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Sideways Advocacy

Introduction

International human rights advocacy has traditionally been defined by the claims of persecuted individuals or groups against states. The post-WWII recognition of individuals as legal rights-bearers in the international arena ushered in an era of human rights institution-building to address the grievances of affected persons. In a typical case, an individual or group deprived of rights sues the state in a forum designed to hear such claims, a classic vertical and unidirectional demand. The state is always the defendant or respondent and although many institutions are highly deferential toward the state's sovereign prerogatives, the model invites injured claimants or petitioners to seek equitable redress, compensation or declaratory relief in a sphere beyond the control of the state in question. From the European Court of Human Rights to the Inter-American Commission and Court of Human Rights to the Human Rights Committee of the ICCPR to the many treaty bodies of the United Nations, states stand accused of violations in a legalistic web of courts, institutions and quasi-investigative bodies.¹ The institutions designed to uphold international human rights are founded on the dual premise that the state owes legal duties to human beings and that a breach of specified rights guarantees may be remedied in a forum that acknowledges the responsibilities of the collective toward a person or persons.

There are myriad problems with a global system that pits individuals against disinterested states: many systems, including the Inter-American Human Rights

¹ Romania alone has been sued in 14,000 cases at the European Court of Human Rights by Roma (gypsy) persons facing violence and discrimination.

Commission have grown sclerotic, a process that causes prejudicial delays to applicants;² underenforcement of judgments and the failure to monitor implementation routinely betray the promise of justice and the cost and expertise required to effectively navigate many international bodies deters many worthy claimants.³ Sovereignty, as William Nifong notes, can be deployed as a shield “most often invoked by countries and leaders seeking to avoid the scrutiny, condemnation, and possible intervention of the international community.”⁴ Excessive deference to states, it is clear, frustrates many of the core principles of human rights promotion.⁵

But equally challenging is the fact that states aren’t necessarily the worst wrongdoers. In a world where corporations negotiate with elected and unelected leaders to remove national labor regulations, where military contractors enjoy impunity for abuses committed in conflict zones, and where firms use proxies in government to do their bidding even where public health and human security are compromised, states are no longer the sole agents of human rights abuses.. Corporations, designed to deliver returns to shareholders, can trammel fundamental

² Instituto de Defensa Legal (IDL), Centro de Estudios Legales y Sociales (CELS), Due Process of Law Foundation (DPLF), Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), & Conectas Direitos Humanos, Fundación Construir, *Position of Civil Society Organizations of the Americas on the Final Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System*, 16 APORTES DPLF (2012), available at <http://www.dplf.org/uploads/1338572412.pdf>, at 51.

³ See Charles R. Venator-Santiago, *The Changing Face of Justice: Access to the Inter-American System of Human Rights*, 3 CREIGHTON INT’L & COMP. L.J. 116, 116 (2012); Rachel Slater, *Gender Violence or Violence against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone*, 13 MELBOURNE J. OF INT’L LAW 732, 773 (2012) (in the context of forced marriage as a gender crime, describing the similarities of obligations of state and non-state actors); Laura M. Olson, *Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law - Demonstrated by the Procedural Regulation of Internment in Non-international Armed Conflict*, 40 CASE W. RES. J. INT’L L. 437, 450 (2009) (describing the assumption that “private individuals or groups, i.e., non-state actors, do not have the legal capacity to violate IHL”).

⁴ William R. Nifong, *Promises Past: Marcus Atilus Regulus and the Dialogue of Natural Law*, 49 DUKE L.J. 1077, 1124 (2000).

⁵ Peter R. Baehr, *BOOK REVIEW AND NOTE: Review Essays: Human Rights at the Millennium: Human Rights: Universality in Practice*, 95 A.J.I.L. 227, 230 (2001).

liberties just as state actors do.⁶ At oral argument before the United States Supreme Court, Justice Breyer recently mused that it would be appropriate to refer to modern day human rights abusers as “Torture, Inc..”⁷ Justice Breyer’s observation is matched by the work of scholars who have recognized that an exclusively state-centric approach leaves trans-state actors, such as multinational corporations, without accountability.⁸

Traditionally, business entities (like individuals) had no standing in international law and were thus rendered invisible on world stage.⁹ As long as such entities remained primarily within one state, i.e. were incorporated, headquartered and active there, they had a clear home and it was the home state that had the right to represent them on the international stage. After World War II, however, three major developments changed the picture: business entities became more international so that their “home” often became less clear; they acquired their own rights under certain treaties so that they became less dependent on state protection in the individual case;¹⁰ and today the forces of globalization mean that corporate misconduct can be exposed and transmitted in real time.¹¹

⁶ Corporations are not the only non-state actors to gain legal subjectivity in recent years: individuals (particularly persons accused of international humanitarian law violations), international organizations and some non-state groups, including al-Qaeda, are increasingly the focus of human rights claims.

