign group Friends of the Earth filed suits in 2008 in The Hague (the Netherlands), where Shell has its global headquarters, seeking reparation for lost income from contaminated land and waterways in the Niger Delta region, the heart of the Nigerian oil industry. The District Court of The Hague ruled that Shell Petroleum Development Company of Nigeria Ltd (SPDC), a wholly-owned subsidiary, must compensate one farmer, but dismissed four other claims filed against the Dutch parent company: *Akpan* v. *Royal Dutch Shell Plc and SPDC*, District Court of the Hague, 30 Jan. 2013, LJN:BY9854, C/09/337050/HAZA 09-1580, available at: http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo; *Dooh* v. *Royal Dutch Shell Plc and SPDC*, District Court of the Hague, 30 Jan. 2013, LJN:BY9854, C/09/337058/HAZA 09-1581, available at: http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-dooh-vs-shell-oil-spill-goi; *Efanga & Oguru* v. *Royal Dutch Shell Plc and SPDC*, District Court of the Hague, 30 Jan. 2013, LJN:BY9850, C/09/330891/HAZA 09-0579, available at: http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-oguru-vs-shell-oil-spill-goi.

5 Royal Dutch Shell Plc is one of the world's largest independent oil and gas companies. Its registered office and place of incorporation are in the UK. It is domiciled in the UK and listed on the Financial Times Stock Exchange (FTSE). It is the parent company of the Shell group of companies (the Shell Group).

6 [2014] EWHC 1973 (Technology and Construction Court (TCC)) (*Bodo Community*).

7 *Lucky Alame and Ors* v. *Royal Dutch Shell Plc and SPDC; His Royal Highness Emere Godwin Bebe Okpabi and Ors* v. *Royal Dutch Shell Plc and SPDC* (unreported leave decisions of His Honour Judge Raeside QC, TCC, 2 Mar. 2016). The discussion of this emerging civil action draws on Claim No. HT-2015-000241, Exhibit DL/1 (Witness Statement of Daniel Learner) and Claim No. HT-2015-000430, Exhibit MD/1 (Witness Statement of Martyn Day). The cases will be referred to as the *Ogale* and *Bille claims*.

at its London address and the subsidiary at its address in Nigeria, for which leave of the court to serve the claim out of jurisdiction was sought and obtained.[8] On this occasion, in contrast to *Bodo Community*, the parties have been unable to agree on the jurisdiction of the English court in respect of the subsidiary. While the claims against Shell are based on the party's domicile in England,[9] the jurisdiction of the English court in respect of the Nigerian subsidiary is contested.

With so much attention given to the ruling in *Kiobel* v. *Royal Dutch Petroleum Corporation*,[10] in which the United States (US) Supreme Court rejected jurisdiction on the basis of a pre-presumption against the extraterritorial application of the US Alien Tort Statute,[11] it is easy to overlook the fact that the principles and rules relating to extraterritorial litigation are grounded in national legal systems, and thus may differ from country to country. Thus, putting the brakes on the once claimant-friendly[12] US approach does not necessarily close the door to other national paths within private international law.[13] It is true that US law for some time has been 'the main engine for transnational human rights and the environment litigation',[14] but alternatives are available in other jurisdictions.[15] This article explores the extent to which the Shell litigation helps to elucidate an alternative national approach to questions of jurisdiction, based both on the mandatory rules of jurisdiction for EU Member States under the 'Brussels system'[16] and, more specifically, on Britain's unique common law constitution, which, it is argued, differs from the US with regard to the nature and strength of the presumption against extraterritorial jurisdiction.

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8 Ibid.

9 Brussels I Recast Regulation, n. 16 below, Art. 4.

10 133 S. Ct. 1659 (2013). For commentary on the case see, among others, 'Agora: Reflections on Kiobel. Excerpts from the American Journal of International Law and AJIL Unbound', available at: https://www.asil.org/sites/default/files/AGORA/201401/AJIL%20Agora-%20Reflections%20on%20Kiobel.pdf. See also A. Grear & B. Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15(1) *Human Rights Law Review*, pp. 21–44.

11 28 U.S.C. § 1350. Although the Court left the door open for those claims that sufficiently 'touch and concern' the US: R. McCorquodale, 'Waving not Drowning: *Kiobel* Outside the United States' (2013) 107(4) *American Journal of International Law*, pp. 846–51.

12 Even though the qualification of 'claimant-friendly' has been challenged by different academics: see, e.g., J. Dine, 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution' (2012) 3(1) *Journal of Human Rights and the Environment*, pp. 44–69, at 45.

13 A.J. Colangelo, 'The Alien Tort Statute and the Law of Nations in *Kiobel* and Beyond' (2013) 44(4) *Georgetown Journal of International Law*, pp. 1329–46; R.P. Alford, 'The Future of Human Rights Litigations after *Kiobel*' (2013–14) 89 *Notre Dame Law Review*, pp. 1749–72.

14 I. Wuerth, 'Kiobel v Royal Dutch Petroleum Co: The Supreme Court and the Alien Tort Statute' (2013) 107(3) *American Journal of International Law*, pp. 601–21.

15 Notably in those adhering to the Brussels I Recast Regulation (n. 16 below) where claims initiated against a defendant domiciled within the territory of a Member State will proceed.

16 The 'Brussels system' is used to denote provisions under Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1 (Brussels I Regulation), as of 10 Jan. 2015 replaced by Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351/1 (Brussels I Recast Regulation); and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano (Italy), 30 Oct. 2007, in force 1 Jan 2010 (replacing the original 1988 Lugano Convention), available at: http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=13041. The Lugano Convention extends rules that are virtually similar to those under the Brussels I Regulation to Iceland, Norway and Switzerland.

The analysis begins in the next section with a general overview of the jurisdictional rules in the European Union (EU) and in England and Wales. We make a particular point of distinction between claims that originate as of right (when served on a party at an address in England or Wales)[17] and those that may be served on the defendant abroad only at the discretion of the court. We then examine this distinction with regard to environmental tort cases. Section 3 considers service-as-of-right cases, especially the 'toxic tort' cases *Connelly*[18] and *Lubbe*,[19] in which the court ruled that English jurisdiction was appropriate despite not being the *forum conveniens* in terms of satisfying the 'ends of justice'.[20] Section 4 considers recent discretionary jurisdiction cases, including *Cherney*,[21] and *Kyrgyz Mobil*,[22] which have been criticized on the grounds of exorbitant jurisdiction, but which may prove relevant to private international nuisance claims where a fair trial would be difficult in the more convenient forum. Section 5 considers the enforceability of remedies awarded in extraterritorial tort litigation, particularly the injunction as a coercive remedy. We conclude that the English approach to allowing jurisdiction where the case 'can be more suitably heard for the interests of all parties and the ends of justice'[23] is a potentially valuable, albeit unilateral, development in transnational environmental law litigation.[24]

2. ENGLISH JURISDICTIONAL RULES IN CONTEXT

There are several normative foundations on which a court may hear 'foreign' claims.[25] One is that there must be a minimum territorial link between the forum country and the facts of the dispute (or one or more of its parties). A territorial link is necessary, so the argument goes, because initiating a private claim involves the assertion of power on the part of the state,[26] even if this is increasingly symbolic.[27]

17 In this article, 'England' is used as a shorthand in jurisdiction terms for England and Wales.

18 *Connelly* v. *RTZ Plc* [1998] AC 854 (*Connelly*).

19 *Lubbe and Ors* v. *Cape Plc* [2000] 1 WLR 1545 (*Lubbe*).

20 Although the jurisdictional grounds have changed in respect of these cases by virtue of the impossibility for the English court of staying actions in cases where jurisdiction derives from the Brussels system. This is discussed in detail in Section 4 below.

21 *Cherney* v. *Derikpaska* [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456; approving [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333 (*Cherney*).

22 *AK Investment CJSC* v. *Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 (*Kyrgyz Mobil*).

23 *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] AC 460 (*Spiliada*).

24 On unilateralism, see G. Shaffer & D. Bodansky, 'Transnationalism, Unilateralism and International Law' (2012) 1(1) *Transnational Environmental Law*, pp. 31–41.

25 On the theoretical basis of jurisdiction, see E. Merrick Dodd Jr, 'Jurisdiction in Personal Actions' (1929) 23(5) *Illinois Law Review*, pp. 427–45.

