5. By-passing sovereignty: *Trafigura lawsuits (re Côte d'Ivoire)*

5.1 CASE BACKGROUND

The *Trafigura* case concerns corporate liability related to environmental damage in a transnational setting, which raises questions of ethical responsibility of multinationals. The main lawsuits took place in Ivory Coast, in the United Kingdom and in the Netherlands. In late 2005, a multinational trading company called Trafigura decided to buy large amounts of an unrefined gasoline in order to use it as a blendstock for fuels. The process of refining this product is known as caustic washing and it was carried out on a ship named Probo Koala. The company knew beforehand that the resulting chemical waste would be difficult to treat or dispose of. On 19 August 2006, Probo Koala unloaded the waste shipment at open-air sites at Abidjan, Ivory Coast. Soon afterwards, according to the allegations in this case, the people living near the discharge sites began to suffer from a range of illnesses. Subsequently, at least 100,000 sought medical attention for conditions which were attributed to the presence toxic waste and a considerable number of people died.

In November 2006, the High Court of Justice in London agreed to hear an action by some 30,000 claimants from the Ivory Coast against Trafigura. Trafigura denied responsibility, claiming that the substances were standard waste from onboard operations of ships that were entrusted to an Ivorian disposal company. The English proceedings took an unexpected turn when Trafigura obtained, on the sidelines of the case, a super-injunction or 'gagging order' against the *Guardian*, and attempted to prevent the ensuing issue of the freedom of the press from being discussed in Parliament. However, on 23 March 2009, the High Court issued a temporary injunction barring Trafigura from contacting any of the claimants in the case, in view of evidence that the company had been asking individual claimants to change their sworn statements. In September 2009, the parties reached a settlement agreement. Meanwhile, on 22 January 2010, the Court of Appeals in Abidjan ruled in favour of the claimants against Trafigura. However, it seems that the victims never received the compensation thus ordered. In 2008, Dutch prosecutors filed criminal charges against Trafigura, based on the breach of Dutch environmental laws. In July 2010, the Dutch court ruled that the company had concealed the dangerous nature of the waste aboard the Probo Koala and fined the company €1 million. On appeal, however, in April 2011, it was ruled that the public prosecution department is not required to prosecute Trafigura for the waste dumping in Ivory Coast. Nevertheless, in a parallel lawsuit, in January 2012, the Court of Appeals of Amsterdam decided that Trafigura's co-founder and director could be personally prosecuted for the alleged illegal export of waste by Trafigura. In November 2012, the Dutch Public Prosecutor's Office and Trafigura reached an out-of-court settlement.

In February 2015, a lawsuit proposed by a foundation was presented before the Dutch courts. In view of the bodily, moral and economic injury that Trafigura caused, it requested 2,500-euro compensation for each victim and cleaning of the toxic waste. In November 2016, the court rejected the claim, finding that the foundation did not establish that the claim was in the best interests of the affected Ivorians.

Case: High Court of Justice. Queen's Bench Division. September 11, 2009.

5.2 BUILDING AN ENVIRONMENTAL AND HUMAN DISASTER INTO A TRANSNATIONAL CASE: A SOCIO-POLITICAL PERSPECTIVE

Sara Dezalay

1. INTRODUCTION

In December 2005, large amounts of coker naphtha, an unrefined fuel, were bought by *Trafigura*, the world's third-biggest private oil and metals trader. Subjected to a process called caustic washing on board the *Probo Koala*, a ship registered in Panama, the refining of the fuel resulted in the creation of tonnes of hazardous waste. In July 2006, Trafigura attempted to deliver the waste in Amsterdam. When the price for treatment was increased upon finding that the waste was highly contaminated, Trafigura ordered it to be re-loaded on the *Probo Koala*. In August 2006, after a failed attempt to unload in Nigeria, Trafigura contracted a local company which dumped the waste in locations around the city of Abidjan in Côte d'Ivoire, without receiving any treatment. A major medical emergency ensued, with tens of thousands of people reporting at local hospitals with headaches, vomiting, skin irritations and breathing problems, and at least 16 deaths.[1] Thus started the 'Trafigura saga': a media, political and environmental scandal with judicial ramifications across five jurisdictions – Abidjan, London, Amsterdam, Paris and Brussels. More than ten years after the *Probo Koala* disaster, over 100, 000 victims have filed complaints against Trafigura. Yet, the company has never admitted any liability. Despite a sulphurous reputation,[2] Trafigura continues to thrive on the volatility of global markets for carbon commodities, advocating a public image neatly orchestrated by the PR firm Bell Pottinger as a 'decent global citizen' and agent of development in West Africa. Meanwhile, left largely untreated the waste continues its environmental and human damage. In Côte d'Ivoire, which has since transitioned from a protracted civil war into one of Africa's booming economic hotspots, business with Trafigura, if it ever was interrupted, is thriving.