⁷ Oral Argument at 50: 8, 14, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 2013 U.S. LEXIS 3159 (U.S. 2013).

⁸ Miriam Mafessanti, *Corporate Misbehavior and International Law: Are There Alternatives to “Complicity?”* 6 S.C. J. INT’L L. & BUS. 167, 180-181 (2010).

⁹ Zakia Afrin, *Foreign Direct Investments and Sustainable Development in the Least-Developed Countries*, 10 ANN. SURV. INT’L & COMP. L. 215, 229 (2004).

¹⁰ Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT’L HUM. RTS. 222, 239 (2008) (citing Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259, 274 (1997), for the proposition that, due to dispute settlement mechanisms and other arbitration provisions in investment treaties, corporations possess “international legal personality”).

¹¹ See, e.g., Della Kilroy, *Seeing Is Believing: Human Rights Content in the Age of Social Media*, Storyful.blog (Aug. 12, 2012), <http://blog.storyful.com/2012/08/12/seeing-is-believing-human-rights-content-in-the-age-of-social-media/#.UZMLbKKyBu4>.

Aware of these trends, a new generation of human rights advocates is using innovative tools to vindicate rights, shame corporate abusers, and fashion new forms of relief. Although institutional changes have been slow to emerge, the field of international human rights law is increasingly shaped by non-state actors bringing claims against other non-state entities, principally corporations.¹² This paper explores examples of horizontal (and occasionally diagonal) advocacy that reframe the role of the state and the purpose of human rights promotion. By examining the growing trend of direct suits against corporations for human rights abuses, environmental action at the local and supranational level, and the struggle by AIDS activists to win compulsory licenses for HIV medications in Colombia – the state as forum, partner and enforcer – I ask whether we are witnessing a paradigm shift in the field of human rights and a new role for the state as a facilitator of accountability and a partner in fulfilling human rights guarantees.

i) The State as Forum and Facilitator

Global actors concerned about human rights have long scrutinized the activities of business enterprises, in particular multinational corporations (MNCs).¹³ Some international organizations and NGOs have made it their business to expose the various kinds of corporate activity that have a detrimental impact on human welfare. In the main, these groups do not critique capitalism or corporate economic power writ large, but they do criticize certain corporate behavior for impinging on clearly accepted norms of human rights law based on widely ratified treaties and customary

¹² See ALAN BOYLE AND CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* (Oxford University Press, 2007) 89 (listing examples of soft law instruments promulgated by non-state actors).

¹³ The most definitive works on MNCs and human rights include David Kinley, ed., *HUMAN RIGHTS AND CORPORATIONS* (2009); Claudia T. Salazar, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States For International Human Rights Violations Under the Alien Tort Claims Act*, 19 J. CIV. RIGHTS & ECON. DEV. 111 (2004); Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM J. INT'L L. 798, 798 (2002); Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 75 (2002). Stephens points out that traditional international law prohibited piracy and slave-trading by individuals including, presumably, corporations. *Id.* at 75.

international law.¹⁴ Beginning in the 1990s, several human rights organizations developed a methodology for evaluating the actions of MNCs using the language and standards of international human rights.¹⁵ Human rights lawyers began to look for ways to translate criticism into legal action. In that effort, advocates have sought to use existing available means to correct the rights abuses of corporations and to invent new tools of accountability, from drafting codes of conduct to soft law encouragement, to promoting as yet unadopted international treaties. The problem with each of these methods is the inability to attach true legal obligations to corporate malfeasance.¹⁶ Even egregious conduct, such as the decision to reopen the Bangladesh factory that collapsed in April 2013,¹⁷ is not deterred by industry-driven self-regulation. And unlike the space provided by national or sub-national human rights commissions or statutes affording damages against state actors (to the extent the perpetrators are not shielded by immunity) there is no obvious forum in which to remedy human rights violations committed by business entities.

As a consequence, human rights activists are turning to public and private law causes of action capable of generating monetary damages. In the same way that a web of statutes, regulations and policy directives control corporate environmental, anticompetitive, securities or bribery-related activities, firms can be held to human rights standards. And although private litigation might be a cumbersome way to enforce such duties, human rights claims presented before tribunals familiar to business defendants offer a realistic opportunity to sanction corporations.

Corporate law recognizes liability for a host of torts which produce remedies in economic terms that firms well understand. Tort laws are almost universal;

¹⁴ Steven R. Ratner, *Corporations and Human Right: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

¹⁵ See, e.g. Business and Human Rights Resource Centre, www.business-humanrights.org/Home.

¹⁶ To be sure, that reputational costs of human rights violations are real.

