

# Litigating Extra-Territorial Nuisances under English Common Law and UK Statute.

## 1 Introduction

English nuisance law is an area of tort law that remedies interferences with the use and enjoyment of land in accordance with the principle of ‘good neighbourliness’.<sup>1</sup> For many centuries, it has tackled pollution of air and water, with one commentator characterising it aptly as ‘among the earliest forms of environmental protection the world has known’.<sup>2</sup> Every country has an equivalent of nuisance, but the English version is particularly important historically since, at the height of the British Empire, it remedied industrial-scale pollution across 40% of the world’s territory, often ‘supplementing’ local laws and regulations.<sup>3</sup> Against this backdrop, this article examines a current problem: English judges, sitting in English courts, being asked to hear ‘foreign’ nuisance claims of an environmental nature.<sup>4</sup>

The focus of the discussion is the on-going extra-territorial nuisance litigation around the exploitation of oil in the Niger Delta by Shell Petroleum Development Company of Nigeria Ltd (SPDC) and Royal Dutch Shell (RDS)<sup>5</sup> in the English court. The Shell nuisance litigation under scrutiny began with a claim brought by 15,000 members of the Ogoni People, whose land and livelihoods were (and continue to be) injured by oil spills associated with the defendant’s works in 2008 and 2009. The claim was initially brought against both RDS and

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<sup>1</sup> See e.g. Lord Millett, in *Southwark LBC 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’).

<sup>2</sup> R. Palmer, ‘Common Law Environmental Protection: the Future of Private Nuisance, Part 1’ (2014) 6 International Journal of Law in the Built Environment 21. For case studies on the application of nuisance law in an environmental setting see B. Pontin, *Nuisance Law and Environmental Protection* (Lawtext Publishing 2013).

<sup>3</sup> For example 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. He held that Article 1200 of the Mejlle code – the local law addressed to nuisance - was supplemented by substantive English common law nuisance provisions and the equitable remedy of an injunction (at 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’ (at 43). See further D. Schorr, ‘The *Taasiyah Chemith* Case: Pollution Law in the Palestine Mandate’, Paper Presented at World Congress of Environmental History Copenhagen, August, 2009.

<sup>4</sup> These cases are not exclusive to England. Four Nigerians and the campaign group Friends of the Earth filed suits in 2008 in The Hague, where Shell has its global headquarters, seeking reparations for lost income from contaminated land and waterways in the Niger Delta region, the heart of the Nigerian oil industry. The district court in 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 & SPDC*, District Court of the Hague, 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 & SPDC*, District Court of the Hague, 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 & SPDC*, District Court of the Hague, 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>

<sup>5</sup> 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 United Kingdom. It is domiciled in the United Kingdom and listed on the FTSE stock exchange. It is the parent company of the Shell group of companies (the “Shell Group”).

SPDC, in respect of liabilities under English law (in the RDS case) and Nigerian law (in respect of SPDC), but the parties agreed that it would proceed in respect of the SPDC alone. The claim was settled after a hearing of preliminary issues, in *Bodo People v Shell Petroleum Development Company (Nigeria) Ltd.*<sup>6</sup>

Two further group claims of similarly significant proportions have subsequently been commenced by inhabitants from the Ogale and Bille communities respectively in 2016.<sup>7</sup> The claims have been brought against both RDS at its London address and SPDC at its address in Nigeria, for which leave of the court to serve the claim out of jurisdiction has been sought, and obtained.<sup>8</sup> On this occasion, by contrast with *Bodo People*, the parties have been unable to agree on the jurisdiction of the English court in respect of SPDC. While the claims against RDS are based on the party's domicile in England,<sup>9</sup> the jurisdiction of the English court in respect of the Nigerian subsidiary (SPDC) is contested.

With so much attention being given to the ruling in *Kiobel v Royal Dutch Petroleum Corporation*,<sup>10</sup> in which the US Supreme Court rejected jurisdiction on the basis of a pre-presumption against the extra-territorial application of the US Alien Torts Statute (ATS),<sup>11</sup> it is easy to overlook the fact that the principles and rules relating to extra-territorial litigation are grounded in national legal systems, and thus may differ from country to country. Thus putting the breaks on the once claimant friendly<sup>12</sup> US approach does not necessarily close the door on other national paths within private international law.<sup>13</sup> It is true that US law has for some time been 'the main engine for transnational human rights and the environment

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<sup>6</sup> *Bodo Community and others v Shell Petroleum Development Company of Nigeria* [2014] EWHC 1973 (TCC).

<sup>7</sup> *Lucky Alame and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd; His Royal Highness Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* (unreported leave decisions of His Honour Judge Raeside QC, Technology and Construction Court, 2 March 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.

<sup>8</sup> *Ibid.*

<sup>9</sup> Article 4, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters [2012] OJ L351/1 (Brussels I Recast).

<sup>10</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). For commentary on the case see, among others, For example, 'Agora: Reflections on *Kiobel*. Excerpts from the American Journal of International Law and AJIL Unbound' (2013) 107 *American Journal of International Law* 601. A. Grear and B. Weston, (2015) 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel* Landscape' *Human Rights Law Review*, , 21-44

<sup>11</sup> Although the court left the door open for those claims that sufficiently 'touch and concern' the United State. R. McCorquodale, 'Waving nor drowning: *Kiobel* outside the United States' (2014) *American Journal of International Law* 846 -851.

<sup>12</sup> Even though the qualification of 'claimant friendly' has been challenged by different academics, See 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.

<sup>13</sup> A. J. Colangelo 'The Alien Tort Statute and the Law of Nations in *Kiobel* and Beyond' (2013) 44 *Georgetown Journal of International Law*, pp. 1329-1346; R. P. Alford (2014) 'The Future of Human Rights Litigations After *Kiobel*' *Scholarly Works*. Paper 1063, available at: [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1063](http://scholarship.law.nd.edu/law_faculty_scholarship/1063)

litigation’,<sup>14</sup> but alternatives are available in other jurisdictions.<sup>15</sup> This article explores the extent to which the Shell nuisance litigation helps elucidate an alternative national approach to questions of jurisdiction, based both on the rules of jurisdiction mandatory for EU member states under the Brussels regime<sup>16</sup> and, more specifically, on Britain’s unique common law constitution, which, it is argued, differs from the US in regard to the nature and strength of the presumption against extra-territorial jurisdiction.