For the student interested in the complex articulation between law, multinational corporations and global value chains in late capitalism, the Trafigura saga seems to offer an exemplary case study. Firstly, the transnational dimension of the litigations around the Trafigura case underlines the multiple legal loopholes and the political resistance that are contriving to leave international law on hazardous waste and human rights, foremost the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, without much effect in the Global South. The case also underscores the difficulties to trace the chains of responsibilities within a multinational whose business spans the whole value chain involved in the sourcing and

[1] Ivorian official records variously report 15–17 deaths, see Greenpeace and Amnesty International, *The Toxic Truth*, 2012: 58.

[2] The company has been suspected of being involved in a number of legally suspect oil deals, including the smuggling of 500,000 barrels from Saddam Hussein's Iraq in 2001, and more recently the buying of oil said to have been 'looted' from South Sudan.

trading of carbon and mineral commodities across the globe: sourced in Mexico, the coker naphtha underwent a process of caustic washing both on land in various jurisdictions and at sea, along the long journey of the Probo Koala. Finally, the complex corporate structure of Trafigura seems specifically designed to disperse its chain of command across territorial boundaries, with Trafigura's head office, Trafigura Group Pte. Ltd, registered in Singapore, the group's holding company, Trafigura Beheer B.V., incorporated in Amsterdam, and Trafigura Ltd in London, acting as the coordinating entity for a substantial proportion of the group's oil operations including those related to the dumping of the waste in Abidjan, which, for its part, was managed by Puma Energy, Trafigura's wholly owned subsidiary in Côte d'Ivoire.

To overcome these difficulties, 'transnational litigation' seems a natural point of entry to study this case, that is: focusing on the strategic litigation opportunities (and barriers of entry) to bring claims against this multinational corporation domiciled and headquartered in one jurisdiction for its wrongful conduct in other jurisdictions, in Abidjan where the waste was dumped and along the journey of the Probo Koala. Yet: the complexity of the unravelling of the *Trafigura case* since 2006 seems to contradict a narrative that would see the fight for 'justice against corporate crimes' as a spontaneous uprising of civil society aided by 'cause lawyers' working around the strategic opportunities and barriers of access for transnational litigation. Emblematically, the *Trafigura case* grew into Britain's biggest ever group-action lawsuit, with staggering figures: representing 30, 000 victims, the London-based firm Leigh Day & Co. negotiated an out-of-court settlement in 2009 which secured £30 million for the victims, £105 million in legal costs and a success fee of £40 million.[3] While the bulk of the settlement money was diverted by the self-claimed representative of the victims, the Trafigura saga imploded into several cases in Europe, with a jigsaw of actors … such that it now reads like a derailed Le Carré's *Mission Song*: elusive victims with a dozen associations claiming to represent them; another dozen European 'cause lawyers'; the media; NGOs; and a state in the background that is either apparently disempowered or complicit in the face of transnational corporate power in Côte d'Ivoire, or benevolent towards group claims filed by foreign victims, though leaning to the considerable political clout of Trafigura in the United Kingdom.

A socio-political perspective would help illuminate these complex articulations. To be fully effective, such an approach would entail looking at the whole array of agents and national spaces that have contributed to the development of this scandal into a transnational litigation, to determine the combination of variables that shaped it: legal, but also social, economic and political. This necessarily includes looking at the legal entry-points and obstacles fostered by the interplay between (inter-)national legal frameworks, the corporate structure of Trafigura, and the specificities of the human and environmental damage in this case. It would also be necessary to trace carefully the constitutive roles played by the lawyers acting on behalf of each party, by being attentive not only to their technical interventions in the case, but also to their specific characteristics *qua* lawyers. A rich scholarship in political sociology has notably underscored how the strategies, trajectories and resources of lawyers could provide

[3] A. Hirsh and R. Evans, 'Lawyers for claimants in Trafigura case seek £105m in costs' *The Guardian*, 10 May 2010.

insights into globalisation patterns, across national scales and time.[4] As a social mobilisation, this case would further require tracing the roles of other actors – NGOs, the media, states and victims – their structural positions in relation to state and corporate power, as well as the cognitive alignments and dis-alignments that have contributed to build this case into a 'cause'.[5] In particular, this would imply reconstructing systematically the chains of intermediation between these different actors, notably the mobilisation and organisation of victims in Côte d'Ivoire.

For reasons of space, but also of access to sources,[6] this chapter suggests some elements of answers by zooming in onto specific aspects of this broad road-map. The first two sections follow a chronological sequencing to trace how the mobilisation of social, political and media resources contributed, along with legal opportunities, to the development of the scandal into a judicial battle, from Abidjan to London and other European jurisdictions. The second section focuses specifically on the London episode of the case, by looking at the resources mobilised by Leigh Day to build a civil claim against Trafigura. The concluding section opens up a wider interrogation on the contribution of this case to understandings of the transnational and transnational law, as it reflects broader articulations between law, politics and capitalism in the development of state power.