¹⁷ Aru Pande, *Bangladeshi Garment Factories Reopen*, VOICE OF AMERICA (May 2, 2013), <http://www.voanews.com/content/bangladeshi-garment-factories-reopen/1652994.html>.

according to the International Commission of Jurists “[i]n every jurisdiction, despite differences in terminology and approach, an actor may be held liable under the law of civil remedies if through negligent or intentional conduct it causes harm to someone else.”¹⁸ Assuming a fair and impartial adjudicator, remedies for harm to life and liberty are part of public and private litigation around the world. To the extent a foreign country does not have effective tort laws, then a choice of law public policy exception may result in the application of domestic tort laws.

At the risk of emphasizing relatively minor legal failings – prosecuting corporate Capones for tax evasion if you will – advocates seeking to call business entities to reckon for human rights violations are finding that facially neutral tribunals can be a platform for redress. From this perspective, the state facilitates horizontal legal action between two non-state entities and provides a forum amenable to – if not designed for – the resolution of human rights questions.

Hazel Tau et al v. GlaxoSmith Kline, Boehringer Ingelheim et al,¹⁹ demonstrates the efficacy of direct action by one non-state actor against another in the context of an antitrust suit before South Africa’s National Competition Commission. There, the complainants, working with the Treatment Action Campaign, alleged that the firms had breached Article 8(a) of the *Competition Act* 1998 (South Africa) by charging excessive prices for anti-retroviral medicines (ARVs) to the detriment of consumers. The complainants charged that ‘The excessive pricing of anti-retrovirals is directly responsible for premature, predictable and avoidable deaths of people living with HIV/AIDS, including both children and adults.’²⁰ The Competition Commission

¹⁸ www.icjcanada.org/fr/document/doc_2008-10_vol3.pdf

¹⁹ *Hazel Tau & Others v. GlaxoSmith Kline and Boehringer Ingelheim*, Competition Commission of South Africa (2003).

²⁰ *Ibid.*

found for the complainants, although it allowed the defendants to amortize development costs.²¹

Likewise, in April 2006, the on-going legal drama concerning Texaco/Chevron's activities in Ecuador took on a new twist when Cristobal Bonifaz filed a second class action lawsuit against Chevron, *Doe v. Texaco*, with nine named plaintiffs, who suffer from cancer or an increased risk of cancer that they attribute to pollution from Texaco's produced water waste in Ecuador. The complaint was based on claims of unjust enrichment and violations of California's Unfair Competition Law; the suit asks for disgorgement of the unlawful profits to build medical facilities in the impacted region where the plaintiffs live. The court dismissed the complaint for failure to state a claim upon which relief could be granted but allowed the plaintiffs to amend and refile. The amended complaint also arises out of injuries related to cancer and increased risk of cancer, but is not a class action and is based on common law claims of negligence, intentional or reckless infliction of emotional distress, and battery; it seeks equitable relief in the form of a medical monitoring trust fund to establish medical facilities in the affected region, or compensatory and punitive damages.²²

Perhaps the most well known forum for the litigation of human rights violations committed by corporations is the Alien Tort Claims Act. Although the Supreme Court has recently been diminished the scope of the statute, the ATCA stands as a

²¹ The Commission's decision promoted a settlement between the parties under which GlaxoSmithKline and Boehringer Ingelheim agreed to grant voluntary licenses on their patented medicines to generic firms in exchange for a royalty. The AIDS Law Project, acting on behalf of the Treatment Action Campaign, recently filed another complaint with the South African Competition Commission to investigate the refusal by Merck and its South African subsidiary to allow sufficient competition to lower the price of Efavirenz. Similar claims against corporations under domestic law and the use of national patent flexibilities (such as India's opportunity for pre-grant opposition to patent applications or Canada's generic medicines export license procedures) offer additional avenues for increasing access to medicines.

²² Judith Kimerling, *Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 489-490 (2006/2007).

model for the reappropriation of legal avenues originally constructed to deal with non-human rights issues. Under the act, foreigners alleging a tort in violation of the law of nations may bring suit in U.S. federal court. The watershed case of *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) embodied the use of the statute as well as other state and federal laws (such as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.) to vindicate human rights claims. In *Unocal*, Burmese villagers alleged that the company directly or indirectly subjected the plaintiffs to forced labor, murder, rape, and torture when the defendants constructed a gas pipeline through the Tenasserim region. By finding the defendant potentially liable, *Unocal* clarified the theory of corporate aiding and abetting of atrocities and emboldened dozens of other suits, including *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Sarai v. Rio Tinto*, 550 F.3d 822 (9th Cir. 2008); and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (C.A. 2, 2009). Thus, for nearly a decade after *Unocal*, U.S. courts proceeded on the assumption that the Alien Tort Statute can provide jurisdiction over corporations.