26 According to the English traditional rules, symbolic power over the defendant or his property, either through physical service of a summons while in the forum or seizure of property (often land) located in the forum, justified the basis of jurisdiction: 'Whoever is served with the King's writ and can be compelled consequently to submit to the decree made is a person over whom the courts have jurisdiction': *John Russell & Co. Ltd* v. *Cayzer, Irvine & Co. Ltd* [1916] 2 AC 298 (House of Lords (HL)), at 302. Very few limits were established under this rule, the main ones involving the use of deception or enticing the defendant fraudulently or improperly: *Watkins* v. *North American Timber Co. Ltd* (1904) 20 TLR 534.

27 On the symbolic aspect of this, see Lord Sumption in *Abela and Ors* v. *Baadarani* [2013] 1 WLR 2043 (*Abela*), p. 2063; Lord Clarke concurred (p. 2060). See discussion below in this section.

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This underpins the presumption against the extraterritorial application of the law in cases like *Kiobel*, where it was ruled that the human rights abuse allegations arising from Shell's oil enterprise in Nigeria did not 'touch upon and concern [US territory] … with sufficient force to displace the presumption against extraterritorial application'.[28] It also informs the general rules of jurisdiction of the Brussels I Recast Regulation,[29] which revolve around the domicile of the defendant.[30]

A contrasting basis for jurisdiction, independent of and capable of rebutting the territorial presumption, is consent of the individuals involved.[31] This is based not on state power or authority but on individual autonomy, in the sense given by European philosopher Kant[32] that people can choose where to litigate and that the court will respect that choice as a matter of principle.

A third basis of jurisdiction centres on the rule of law, central to the Western liberal tradition.[33] A key facet of this is access to justice, sometimes couched in terms of the right to a hearing by a fair and independent tribunal in the determination of civil rights or obligations.[34] This right exists in various forms in most of the world's constitutions; in some countries reference is also made to the prohibition of 'denial of justice', which is a general principle of public international law.[35]

In England, jurisdiction over actions *in personam* is determined first by the Brussels system and, if the Regulation does not apply, by the traditional rules of jurisdiction that are said to be residual.[36] An important aspect of jurisdiction allocated under the Brussels system is that a court with jurisdiction cannot decline jurisdiction in favour of another court. This simplifies jurisdictional battles in court and provides legal certainty for both claimants and defendants.[37]

Under the Brussels system national courts have jurisdiction over those domiciled in the territory of a Member State.[38] The determination of a defendant's domicile is carried out according to the national law of each Member State.[39] In England and Wales this is according to the provisions of the Civil Jurisdiction and Judgments Act 1982,

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28 *Kiobel*, n. 10 above, p. 1669.

29 N. 16 above.

30 Brussels I Recast Regulation, n. 16 above, Art. 4: 'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

31 Ibid., Arts 25 and 26. This is developed in this section in respect of the English traditional rules.

32 I. Kant, *Practical Philosophy* (ed. and trans. M. Gregor, Cambridge University Press, 1999).

33 J. Raz, 'Rule of Law and its Virtue', in J. Raz (ed.), *The Authority of Law: Essays on Law and Morality*, 2nd edn (Oxford University Press, 2009), pp. 210–32.

34 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, Art. 6(1), available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

35 See A. Adede, 'A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law' (1976) 14 *Canadian Yearbook of International Law*, pp. 73–95.

36 A. Briggs, *The Conflict of Laws* (Oxford University Press, 2013), pp. 110–12.

37 The court with jurisdiction derived from the Brussels system cannot stay actions on the basis of *forum non conveniens*, following the judgment of the Court of Justice of the European Union (CJEU) in Case C–281/02, *Andrew Owusu* v. *N.B. Jackson* [2005] ECR I–1383 (*Owusu* v. *Jackson*).

38 Brussels I Recast Regulation, n. 16 above, Art. 4.

39 Ibid., Art. 62 for individuals, Art. 63 for companies.

as amended by the Civil Jurisdiction and Judgments Order 2001.[40] Corporations are domiciled in the place of their statutory seat, central administration or principal place of business.[41] The Regulation also considers jurisdiction based on consent (implicit or explicit).[42] Creating a forum on the basis of access to justice was discussed at the time of drafting the Brussels I Recast Regulation,[43] but was ultimately dismissed.[44]

To elaborate briefly on the consensual basis of jurisdiction – not least because of its importance to the *Bodo Community* claim – a foreign defendant submitting to the jurisdiction of the court can do so in many ways.[45] A defendant may submit to the jurisdiction of the court by acknowledging service without applying for an order of the court declaring that it lacks jurisdiction,[46] or by instructing a solicitor to accept service on its behalf.[47] Parties can also contractually agree to submit to the jurisdiction of a court to which they would not otherwise be eligible. This is common in international commercial transactions where the parties may wish to choose a neutral forum for the resolution of a potential dispute. If such a jurisdiction clause exists, the court could be persuaded (provided all other factors are present) to grant service on the defendant abroad unless there is a strong reason not to do so.[48] However, it is not possible to confer jurisdiction consensually beyond the authority of the court.[49]

In the United Kingdom (UK), what falls within the authority of the court is ultimately a matter for the court to determine, but Parliament has set out relevant provisions relating to a number of areas, including tort. Section 30(1) of the Civil Jurisdiction and Judgments Act 1982 (UK) as amended provides:

> The jurisdiction of any court in England and Wales or Northern Ireland to entertain proceedings for trespass to, or any other tort affecting, immovable property shall extend

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40 SI 2001 No. 3929: s. 9 'Domicile of an individual; and s. 10 'Seat of company, or other legal person or association for purposes of Article 22(2) (s. 43).

41 Brussels I Recast Regulation, n. 16 above, Art. 63.

42 Ibid., Arts 25 and 26.

43 A. Nuyts, 'Study on Residual Jurisdiction: Review of the Member States' Rules concerning the "Residual Jurisdiction" of their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations', European Commission, 3 Sept. 2007, p. 64, available at: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

44 For a discussion on the possibility of introducing an alternative general forum based on 'necessity' or access to justice see C. Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30(78) *Utrecht Journal of International and European Law*, pp. 24–43, at 32.

45 For a discussion of common law rules relating to agreements on jurisdiction see J. Fawcett & J.M. Carruthers, *Cheshire, North and Fawcett's Private International Law* (Oxford University Press, 2008), pp. 383–448. Agreements on jurisdiction for the court of a Member State are validated by Art. 25 Brussels I Recast Regulation; note also The Hague Choice of Court Convention, The Hague (the Netherlands), 30 June 2005, in force 1 Oct. 2015, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

46 Civil Procedure Rules (UK) (CPR), r. 11(5).

47 CPR, para. 6.4(2).

48 See CPR r. 6.20(5)(d) (formerly RSC Ord. 11, r. 1(1)(d)(iv)); Fawcett & Carruthers, n. 45 above, p. 382. The court is also unlikely to stay an action on the grounds of *forum non conveniens* where there is a valid English jurisdiction clause.

49 E.g., in cases in respect of title to foreign land, or family matters where jurisdiction fora are compulsory. The title issue is particularly pertinent to nuisance law (see n. 124 below, and associated text).

> to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property.

By its very nature, as a tort to land, nuisance is capable of raising issues of title and possession which are *ultra vires* the court's authority.[50]

Under English law, a distinction is drawn between claims originating as of right[51] and those originating at the discretion of the court.[52] Claims can be served as of right on a defendant present in England[53] in the manner prescribed by the Civil Procedure Rules (CPR).[54] An English company may be served at its registered office,[55] while a foreign company may be served either by making service on the person authorized to accept service on its behalf or by service to any place of business within the jurisdiction.[56] The procedures in CPR Part 6 for service on a company cover alternative methods and places of service.

Where a claim is served on a defendant as of right but the domicile requirement of the Brussels system is not engaged (and thus the regime does not apply), a defendant wishing to have the action heard in a different court must make an application to stay proceedings. The principle on which this application is made is that of *forum non conveniens*, which is set out by Lord Goff in *Spiliada* (albeit that this case concerned service at the discretion of the court, contested by the respondent):

> The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all parties and the ends of justice.[57]

In terms of the burden of proof, Lord Goff emphasized that:

> the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is distinctly more appropriate than the English forum.[58]

Once that burden is discharged by the defendant, the onus shifts to the claimant to establish that the English court, although not the natural forum, is nonetheless the *right* forum for the purposes of meeting the 'ends of justice'.[59] The 'ends of justice'

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50 Ibid.