2. TURNING A HUMAN AND ENVIRONMENTAL SCANDAL INTO A JUDICIAL CASE

Sociological research on transnational litigation has emphasised the insights provided by a so-called pragmatic approach to law to trace the articulation between actors, discourses and substantive legal aspects in developing transnational claims.[7] Focusing on these connections helps understand how the case made its way from Abidjan to European jurisdictions. After the outbreak of the medical emergency in Abidjan in August 2006, several individuals across Trafigura's hierarchical structure were charged and imprisoned to face proceedings before Ivorian courts for offences relating to breaches of Ivorian public health and environmental laws, and breach of the Basel

[4] On the roles played by lawyers in state trajectories and globalization across Africa, see S. Dezalay, 'Lawyers in Africa: brokers of the state, intermediaries of globalization. A case-study of the "Africa" Bar in Paris' forthcoming (2019) 25(2) *Indiana Journal of Global Legal Studies*.

[5] See D. Snow et al., 'Frame alignment processes, micro-mobilization and movement participation' (1986) 51 *American Sociological Review* 464–548.

[6] There is a specific problem of empirical sources in this case. In particular, beyond a limited legal scholarship, the plethora of sources (the media and advocacy organisations) reflect the positions of the actors who produced them. To gain a level of reflexivity, it would be necessary to interview agents involved in the case across the different sites partaking in its transnational landscape – Abidjan, London, Amsterdam, Paris, Brussels.

[7] E.g. focusing on the growth of universal jurisdiction in the 1990s, J. Seroussi, 'The cause of universal jurisdiction. The rise and fall of an international mobilisation' in Y. Dezalay and B. G. Garth (eds.), *Lawyers and the Construction of Transnational Justice* (Abingdon, Routledge 2011) 47–59.

Convention: two Trafigura executives who had travelled to Abidjan to negotiate with the Ivorian authorities, including its president Claude Dauphin, as well as the managing director of the Société Puma, the head of the Compagnie Tommy, the local company contracted to manage the waste, and other customs and ports officials. Ultimately, only these local companies' agents were convicted by the Tribunal de Première Instance d'Abidjan-Plateau.[8] At the time, Côte d'Ivoire was still in the midst of a protracted civil war, which started in 2002 and had led to the *de facto* partition of the country between a North controlled by the so-called *Forces nouvelles*, and a South, including Abidjan, held by forces loyal to then President Laurent Ggagbo. While the imprisonment of Dauphin certainly gave Ggabgo and his negotiators the upper hand, the settlement he negotiated with Trafigura in February 2007 granted the multinational substantive and broad-sweeping[9] immunity from prosecution in Côte d'Ivoire in return for a compensation of CFA 95 billion (€152 million) that, to date, has largely failed to deliver on its intended purpose to compensate the victims and clean up the contaminated zones.[10]

By then the Probo Koala disaster had already been built into a 'scandal' through the involvement of other actors: the media, the environmental NGO Greenpeace and a cluster of European lawyers specialised in transnational litigation.[11] The case was sparked first by the activism and media savvy of Greenpeace: in September 2006, Greenpeace activists blockaded the Probo Koala at the Estonian port of Paldiski, and the NGO filed a report with the Dutch Public Prosecutor requesting a criminal investigation into the dumping.[12] Involved early on, Leigh Day built on the London location of Trafigura Ltd and its direct role in the Probo Koala disaster to obtain a Group Litigation Order with the High Court of Justice in London in November 2006, to file a civil claim on behalf of thousands of Ivorian victims (ultimately 30,000) for damages for personal injury. To identify victims Leigh Day mobilised the firm's links with Greenpeace which launched a media campaign in Côte d'Ivoire that same autumn.

Here, the position of Leigh Day in the legal field in the United Kingdom, and specifically the firm's senior partner Martyn Day, helps explain the opportunity for filing this claim in Britain, while also accounting for the unravelling of the case simultaneously on the terrain of the law and that of the media and politics in the United Kingdom, the Netherlands, Côte d'Ivoire as well as in Norway, after explosion a Norwegian facility in May 2007 where Trafigura had continued caustic washing processes. Martyn Day, like other transnational litigation lawyers involved in the

[8] Salomon Ugborogbo, the head of Compagnie Tommy and Essoin Kouao, a shipping agent from West African International Business Services (WAIBS).

[9] With Trafigura identified under the broad sweeping terms of 'Trafigura Parties' to cover the whole corporate structure of the company.