In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), however, the Second Circuit held that corporations could not be liable for human rights abuses under customary international law so that there was no subject-matter jurisdiction under the ATCA. On appeal to the Supreme Court, a majority reasoned that the presumption against extraterritoriality applies to claims under the alien tort statute, and found that nothing in the statute rebuts that presumption.²³ Justice Breyer's concurrence agreed with the majority's dismissal of the case, but argued that the ATS should provide "jurisdiction . . . where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that

²³ *Kiobel*, 2013 U.S. LEXIS at 26.

includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”²⁴ Justice Kennedy wrote in his one-paragraph concurrence that “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition.”²⁵ Justice Alito with Justice Thomas joining found that “a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality – and will therefore be barred – unless the domestic conduct is sufficient to violate an international norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”²⁶ *Kiobel* leaves undecided the issue of corporate liability itself and does not preclude non-state actors from suing corporations in other contexts.²⁷ *Kiobel* also appears to create more stringent standards for U.S. corporations than their foreign counterparts (because of the territorial nexus to the firm). A case against ExxonMobil in Indonesia, for example, may go forward because ExxonMobil “sprung from Standard Oil and is currently headquartered in Texas.”²⁸

Even if ATCA litigation has been severely curtailed, the practice of looking to domestic legal fora to resolve human rights claims endures. One possible outcome could be renewed interest in transnational tort litigation. When human rights claims are framed as intentional torts, torture is recast as assault and battery and slavery becomes a false imprisonment. Instead of searching for a statute that condemns

²⁴ *Id.* at 31 (Breyer, J., concurring).

²⁵ *Id.* at 26 (Kennedy, J., concurring).

²⁶ *Id.* at 29 (Alito, J., concurring).

²⁷ *Kiobel v. Royal Dutch Petroleum: Beyond the Alien Tort Statute—Broadly Extending the Presumption Against the Extraterritorial Reach of US Law*, JD SUPRA (Apr. 26, 2013) (Lexis-Nexis, News, Most Recent 90 Days); *Supreme Court Leaves Much Unclear In Opinion on Alien Tort Statute*, INSIDE U.S. TRADE (Apr. 26, 2013) (Lexis-Nexis, News, Most Recent 90 Days).

²⁸ *Indonesians Sue ExxonMobil in US court; Villagers in Aceh Claim ExxonMobil is Responsible for Human Rights Abuses Committed by Indonesian Soldiers Guarding its Natural Gas Pipeline and Processing Facility*, GLOBALPOST: BEATS (NORTH AMERICA) (Apr. 26, 2013) (Lexis-Nexis, News, Most Recent 90 Days).

corporate accessorial liability for war crimes, genocide or crimes against humanity, a tort-focused approach views the case as the product of reckless or negligent behavior where what matters is whether the defendant knew or should have known that its conduct would cause harm. To do so, advocates for corporate accountability are well advised to become experts in choice of law and comparative tort law, advice illustrated by Roger Alford's laundry list of choice-of-law issues:

Going forward, human rights lawyers must consider whether choice-of-law standards of the several states will authorize recourse to state or foreign tort laws. That means forum shopping with an eye toward choice of law. Is it better to sue in a "most significant relationship" jurisdiction (e.g., Texas, Florida), a "government interest" jurisdiction (e.g., District of Columbia, California), a *lex fori* jurisdiction (e.g., Michigan, Kentucky), a *lex loci delicti* jurisdiction (e.g., Virginia, Maryland), a "better law" jurisdiction (e.g., Minnesota, New Hampshire), or a jurisdiction that adopts an eclectic approach (e.g., New York, Pennsylvania). Who knows, for it will depend on the facts of each case. In some cases (i.e., terrorist attacks in Israel), foreign tort laws may be preferable to state tort laws. In other cases (i.e., torture and killings in Burma), domestic tort laws will be far preferable to foreign laws.²⁹

Consciously or not, states can invite human rights litigation through tested, non-specific means. It then falls to advocates to repurpose existing frameworks while preserving their viability as adjudicatory bodies for a range of functions.

ii) The State as Partner

States have long been beholden to business interests. In some contexts, including the negotiation of trade treaties, the demands of the corporate community are elevated to doctrine. Indeed, the enduring symbol of the Cochabamba water controversy, the spark that generated a social movement backlash, was the image of

²⁹ Roger Alford, <http://opiniojuris.org/2013/04/17/kiobel-insthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/>; see also, www.law.uci.edu/lawreview

the former President of Bolivia and mayor of the town drinking champagne with Bechtel executives at a contract-signing ceremony that would privatize water rendering it unaffordable to much of the local populace.³⁰