51 See n. 26 above and associated text.

52 Discussed in Section 4 below.

53 'Whoever is served with the King's writ and can be compelled consequently to submit to the decree made is a person over whom the courts have jurisdiction': *John Russell & Co. Ltd* v. *Cayzer, Irvine & Co. Ltd*, n. 26 above, p. 302.

54 CPR r. 6.3. Service may be made personally, by post, or by certain electronic means.

55 Companies Act 2006 (UK), s. 1139(1).

56 *South India Shipping Corpn Ltd* v. *Export-Import Bank of Korea* [1985] 1 WLR 585 (Court of Appeal (CA)); see also CRP r. 6.3(2); *Saab* v. *Saudi American Bank* [1999]1 WLR 1861 (CA).

57 *Spiliada* n. 23 above, p. 476.

58 Ibid., p. 477.

59 The second limb of the *Spiliada* test.

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may have some broad similarity with the 'public interest' as it is relevant in US case law, for example.[60] However, the English courts are concerned exclusively with the private interests (including rights) of the parties, rather than wider, instrumental calculations bearing on the public at large. So, in this respect the 'ends of justice' may have more in common with the Canadian notion of 'public necessity',[61] or even *forum necessitatis*[62] introduced as an autonomous ground of jurisdiction in Belgium and the Netherlands following the abolition of the exorbitant bases of jurisdiction based on the plaintiff's domicile in the forum.[63] Regardless, the crux of an English court's inquiry is justice between the parties, in a highly casuistic fashion. In the words of Evans LJ,[64] the alternative forum must be 'available in practice to *this* plaintiff, to have *this* dispute resolved'.[65]

Moving on to claims served out of jurisdiction which require leave of the court, the rules are set out in CPR r. 6.36 and Practice Direction (PD) 6B. In order to serve a claim on a defendant out of jurisdiction, the prospective claimant must satisfy three cumulative tests:[66] (i) the claimant must have a 'reasonable prospect of success';[67] (ii) there is a good arguable case that falls within the grounds of the rules;[68] and (iii) England is the 'appropriate forum'.[69] This latter test is fleshed out in a series of leading cases, notably by Lord Goff in *Spiliada*,[70] and most recently by the UK Supreme Court in *Cherney*[71] and *Kyrgyz Mobil*.[72] In general, concepts such as 'appropriate' or 'natural forum'[73] have developed in the context of torts as undoubtedly pointing to the *forum loci delictii* where the events leading to the damage took place.[74] However, this does not prevent exceptional cases from being litigated in a place other than the natural forum because of the unavailability of the

60 *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), analyzing the 'private interest factors' affecting the litigants' convenience and the 'public interest factors' affecting the forum's convenience. A four-step approach is used by the 11th Circuit Court as in *Aldana* v. *Del Monte Fresh Prod N.A., Inc.*, 2009 WL 2460978, 5-6 (11th Cir.,13 Aug. 2009).

61 Nwapi, n. 44 above, p. 33.

62 This is the case of Belgium or the Netherlands: see Nuyts, n. 43 above, p. 64.

63 *Spiliada*, n. 23 above, p. 476.

64 *Mohamed* v. *Bank of Kuwait and the Middle East KSC* [1996]1 WLR 1483.

65 Ibid., p. 1485 (emphasis added). *Mohamed* has been criticized as an example of the wrongful coalescence of the first and second prongs of the *Spiliada* test: L. Merrett, 'Uncertainty in the First Limb of the Spiliada Test' (2005) 54(1) *International & Comparative Law Quarterly*, pp. 211–20.

66 R. Stewart, G. Chapman & C. Yeginsu, 'Londongrad Calling: Jurisdictional Battles in the English Courts' (2014) 8(1) *Dispute Resolution International*, pp. 25–36, at 26.

67 *Carvill America Inc.* v. *Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457, para. 24.

68 *Canada Trust Co.* v. *Stolzenberg (No. 2)* [1998] 1 WLR 547, at 555–7, per Waller LJ (affirmed [2002] 1 AC 1); *Bols Distilleries BV* v. *Superior Yacht Services* (trading as *Bols Royal Distilleries*) [2007] 1 WLR 12.

69 *The Atlantic Star* [1974] AC 436 (HL).

70 *Spiliada*, n. 23 above.

71 N. 21 above.

72 N. 22 above.

73 The concept of the 'natural forum' was discussed in *The Atlantic Star*, n. 69 above, *Mac Shannon* v. *Rockware Glass* [1978] AC 705, and *The Abidin Daver* [1984] AC 398 in the lead-up to adoption of the *forum (non) conveniens* doctrine in England by *Spiliada*.

74 Recently, in tort cases, by the House of Lords in *Berezovsky* v. *Michaels* [2000] 1 WLR 1004 (HL); but see below.

forum loci delictii in a practical or legal sense. In *VTB Capital Plc* v. *Nutritek International Corp. & Others*,[75] a case concerning a tort committed in England between foreign parties, the court unanimously approved the application of the *Spiliada* test for determining whether England was the appropriate forum and found that Russia was distinctively the more appropriate forum. In so doing, it rejected the previously held view that the place where the tort was committed was always and clearly the most appropriate forum.[76] The English courts, it stated, will not approach a case by way of applying presumptions but rather by considering all relevant factors.

Where leave is granted under CPR r. 6.45, the claim form must include a copy translated into the official language of the country in which it is to be served. Here, the onus is on the claimant to satisfy the court that England is the right jurisdiction. The English courts have sometimes strongly expressed a concern that the English jurisdiction is 'exorbitant', which raises delicate diplomatic issues relating to other sovereign nations.[77] For example, Scott LJ in *George Monro Ltd* v. *American Cyanamid & Chemical Corporation* mentioned that:

> [s]ervice out of jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where the service is to be effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of jurisdiction.[78]

Words used by the courts to describe limits on the exercise of discretion to serve out of jurisdiction include the need for 'considerable care',[79] 'extreme caution',[80] 'forbearance',[81] and 'with discrimination and scrupulous fairness'.[82] These expressions favour neither one nor the other party; they are about doing justice between the parties viewed in the round. Moreover, the very possibility of exorbitant jurisdiction shows that English law is willing at least to consider coming to the aid of a foreign claimant seeking access to justice to a degree that is distinctive, and perhaps even unique.

Lately the courts have appeared rather less cautious in the face of diplomatic sensitivity than in the past. In *Cherney*[83] there was an almost nil connection with England[84] and yet the Commercial Court found allegations that the safety of the

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75 [2010] EWCA Civ 808; [2013] UKSC 5.

76 This had been left as an open question in *Cordoba Shipping Co. Ltd* v. *National State Bank* (*The 'Albaforth'*) [1984] 2 Lloyd's Rep 91, and *Berezovsky* v. *Forbes Inc. and Michaels* [2000] 1 WLR 1004.

77 L. Collins, 'Some Aspects of Service Out of Jurisdiction in English Law' (1972) 21(4) *International and Comparative Law Quarterly*, pp. 656–81.

78 [1944] KB 432, at 437 (cited in Collins, ibid., p. 658).

79 *Malik* v. *Narodni Banka Ceskoslovenska* [1946] 2 All ER 663, at 664 (per Lord Goddard CJ).

80 *Aaronson Brothers* v. *Maderera del Tropica SA* [1967] 2 Lloyd's Rep 159, at 161 (per Winn LJ).

81 *Massey* v. *Hayes* (1888) 21 QBD 330, at 334 (per Wills J).

82 *Dunlop Rubber Co. Ltd* v. *Dunlop* [1921] 1 AC 367, at 373 (per Lord Birkenhead).