The analysis begins with a general overview of the European Jurisdiction and Enforcement of Judgments Regulation and common law and statutory jurisdictional rules in England and Wales. Attention is drawn, in the context of the traditional rules of jurisdiction to the distinction between claims that originate as of right (when served on a party at an address in England or Wales)<sup>17</sup> and those that can only be served on the defendant at the discretion of the court (where leave is obtained to serve a claim on a defendant abroad). Subsequent sections examine the application of these general rules and principles to tort litigation bearing on the environment, including the Shell litigation. Section 3 considers service as of right cases – especially the ‘toxic tort’ cases *Connelly*<sup>18</sup> and *Lubbe*<sup>19</sup> – where the court ruled under challenge from the defendant that the English jurisdiction was appropriate despite not being the *forum conveniens* in terms of satisfying the ‘ends of justice’.<sup>20</sup> Section 4 considers recent developments in discretionary jurisdiction cases, including *Cherney*,<sup>21</sup> and *Kyrgyz Mobil*,<sup>22</sup> which have been criticised on the grounds of exorbitant jurisdiction, but which may prove of particular relevance to private international nuisance claims as they show a willingness, from the English courts, to extend jurisdiction to cases where a fair trial would be difficult, if not impossible in the more convenient forum. Section 5 considers the enforceability of remedies awarded in extra-territorial tort litigation, including the peculiar problems that are raised in regard to nuisance law by the fact that the primary remedy is an injunction (a coercive remedy). It is concluded that the English approach to allowing displacement of jurisdiction from the natural forum to an alternative forum where the case ‘can be more suitably heard for the interests of all parties and the ends of justice’<sup>23</sup> under its traditional rules may represent a

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<sup>14</sup> D. P. Stewart, ‘Kiobel v Royal Dutch Petroleum Co: The Supreme Court and the Alien Tort Statute’ (2013) 107 *American Journal of International Law* 601

<sup>15</sup> Notably in those adhering to the Brussels I Recast where claims initiated against a defendant domiciled within the territory of a member state will proceed.

<sup>16</sup> The “Brussels Regime” or ‘Brussels system’ is used to denote provisions under ‘Brussels I Regulation’ on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Reg. (E.C.) 44/2001, [2001] O.J. L 12/1 and the Lugano Convention (which extends rules virtually similar to those under the Brussels I Regulation to Iceland, Norway and Switzerland). From 10 January 2015, the Brussels I Regulation was replaced by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L 351/1

<sup>17</sup> ‘England’ is used as a shorthand in jurisdiction terms for England and Wales in this article.

<sup>18</sup> *Connelly v RTZ Plc* [1998] AC 854. (hereafter *Connelly*)

<sup>19</sup> *Lubbe and others v Cape plc* [2000] 1 WLR 1545. (*Lubbe*)

<sup>20</sup> 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 regime. This is discussed in detail in section 4.

<sup>21</sup> *Cherney v Derikpaska* [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456 (hereafter *Cherney*)

<sup>22</sup> *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC (hereafter *Kyrgyz Mobil*)

<sup>23</sup> *Spilada Maritime Corp v Cansulex Ltd* [1987] AC 460.

valuable ‘unilateral’ development of potentially considerable importance to transnational environmental law litigation.<sup>24</sup>

## 2. English Jurisdictional Rules in Context

The rules and principles of private international law bearing on jurisdiction in civil claims differ from country to country, but there are nonetheless some meaningful generalisations that can be made as to the normative foundation for a court hearing ‘foreign’ claims.<sup>25</sup> 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 symbolic assertion of power on the part of the state,<sup>26</sup> even if increasingly symbolic.<sup>27</sup> This underpins the presumption against the extra-territorial 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.’<sup>28</sup> It also informs the general rules of jurisdiction of the Brussels I (Recast) Regulation which revolve around the domicile of the defendant.<sup>29</sup>

A contrasting basis for jurisdiction, independent of and capable of rebutting the territorial presumption, is consent of the individuals involved.<sup>30</sup> This is based not on state power or authority but on individual autonomy in the sense given clearest expression in the context of European political philosophy by Kant.<sup>31</sup> The idea is that people can choose where they are to litigate and that the court will respect that choice as a matter of principle.

A third basis of jurisdiction centres on the idea – again central to the Western liberal tradition – of rule of law.<sup>32</sup> 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

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<sup>24</sup> On unilateralism, see G. Shaffer and D. Bodansky, ‘Transnationalism, Unilateralism and International Law’ (2012) 1 *TEL* 31.

<sup>25</sup> On the theoretical basis of jurisdiction, see E. Merrick Dodd Jr (1929) ‘Jurisdiction in personal actions’ in P. Borchers, (ed) *Jurisdiction in Private International Law*, (Edward Elgar, 2014) Ch 1.

<sup>26</sup> 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 and Co Ltd* [1916] 2 AC 298 at 302, HL. Very few limits were established under this rule, the main ones involving use of deception or enticing the defendant fraudulently or improperly *Watkins v North American Timber Co Ltd* (1904) 20 TLR 534

<sup>27</sup> On the symbolic aspect of this, see Lord Sumption in *Abela and others v Baadarani and others* [2013] 1 WLR 2043 at 2063. Lord Clarke concurred (at 2060). See discussion below in this section.

<sup>28</sup> *Kiobel* n. 10 at 1669.

<sup>29</sup> Art. 4 Brussels I Recast: ‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

<sup>30</sup> Arts. 25 and 26 Brussels I Recast. This is developed below, in this section, in respect of the English traditional rules.

<sup>31</sup> I. Kant, *Practical Philosophy*. ed. and trans. M. Gregor (Cambridge University Press, 1999).

<sup>32</sup> J. Raz, ‘Rule of Law and its Virtue’, in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979).

obligations.<sup>33</sup> This right exists in some form or another in most of the world's constitutions and in some countries reference is also made to the prohibition of 'denial of justice', which is a general principle of public international law.<sup>34</sup>

In England, jurisdiction in actions *in personam* is determined first by the Brussels regime and, if the regulation does not apply, by the traditional rules of jurisdiction that in this respect are said to be residual.<sup>35</sup> An important aspect of jurisdiction allocated under Brussels system is that a court with jurisdiction according to the provisions of the regulation cannot decline jurisdiction in favour of another court. This simplifies jurisdictional battles in court and provides legal certainty for both claimants and defendants.<sup>36</sup>

Under the Brussels regime national courts have jurisdiction over those domiciled in the territory of a member state.<sup>37</sup> The determination of the defendants' domicile is done according to the national law of each member state.<sup>38</sup> In England and Wales this is done according to the provisions of the Civil Jurisdiction and Judgments Act 1982 as amended by the Civil Jurisdiction and Judgments Order 2001.<sup>39</sup> Corporations are domiciled in the place of their statutory seat, central administration or principal place of business.<sup>40</sup> The Regulation also considers jurisdiction based on consent by it implicit or explicit.<sup>41</sup> Creating a forum on the basis of access to justice was discussed at the time of drafting the Recast Regulation,<sup>42</sup> but ultimately dismissed.<sup>43</sup>

To elaborate briefly on the consensual basis of jurisdiction, not least because of its importance to the *Bodo People* claim,<sup>44</sup> a foreign defendant submitting to the jurisdiction of the court can do so many ways.<sup>45</sup> A defendant can submit to the jurisdiction of the court by acknowledging service without applying for an order of the court declaring that it lacks

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<sup>33</sup> Article 6.1 European Convention on Human rights (E.C.H.R.) European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213. UNTS 221

<sup>34</sup> See A. Adede, 'A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law' (1979) 14 *Can. Year. Int. Law*, p. 73.