But the opposite is also true: states can lend governmental resources to support human rights ideals. Strategic partnerships between state officials and the human rights community may prove to be mutually beneficial and serve to deflect criticism away from the state toward corporate wrongdoers that may bear more immediate responsibility. Nowhere is the process more pronounced than in the field of environmental justice. Throughout Latin America, the environment has become both a vehicle and an objective of contentious politics, influencing the way in which that politics is organized and performed and permitting shared interests between the state and one-time outsiders. Anthony Bebbington observes that “new socio-environmental movement organizations have emerged; new (if difficult) intersections between environmentalism and other discourses have been crafted; relationships among environmentalists have been built within the region as well as with groups beyond Latin America; new mega-conservation nongovernmental organizations have emerged; and so on.”³¹

Consider *Aguinda v. Chevron*, the case that pits Ecuadorians from the Oriente region against Chevron, the successor in interest to Texaco. Since the early 1960s, Texaco/Chevron has extracted oil from the eastern lowlands of the Oriente at a heavy environmental and human cost.³² In 1993, a class of Ecuadorian plaintiffs

³⁰ William Finnegan, *Leasing the Rain*, THE NEW YORKER (Apr. 8, 2002), http://www.newyorker.com/archive/2002/04/08/020408fa_FACT1; see also, Leire Urkidi & Mariana Walter, *Dimensions of Environmental Justice in Anti-Gold Mining Movements in Latin America*, 42 GEOFORUM 683 (2011)(describing the confluence of corporate and local government interests in the face of anti-mining movements)

³¹ Anthony Bebbington, *Contesting Environmental Transformation: Political Ecologies and Environmentalisms in Latin America and the Caribbean*, 44 LATIN AMERICAN RESEARCH REVIEW 177, 179 (2009).

³² See Suraj Patel, *Delayed Justice: A Case Study of Texaco and the Republic of Ecuador's Operations, Harms, and Possible Redress in the Ecuadorian Amazon*, 26 TUL. ENVTL. L.J. 71, 77 (2012) (noting that

sued Texaco in New York alleging massive environmental contamination that had caused elevated rates of cancer and birth defects. The case was dismissed on *forum non conveniens* grounds and refiled in Ecuador. After President Rafael Correa came to power, the case accelerated in the Ecuadorian courts, ultimately resulting in an \$18 billion judgment (a figure that has subsequently grown to \$27 billion). The plaintiffs have attempted to enforce the Ecuadorian judgment in the U.S. where they have met fierce opposition from Chevron.

The effort to collect on the judgment and redistribute Chevron's profits to the affected communities has joined the state and the plaintiffs' counsel in common cause. According to Chevron, President Correa has exerted pressure on the judges and investigators to the detriment of the company's interests. Chevron also accuses Correa of conducting a visit to the former concession area in order "verify the environmental, social, and cultural impacts caused by hydrocarbon exploitation, in particular that of the U.S. company Texaco," referring to the plaintiffs' counsel as "compañeros," offering the government's support to the plaintiffs, pledging to assist in evidence gathering and calling upon Ecuador's Prosecutor General to indict persons involved in the Remediation Agreement and Final Act. In the swirl of Correa's anti-Chevron rhetoric, the company has concluded that "the thumbs of politics are weighing heavily on the scales of justice."³³

the chief sources of environmental damage were leaching or discharge of "formation water" and "produced water," drilling wastes, accidental discharge from the pipeline, and deliberate dumping of wastes); Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 19 J. TRANSNAT'L L. & POL'Y 1, 7 (2009) (noting contaminated water and livestock, decreased life expectancy, and a rate of cancer three times higher in the Oriente than in other Amazon provinces); Judith Kimerling, *Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 451 (2006/2007) (noting that Texaco and other companies ignored Ecuadorian environmental laws and that the government failed to implement and enforce such laws).

³³ Juan Forero, In Ecuador, High Stakes in Case Against Chevron, Wash. Post, Apr. 28, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/27/AR2009042703717.html> (quoting Chevron spokesman James Craig).

Whether or not Correa's actions are benign, it is undisputed that post-judgment support from the state has galvanized the plaintiffs, carried the struggle into new arenas and increased the pressure on the defendant to offer meaningful redress. Much the same was true in Argentine Matanza/Riachuelo river case.³⁴ In *Mendoza Beatriz Silva et al. v. State of Argentina*, residents of the Matanza/Riachuelo area filed suit arguing they had suffered damages owing to the pollution of the river. In July 2008, the Court issued a decision in which it required the national government, the Province of Buenos Aires, and the City of Buenos Aires to take measures to improve the residents' quality of life, remedy the environmental damage and prevent future contamination. The Court established an action plan requiring the government agency responsible for the Matanza/Riachuelo basin, ACUMAR, to fulfill specific measures, including: a) producing and disseminating public information; b) controlling industrial pollution; c) cleaning up waste dumps; d) expanding water supply, sewer and drainage works; e) developing an emergency sanitation plan; f) adopting an international measurement system to assess compliance with the plans goals. In order to ensure adequate enforcement, the Court delegated the enforcement process to a federal court, Juzgado Federal de Primera Instancia de Quilmes, to monitor enforcement of the decision.