83 N. 21 above.

84 Despite this, in a detailed and carefully reasoned judgment (ibid., [2008] EWHC 1530 (Comm)), Christopher Clarke J found that the court had a basis for exercising its discretion to take jurisdiction as

claimant would be at risk should he put a foot in Russia enough to justify service abroad and thereby institute the jurisdiction of the court.[85] Concerns with the 'ends of justice' in respect of Mr Cherney's personal safety and of his prospect to obtain a fair trial in Russia were the fundamental drivers of this decision.[86]

Similarly, the UK Supreme Court ruling in *Kyrgyz Mobil*[87] appears to push back from some of the cautionary remarks of the courts in times past. Here, the Privy Council, sitting on appeal from the High Court of the Isle of Man, allowed service out of jurisdiction in respect of a claim the natural forum of which was in Kyrgyzstan 'on the grounds that the risk that a Kyrgyz court would deliver injustice overwhelmed the ordinary operation of the *Spiliada* test'.[88] The Privy Council addressed, and rejected, the defendant's argument that comity required the court not to pass judgment on the adequacy of another state's courts (in that case the courts of Kyrgyzstan):

> The true position is that there is no rule that the English court … will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence.[89]

While *Cherney* and *Kyrgyz Mobil* have been criticized as exorbitant,[90] there is clearly a tension between comity and the 'ends of justice', which the courts address on a fact-sensitive, casuistic basis.

In *Abela* v. *Baadarini*,[91] where the main issue was the mode and timing of service out of jurisdiction, Lord Sumption suggested a new language to qualify the courts' powers in extraterritorial cases. The defendant in this case resided in Lebanon – which is neither a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965[92] nor a party to any bilateral convention on service of judicial documents – and the trial judge had allowed service abroad by an alternative method: at the address of the defendant's solicitor. The UK Supreme Court held that the judge had been right under CPR r. 6.15(2) (to retrospectively permit service by an alternative method of a claim form on the defendant in Lebanon) on the basis that it was considered that there was a 'good reason' to make the order. The Court of Appeal overturned the trial judge's decision to serve on the basis that it would 'make what is already

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it was common ground that, if the relevant agreement was made, it was made in England and one of the jurisdictional gateways of CPR Pt 6 PD 6B was engaged.

85 For a vigorous criticism of the decision see A. Briggs, 'Forum non Satis: Spiliada and an Inconvenient Truth' (2011) 3 *Lloyd's Maritime and Commercial Law Quarterly*, pp. 329–33.

86 Steward, Chapman & Yeginsu, n. 66 above, p. 30.

87 N. 22 above.

88 Briggs, n. 85 above, p. 330.

89 *Kyrgyz Mobil*, n. 22 above, p. 33.

90 A. Arzandeh, 'Should the Spiliada Test Be Revised?' (2014) 10(1) *Journal of Private International Law*, pp. 89–112, at 90.

91 *Abela*, n. 27 above.

92 The Hague (the Netherlands), 15 Nov. 1965, in force 10 Feb. 1969, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.

an exorbitant power still more exorbitant'.[93] The Supreme Court subsequently restored the finding of the trial judge on the basis that the language of 'exorbitancy' was old-fashioned and unrealistic. Lord Sumption gave a number of reasons why it 'should no longer be necessary to resort to the kind of muscular presumptions against service out [of jurisdiction] which are implicit in adjectives like "exorbitant"'.[94] Reasons included the notion that extraterritorial litigation 'is a routine incident of modern commercial life',[95] together with (and reflected by) the growing number of multilateral agreements for cooperation in civil matters beyond commercial matters.[96]

Yet, the trend towards liberal exercise of discretion to serve out of jurisdiction should not be overstated. The court in *Cherney* went to some length to clarify that it was not passing general judgment on the Russian legal system or its standards of administration of justice. Indeed, the same judge, Lord Clarke, distinguished the decision (to which he had contributed) in *Yugraneft* v. *Abramovich*[97] by holding that a fair trial was possible in Russia between different parties and on different facts. Moreover, some subsequent cases in which the claimant sought to establish the jurisdiction of the English courts and discard that of the 'natural forum' based on considerations of the 'ends of justice' have been dismissed by the English court on the basis that a case has not been made out that justice is likely to be denied locally.[98]

The debate arising from *Cherney* and *Kyrgyz Mobil* echoes Lord Denning's expansionist dictum in the Court of Appeal 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.[99]

Yet, the judgments in *Cherney* and *Kyrgyz Mobil* are arguably of a different and nuanced order. There is no glib invitation to forum shop in England. The English court is not accepting jurisdiction on the basis that its justice process is the world's best (as conveyed by the cliché 'Rolls Royce' justice).[100] Rather, it is accepting jurisdiction because the common law recognizes a fundamental right to a fair hearing for anyone who persuades the English court that such a hearing is

93 Cited by Lord Clarke in *Abela* (n. 27 above) in relation to Longmore LJ in the Court of Appeal.

94 Ibid., p. 2063; Lord Clarke concurred (p. 2060).

95 Ibid.

96 Ibid.

97 *OJSC Oil Company Yugraneft (in liquidation)* v. *Abramovich and Ors* [2008] EWHC 2613 (Comm) (*Yugraneft*).

98 *Erste Group Bank AG (London Branch)* v. *JSC 'VMZ Red October' and Ors* [2013] EWHC 2913 (Comm). A similar conclusion was reached in respect of Ukraine in *Pacific International Sports Club Ltd* v. *Soccer Marketing International Ltd and Ors* [2009] EWHC 1839 (Ch), and *Ferrexpo AG* v. *Gilson Investments Ltd and Ors* [2012] EWHC 721 (Comm).

99 [1973] 1 QB 364 (CA), at 381–2.

100 *Lubbe*, n. 19 above, p. 1545.

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impossible locally.[101] In this way, the ruling can be considered to be consistent with the principle of legality, which found influential expression in the writing of Dicey.[102]

Indeed, it is probably no coincidence that A.V. Dicey is the author of the leading late-Victorian private international law text (Dicey preferred 'conflict of laws'),[103] published almost a decade after his seminal constitutional study. Dicey, the 'constitutional lawyer', wrote that '[o]ur constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law'.[104] With specific reference to the right of access to justice and to other common law rights, Dicey wrote that these are defined and enforced by the judiciary, on the basis that they are the source of the constitution.[105] Dicey compared this with codified European constitutions, in which the code was the positive source of rights (such that these rights could be limited or extinguished through reform of the code). Owing to their primordial or at least foundational status under Diceyan theory, they cannot be taken away by legislation without a 'revolution'.[106]

Dicey did not elaborate on the 'good and bad' of this idiosyncratic constitutional arrangement, but some of it is obvious and evidenced in the case law above. What is 'good' about the arrangement is its responsiveness to individual circumstances. What is 'bad' is that the law lacks predictability. Thus, while *Kyrgyz Mobil* does appear to provide minimally clear guidance as to the onus being on the foreign claimant to satisfy the court that the natural forum cannot provide a fair hearing, cases of this kind will necessarily turn on their merits.

The constitutional context of English private international law is also relevant to the role played by leave of the court in both public law (judicial review) and private international service-out-of-jurisdiction claims. Claimants seeking to hold a public authority to account in terms of the rule of law, by way of judicial review, may not bring a claim as of right. They must first obtain the permission (leave) of the court for a full hearing. The permission hearing is usually an *ex parte* process which answers to the need for the court to establish that the claimant has standing to bring a claim and that there is an arguable case on the merits.[107] The overwhelming majority of claims

101 Briggs (n. 85 above, p. 330) stresses that the English courts 'aside from egregious examples where the facts needed no commentary, [h]ad gone out of their way to discourage litigants who, having no other cards to play, sought to resist a stay or to obtain permission to serve out on the basis that the relevant foreign jurisdiction was dreadful and not to be trusted'.

102 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1915, first published 1889).

103 A.V. Dicey, *A Digest of the Laws of England with Particular Reference to Conflicts of Laws* (Stevens and Sons, 1896).

104 Ibid., p. 116.

105 Ibid., pp. 119–20 ('The fact, again, that in many foreign countries the rights of individuals, e.g. to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalisation of the rights which the Courts secure to individuals, has this important result. The general rights guaranteed by the constitution may be, and in foreign countries constantly are, suspended').

106 Ibid.

107 On judicial review see P. Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24(4) *Oxford Journal of Legal Studies*, pp. 237–57.

fall at this hurdle; therefore leave serves the important function of affording access to a court while filtering out 'weak' claims. In a private international law context, leave has the same function, except that it touches also on relations between, as well as within, sovereign nations.