<sup>35</sup> A. Briggs, *The Conflict of Laws* (Oxford University Press, 2013) pp. 110-2.

<sup>36</sup> The court with jurisdiction derived from the Brussels Regime cannot stay actions on the basis on *forum non conveniens* following the ECJ judgement in *Owusu v Jackson* [2005] (C-281/02) E.C.R. I-1383.

<sup>37</sup> Article 4. Brussels I Recast.

<sup>38</sup> Article 62 for individuals and Art 63 for companies. *id.*

<sup>39</sup> Section 9 'Domicile of an individual; and section 10 'Seat of company, or other legal person or association for purposes of Article 22(2) (section 43).

<sup>40</sup> Art. 63. *Ibid.*

<sup>41</sup> Arts. 25 and 26. *Ibid.*

<sup>42</sup> A. Nuyts (2007) 'Study on residual jurisdiction: general report'. Available at [http://ec.europa.eu/civiljustice/news/docs/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf) at 64

<sup>43</sup> For a discussion on the possibility of introducing an alternative general forum based on 'necessity' or access to justice see: Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30 *Utrecht Journal of International and European Law*, p 24, at p. 32.

<sup>44</sup> See below n 46.

<sup>45</sup> For a discussion of common law rules on agreements on jurisdiction see, J. Fawcett and J.M. Carruthers, *Cheshire, North and Fawcett's Private International Law* (14<sup>th</sup> ed. Oxford University Press, 2008), pp 383-448. Agreements on jurisdiction for the court of a Member State are validated by Article 25 of (Brussels I recast); also note Hague Choice of Court Convention of 2005 of 30 June 2005.

jurisdiction,<sup>46</sup> or by instructing a solicitor to accept service on his behalf.<sup>47</sup> Parties can also, by way of contract –or more frequently by a clause in a contract- agree to submit to the jurisdiction of a court to which they are not, otherwise, amenable. 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 were to exist, the court could be persuaded (provided all the other factors are present) to grant service abroad on the defendant unless there is a strong reason not to do so.<sup>48</sup> However, it is not possible to confer jurisdiction consensually beyond the authority of the court.<sup>49</sup>

What falls within the authority of the court is ultimately a matter (in the UK) 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 as amended provides that:

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 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 courts' authority.<sup>50</sup>

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

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<sup>46</sup> CPR, para 11 (5)

<sup>47</sup> CPR, para 6.4 (2)

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

<sup>49</sup> For example 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 below, n 128, and associated text).

<sup>50</sup> Id.

<sup>51</sup> See n 26 and associated text.

<sup>52</sup> Discussed in section 4.

<sup>53</sup> “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 and Co Ltd* [1916] 2 AC 298 at 302, HL

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

<sup>55</sup> Companies Act 2006, s 1139(1)

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

Where a claim is served on a defendant as of right, but the domicile requirement of the Brussels regime 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 *The Spiliada* (albeit that this is a case concerning 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.<sup>57</sup>

In terms of the burden of proof, Lord Goff elaborated by emphasising 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’.<sup>58</sup>

Once that burden is discharged by the defendant, the onus then shifts to the claimant to establish that the English court, though not the natural forum, is the nonetheless the right forum for purposes of determining the rights of the parties and meeting the ‘ends of justice’.<sup>59</sup> The ‘ends of justice’ may or may not have some broad similarity with the ‘public interest’ as it is relevant in the US case law for example.<sup>60</sup> 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. In this respect the ‘ends of justice’ may have more in common with ‘public necessity’<sup>61</sup> applied, for example, in Canada, or *forum neccesitatis*<sup>62</sup> introduced as an autonomous ground of jurisdiction in Belgium and the Netherlands after the abolition of the exorbitant bases of jurisdiction based on the plaintiff’s domicile in the forum.<sup>63</sup> Regardless, concentrating on the common law setting at hand, and to reiterate, the crux of the court’s inquiry is justice between the parties, in a highly casuistic- fashion. In the

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<sup>57</sup> *Spilada* n 23 at 476.

<sup>58</sup> Ibid 477.

<sup>59</sup> The second limb of the *Spiliada* test.

<sup>60</sup> *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 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 11<sup>th</sup> Circuit Court as in *Aldana v. Del Monte Fresh Prod. N.A., Inc.*, 2009 WL 2460978, 5-6 (11th Cir. Aug. 13, 2009).

<sup>61</sup> Chilenye Nwapi, ‘Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor’ (2014) 30 *Utrecht Journal of International and European Law*, p 24, at p 32.

<sup>62</sup> This is the case of Belgium or the Netherlands. See A. Nuyts (2007) ‘Study on residual jurisdiction: general report’. available at [http://ec.europa.eu/civiljustice/news/docs/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf) at 64

<sup>63</sup> *Spiliada* n 23 at 476.

words of Evans LJ<sup>64</sup> the alternative forum must be ‘available in practice to *this* plaintiff, to have *this* dispute resolved’.<sup>65</sup>

Moving on to claims served out of jurisdiction which require leave of the court, the rules are set out in CPR 6.36 and Practice Direction 6B, as above. In order to serve a claim on a defendant out of jurisdiction, the prospective claimant must satisfy three cumulative tests.<sup>66</sup> First, that they have a ‘reasonable prospect of success’;<sup>67</sup> second, that there is a good arguable case that falls within the grounds of the rules;<sup>68</sup> and third, that England is the ‘appropriate forum’.<sup>69</sup> This latter test is fleshed out in a series of leading cases, notably by Lord Goff in *The Spiliada*,<sup>70</sup> and most recently, by the Supreme Court in *Cherney*<sup>71</sup> and *Kyrgyz Mobil*.<sup>72</sup> In general, concepts such as ‘appropriate’ or ‘natural forum’<sup>73</sup> have developed in the context of torts as undoubtedly pointing to the *forum loci delictii* where events leading to the damage took place.<sup>74</sup> However, this does not impede exceptional cases from being litigated in a place other than the natural forum due to the unavailability of the *forum delictii* in a practical or legal sense. In *VTB Capital Plc v Nutriek International Corp & Ors*<sup>75</sup> a case concerning a tort committed in England between foreign parties, upon approving unanimously the application of the *Spiliada* test for determining whether England was the appropriate forum the court found that Russia was the distinctively more appropriate forum, and thus rejected the previously held view that the place where the tort was committed was always and clearly the most appropriate forum.<sup>76</sup> The English courts, it stated, will not approach a case by way of applying presumptions but would consider all relevant factors.