Following the ruling, the government tasked the national Ombudsman with participating in a working group comprised of diverse stakeholders, including NGOs that had been involved in the case as non-litigant parties. The goal of the working group is to strengthen and enable citizen participation in monitoring enforcement of the decision.³⁵ Although progress has been slow, the state has relocated some poor residents to government housing, identified and remediated open waste dumps and begun the sanitation process of river to help clean and re-

³⁴ See http://www.escr-net.org/sites/default/files/Sentencia_CSJN_2008_english.pdf

³⁵ See generally, Elynn Kaan, *A Case of Environmental Justice: The Matanza-Riachuelo River Basin*, RAINTEES.COM (Apr. 8, 2013), <http://blog.raintees.com/2013/04/a-case-of-environmental-justice-the-matanza-riachuelo-river-basin/>.

oxidize the water, all as part of the Court-ordered mandate to implement social and economic rights in the aftermath of environmental degradation.

Similarly, environmental activists in the United States pressured the Obama administration into delaying and re-routing the proposed Keystone Pipeline.³⁶ The project was initially designed to transport crude oil from Alberta, Canada, across several U.S. states, and ultimately to Houston, Texas.³⁷ Despite the State Department's 2010 conclusion that the pipeline would have minimal environmental impact, environmental activists responded with a multi-faceted campaign to oppose the project and the production of oil produced from tar sands more generally.³⁸

The principal objective of the anti-pipeline campaign is to persuade the President to halt the project. To achieve this goal, the campaign has adopted an insider/outsider strategy. The insider tactic is to collaborate with the Environmental Protection Agency to oppose other federal agencies working to clear the sale of tar sands oil.³⁹ The external movement has engineered mass protests aimed at reminding the President that he was elected by a constituency with demands.⁴⁰ The demonstrations have been led by Hollywood celebrities and members of Congress rather than anti-systemic agitators.⁴¹ Movement figurehead Bill McKibben said at the Los Angeles protests in February 2013, "You cannot occupy the White House, but you can surround it," a swipe against the Occupy Wall Street movement of 2011-12, viewed by mainstream activists as too extreme.⁴² Online petitions urge readers to "tell the

³⁶ Courtney Cherry, *The Keystone Pipeline: Environmentally Just?*, 6 ENV'T'L & ENERGY L. & POL'Y J. 125, 126 (2011).

³⁷ Arnold W. Reitze, Jr., *The Role of NEPA in Fossil Fuel Resource Development and Use in the Western United States*, 39 B.C. ENVTL. AFF. L. REV. 283, 343. (2012).

³⁸ *Id.*

³⁹ *Id.* at 344.

⁴⁰ See *L.A. Protesters Join Campaign Against Keystone on Pipeline*, LOS ANGELES TIMES (Feb. 17, 2013), <http://latimesblogs.latimes.com/lanow/2013/02/la-protesters-join-nationwide-campaign-against-canadian-oil-pipeline.html> (documenting protesters in Los Angeles staging a demonstration "designed to pressure President Obama into rejecting" Keystone).

⁴¹ *Id.*

⁴² *Id.*

White House to cancel” the pipeline.⁴³ President Obama responded to this social movement pressure by postponing a decision and issuing a memorandum in March 2012 designed to facilitate review of the XL portion of the Keystone project, a course of conduct that comes at the expense of Canadian energy firms.⁴⁴

In all three instances, the alliance of government institutions and the demands of nongovernmental actors have transformed protest movements into governance partners.⁴⁵ It is here that the state simultaneously validates human rights initiatives and wrests a measure of control from the original agitators. Partnerships of this kind, usually limited in scope and duration, may constitute goal-oriented marriages of convenience. In Ecuador, for example, environmentalists and indigenous people (represented by CONAIE) are wary of President Correa’s motivations, not withstanding his revolutionary rhetoric, and worry that the current regime will continue to allow mining and petroleum companies to gain unfettered access to traditional territories. Correa, for his part, has been pleased to inveigh against a deep-pocketed foreign business while remaining mute on the environmental and monetary responsibilities of the Ecuadorian subsidiary.