3. EXTRATERRITORIAL TORT CLAIMS: JURISDICTION 'AS OF RIGHT'

Claims served as of right on the defendant[108] may be contested by the defendant making a case as to why the proceedings should be stayed[109] (claims served at the discretion of the court, on the initiative of the claimant, are considered in the following section). The discretion of the court and scope for staying actions was firmly restricted by the ruling of the Court of Justice of the European Union (CJEU) in *Owusu* v. *Jackson*,[110] which clarified that English courts may still stay actions when the defendant is not domiciled in a state within the Brussels system and service has been effected as of right, for example, on a foreign company not domiciled but present in England.[111]

This section draws on 'toxic tort' cases, namely *Connelly* and *Lubbe*, in which the English domiciled defendants sought a stay of proceedings on the ground of *forum non conveniens* under the *Spiliada* ruling. These cases today could not be subject to the same jurisdictional challenges, as they could not now be stayed on the ground of the EU domicile of the parent company. However, they remain highly pertinent to the discussion of the ongoing Shell litigation. In particular, they contain guidance on the 'ends of justice' test as it applies to the exercise of court discretion to hear tort claims with a foreign dimension.

In *Connelly*, the claimant (domiciled in Scotland) alleged injury while working in a uranium mine in Namibia operated by a South African-registered company, Rossing Uranium Ltd (RUL). The company was a subsidiary of English-registered RTZ Plc. The claimant pursued the parent company, alleging that it was negligent in devising the subsidiary company's health and safety policy. The defendant sought a stay of proceedings within the framework of the *forum non conveniens* principle set out in *Spiliada*. Delivering the lead judgment, Lord Goff noted that the reason for the choice of parent company as a defendant over the subsidiary was that the claim could thereby originate as of right, and thus the onus fell on the defendant, if it wished, to establish that the claim should be stayed for want of appropriate forum.[112] The critical attraction of the English civil justice system was the availability

108 According to the criteria mentioned above in Section 2.

109 According to the principles established by Lord Goff in *Spiliada*, n. 23 above.

110 N. 37 above.

111 See Section 2 above. See also *Re Harrods (Buenos Aires) Ltd* [1990] 4 All ER 3347, in which the Court of Appeal held that 'an English court could stay proceedings brought against an English domiciled defendant when the court was convinced that a non-contracting state was clearly the more appropriate forum'.

112 *Connelly*, n. 18 above, p. 873.

of a firm of solicitors who would be prepared to undertake the claim on a no-win no-fee basis.

> No doubt their [the defendant company's] domicile in this country, coupled with the availability of financial assistance here, has encouraged him [the claimant] to select them as defendants in place of R.U.L. But I cannot see that that of itself exposes the plaintiff to criticism. If he was going to sue these defendants, this was an appropriate jurisdiction in which to serve proceedings on them. It is then for the defendants to persuade the court, as they are seeking to do, that the action should be stayed on the ordinary principles of *forum non conveniens*.[113]

The court held that the defendant company had discharged the first stage of the *Spiliada* test: a Namibian court was the appropriate forum, as it was the forum where the injury was alleged to have been suffered and where many of the allegedly tortious acts causing the injury occurred. The onus then switched to the claimant to establish that 'substantial justice cannot be done in the appropriate forum'.[114] The lack of availability of legal aid and other assistance in Namibia was not in itself enough to 'oust' the natural forum, but it became so when situated in the wider context of the legal and evidential complexity of the claim. The House of Lords agreed with the analysis of Lord Bingham MR in the Court of Appeal that the court was faced with a 'stark choice' between a natural forum where there never could be a fair hearing and one which, while 'not the most appropriate', made a hearing possible.[115]

Lord Hoffmann added the qualification that he would not have found for the claimant were it not for the fact that the claimant was no longer resident in Namibia. He doubted that a Namibian, or a Scotsman residing in Namibia, had a 'legitimate expectation' to sue an English company in England in respect of injury sustained in Namibia.[116] However, that does not appear to have been supported by other Law Lords, nor was it followed in *Lubbe* (discussed below). In that case, 3,000 South African-resident workers in the asbestos mining industry were able to sue in England, notwithstanding that South Africa was the appropriate forum.

In *Lubbe*, like *Connelly*, the claimant's choice of forum was driven by the practical consideration of the availability of legal expenses support in England. The claimant provided evidence of a 'clear, strong and unchallenged view of the [South African] attorneys … that no firm of South African attorneys with expertise in this field had the means or would undertake the risk of conducting these proceedings on a contingency fee basis'.[117] There was further evidence, to which the court attached

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113 Ibid.

114 Ibid.

115 Ibid., p. 866 ('Faced with the stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly, in favour of that forum in which the plaintiff could assert his rights', per Bingham MR).

116 Ibid., p. 876. *Connelly* was received with dismay by the business community: 'RTZ Ruling Threatens other Multinationals', *The Financial Times*, 25 July 1997; and the Lord Chancellor proposed legislation to reverse the effect of the House of Lords' ruling: for a discussion of this case see R. Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3(1) *City University of Hong Kong Law Review*, pp. 1–41, at 28.

117 *Lubbe*, n. 19 above, p. 1559.

some weight, that the South African civil justice system lacked the experience with 'group proceedings' that the English system had.[118]

Applying this to the position following the enactment of the Brussels I Regulation, the inability of the court to stay an action commenced against a defendant domiciled in a state subject to the Brussels system enabled the *Trafigura*[119] and *Monterrico*[120] litigation to proceed without the habitual jurisdictional battles.[121] Similarly, in *Bodo Community* a claim was brought against both Shell and its Nigerian subsidiary.[122] Part of the attraction of suing Shell was that, as a company domiciled in England according to Article 60(1) of the Brussels I Regulation, it enabled not only the claim to be served as of right on the parent company at its English address with service at this address in the subsidiary, but also – unless the subsidiary could prove that there was no merit in the claim against the parent company[123] – the claim against it could not be stayed on grounds of *forum non conveniens*. The *Bodo Community* litigation proceeded on the agreement between the parties that the subsidiary company would submit to the English forum on condition that the local Nigerian law was applied and that the claim against Royal Dutch Shell (the parent company) was abandoned.

The concern with the tort of nuisance – a tort against land – meant that the High Court, at the trial on preliminary issues of law in *Bodo Community*, was invited to rule on the statutory exclusion of jurisdiction over questions of title to land, or the right to possession of land, located outside the UK. In *Polly Peck* it was held that whether a question was principally one of title was a matter of fact and degree.[124] The judge in *Bodo Community* ruled that this could not be resolved at a preliminary stage but nevertheless offered guidance as to the kind of facts which might lead to some of the claims not being heard, such as a dispute over whether the claimant was a tenant of land, and also the extent of a bailiwick of a chief, king or headman suing in a representative capacity.[125] Judge Akenhead hinted that some of the claims would have failed on these points had the case not been settled after the preliminary issues hearing.

A further noteworthy feature of the *Bodo Community* judgment and the subsequent cases of *Bille* and *Ogale*[126] is that of the substantive applicable law. In *Bodo Community* the English court applied Nigerian law as agreed by the parties.[127] Part of the preliminary hearing thus involved interpretation of the

118 Ibid.

119 The *Trafigura* case, which concerned victims of toxic waste dumping in Côte d'Ivoire, was atypical in this respect as it involved the UK head office company itself and no subsidiary: *Yao Essaie Motto & Others* v. *Trafigura Ltd and Another* [2009] EWHC 1246 (QB), para. 28.

120 *Guerrero & Others* v. *Monterrico Metals Plc* [2009] EWHC 2475 (QB).

121 For a discussion of both, see Meeran, n. 116 above.

122 Leigh Day & Co, 'History of the Bodo Litigation', available at: https://www.leighday.co.uk/International-and-group-claims/Nigeria/History-of-the-Bodo-litigation.

123 As SPDC Nigeria alleged in *Oguru, Efanga & Milieudefensie* v. *Royal Dutch Shell Plc and Shell Petroleum Development Co. Nigeria Ltd*, No. 330891/HA ZA 09-579 2009.

124 *Re Polly Peck International Plc (No. 2)* [1998] 3 All ER 812, p. 828 (per Mummery LJ).

125 *Bodo Community*, n. 6 above, para. 165.

126 N. 7 above.

127 *Bodo Community*, n. 6 above.