Where leave is granted, under CPR 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. As Collins explains in his history of English service out of jurisdiction law,<sup>77</sup> the English courts have sometimes strongly expressed a concern that the English jurisdiction is ‘exorbitant’, to such an extent

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

<sup>65</sup> Ibid at 1485, emphasis by the authors. *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*, p 201.

<sup>66</sup> Roger Stewart, G. Chapman and Can Yeginsu ‘Londongrad Calling: Jurisdictional Battels in The English Courts’ (2014) 8(1) *Dispute Resolution International*, p 25, at p 26.

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

<sup>68</sup> *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555–557, per Waller LJ (affirmed [2002] 1 AC 1); *Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries)* [2007] 1 WLR 12.

<sup>69</sup> *The Atlantic Star* [1974] AC 436.

<sup>70</sup> *Spilada* n 23.

<sup>71</sup> Above n 21.

<sup>72</sup> Above n 22.

<sup>73</sup> The concept of the ‘natural forum’ was discussed in in *The Atlantic Star* [1974] AC 436, *Mac Shannon v Rockware Glass* [1978] AC 705 and *The Abidin Daver* [1984] AC 398 in the lead up to adoption of forum (non) conveniens in England by *The Spiliada*.

<sup>74</sup> Recently, in tort cases, by the House of Lords in *Berezovsky v Michaels* [2000] 1 WLR 1004 HL but see below.

<sup>75</sup> [2010] EWCA Civ 808, [2013] UKSC 5.

<sup>76</sup> This had been left as an open question by the *Albafort* [1984] 2 *Lloyds Rep* 91 and *Berezovsky v Michaels* [2000] 1 WLR 1004.

<sup>77</sup> L. Collins, ‘Some Aspects of Service Out of Jurisdiction in English Law’ (1972) 21 *ICLQ*, p 656.



that it raises delicate diplomatic issues relating to other sovereign nations. For example, Scott LJ in *George Monro v American Cyanamid* mentioned that:

Service 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.<sup>78</sup>

Words used by the courts to describe limits on the exercise of discretion to serve out of jurisdiction include the need for ‘considerable care’,<sup>79</sup> ‘extreme caution’<sup>80</sup>, and ‘forbearance’,<sup>81</sup> and ‘with discrimination and scrupulous fairness’.<sup>82</sup> But these do not favour one or other party – they are about doing justice between the parties viewed in the round. And the very possibility of exorbitant jurisdiction being entertained affirms that the English law is willing to at least 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 delicacies than at certain times in the past. In *Cherney v. Deripkasa*,<sup>83</sup> there was an almost nil connection with England<sup>84</sup> and yet the Commercial Court found allegations that the safety of the claimant would be at risk should he put foot in Russia enough to justify service abroad and thereby institute the jurisdiction of the court.<sup>85</sup> Concerns with the ‘ends of justice’ in this particular case, in respect of Mr Cherney’s personal safety and physical integrity and of his prospect to obtain a fair trial in Russia were the fundamental drivers of this decision.<sup>86</sup>

Similarly, the Supreme Court ruling in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd*<sup>87</sup> 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 the jurisdiction in respect of a claim whose natural forum was in Kyrgyzstan, ‘on the grounds that the risk that a Kyrgyz court would deliver injustice overwhelmed the ordinary operation of the *Spiliada* test.’<sup>88</sup> The Privy Council addressed – and rejected – the defendant’s

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<sup>78</sup> [1944] KB 432 at 437 (cited *ibid* p 658).

<sup>79</sup> *ibid*

<sup>80</sup> *ibid*

<sup>81</sup> *ibid*

<sup>82</sup> *ibid*.

<sup>83</sup> [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456, approving [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333.

<sup>84</sup> Despite the small connection in a detailed and carefully reasoned judgment ([2008] EWHC 1530 (Comm)), Christopher Clarke J found that the court had a basis for exercising its discretion to take jurisdiction since it was common ground that, if the relevant agreement was made, it was made in England – one of the jurisdictional gateways of the CPR Part 6 PD6B was engaged.

<sup>85</sup> See A. Briggs ‘Forum Non Satis, *Spiliada* and an Inconvenient Truth’ (2011) *Lloyd’s Maritime and Commercial Law Quarterly*, p 321, at p 329 for a vigorous criticism of the decision.

<sup>86</sup> R. Steward, G. Chapman and C Yeginsu, “Londongrad Calling: Jurisdiction Battles in the English Courts” (2014) 8(1) *Dispute Resolution International*, p 25, at p 30.

<sup>87</sup> [2011] UKPC 7.

<sup>88</sup> Briggs n. 85, at p 27.

argument that comity required the court not to pass judgment on the adequacy of another state's courts (in that case 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.<sup>89</sup>

While *Cherney* and *Kyrgyz Mobil* have been criticised as exorbitant,<sup>90</sup> there is clearly a tension between comity and the 'ends of justice', which they courts address on a fact sensitive, casuistic basis (rather than with bright line rules of inclusion or exclusion).

In *Abela v Baadarin*<sup>91</sup> – where the main issue was the mode and timing of service out of the jurisdiction - a new language to qualify the Courts' powers in extraterritorial cases was suggested by Lord Sumption. 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,<sup>92</sup> nor a party to any bi-lateral convention on service of judicial documents and the trial judge had allowed service abroad on an alternative method – at the address of the defendant's solicitor. The 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 and exorbitant power still more exorbitant'.<sup>93</sup> The Supreme Court 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"'.<sup>94</sup> Among those changes are that extraterritorial litigation 'is a routine incident of modern commercial life',<sup>95</sup> together with (and reflected by) the growing number of multilateral agreements for cooperation in civil matters beyond commercial ones.<sup>96</sup>

But 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*,<sup>97</sup> by holding a fair trial was possible in Russia between different parties and on different facts. Some subsequent cases where the claimant has sought to

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<sup>89</sup> *Kyrgyz Mobil*, 1830.

<sup>90</sup> A. Arzandeh "Should the Spiliada Test Be Revised?" (2014), 10 (1) *Journal of Private International Law*, p 89, at p 90.

<sup>91</sup> *Abela and others v Baadarani and others* [2013] 1 WLR 2043.

<sup>92</sup> In force 10 Feb 1969 available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17>

<sup>93</sup> Cited by Lord Clarke in *Abela*, n 91 in relation to Longmore LJ in the Court of Appeal.

<sup>94</sup> Above n 91, at 2063. Lord Clarke concurred (at 2060).

<sup>95</sup> *Id.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Yugraneft v Abramovich* [2008] EWHC 2613.