To be sure, the risk of cooption for social movements engaged in such partnerships is real. As Jordi Díez chronicles, the assimilation of Mexican environmentalists into the Zedillo and Fox administrations weakened the environmental movement in that country.⁴⁶ Paradoxically, by accepting jobs with the state, fellow Mexican

⁴³ Tell the White House to Cancel the Keystone XL Pipeline, American Sustainable Business Council (2013), <http://asbcouncil.org/node/238>.

⁴⁴ Sam Kalen, *Thirst for Oil and the Keystone XL Pipeline*, 46 CREIGHTON L. REV. 1, 5-6 (2012). Kalen notes: “The President has charged the State Department with determining whether the Department believes that a particular international pipeline is in the ‘national interest’ . . . The executive orders leave undefined what constitutes the ‘national interest.’” *Id.* at 10-11.

⁴⁵ Catherine Christen, Selene Herculano, Kathryn Hochstetler, Renae Prell, Marie Price, & J. Timmons Roberts, *Latin American Environmentalism: Comparative Views*, 33 STUDIES IN COMPARATIVE INT’L DEVELOPMENT 58 (1998); *see also*, Diana M. Liverman & Silvina Vilas, *Neoliberalism and the Environment in Latin America*, 31 ANNUAL REVIEW OF ENVIRONMENT AND RESOURCES 327 (2006).

⁴⁶ Jordi Díez, *The Rise and Fall of Mexico’s Green Movement*, 85 EUROPEAN REVIEW OF LATIN AMERICAN AND CARIBBEAN STUDIES 81 (2008).

environmentalists outside of government found it exceedingly difficult “to apply pressure on the new government once it became evident that environmental issues did not figure high among the administration's priorities.”⁴⁷ Still, representation at the highest levels of governments has provided many environmental groups with a seat at the table previously reserved for business. The voice of environmentalists within the White House has meant that even if President Obama ultimately approves the pipeline, concerned groups expect climate change policy concessions – power plant regulations or renewable energy incentives – to offset the effects of carbon emissions associated with the project.⁴⁸

iii) The State as Enforcer

What does it mean to employ the power of the state in the service of human rights and against corporate interests? Can human rights be more effectively championed through, rather than against, the state? In its approach to access to medicines, Colombia offers a potential answer.

Like several other Latin American states, Colombia has promoted the enforcement of some (but not other) human rights guarantees.⁴⁹ Spurred on by an energetic essential medicines campaign and periodic judicial rulings, the government of Colombia has consistently sided with human rights advocates seeking to lower the cost of life-saving anti-retroviral medicines used to combat HIV/AIDS.⁵⁰ Beginning in 1994, the Constitutional Court of Colombia held that the state is required to provide HIV-positive persons with AIDS treatment regardless of cost. In *Pedro*

⁴⁷ Id. at 94.

⁴⁸ John M. Broder, *Foes Suggest a Tradeoff if Pipeline Is Approved*, NY TIMES (May 8, 2013), http://www.nytimes.com/2013/05/09/business/energy-environment/a-call-for-quid-pro-quo-on-keystone-pipeline-approval.html?_r=0.

⁴⁹ See João Biehl, *Will to Live: AIDS Therapies and the Politics of Survival* (2007), which argues that Brazil's AIDS policy is emblematic of novel forms of state action on and toward public health.

⁵⁰ See Noah Benjamin Novogrodsky, *After AIDS* (SELA 2011).

Orlando Ubaque v. Director,⁵¹ the Court ordered ARVs for inmates unable to provide for their own healthcare.⁵² Active lobbying by civil society groups led to the subsequent addition of ARVs to the official medicines list.⁵³ The government has since used a variety of mechanisms to promote price-reductions, including parallel imports, the issuance of compulsory licenses to promote generic competition and threats of additional action designed to compel brand pharmaceutical firms to provide voluntary licenses.

In April 2009, the Colombian government issued an order establishing a price ceiling for Kaletra, an ARV medication produced by Illinois-based Abbott Pharmaceuticals.⁵⁴ Abbott ignored the pricing decree and in September 2009, Colombian health organizations filed an “Acción Popular,” a mechanism under Article 88 of the Colombian Constitution to protect collective rights, public services and administrative morality. (It is roughly analogous to a private attorney general action).⁵⁵ The petitioners sought a compulsory license to stimulate competition. In January 2010, the Colombian government announced a financial emergency in its health system and strengthened the powers of the medicines pricing commission. Only then did Abbott comply with the pricing order, reducing the price of the drug approximately 54-68%, an amount projected to save Colombia’s HIV programs

⁵¹ *Pedro Orlando Ubaque v. Director*, Constitutional Court of Colombia, Dec. No. T-502/94 (1994) (finding that conditions in a prison ward of HIV-positive prisoners violated the prisoners’ right to health and dignity in view of their compromised immune systems).