[10] Including CFA73 billion to compensate for the harm caused to the state of Côte d'Ivoire, and to the victims, and CFA 22 billion to treat the pollution caused by the waste See 'Protocole d'accord entre Trafigura et l'État de Côte d'Ivoire' 13 February 2007, www.probokoala.org (consulted 26 January 2018). Note that the victims are not identified in the agreement.

[11] Greenpeace has been at the forefront of claims filed in Amsterdam, and published a report in 2012, along with Amnesty International, to 'set out the case against Trafigura'. Greenpeace and Amnesty International (n 1).

[12] See Greenpeace and Amnesty International, ibid.

Trafigura saga,[13] combines a set of resources – legal, political and militant – that have contributed to the growth in Europe of strategic transnational litigation against corporate crimes from the end of the 1990s. These resources enabled Leigh Day to embed politics and media clout in the litigation of the Trafigura case in London.

Described in the press as 'the scourge of the corporations,'[14] Day was raised in Zimbabwe before returning to the UK as a young adult, where he obtained a law degree from Warwick University and qualified with Colombotti & Partners in 1981. A former Labour councillor, he helped draft *In Trust for Tomorrow*, the Labour Party's roadmap on the environment in 1994, whose key proposal was to encourage individuals to bring cases against polluting companies by scrapping the traditional 'loser pays' rules, under which a failed plaintiff must pay the winner's costs as well as his own.[15] Day has also had a long-standing involvement with Greenpeace, as member of the board of the NGO, Director of Greenpeace Environmental Trust, and chairman of Greenpeace UK until 2008. In 1981, Martyn Day first practised in the corporate firm Clifford & Co, before moving to Bindman & Partners, a firm set up in 1974 by a group of lawyers including Sarah Leigh,[16] that gained prominence as a defender of civil liberties and human rights. Leigh Day, co-founded with Sarah Leigh in 1987 to specialise in international, environmental and product liability claims, thus pioneered in transnational litigation.

3. FROM LONDON TO THE IMPLOSION OF THE *TRAFIGURA* LITIGATIONS

Particularly favourable opportunities within the British legal system – compared to other European jurisdictions – also help explain the development of a professional market for transnational litigation in the United Kingdom, notably the possibility to file group claims, and the opening up of this jurisdiction for claims made on behalf of foreign victims for wrongdoings in foreign jurisdictions. Leigh Day obtained a reversal of the *forum non conveniens* doctrine[17] in the *Cape Gencor lawsuits (re-South*

[13] E.g. William Bourdon, from the Paris Bar, who displays characteristics similar to that of Martyn Day – with a combination of resources across law, politics, economics and militancy. See his portrait in Dezalay (n 4).

[14] J. Vidal, 'Lawyers Leigh Day: troublemakers who are a thorn in the side of multinationals' *The Guardian*, 1 August 2015.

[15] Nick Gilbert, 'Profile: Martyn Day: Smoking out the tobacco giants' *The Independent*, 10 May 1997.

[16] All then solicitors at Lawfords, a trade union firm in Gray's Inn. Bindman & Partners original intent was to provide local residents eligible for legal aid, with legal services in family law, immigration, personal injuries, housing, social welfare and crime.

[17] The *forum non conveniens* doctrine enabled English courts to decline jurisdiction on the ground that there is a court in another jurisdiction which is clearly a more suitable forum for the trial of the action, in the interests of all the parties and justice of the case.

Africa).[18] The decision of the European Court of Justice in the case of *Owusu*[19] in 2005 further solved the question of jurisdiction. The British government's pro-active public legal aid policy until the early 2000s also played a key role: 'taxpayer cash has helped put (the) firm on the map.'[20] In 1997, the firm received £8.3 million from the Legal Aid Board. This contributed to position the firm as a key player in transnational litigation and establishing its strategy of promoting a low profile (defending 'the ordinary guy') in high profile cases from the end of the 1990s, ranging from the human and environmental wrongdoings of multinational corporations,[21] to political cases involving the British Department of Defence and British troops in wars of decolonisation[22] and Britain's involvement in Iraq from 2003.[23] The funding of such claims became an issue with the downsizing of legal aid from the turn of the 2000s. Leigh Day's last application for public funding for a group claim failed in 2005. The firm's strategy to counter this trend, such as in the *Trafigura case*, has been to bring these claims under a conditional fee basis. However, the amounts claimed by Leigh Day following the settlement of the case in 2009 have contributed to prompting governmental plans, still under review, to implement further cuts to legal aid and to restrict no win-no fee agreements[24] – thus potentially imperilling future possibilities to file group actions against transnational corporations in the United Kingdom.