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.<sup>98</sup>

On the face of things, the debate arising from *Cherney*, *Krygyz Mobil* echoes somewhat that a few decades ago surrounding 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.<sup>99</sup>

Yet the judgments in *Cherney* and *Krygyz Mobil* are arguably of a different, nuanced, order. In neither is there a 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).<sup>100</sup> Rather, it is accepting jurisdiction because the common law recognises a fundamental right to a fair hearing vesting in anyone who persuades the English court that a hearing is impossible locally.<sup>101</sup> The ruling can, in this way, be considered consistent with the principle of legality, which found influential expression in the writing of Dicey.<sup>102</sup>

Indeed, it is probably no coincidence that A V Dicey is the author of the leading late Victorian private international law (Dicey preferred ‘conflict of laws’) text,<sup>103</sup> published a decade after his seminal constitutional study.<sup>104</sup> Dicey the ‘constitutional lawyer’ wrote that ‘Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law.’<sup>105</sup> With specific reference to the right to 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.<sup>106</sup> Dicey compared this

<sup>98</sup> *Erste Group Bank A G (London) v JSC (VMZ Red October)* [2013] EWHC 2913. Similar conclusion was reached in respect of Ukraine in *Pacific International Sports Club Ltd v Soccer Marketing Ltd* [2009] EWHC 1839 (Ch) and *Ferrexpo AG v Gilson Investment* [2012] EWHC 721.

<sup>99</sup> [1973] 1 QB 364, 381-382.

<sup>100</sup> Lubbe n. 19 at 1455

<sup>101</sup> Briggs n 85 at 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.

<sup>102</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edition (Macmillan, 1915).

<sup>103</sup> A V Dicey, *A Digest of the Laws of England with particular reference to Conflicts of Laws* (Stevens and Sons, 1896)

<sup>104</sup> Above n. 102

<sup>105</sup> Dicey, *ibid*, p 116.

<sup>106</sup> *Ibid*, p 119-120 (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.)

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 to the code). Owing to their primordial or at least foundational status under Diceyan theory, they cannot be taken away by legislation without a 'revolution'.<sup>107</sup>

Dicey did not elaborate on the 'good and bad' of this idiosyncratic constitutional arrangement, but some of it is obvious. What is 'good' about the arrangement is its responsiveness to individual circumstances. That is what the claimants in some (but not others) of the jurisdiction cases above discovered to their advantage. What is 'bad' is that the law lacks predictability – again, something that chimes well with the case law above. Thus, whilst *Krygyz 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 give them a hearing, cases of this kind will necessarily turn on their merits, where the margins will, invariably, be fine.

A further way in which the constitutional context of English private international law is illuminating concerns 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 account in terms of the rule of law, by way of judicial review, cannot 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 that answers to the need for the court to establish that the claimant standing to bring a claim and that there is an arguable case on the merits.<sup>108</sup> The overwhelming majority of claims fall at this leave hurdle, but nonetheless leave serves the important function of affording access to a court, whilst filtering out 'weak' claims, whose hearing would unnecessarily add to the difficulties and complexities of government. 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<sup>109</sup> can be contested by the defendant making a case as to why the proceedings should be stayed<sup>110</sup> (claims served at the discretion of the court, on the initiative of the claimant, are considered in the section following). Although the discretion of the court and scope for staying actions has been firmly restricted by the ruling of the ECJ in *Owusu v Jackson*,<sup>111</sup> where after a decade of ambiguous decisions regarding the ability of English Courts to stay actions commenced as of right in England, when the

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<sup>107</sup> Ibid.

<sup>108</sup> On judicial review P. Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24 (4) *Oxford J Legal Studies*, pp. 237-257.

<sup>109</sup> According to the criteria mentioned above in section 2, above.

<sup>110</sup> According the principles established by Lord Goff in *The Spiliada* n 23.

<sup>111</sup> Id.

alternative forum was a non-Brussels country,<sup>112</sup> it was clarified that English courts can still stay actions when the defendant is not domiciled in a Brussels state and service has been effected as of right, for example, on a foreign company not domiciled but present in England.<sup>113</sup>

Our discussion in this section draws on ‘toxic tort’ cases that today could not be subject to the same jurisdictional challenges, as they could not now be stayed due to the EU domicile of the parent company. These cases are *Connelly* and *Lubbe*, in which the English domiciled defendants sought a stay on proceedings on the ground of forum non conveniens (under *The Spiliada* ruling). However, these cases 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 any discretion the court has to hear tort claims with a foreign dimension.

In *Connelly*,<sup>114</sup> the claimant (domiciled in Scotland) alleged injury whilst working in a uranium mine in Namibia operated by a South African registered company Rossing Uranium Ltd (R.U.L.). The company was a subsidiary of English-registered RTZ plc. The claimant pursued the parent company alleging that it was negligent in devising of 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.<sup>115</sup> The critical attraction of the English civil justice system was the availability of a firm of solicitors who were prepared to undertake the claim on a no win no fee basis.

No doubt their [the defendant’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*.<sup>116</sup>

The court held that the defendant 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 many of the allegedly tortious acts causing the injury done. The onus then switched to the claimant to establish that ‘substantial justice cannot be done in the

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<sup>112</sup> In *Re Harrods (Buenos Aires) Ltd* [1990] 4 ALL ER 3347, 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”.

<sup>113</sup> See Section 2, above.

<sup>114</sup> Above n. 18.

<sup>115</sup> *Connelly* 873

<sup>116</sup> *Ibid* 873

appropriate forum’.<sup>117</sup> 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 Lord Bingham MR’s analysis in the Court of Appeal that the court was faced with ‘stark choice’ between a natural forum where there never could be a hearing and one which, whilst ‘not the most appropriate’, made a hearing is possible.<sup>118</sup>

Lord Hoffmann added however 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.<sup>119</sup> However, that does not appear to have been supported by other Law Lords, nor was it followed in *Lubbe* (considered below).<sup>120</sup> In that case 3000 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 expense support in England. The court was provided by the claimant with 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.’<sup>121</sup> There was further evidence, to which the court attached some weight, that the South African civil justice system lacked the experience with ‘group proceedings’ that the English system had.<sup>122</sup>

Applying this to the post Brussels Regulation regime, the inability of the court to stay an action commenced against a defendant domiciled in a Brussels Regulation state enabled the *Trafigura*<sup>123</sup> and *Monterrico*<sup>124</sup> litigations to proceed without the habitual jurisdictional battles.<sup>125</sup> Likewise, in *Bodo People* a claim was brought against both RDS and Royal Dutch Shell and Shell Petroleum Development Corporation Nigeria Ltd.<sup>126</sup> Part of the attraction of

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid, 8 (‘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)).

<sup>119</sup> Ibid 876. *Connelly* was received with dismay by the business community, see ‘RTZ Ruling Threatens other Multinationals’ Financial Times (London 25 July 1997), and the Lord Chancellor proposed legislation to reverse the effect of the House of Lords’ ruling, 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 for a discussion of this case.