⁵² See Protection Writ, *Judgment of Fabio Moron Diaz, Magistrado Ponente*, Constitutional Court of Colombia, Dec. No. T-328/98 (1998) (holding denial of costly antiretroviral treatment prescribed for plaintiff under social security system violates constitutional fundamental right to life), <http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1998/Tutela/T-328-98.htm>; see Alicia Yamin, *Not Just a Tragedy: Access to Medications as a Right under International Law*, 21 B.U. INT’L L.J. 325, 340 (2003).

⁵³ Decree No. 1543 (1997) (Colom.); see also Hans V. Hogerzeil et al., *Is access to essential medicines as part of the fulfillment of the right to health enforceable through the courts?* 368 THE LANCET 309 (2006).

⁵⁴ *Abbott and Colombian MoH Charged over Fixing Kaletra Price Above Reference*, Global Insight (May 11, 2012) (Lexis-Nexis, News, All News).

⁵⁵ *Colombia’s CL Campaign Story*, Public Citizen (May 3, 2012), <http://www.citizen.org/colombia-CL-campaign-story>.

approximately US\$12 million.⁵⁶

On February 29, 2012, Administrative Court 37 of Bogotá found that Abbott had violated the 2009 government pricing order for its HIV drug Kaletra and directed the Ministry of Health to initiate procedures for sanctions against Abbott (potentially including financial penalties).⁵⁷ The Court determined that Abbott abused its dominant market position by pricing its essential medicine 350% higher in Colombia than in neighboring countries (about \$3500 in the private sector compared to about \$1000). According to the Court, this fact harmed the sustainability of Colombia's health system and violated "public administrative morality." "Mercantile utility and patent ownership" the decision holds, do not justify "disobeying the national policy of price control for HIV/AIDS medicines."⁵⁸ The ruling calls for maintaining Kaletra on a parallel importation list to ensure availability of the international reference price.⁵⁹

Only the state can issue price parameters and compulsory licenses, intervening in the market to ensure affordable drug purchases. In this mode, the state has assumed an adversarial posture vis-à-vis a corporation, ostensibly in defense of human rights. Although the state has an interest in avoiding unnecessary conflict with firms doing business within its borders, it is readily apparent that governmental power can be applied differently than the naming, shaming and coalition building work of NGOs. Less clear is what is lost in the move from paradigmatic human rights claims asserted against the state to a world in which the state takes sides in a dispute between two non-state actors.⁶⁰

⁵⁶ Peter Maybarduk, *Colombian Court: Abbot Labs' AIDS Drug Pricing Abuse Violated Health Rights*, InfoJustice.org (Apr. 27, 2012), <http://infojustice.org/archives/16870>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 411 (2003) (noting that disputes between MNCs and NGOs are likely to be resolved by "market power" and that few tribunals open their fora up to non-state actor disputes).

Conclusion

Latin America has a well-developed human rights system. Like its European counterpart, the Inter-American Court and Commission structure is statist in its orientation. Despite obvious shortcomings, recourse to human rights litigation against the state has become an accepted norm. It might be that horizontal advocacy against non-state actors, principally corporations, is more likely to occur in regions without a record of holding states accountable for a range of human rights violations. After all, advocates sue where they have the greatest likelihood of success. A competition tribunal case in South Africa (where there is no functioning regional court) or ATCA litigation in the United States (in a state that is not a party to the Inter-American Court) makes sense. Viewed in this way, Latin America may be less likely to experience sideways advocacy because although serious abuses occur at the hands of non-state actors, such violations are generally committed with the tacit approval of state officials within a regional system that provides at least nominal relief against states. This is particularly true within the Inter-American system where the *Velazquez Rodriguez* case imputes state responsibility in cases of forced disappearance, that is, it assigns legal duties to states for all kinds of conduct that occur on the territory.⁶¹

Stories of the state as facilitator, partner and enforcer of human rights norms facilitate new ways of conceiving of human rights advocacy directed at parties other than the state. At a minimum, the state no longer occupies the field exclusively, and it is more than a static wrongdoer. In many circumstances, government can play an important role in preventing or responding to corporate human rights violations and the state can empower local and international human rights communities to assert

⁶¹ *Velazquez Rodriguez v. Honduras*, 28 I.L.M. 294, 328 (1989).

new forms of activism. In other circumstances, non-state actors can inspire, provide cover for, or antagonize states into, progressive human rights policies. The emerging importance of non-state actors does not *replace* either the power or the analytic focus of the state, but rather supplements it and poses challenges to describing the dynamic of state and non-state actors across a range of conflicts and crises.⁶²

⁶² See Charles R. Venator-Santiago, *The Changing Face of Justice: Access to the Inter-American System of Human Rights*, 3 CREIGHTON INT'L & COMP. L.J. 116, 116 (2012).