The termination of the judicial proceedings in London with an out-of-court settlement in September 2009 emerged as one of the multiple political and media twists in the development of the case. The settlement agreed between Trafigura and Leigh Day stated that the waste had only caused 'flu-like symptoms' and did not admit any liability of the company. It also appeared as a last-minute deal, before the case was to be heard before the High Court in London, as parallel political, legal and media battles were unravelling. In May 2009 Trafigura sued (and won) a defamation case against the BBC. In autumn 2009, the Trafigura case also emerged as a test-case for the new 'super injunctions' which started being filed in Britain in the 2000s to allow companies and individuals to prevent the publication not just of the substance of allegations involving

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[18] UK House of Lords: *Judgments – Schalk Willem Burger Lubbe (Suing as Administrator of the Estate of Rachel Jacoba Lubbe) and 4 Others and Cape Plc. And Related Appeals*, 20 July 2000, [House of Lords decision].

[19] Judgment of the Court (Grand Chamber) of 1 March 2005. *Andrew Owusu v N. B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others*. Case C-281/02.

[20] Gilbert (n 15).

[21] Starting with a first high-profile case against Gallaher & Imperial Tobacco on behalf of lung cancer victims in 1997; or, among other examples of group action claims against multinationals in the 2000s, the settlement secured in 2006 by Leigh Day on behalf of a group of Colombian farmers in a civil group action against BP.

[22] E.g. the group action against the British government on behalf of 5228 former insurgents involved in the Mau Mau uprising in Kenya (the firm negotiated a settlement in 2010).

[23] Day represented the family of Baha Mousa but faced (and succeeded in) a disciplinary prosecution before the Solicitors Disciplinary Tribunal launched by the Defence secretary in 2014, regarding the firm's conduct in the Al-Sweady inquiry. Phil Shiner, one of Day's main competitors in human rights litigation faced similar charges and his Public Interest Lawyers firm was dismantled in 2016.

[24] O. Bowcott, 'Impact of cuts to legal aid to come under review' *The Guardian*, 31 October 2017.

them, but even of the existence of such allegations. While the super-injunction granted to Trafigura spurred a public outcry as it was essentially preventing a parliamentary hearing over the case, the social media were leaking damning information demonstrating inside knowledge, within Trafigura, about the toxicity of the waste.[25]

Yet, Trafigura has consistently denied criminal liability for the damage created by the dumping of the waste in Abidjan. In 2010, a Dutch court did find the company guilty of illegally exporting waste from Europe, but it did not investigate events in Abidjan, the Public Prosecutor having decided that it would not be feasible to do so.[26] Attempts to date, in other European jurisdictions, to file criminal charges against Trafigura for the events in Côte d'Ivoire have failed. These include a complaint brought in Amsterdam by Greenpeace in 2009 against the Public Prosecutor's decision not to prosecute Trafigura Beheer BV and Puma Energy, Trafigura Chairman, Claude Dauphin, and other employees of the Trafigura Group, for criminal offences related to the dumping in Côte d'Ivoire; as well as, more recently, attempts made by Amnesty International in the United Kingdom to get the Crown Prosecution Services and the Environment Agency to open investigations for criminal conspiracy against the company.[27] In April 2010, two French NGOs, Robin des Bois and William Bourdon's Sherpa filed complaints against Estonia and the Netherlands before the European Commission, so that the cases be referred to the European Court of Justice. Both complaints failed, the European Commission arguing in the first instance that Estonia did not have all the relevant information about the waste to take action, and in the second, that there were already criminal proceedings under way in Amsterdam.[28] An earlier complaint, filed in 2007 by French and Ivorian NGOs acting on behalf of Ivorian victims[29] against the two French Trafigura executives, Claude Dauphin and Jean-Pierre Valentini, before the Paris Prosecutor, was also dismissed in 2008, the Prosecutor arguing this time that there was not a sufficient link with France.

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[25] See D. Leigh, 'Revealed: Trafigura-commissioned report into dumped toxic waste' *The Guardian*, 17 October 2009.

[26] In 2010, criminal charges were brought in Amsterdam against two relatively junior individuals, the tanker's captain, and a London-based Trafigura employee. Both were fined and convicted with suspended prison sentence, while the oil trader was fined £1m for concealing the dangerous nature of the waste when it was initially unloaded in Amsterdam. But the Court ruled that the company's chief executive, Claude Dauphin, would not face personal charges; and the prosecution did not cover the events after the tanker left Amsterdam.

[27] Both public agencies have responded that they lacked the expertise and the resources to investigate the oil company for criminal prosecution: J. Ball and H. Davies, 'UK authorities "lack resources" to investigate Trafigura over toxic waste' *The Guardian*, 23 July 2015.

[28] Greenpeace and Amnesty International (n 1) 168.

[29] The Legal Action Group of the FIDH, the French League for Human Rights, the Ivorian League of Human Rights and the Ivorian Movement for Human Rights (MIDH).