<sup>120</sup> n 19.

<sup>121</sup> Ibid 1559.

<sup>122</sup> Ibid.

<sup>123</sup> The *Trafigura* case for 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 & Ors v Trafigura* at 28 BV HQ06X03370.

<sup>124</sup> *Guerrero & Ors v Monterrico Metals Plc* HCMP 1736/2009.

<sup>125</sup> For a discussion of both, Meeran n. 119.

<sup>126</sup> <https://www.leighday.co.uk/International-and-group-claims/Nigeria/History-of-the-Bodo-litigation>.

suing Royal Dutch Shell was that, as a company domiciled in England according to article 60 (1) of the 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 on the Nigerian subsidiary, but also, unless SPDC could prove that there was no merit on the claim against the parent company,<sup>127</sup> the claim against it could not be stayed on the grounds on *forum non conveniens*. In the event, the *Bodo People* 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 RDS was abandoned.

The concern with the tort of nuisance – a tort to land – meant that the High Court at the trial on preliminary issues of law in *Bodo People* was invited to rule on the statutory exclusion of jurisdiction over questions of title to, or right to possession of land 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.<sup>128</sup> The judge in *Bodo People* ruled that this could not be resolved at a preliminary stage, but nevertheless the judge offered guidance as to the kind of facts which might lead to some of the claims might be precluded from being heard on this basis these include a dispute over whether the claimant was a tenant of land, and also the extent of a bailwick of a chief, king or headman suing in a representative capacity.<sup>129</sup> Judge Akenhead hinted that some of the claims would have failed on this point, had the case not be settled after the preliminary issue hearing.

A further noteworthy feature of the *Bodo People* judgment and the subsequent cases of *Bille* and *Ogale* is that of the substantive applicable law. In *Bodo* the English court applied Nigerian law as agreed by the parties.<sup>130</sup> Part of the preliminary hearing thus involved determination of what the Nigerian law was. The judge heard expert evidence of the correct interpretation of Nigerian law by two Supreme Court judges, 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.<sup>131</sup> Even if the parties hadn’t agreed on the applicable law it is likely that the court would have applied Nigerian law to the conduct of SPDC for acts taking place in Nigeria, pursuant to sections 11, 12 and/or 14 of the Private International Law (Miscellaneous Provisions) Act 1995<sup>132</sup>, and pursuant to Articles 7 and/or 4 and/or 26 of the Rome II Regulation.<sup>133</sup>

To conclude this section for claims against companies domiciled in the EU it is now much simpler to bring a case in the courts of any 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* is on the determination by the court that there is merit on the claim against the European domiciled (parent) company

<sup>127</sup> As SPDC Nigeria tried to alledge in *Oguru, Efanga & Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd* No. 330891/ HA ZA 09-579 2009.

<sup>128</sup> *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812, 828 (per Mummery LJ).

<sup>129</sup> *Bodo People* [165]

<sup>130</sup> *Ibid.*

<sup>131</sup> *Bodo People*, n 1, at [179].

<sup>132</sup> For acts and omissions that occurred between 1 May 1996 and 11 January 2009.

<sup>133</sup> For acts and omissions that occurred between 1 May 1996 and 11 January 2009

and that this has not been brought up with the sole aim of suing the foreign domiciled subsidiary as a co-defendant or necessary or proper party.<sup>134</sup> For cases brought as of right against companies who are present but not domiciled for the purposes of the Brussels regime the English court still retains the ability to stay such cases on the grounds of *forum non conveniens*.

#### 4 Extra-territorial claims at the discretion of the Court

As noted above, the *Bodo People* case eventually proceeded in the High Court consensually. By contrast, the SPDC in the most recent cases, involving the Ogale and the Bille communities, has contested the High Court's jurisdiction. In a landmark (but as yet unreported) ruling, on the 2 March 2016, leave was granted for these latest claims to proceed against Shell Nigeria Ltd.<sup>135</sup> 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 leave decision, it is difficult to comment on the reasoning of the court in granting leave. However, as explained above, there are well established principles regarding 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 South African ones (in *Lubbe*) to hear a complicated group claim,. Nigerian legal practitioners would prima facie struggle to pursue a contingent fee claim on the scale of *Bodo People* with confidence, as the court acknowledged would be a problem in relation to South African legal practice (in *Lubbe*). If so, the Ogale and Bille communities in this new phase of Shell extra-territorial nuisance litigation did not (so the argument may go) 'choose' the English court jurisdiction over the local court jurisdiction; rather, the choice in these circumstances was between having a hearing or not.<sup>136</sup>

It is helpful to reflect on the specific nature of the local obstacles to access to justice that could in principle justify extra-territorial jurisdiction in these and similar future circumstances. 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 fee, group claim and other arrangements concerning the administration of civil justice), and those of a more 'political' character (concerning discrimination and/or corruption in the national justice regime). The former describes the situation in *Connelly* and *Lubbe* (above), where the court attributed considerable weight to the absence of local availability of financial assistance (in *Connelly*)<sup>137</sup> and the capacity to handle a complex group claim (in *Lubbe*).<sup>138</sup> The latter describes the situations in *Cherney*<sup>139</sup> and *Krygyz*

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<sup>134</sup> Exhibit D/L n. 7 para 34.

<sup>135</sup> Above n 7. Order of the Technology and Construction Court, 2 March 2016.

<sup>136</sup> Bingham MR in *Connelly*, above n 131.

<sup>137</sup> *Connelly* at 873

<sup>138</sup> n. 19 at 1559.

<sup>139</sup> n. 86.



*Mobil*.<sup>140</sup> The ‘technical’ and the ‘political’ obstacles to ‘ends of justice’ argument are not mutually exclusive, but the distinction is, nevertheless, important. The latter more deeply engages the principle of comity, in the sense 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 Kingdom claims, evidence is being put forward by the claimants’ legal representatives which covers both kinds of obstacle. In 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.<sup>141</sup>

Further, it is alleged that the civil justice system is subject to lengthy delays. In *SPDC v Tiebo*, for example, the Nigerian Supreme Court in 2005 handed down judgment 17 years after proceedings were started.<sup>142</sup>

At a political level, the obstacles centre on a deep distrust of the local civil justice regime as propping up the nation’s ‘oil oligarchy’,<sup>143</sup> which was at the forefront of the US litigation in *Wiva*,<sup>144</sup> the unsuccessful litigation in *Kiobel*,<sup>145</sup> the *Bodo People* claim, and is, again, resurfacing in the context of the *Ogale* and *Bille* nuisance litigation. Thus, in the witness statements reference is made to ‘state interference in the course of justice’<sup>146</sup> that includes ‘a widespread belief...that the Nigerian judicial system is vulnerable to interference and corruption.’<sup>147</sup>

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

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<sup>140</sup> And similar cases like *Yugraneft* n.97

<sup>141</sup> DL/1, above n 7 m para 44(b)(i).