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Nigerian law. The judge heard expert evidence of the correct interpretation of Nigerian law by two judges of the Nigerian Supreme Court, one for the claimants (Justice Oguntade) and one for the defendant (Justice Ayoola). Understandably, the judge expressed 'trepidation' at points where he disagreed with each of these experts.[128] Even if the parties had not agreed on the applicable law, it is likely that the court would have applied Nigerian law to the conduct of the subsidiary for acts taking place in Nigeria, pursuant to sections 11, 12 and/or 14 of the Private International Law (Miscellaneous Provisions) Act 1995,[129] and pursuant to Articles 7 and/or 4 and/or 26 of the Rome II Regulation.[130]

In conclusion, it is now much simpler to bring a case in the courts of any EU Member State without fear of protracted *forum non conveniens* jurisdictional battles. The remaining issues in such cases, and in those involving non-EU domiciled co-defendants like *Bodo*, *Ogale* and *Bille*, involve the determination by the court that the claim has merit against the European domiciled (parent) company and that the sole aim is not of suing the foreign domiciled subsidiary as a co-defendant or necessary or proper party.[131] For cases brought as of right against companies which are present but not domiciled for the purposes of the Brussels system, English courts still retain the ability to stay proceedings on the grounds of *forum non conveniens*.

4. EXTRATERRITORIAL CLAIMS AT THE DISCRETION OF THE COURT

The *Bodo Community* case eventually proceeded in the High Court consensually. By contrast, in the most recent cases, involving the Ogale and the Bille communities, the subsidiary has contested the High Court's jurisdiction. In a landmark (but as yet unreported) ruling, on 2 March 2016, leave was granted for these latest claims to proceed against Shell Nigeria Ltd.[132] These are the first occasions on which nuisance proceedings have been originated at the discretion of an English court.

In the absence of a reported decision on the subject, it is difficult to comment on the reasoning of the court in granting leave. However, as explained above, there are well-established principles with regard to meeting the 'ends of justice' within the *forum non conveniens* test that are capable of displacing the natural/local forum (Nigeria). One consideration is whether the Nigerian courts are any better equipped than the courts in South Africa (in *Lubbe*) to hear a complicated group claim. Nigerian legal practitioners would struggle to pursue a contingent fee claim on the scale of *Bodo Community* with confidence, as acknowledged (in relation to South Africa) in *Lubbe*. Thus, the Ogale and Bille communities in this new phase of Shell extraterritorial nuisance litigation may not have 'chosen' the English court

128 Ibid., para. 179.

129 For acts and omissions that occurred between 1 May 1996 and 11 Jan. 2009.

130 *Bodo Community*, n. 6 above. Regulation (EC) No. 864/2007 of 11 July 2007 on the Law Applicable to Non-Contractual Obligations.

131 Exhibit DL/1 (Witness Statement of Daniel Learner), n. 7 above, para. 34.

132 *Ogale* and *Bille*, n. 7 above.

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jurisdiction over the local court jurisdiction; rather, the choice in these circumstances was between having a hearing or not.[133]

It is helpful to reflect on the specific nature of local obstacles to access to justice that could in principle justify extraterritorial jurisdiction in these and similar circumstances in the future. Rather than rely on broad notions of 'obstacle', a pertinent distinction can be drawn between impediments to access to justice based on 'technical' considerations (concerning fees, group claims and other arrangements regarding the administration of civil justice), and those of a more 'political' character (concerning discrimination and/or corruption in the national justice regime). The former type describes the situation in *Connelly* and *Lubbe*, where the court attributed considerable weight to the absence of the local availability of financial assistance (in *Connelly*)[134] and the capacity to handle a complex group claim (in *Lubbe*). The latter describes the situations in *Cherney* and *Kyrgyz Mobil*.[135] The 'technical' and the 'political' obstacles to the 'ends of justice' argument are not mutually exclusive, but the distinction is, nevertheless, important. The latter more deeply engages the principle of comity, in that it is one thing to say that a foreign civil justice regime lacks the technical competence of some of the world's most experienced regimes and another thing altogether to say that it is sometimes corrupt.

Applied to the *Ogale* and *Bille* claims, evidence is being put forward by the claimants' legal representatives which covers both kinds of obstacle. With regard to technical obstacles, the following passage from a witness statement is illustrative:

> Most of the Claimants in this case are poor, rural Nigerians who live as subsistence farmers or fishermen. As a result, it may well be difficult for them to obtain suitably qualified legal representatives. There is no legal aid available in Nigeria for claims of this nature, which means that there is a stark inequality in resources between the Claimants and the Defendants in this case. Whilst claims of this nature can sometimes be funded using damages-based agreements or similar types of agreement, many Nigerian lawyers will additionally require payment whilst a case is progressing, including for drafting submissions or attending hearings. This is particularly true where a case is complex or where the lawyer is required to attend court frequently.[136]

Further, it is alleged that the civil justice system is subject to lengthy delays. In *Shell Petroleum Development Corporation (Nigeria) Ltd* v. *Tiebo*, for example, the Nigerian Supreme Court in 2005 handed down judgment 17 years after proceedings were started.[137]

At the political level, the obstacles centre on a deep distrust of the local civil justice regime as propping up the nation's 'oil oligarchy',[138] which was at the forefront of

133 *Connelly*, n. 18 above, per Bingham MR.

134 Ibid., p. 873.

135 And similar cases such as *Yugraneft*, n. 97 above.

136 Exhibit DL/1 (Witness Statement of Daniel Learner), n. 7 above, para. 44(b)(i).

137 Ibid., para. 44(b)(iv).

138 S. Joab, D. Peterside & M. Watts, 'Rethinking Conflict in the Niger Delta: Understanding Conflict – Dynamics, Justice and Security', University of California, Institute of International Studies, Working Paper No. 26, 2012, available at: http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Watts_26_Revised.pdf.

the US litigation in *Wiwa*,[139] the unsuccessful litigation in *Kiobel*, the *Bodo Community* claim, and is resurfacing in the context of the *Ogale* and *Bille* nuisance litigation. Thus, the witness statements make reference to 'state interference in the course of justice'[140] which includes 'a widespread belief … that the Nigerian judicial system is vulnerable to interference and corruption'.[141]

Cutting across the technical-political distinction is a delicate issue of international relations concerning the labelling of shortcomings in local justice in a foreign (in this case English) court. Muchlinski makes a salient point in connection with the removal of the Bhopal claim from the US to the Indian court system, that 'an admission by the home country [the US] that the host country is the better forum may give legitimacy to host country controls over the firm'.[142] A corollary of this is that a show of confidence in the local regime – say, the Nigerian justice system – could, in principle, help it to improve and develop resilience. Indeed, whether the argument centres on technical or political obstacles to justice, the courts are necessarily engaging with a field beset with complex international political considerations. Again, Muchlinski captures this well in commenting that judges in this setting are never dealing narrowly with 'a formal system of rules but a system of national policy implementation … Even where the judges do not intend it, decisions on jurisdiction will be read as political acts'.[143]

The Shell nuisance litigation, and in particular the granting of leave in respect of the Ogale and Bille community claims, will undoubtedly offer considerable encouragement to individuals in other parts of the world who are victims of industrial nuisance in similar circumstances to those of the Niger Delta. Before independence in 1963, Nigeria was a British Protectorate (and before that a territory annexed to Britain). It was under British rule that oil exploitation commenced, and with it Shell's involvement in the region.[144] This has remained in the background of the nuisance litigation as has the fact that, after independence, opposition from local farmers and fishermen to Shell's enterprise escalated.[145] The suppression of this opposition by Shell and the Nigerian state prompted human rights abuse claims brought before the US courts on the basis of the Alien Tort Statute (*Wiwa* and *Kiobel*).

An analogous case study that is helpful in fleshing out some of the potential limits on English court discretion in the present context is that of Palestine and Israel. In Palestine, a former British protectorate like Nigeria, the politics of occupation by Israel and the design of the legal system make access to the local courts by Palestinian nuisance victims as complex, because of the historical and political settings, as those

139 *Wiwa et al.* v. *Royal Dutch el al.*, No. 96 Civ. S386 (KMW-HBP), in which the claimants sought damages from the Shell Group's parent companies for human rights abuses, including their involvement in the deaths of Ken Saro-Wiwa and other Ogoni activists. The claim was settled.

140 Exhibit DL/1 (Witness Statement of Daniel Learner), n. 7 above, para. 44(b)(iii).

141 Ibid.

142 P.T. Muchlinski, 'The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors' (1987) 50(5) *The Modern Law Review*, pp. 545–87, at 580.

143 Ibid, p. 581.

144 J.G. Frynas, 'Political Instability and Business: Focus on Shell in Nigeria' (1998) 19(3) *Third World Quarterly*, pp. 457–78.