4. CONCLUSION: THE ARTICULATION BETWEEN LAW, POLITICS AND ECONOMICS IN THE *TRANSNATIONAL LANDSCAPE* OF THE *TRAFIGURA* CASE

The various variables – political, social, economic – at play in the development of the *Trafigura case* have contributed to shape a legal trail – or *interlegality*[30] – across these national scales. Each nudge of the trail followed the structure of Trafigura as a multinational corporation, and opportunities in each jurisdiction to define legal entry-points for litigation. Meanwhile, this fostered the 'messiness of the landscape' of the case with competing norms and legal systems 'yielding their own characteristic excesses and omissions.'[31] Each nudge of the trail also reflected the specificities of the structure of the legal field and national field of state power in these diverse jurisdictions. These characteristics help account for the development of the case, notably the relative effectiveness of the strategies of the lawyers acting on behalf of each party. The failures of criminal claims, thus, can be explained in part by the legal specificities of each of these jurisdictions, as much as the apparent dis-alignment in the mobilisation of the cluster of actors involved in the development of the case – NGOs, lawyers and victims.

Emblematically, the controversies sparked by the embezzlement of the bulk of the settlement monies secured by Leigh Day in 2009[32] also contributed to the implosion of the *Trafigura* litigations in Amsterdam, with the emergence of a dozen competing organisations claiming to represent Ivorian victims set up with the help of Dutch lawyers from 2009, and a counter-claim in 2011 by yet another victims' organisation against Leigh Day in London to recover the disappeared funds. This elusiveness of victims, with accusations of theft identity or 'fake victims' a constant in Trafigura's defence, has also been one of the arguments to disqualify the Ivorian state – both for its role in the Probo Koala disaster, and as a valid forum to investigate the events. To be sure, 'the vulnerability of Ivory Coast officials to corruption formed part of the background to the original environmental disaster when the waste was dumped.'[33] With the country then at war, these propitious conditions certainly also contributed to

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[30] B. de Sousa Santos, 'Law: A Map of Misreading – Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279–302.

[31] C. Greenhouse and C. Davis (eds.), *Landscapes of Law: Practicing Sovereignty in Transnational Terrain*, manuscript under review.

[32] Leigh Day was to oversee the distribution of the settlement moneys to the 30,000 victims, but shortly after the settlement was agreed Martyn Day allegedly received a request to meet representatives of a senior Ivorian figure in Paris to agree to come to an 'arrangement'. This figure, claiming to be the president of the *National Coordination of Toxic Waste Victims of Côte d'Ivoire* (*Coordination nationale des victimes de déchets toxiques de Côte d'Ivoire*) managed to get the funds frozen in a move backed by the Abidjan state prosecutor. The compensation money was transferred a few days later, to the account of Claude Gohourou, 'one of the dozens of people representing the communities affected by the toxic waste' and henceforth partly disappeared, along with Gohourou. See X. Rice, 'Fears over £30m payment to toxic waste victims in Trafigura case' *The Guardian*, 22 January 2010.

[33] D. Leigh, 'Corruption fears over Ivory Coast toxic waste victims' £30m Trafigura payout' *The Guardian*, 4 November 2009.

positioning the country as one of the 'old margins' turned into 'new frontiers' described by the Comaroff, as 'places where mobile, globally competitive capital – much of it these days southern and eastern, finds minimally regulated zones in which to vest its operations.'[34]

Indeed, at a first glance, the *Trafigura case* reads like a by-passing of sovereignty, with the Ivorian state becoming seemingly a mere shadow in the background of the case, either disqualified due to the inefficiency of local jurisdictions and authorities, or their corruption. Yet this by-passing of sovereignty also applies to the other states involved in the landscape of the case, including the United Kingdom, with the super-injunctions granted to Trafigura in the London proceedings in 2009 demonstrating the political clout held by Trafigura in Britain. Thus, this apparent by-passing of sovereignty, importantly, also contributes to blurring the connections between Trafigura as a multinational corporation, the state – be it in Ivory Coast or the United Kingdom and other European jurisdictions – and the operations of transnational law, by drawing an image of transnationalism as primarily an expression of global capitalism *against* the state.

Yet, a recent body of scholarship[35] is endeavouring to locate, precisely, transnational law 'in the conceptual and practical spaces left open between borderless capitalism and bordered states.'[36] In this, focusing on the legal, but also social, political and economic landscape of the case across these different national forums could also help shed light on what remains largely a gap in the literature: the articulation between global value chains as a core feature of late capitalism, the state and transnational law.[37] Ongoing research on 'global wealth chains' is highlighting the 'constitutive significance of bifurcated sovereignty' for the development of capitalism, with law bifurcated to accommodate the mobility of capital and enabling the operations of multinationals across jurisdictions.[38] Though this can only be sketched here, this would imply a re-reading of the *Trafigura* case, not simply as a transnational litigation saga, but also as a reflection of the connections between a multinational corporation, London as a financial capital, and the 'flows and counter-flows'[39] between the national field of state power in Côte d'Ivoire, and the European national fields of state power involved in this case. Drawing on long-standing scholarship in history and anthropology on the co-constitution of capitalism, imperialism and late colonialism could be adding a further layer to this insight, by tracing how this bifurcation of sovereignty is reverberated at the national level in differentiated political, economic and legal spheres.