<sup>142</sup> Ibid, para 44(b)(iv).

<sup>143</sup> S. Joab, D. Peterside, & M. Watts (2012) *Rethinking Conflict in the Niger Delta: Understanding Conflict Dynamics, Justice and Security*. Working paper n 26. Available at: [http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Watts\\_26\\_Revised.pdf](http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Watts_26_Revised.pdf)

<sup>144</sup> *Wiwa et al v Royal Dutch et al* (No. 96 Civ. S386 (KMWXHBP)), 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.

<sup>145</sup> Above n 10

<sup>146</sup> D/L, above, n 7 para 44(b)(iii)

<sup>147</sup> Id.

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’.<sup>148</sup> A corollary of this is that a show of confidence in the local regime – say the Nigerian justice system – can in principle help it 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’.<sup>149</sup>

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 the Niger Delta. Nigeria, prior to independence in 1963, 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.<sup>150</sup> 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.<sup>151</sup> 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 Torts Statute (*Wiva v Shell*<sup>152</sup> and *Kiobel v Royal Dutch Petroleum Corporation*).<sup>153</sup>

In Palestine, like Nigeria a former British protectorate, 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, due to the historical and political settings, as those faced by the Ogoni communities in Nigeria. There are multiple layers to private international law in the setting of Israel/Palestine.<sup>154</sup> 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.<sup>155</sup> 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<sup>156</sup> 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

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<sup>148</sup> Above n. 58 p. 580.

<sup>149</sup> [Ibid, p 581](#)

<sup>150</sup> J. G. Frynas, ‘Political Instability and Business: Focus on Shell in Nigeria’ (1998) 19 *Third World Quarterly* 457

<sup>151</sup> Joab et al. n 150.

<sup>152</sup> *Wiwa et al v Royal Dutch ef a/* (No. 96 Civ. S386 (KMWXHBP)), 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. This claim was

<sup>153</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>154</sup> M Karayanni ‘Access to Justice Ascends to International Civil Litigation: The Case of Palestinian Plaintiffs before Israeli Courts’ (2014) 33 *Civil Justice Quarterly* 41.

<sup>155</sup> Oslo Accord, Annex 4. Karavanni, id at 52.

<sup>156</sup> T Kelly, *Access to justice: the Palestinian legal system and the fragmentation of coercive power* (LSE, Crisis States Research Centre Working Papers Series 1, 2004) p 41.

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’.<sup>157</sup>

In recent years a Palestinian human rights organisation called 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.<sup>158</sup> The works used to be located on the Israeli side of the border, but they were relocated into occupied Palestine as a consequence of complaints by Israeli neighbours (who sued the company in nuisance in the local court in Israel).<sup>159</sup> When relocated to the Palestinian side of the border, the Israeli owners undertook not to operate the works when the wind blew in the direction of Israeli territory. In effect, the works operates only when the wind keeps its pollution within the Palestinian border. As a consequence, it is alleged that the locality is a hotspot of cancer, asthma, eye and respiratory health anomalies.<sup>160</sup>

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<sup>161</sup>) to obtain permission to serve the claim out of jurisdiction, and thus this case study is helpful in fleshing out some of the potential limits on the courts discretion in the present subject matter. The first of such problems is the fundamental issue of whether in the absence of one of the grounds or gateways for service out of the jurisdiction<sup>162</sup> the English (High) Court would be prepared to allow service out of the jurisdiction on a foreign defendant, for a wrong committed abroad, purely on the basis of the common law of natural justice.<sup>163</sup> 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 lacking legitimacy in the context of belligerent occupation.<sup>164</sup> The second hurdle lies in the distinction between the technical and political

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<sup>158</sup> D. Qato and R. Nagra, ‘Environmental and public health effects of polluting industries in Tulkarm, West Bank, occupied Palestinian territory: an ethnographic study’ (2013) *Lancet*, vol 382, p 5, S29. B. Pontin, V. de Lucia, J. Gamero Rus, *Environmental Injustice in Occupied Palestinian Territory* (Al Haq, 2015), 79-80.

<sup>159</sup> Pontin at al. id at 79-80

<sup>160</sup> Qato and Nagra, n 82.

<sup>161</sup> See section 2 above for an overview of ordinary jurisdiction grounds.

<sup>162</sup> It is important to remember that those were present in *Cherney* and in *Kyrgyz Mobil*. It is noteworthy however, the reflection advanced by Prof Briggs that if what drives the court to allow service out is the fact that England is the forum conveniens the requirement to satisfy taxonomic gateways is unjustified. Briggs, n.85 at 123.

<sup>163</sup> If it did, it will amount to the doctrine of forum of necessity.

<sup>164</sup> What *Cherney* and *Kyrgyz Mobil* have shown is that the claimant must establish the risk of injustice (in the sense of lack 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.

grounds that the court will consider when 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. As such it would appear to be 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.<sup>165</sup>

Thus the outcome of *Ogale* and *Bille* is of far reaching significance. It will further illuminate the English court willingness to take on extraterritorial nuisance claims. 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 remains to be seen.

### **5. Enforcement of Nuisance Remedies in English Private International Law**

The potential enforcement of the court judgement forms an integral part of the forum selection by the parties in private international law cases. In a tort setting much depends on what remedies are sought. Nuisance remedies are particularly complex, for whilst they share many of the characteristics of tort remedies more 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.<sup>166</sup> The function of an injunction in this context is to put an end to an on-going civil wrong involving the use of land. In other words, an injunction requires the wrong-doer to use land ‘rightly’. If they fail to do so, the claimant can bring a claim for contempt of court. 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 a nuisance claimant must be realistic about possible limits on the range of remedies they can expect to obtain, if successful in establishing liability. Such realism appears to have shaped the handling of the case by counsel in *Bodo People*. 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 damage 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 policing an injunction awarded in respect of a foreign tort would raise serious issues of comity and exorbitant jurisdiction.

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<sup>165</sup> The regime is modelled on the English civil justice system: A. Barak, ‘Some Reflections on the Israeli Legal System and Its Judiciary’ (2002) 6 *Electronic Journal of Comparative Law*. 169.