145 Joab, Peterside & Watts, n. 138 above.

faced by the Niger Delta communities in Nigeria. There are multiple layers to private international law in the Israel/Palestine setting.[146] Under the terms of the Israeli occupation of Palestine, service of a nuisance claim in a Palestinian court on an Israeli-resident defendant requires the consent of that defendant.[147] According to Israeli private international rules, a claim against the works (assuming the proprietors withheld consent to proceed in the Palestinian courts) can proceed in the Israeli High Court of Justice[148] but, understandably, that may not be the forum in which Palestinians wish the action to be heard. Not only is there a perception among the local Palestinian population of institutional bias in favour of Israeli parties – which may or may not be justified – but there is also a reluctance to endorse one or more of the institutions of the belligerent occupying force (the Israeli national courts) by invoking its civil justice machinery. As one commentator has remarked, litigation of tort claims involving Israeli defendants, before the Israeli courts, can sometimes be interpreted as 'legal laundering', by clothing Israeli occupation 'in a cloak of legality'.[149]

In recent years, a Palestinian human rights organization, Al Haq, has been gathering witness testimony of victims of industrial nuisances with a view to bringing a claim in an 'international' or extraterritorial tort action, possibly before the English courts. One of the most high-profile industrial nuisance allegations centres on the Geshuri agrochemical works in Tulkarm.[150] The works used to be located on the Israeli side of the wall, but they were relocated in occupied Palestine as a consequence of complaints by Israeli neighbours (who sued the company in nuisance in the local court in Israel).[151] When relocated on the Palestinian side of the wall, the Israeli owners undertook not to operate the works when the wind blew in the direction of Israeli territory. In effect, the works operate only when the wind keeps pollution within the Palestinian territory. As a consequence, it is alleged that the locality is a hotspot for cancer, asthma, eye and respiratory health anomalies.[152]

Thus, as with environmental tort cases such as the Shell nuisance litigation, there are some obvious difficulties for a claimant in these circumstances (against a defendant not present within the jurisdiction or who is not a 'necessary and proper party' to an action against a defendant domiciled or present within the jurisdiction[153]) to obtain permission to serve the claim out of jurisdiction. The first

146 M. Karayanni, 'Access to Justice Ascends to International Civil Litigation: The Case of Palestinian Plaintiffs before Israeli Courts' (2014) 33(1) *Civil Justice Quarterly*, pp. 41–75.

147 Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip 1995, Annex IV, Protocol Concerning Legal Affairs, 28 Sept. 1995, Art. 3.2(c), available at: http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20IV.aspx#article3.

148 T. Kelly, '*Access to Justice: The Palestinian Legal System and the Fragmentation of Coercive Power*', Crisis States Research Centre, London School of Economics and Political Science, *Crisis States Research Centre Working Papers Series 1*, 2004, p. 41.

149 Karayanni, n. 146 above, p. 49.

150 D. Qato & R. Nagra, 'Environmental and Public Health Effects of Polluting Industries in Tulkarm, West Bank, Occupied Palestinian Territory: An Ethnographic Study' (2013) 382(5) *The Lancet*, S29, pp. 1–14, at 5; B. Pontin, V. de Lucia & J. Gamero Rus, *Environmental Injustice in Occupied Palestinian Territory* (Al Haq, 2015), pp. 79–80.

151 Pontin, de Lucia & Gamero Rus, ibid.

152 Qato & Nagra, n. 150.

153 See Section 2 above for an overview of ordinary jurisdiction grounds.

problem is the fundamental issue of whether, in the absence of one of the grounds or gateways for service out of jurisdiction,[154] the English (High) Court would be prepared to allow service out of jurisdiction on a foreign defendant, for a wrong committed abroad, purely on the basis of the common law of natural justice.[155] If that, by no means small, hurdle is to be successfully negotiated, it will have to be on the basis of the unconscionability of having the case heard in Israel within a court system lacking legitimacy in the context of belligerent occupation.[156] The second hurdle lies in the distinction between the technical and political grounds that the court will consider in establishing whether the 'ends of justice' should displace the natural territorial forum. Either way there are challenges. The Israeli High Court of Justice is highly respected worldwide for its judicial professionalism, independence and impartiality. It would appear difficult for the English court to be persuaded that the Israeli court would deny the Palestinian claimants a fair hearing. Equally, in Israel there are opportunities for affordably funding a large group nuisance claim.[157]

Thus, the outcome of *Ogale* and *Bille* is of far-reaching significance. It will further illuminate the English court's willingness to take on extraterritorial nuisance claims. It remains to be seen whether 'necessity' or 'the ends of justice' can operate as autonomous drivers to facilitate service abroad in the absence of one of the existing jurisdictional gateways.

5. ENFORCEMENT OF NUISANCE REMEDIES IN ENGLISH PRIVATE INTERNATIONAL LAW

The potential enforcement of the court judgment forms an integral part of the forum selection by the parties in private international law cases. In a tort setting, much depends on the remedies that are sought. Nuisance remedies are particularly complex, for while they share many of the characteristics of tort remedies generally (notably damages of a compensatory nature) there are differences of considerable importance from a private international law perspective. In particular, what Lord Goff called the 'primary remedy' in nuisance proceedings is not damages but an injunction,[158] the function of which in this context is to put an end to an ongoing civil wrong involving the use of land. In other words, an injunction requires the wrongdoer to use land 'rightly'. If it fails to do so, the claimant can bring a claim for contempt of court.

154 It is important to remember that those were present in *Cherney* (n. 21 above) and in *Kyrgyz Mobil* (n. 22 above). Note, however, the reflection advanced by Briggs that if what drives the court to allow service out of jurisdiction is the fact that England is the *forum conveniens*, the requirement to satisfy taxonomic gateways is unjustified: Briggs, n. 36 above, p. 123.

155 If it did, it would amount to the doctrine of forum of necessity.

156 What *Cherney* (n. 21 above) and *Kyrgyz Mobil* (n. 22 above) have shown is that the claimant must establish the risk of injustice (in the sense of the absence of a fair hearing) at a specific level. It is not enough to prove that there is a general risk of corruption, incompetence or irrational decisions in the foreign forum.

157 Israeli Class Action Law 5766-2006. More generally, the system is modelled on the English system: see N. Bentwich, 'The Legal System of Israel' (1964) 13(1*) International and Comparative Law Quarterly*, pp. 236–55, at 236 ('It is the English habit to leave as a permanent legacy of British rule her system of law').

158 *Hunter* v. *Canary Wharf* [1997] AC 655, 692.

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In the context of foreign territory, it is hard to imagine how an English court could police a nuisance injunction without risking a diplomatic crisis.

The first consideration to note, therefore, is that nuisance claimants must be realistic about the possible limits on the range of remedies they can expect to obtain if successful in establishing liability. Such realism appears to have shaped counsel's handling of the case in *Bodo Community*. Here, the claimants reserved their position on the remedy of an injunction until after the trial on liability. As the case was settled, by what is believed to have been a monetary payment and commitment on the defendant's part to clean up and restore the damaged environment, no ruling on remedies was made. It would be unwise to speculate on a counterfactual scenario, except to mention that, in principle, were an injunction to have been sought, the defendant would surely have been in a strong (if not unassailable) position to argue that an injunction ought to be withheld on grounds that enforcement in respect of a foreign tort would raise serious issues of comity and exorbitant jurisdiction.

This presupposes that the remedy of damages is more straightforward. Awards for damages against defendants served as of right (present within the jurisdiction) or with assets within the jurisdiction can be enforced automatically. The enforcement of judgments of English courts in Member States of the Brussels system has been greatly simplified by the revision of the Brussels I Regulation. Not only has the *exequatur* procedure[159] been eliminated along with the declaration of enforceability,[160] but (according to the new Article 54) if the remedy granted by the judgment is not known in the enforcing court, this can be adapted to a similar measure that is known. The ease of enforcement within EU territory may be of relevance to potential claimants that seek to benefit from the flexible grounds of jurisdiction of the English court as they exercise the discretion implicit in the *Spiliada* test for service out of jurisdiction on a foreign defendant knowing that, although the defendant does not have assets in England to satisfy potential damages, the judgment could be enforced in any of the other Member States of the Brussels system.[161]

If the defendant does not have assets in England, the claimant will need to apply to the (High) Court for a certified copy of the judgment,[162] and present evidence of the original claim, service and, crucially, of whether the defendant objected to the jurisdiction of the court and on what grounds.[163] Enforcement in other jurisdictions outside the scope of the Brussels I Regulation[164] will very much depend on the

159 *Exequatur* is a private international law concept used in civil law systems referring to the decision of a court authorizing the enforcement of a foreign judgment.