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[34] J. Comaroff and J. L. Comaroff, *Theory from the South. Or, How Euro-America is evolving toward Africa* (Boulder, London, Paradigm Publishers 2012) 13.

[35] C. Cutler and T. Dietz (eds.), *The Politics of Private Transnational Governance by Contract* (Abingdon, Routledge 2017).

[36] Greenhouse and Davis (n 31).

[37] With few exceptions, see The IGLP Law and Global Production Working Group (including: T. Ferrando), 'The role of law in global value chains: a research manifesto' (2016) *London review of international law* 1.

[38] L. Seabrooke and D. Wigan, 'The governance of global wealth chains' (2017) 24(1) *Review of International Political Economy* 6.

[39] B. Ibhawoh, *Imperial Justice. Africans in Empire's Court* (Oxford, Oxford University Press 2013).

Thus, though this is only one example, developments in the London side of the *Trafigura case* underscored that 'behind Trafigura is a little-known but wealthy group of London oil traders, who have high-level connections in the Conservative party.'[40] Conversely, in Côte d'Ivoire, Trafigura is still conducting a thriving business, nimbly navigating the political transition, from war to peace in 2007, and from the regime of Laurent Gbagbo to that of his successor Alassane Ouattara in 2010. Thus, a nephew of Ouattara, Ahamadou Touré, is now heading the subsidiary of Trafigura in the country, Puma Energy: 'just like in Angola, where Trafigura holds the monopoly over the oil supply into the country based on close ties with the Presidency, Puma Energy relies in Côte d'Ivoire on ties with the family in power.'[41] Both sets of examples illustrate the small world of oil trading in London and Abidjan, and its straddling across business and political interests. However, more than simply pockets of corruptive practices, these ties can also be seen as imperial legacies, specifically in the Ivorian case. Reflecting the co-constitution of global capitalism and late colonialism, these connections have contributed to shaping the very structure of the (post-)colonial state in Africa – what Cooper calls the 'gate-keeper state'[42] – by enabling a bifurcation of the state: with channels, built on inter-personal relations, enabling the flow of the capital generated by extractive boons to shape the unequal and uneven connection between Africa and global capitalism, and a domestic sphere left perfectly vulnerable to the violence of capitalist expansion. Thus, rather than weaving its way into, and despite, the loopholes of global capitalism, transnational law in this case as elsewhere could be constituted as much as it is constituted by bifurcated sovereignty.

5.3 THE *TRAFIGURA* ACTIONS AS PROBLEMS OF TRANSNATIONAL LAW

Simon Archer

1. INTRODUCTION

We are invited to comment on the *Trafigura* 'case' and its relationship to sovereignty. From the perspectives of both the development of transnational law discourse and a resurgence and reconsideration of forms of sovereignty, the task is timely. The Trafigura actions are, at one time, examples of the aspirations and pitfalls of transnational law, particularly vis-à-vis perceived challenges of domestic legal systems

[40] D. Leigh, 'Inside Trafigura: accusations, sour deals and friends in high places' *The Guardian*, 16 September 2009. In particular, Tory peer and former leader of the House of Lords Baron Strathclyde joined Trafigura as a non-executive director in 2013. He had previously stood down from the board of the group's hedge fund arm following the 2009 legal, media and political battles over the Probo Koala disaster in London.

[41] J. Tilouine, 'Probo Koala: drame écologique et bonnes affaires' *Le Monde*, 19 August 2016. My translation from French.

[42] F. Cooper, *Africa Since 1940: The Past of the Present* (Cambridge, Cambridge University Press 2002).

and states in the era of globalised production, communication and exchange.[43] Those aspirations, and the project of defining transnational law, has developed so as to reach something of a self-reflexive moment, in which it asks itself questions about initial assumptions, scope and method.[44]

Sovereignty was always part of the story of transnational law: often invoked for its diminishment under conditions of globalisation, upon closer reading we find its strong assertion, at least in some interests, and we see it continuing to shape the field of transnational law. Finally, transnational law itself has anxieties about its 'legitimacy' in both respects, that is, in positing the diminishment and the continuing presence and re-assertion of the importance of state forms.[45]

2. CASES AS METHOD IN TRANSNATIONAL LAW

Framing an inquiry into transnational private law through the examination of cases has made some decisions for us: cases are adversarial disputes over wrongful conduct, slow, expensive and uncertain in their outcomes both short- and long-term. They do not always or easily capture the ways in which law frames human interaction.[46] By focusing on transnational private law, we may be excluding from consideration other cooperative dimensions of transnational private law (patterns of contracting practices or corporate forms) and aspects of public international law, such as trade arrangements as

[43] The scope and use of term 'globalisation' are not engaged for the purpose of this chapter. Among many sources problematising it see William Robinson, 'Theories of Globalization' in George Ritzer (ed.), *The Blackwell Companion to Globalization* (Oxford, Blackwell 2007), and for a discussion of the conceptual ambiguities in both 'globalisation' and 'transnational law' see Ralf Michaels, 'Globalization and Law: Law Beyond the State' in Reza Banakar and Max Travers (eds) *Law and Society Theory* (Oxford, Hart Publishing 2013).