These cautionary remarks presuppose that the remedy of damages is more straightforward, which to an extent it is. 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 to the Brussels regime has been greatly simplified by the revision of the Brussels I Regulation.<sup>167</sup> Not only has the *exequatur* procedure<sup>168</sup> been eliminated, alongside the declaration of enforceability,<sup>169</sup> but according to the new article 54, if the remedy granted by the judgement is unknown in the enforcing court this can be adapted to a similar, known measure. The ease of enforcement within the European Union territory may be of relevance to potential claimants that could 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 the jurisdiction on a foreign defendant knowing that, although the defendant hasn't got assets in England to satisfy potential damages, the judgment could be enforced in any of the other state members to the Brussels system.<sup>170</sup>

If the defendant doesn't have assets in England the claimant will need to apply to the (High) Court for a certified copy of the judgment,<sup>171</sup> and present evidence of the original claim, service and, crucially, of whether the defendant objected or not, to the jurisdiction of the court and on which grounds.<sup>172</sup> Enforcement in other jurisdictions outside the Brussels I Regulation<sup>173</sup> scope will very much depend on the internal law of the country where the judgment is to be enforced and on the existence or not of reciprocal enforcement conventions between the UK and the country where the claimant seeks to enforce the English Court decision. Countries with which the UK has such agreements<sup>174</sup> may enforce an English judgment by a simplified system of registration. But another note of caution: one of the impediments to registration or/and enforcement in the foreign jurisdiction may be the consideration that the English Court lacked jurisdiction to adjudicate on the matter.<sup>175</sup> 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]

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<sup>167</sup> Israeli Class Action Law 5766-2006. 178 *Hunter v Canary Wharf* (1997) AC 655, 692

<sup>168</sup> *Exequatur* is a private international law concept used in civil law systems referring to the decision of a court authorising the enforcement of a foreign judgment.

<sup>169</sup> As above, the declaration of enforceability authorises the enforcement of a foreign judgment within the court's jurisdiction.

<sup>170</sup> It may also be one of the factors taken into account for 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] 1 L. Pr 302, CA.

<sup>171</sup> CPR Rule 74.12 and Practice Direction 74A supporting Part 74.

<sup>172</sup> Rule 74.13.

<sup>173</sup> The enforcement of judgments under the revised (recast) Brussels I Regulation 1215/20102 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.

<sup>174</sup> The Administration of Justice Act 1920 applies to Malaysia, Nigeria, New Zealand and Singapore while The Foreign Judgements (Reciprocal Enforcement) Act 1933 applies to judgements from Australia, Canada, India, Israel, Pakistan, Guernsey, Jersey and the Isle of Mann.

<sup>175</sup> 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

submit to such assumed jurisdiction<sup>176</sup> and enforce the judgment. The answer to this is ‘probably not’. Attempts to make an English judgment against foreign defendants not present within the jurisdiction enforceable by way of extending the territorial reach of an ex parte order under CPR Part 71<sup>177</sup> were rejected by the House of Lords in *Masri v Consolidated Contractors*.<sup>178</sup> Their Lordships took a view against extending the extra-territorial 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 starting proceedings alongside jurisdiction and choice of law issues.

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. In particular is the extent to which transnational tort actions can often serve symbolic rather than compensatory objectives.<sup>179</sup> For example, in most of Alien Tort Statute actions pursued in the United States, it is understood that damages have not been collected.<sup>180</sup> 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.’<sup>181</sup> That does not appear to have been the case in *Bodo People*, where the concern was with monetary compensation (out of which legal expenses would be paid). But one can easily imagine any claim in the setting of the Geshuri works, discussed above in section 4, having rights-vindication as its priority, whether as a standalone 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,<sup>182</sup> whilst at other times considerations of access to justice are at play.<sup>183</sup> Indeed, issues of substantive law and process are often interconnected and combine in the field of tort, to make

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<sup>176</sup> *Buchanan* *ibid*.

<sup>177</sup> 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*, 421-7.

<sup>178</sup> [2009] UKHL 43

<sup>179</sup> B. Stephens, J. Chomsky, P. Hoffman, J. Green & M. Ratner (eds), *International Human Rights Litigation in the U.S. Courts* (2<sup>nd</sup> ed, Brill, 2008) ; R.B. Lillich, ‘Damages for gross violations of International Human Rights Law’ (1993) 15 *Human Rights Quarterly*, p 207, at p 208.

<sup>180</sup> Often due to practical reasons such of lack of funds within the jurisdiction and the difficulties of enforcement of the decision abroad, factors that we not known to the claimants at the time of starting the action.

<sup>181</sup> 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 Publishing, 2001), at p 112

<sup>182</sup> U. Baxi (ed) *Inconvenient Forum and Convenient Catastrophe; The Bhopal Case* (The Indian Law Institute, 1985).

<sup>183</sup> *In re Union Carbide Corp gas plant disaster* 634 Supp 842 [1986], *Connelly* n 6; and *Lubbe* n 7.

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’.<sup>184</sup> 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.’<sup>185</sup>

Looking ahead to the longer term development of extra-territorial tort litigation within the framework of ‘private international *environmental* law’ in England and beyond, it is instructive to situate the discussion within the wider public international law governing neighbouring states. It is particularly important to think back to, and draw comparisons with, the famous *Trail Smelter* litigation.<sup>186</sup> 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/British Columbia border. Historical research into the context of the litigation reveals that the interests of the original prospective plaintiffs were ultimately prejudiced by the transformation of the dispute from the private to the public international law sphere.<sup>187</sup> In particular, the US government did not wish to push evidence against the Canadian factory that would be used against wealth generating polluting factories operating in US territory, whether by US pollution victims or Mexicans the other side of the US southern border.<sup>188</sup> This reinforces the point that tort based solutions to environmental problems have deep roots historically, and that nuisance is above all attractive as an ‘unofficial’ means of addressing environmental problems – in the sense that by-passes executive bodies in favour of direct access to courts.<sup>189</sup> 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.<sup>190</sup>

*Bodo People* and the on-going Shell nuisance litigation-*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, albeit in an arrangement that is complementary rather than mutually exclusive.

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<sup>184</sup> D. W. Robertson and P.K. Speck, “Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions”, (1990) 68 *Texas law Review*, p 937, at p 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”.

<sup>185</sup> *ibid*

<sup>186</sup> *Trail Smelter Case (US/Can)* 1905 3 RIAA (1941).

<sup>187</sup> John D Wirth, ‘The Trail Smelter Dispute: Canadians and Americans Control Transboundary Pollution, 1927-1941 (1996) 1 *Environmental History*, p 34 (the pollution victims received less compensation than they had claimed privately, whilst the factories invested in only moderately clean technologies, rather than the more expensive cleaner alternatives).

<sup>188</sup> *Ibid*, p 39-40. Furthermore, the Canadian industry received support from US industry, which in turn urged the US government not to pursue the claim against Canada in a way that could be used against US industry (p 38)

<sup>189</sup> D McGillivray and J Wightman, ‘Private Rights, Public Interest and the Environment’ in Hayward and O’Neill (eds) *Justice, Property and the Environment: Social and Legal Perspectives* (Ashgate, 1997).

<sup>190</sup> Meeran n 119 at 3.