160 As above, the declaration of enforceability authorizes the enforcement of a foreign judgment within the court's jurisdiction.

161 It may also be one of the factors taken into account by the court as a potential advantage to one of the parties when exercising its discretion under the *Spiliada* rules: see *International Credit and Investment Company Overseas Ltd* v. *Shaikh Kamal Adham* (1999) *International Litigation Procedure*, p. 302 (CA).

162 CPR r. 74.12 and PD 74A supporting Pt 74.

163 CPR r. 74.13.

164 The enforcement of judgments under the Brussels I Recast Regulation (n. 16 above) has been streamlined further in the latest review of the Brussels regime. A decision of a court of a Member State will be (almost) automatically enforced in the territory of any other Member State.

internal law of the country in which the judgment is to be enforced and on the existence of reciprocal enforcement conventions between the UK and the country in which the claimant seeks to enforce the English court decision. Countries with which the UK has such agreements[165] may enforce an English judgment by a simplified system of registration. However, one of the impediments to registration and/or enforcement in the foreign jurisdiction may be the consideration that the English court lacked jurisdiction to adjudicate on the matter.[166] In cases where the English High Court has assumed jurisdiction in an extraterritorial nuisance case, one should wonder whether, paraphrasing Lord Ellenborough, 'the foreign court [would] submit to such assumed jurisdiction'[167] and enforce the judgment. The answer to this is 'probably not'. Attempts to make an English judgment enforceable against foreign defendants not present within the jurisdiction by way of extending the territorial reach of an *ex parte* order under CPR Part 71[168] were rejected by the House of Lords in *Masri* v. *Consolidated Contractors*.[169] Their Lordships took a view against extending the extraterritorial reach of enforcement orders, sending perhaps a reminder to potential litigants that orders concerning enforcement are restricted to the place where assets are located, and this factor should be taken into account by parties when starting proceedings in parallel with jurisdiction and choice of law issues.

Nonetheless, the above black-letter law remarks should be situated in a wider socio-legal context concerning the politics of private international law in a tort setting. Of particular relevance is the extent to which transnational tort actions can often serve symbolic rather than compensatory objectives.[170] For example, in most of the actions under the Alien Tort Statute pursued in the US it is understood that damages have not been collected.[171] An explanation for this is that civil remedies are sought as a means 'for providing a measure of self-respect, vindication and recognition for the victims rather than a mechanism of enforcement under international law'.[172] That does not appear to have been the case in *Bodo Community*, where the concern was with

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165 The Administration of Justice Act 1920 applies to Malaysia, New Zealand, Nigeria and Singapore while the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies to judgments from Australia, Canada, Guernsey, India, the Isle of Man (UK), Israel, Jersey, and Pakistan.

166 The common law establishes that the English court will recognise a final and conclusive judgment of a court with 'international jurisdiction'. This jurisdiction is 'jurisdiction in the eyes of the English court'; it is not enough that the foreign court had jurisdiction according to its own rules, as Lord Ellenborough stated in *Buchanan* v. *Rucker* (1808) 9 East. 192.

167 *Buchanan*, ibid, p. 194.

168 For an explanation of the intention behind the order and potential enforcement consequences of the decision of the Court of Appeal see A. Briggs, 'Enforcing and Reinforcing an English Judgment' (2008) 4 *Lloyds Maritime and Commercial Law Quarterly*, pp. 421–7.

169 *Masri* v. *Consolidated Contractors International Company SAL and Ors* [2009] UKHL 43.

170 B. Stephens et al. (eds), *International Human Rights Litigation in the U.S. Courts* (Brill, 2008); R.B. Lillich, 'Damages for Gross Violations of International Human Rights Law' (1993) 15 *Human Rights Quarterly*, pp. 207–29, at 208.

171 Often, because of practical reasons, such as lack of funds within the jurisdiction and the difficulties of enforcement of the decision abroad – factors that were not known to the claimants at the time of starting the action.

172 J. Terry, 'Taking *Filartiga* on the Road', in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, 2001), pp. 109–34, at 112.

monetary compensation (out of which legal expenses would be paid[173]). However, one can easily imagine that any claim in the setting of the Geshuri works (discussed above in Section 4) might have rights vindication as its priority either as a stand-alone remedy (a statement of wrongdoing by a respected court) or to unlock a settlement in which the works cleans up its process and respects the rights of its neighbours.

6. CONCLUSION

There are many reasons for seeking to litigate an industrial pollution tort claim beyond the so-called natural or home forum within the framework of private international law. In some cases, the search for a different forum is led by the applicable law or the remedies available,[174] while at other times considerations of access to justice are at play.[175] Indeed, issues of substantive law and process are often interconnected and combine in the field of tort to make this subject as dynamic as it is. In many cases the choice between different jurisdictions signifies a substantive law advantage to one party or the other. Occasionally the stakes are considerably higher than securing an advantage for one of the parties, in that 'what is being decided is whether litigation can proceed or not at all'.[176] In this respect it is not an exaggeration to say that '[t]he battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case'.[177]

Looking ahead to the longer-term development of extraterritorial tort litigation within the framework of private international *environmental* law in England and beyond, it is instructive to situate the discussion within the context of public international law governing neighbouring states. It is particularly important to think back to, and draw comparisons with, the famous *Trail Smelter* litigation.[178] This case of state liability for transboundary harm started out life, before it became a concern of central government agencies, as a private nuisance dispute between farmers and a factory on respective sides of the US/Canadian border. Historical research into the context of the litigation reveals that the interests of the original prospective plaintiffs were somewhat prejudiced by the transformation of the dispute from the private to the public international law sphere.[179] In particular, the US government did not wish

173 See, in this respect Meeran, n. 116 above, p. 23.

174 U. Baxi (ed.), *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (The Indian Law Institute, 1985).

175 *In re Union Carbide Corp Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y., 1986); *Connelly*, n. 18 above; *Lubbe*, n. 19 above.

176 D.W. Robertson & P.K. Speck, 'Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions' (1990) 68 *Texas Law Review*, pp. 937–61, at 938 ('Although courts and commentators routinely discuss forum non conveniens as if the issue at stake were a choice between two competing jurisdictions, in fact, the usual choice is between litigating in the United States or not at all').

177 Ibid.

178 *Trail Smelter Case (United States/Canada)* 3 RIAA 1905 (1941).

179 J.D. Wirth, 'The Trail Smelter Dispute: Canadians and Americans Control Transboundary Pollution, 1927–1941 (1996) 1(2) *Environmental History*, pp. 34–51, at 36 ('the fact that Trail became a foreign policy issue between two sovereign states … brought new actors to the scene, and changed the role of others'). Overall the pollution victims received less compensation than they had claimed privately, while the factories invested in only moderately clean technologies, rather than the more

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to disclose evidence against the Canadian factory that could also be used against wealth-generating polluting factories operating in US territory, whether by US pollution victims or Mexicans on the other side of the US southern border.[180] This reinforces the point that tort-based solutions to environmental problems have deep roots historically and that nuisance is, above all, attractive as a means of addressing environmental problems, which bypasses executive bodies in favour of direct access to courts (giving it an 'unofficial' character).[181] This mirrors the trend towards bringing tort cases against corporations for human rights abuses, alleging harm caused by 'nuisance' or 'negligence' rather than, for example, torture or violation of the right to life.[182]

Bodo Community and the ongoing Shell nuisance litigation in *Ogale* and *Bille* can be read, in this light, as an example of private international environmental law coming out of the shadow of its public international law counterpart in an arrangement that is complementary rather than mutually exclusive.

expensive cleaner alternatives (p. 47). For further criticisms, see M. van der Kerkhof, 'The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute' (2011) 27(73) *Utrecht Journal of International and European Law*, pp. 68–83.

180 Wirth, ibid., pp. 39–40.

181 D. McGillivray & J. Wightman, 'Private Rights, Public Interest and the Environment', in T. Hayward & J. O'Neill (eds), *Justice, Property and the Environment: Social and Legal Perspectives* (Ashgate, 1997), pp. 146–60.

182 Meeran, n. 116 above, p. 3.