[44] Examples of these anxieties might include Martin Loughlin, 'Misconceived search for global law' (2017) 8(3) *Transnational Legal Theory* 353, responding to Neil Walker's proposals for how 'global law' obtains authority or legitimacy in *Intimations of Global Law* (Cambridge, Cambridge University Press 2014); Paul Berman offering three conceptions of global legal orders (sovereigntist, universalist or pluralist) in *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge, Cambridge University Press 2014); Nico Krisch's discussion of democratic reactions (containment, transfer or break) to the emergence of transnational law in *Beyond Constitutionalism: The Pluralist Structure of Post-national Law* (Oxford, Oxford University Press 2010), Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21(2) *Transnational Law and Contemporary Problems* 305, among others.

[45] For example, the discussion by Claire Cutler of generating legitimacy through expertise in, 'The legitimacy of private transnational governance: experts and the transnational market for force' (2010) 8(1) *Socio-Economic Review* 157, or Andreas Maurer arguing legitimacy through participatory mechanisms in 'The Creation of Transnational Law – Participatory Legitimacy of Privately Created Norms' *Zentra Working Papers In Transnational Studies* No. 03/2012 <http://ssrn.com/abstract=2179584>. Finally, we find Ralf Michaels arguing that the state form *is* a transnational legal order: 'The State as Transnational Legal Order' (2016) 1 *UC Irvine Journal of International, Transnational, and Comparative Law* 141.

[46] For a now-dated but useful summary of a modern legal realist approach in this vein, see Duncan Kennedy, 'The Stakes of Law: Hale and Foucault!' (1991) 15 *Legal Studies Forum* 327.

conditioning frameworks. From the perspective of transnational private litigation, we must examine the formation of cases, their actors, processes and outcomes, and build out an understanding of how they might be considered examples of transnational law, if not legal ordering more generally.[47]

In the study of law through the case method, it is common to start with 'the facts,' at least as they become stylised in a decision or summary. Eventually, we recognise that the framing of the factual basis of a case, or any series of events and people, has a powerful effect on the analysis that will follow. Similar observations apply and are amplified in transnational context, where problems of any proceeding are multiplied and magnified by two or more jurisdictions, institutional arrangements, systems of law, perhaps languages and other complicating factors.

The *Trafigura* facts are summarised elsewhere. It is easy to draw out several elements that suggest transnational legal dimensions: a ship registered in Panama and owned by a company headquartered in Greece is chartered by a corporation based in Singapore with head offices in Switzerland, and holding or operating subsidiaries in Amsterdam and London, which picks up raw fuels in Texas from a Mexican state-owned oil business, processes it on the open ocean, visits Amsterdam, then Abidjan, where it uses a recently-formed local company to distribute toxic waste (illegally) on the 19 August 2006. According to the 'facts' before the courts, 17 people die and perhaps 30,000 are injured, although estimates run as high as 100,000.[48] The interim government under Prime Minister Banny (until presidential elections could be run) eventually agrees to a settlement for the dumping (US$195 million) and prosecution of the core Trafigura parties is ceased.[49] A clean-up is ordered, and eventually completed two years later. Some of the payment is used to compensate victims, although facts are unclear. The head of the local company that distributed the waste is sentenced to 20 years in prison. Claims are brought in the UK on behalf of victims, and a settlement agreed to after some back-and-forth.[50] Further prosecutions are brought in the Netherlands, which results in the issuing of fines for Trafigura companies, but a

[47] For this reason, the rest of this comment uses 'transnational law' in relation to transnational private litigation, but recognises that this may only be one dimension or part of what could constitute transnational law.

[48] Amnesty International/Greenpeace Netherlands, *The Toxic Truth About A Company Called Trafigura, A Ship Called Probo Koala And The Dumping Of Toxic Waste In Cote D'Ivoire* (Amnesty International Publications, 2012) ch 5.

[49] State of Côte d'Ivoire and Trafigura Parties, *Protocol of agreement (Protocole d'accord) between the State of Côte d'Ivoire and the Trafigura Parties*, 13 February 2007. According to NGO reports, the settlement was paid in consideration of staying government prosecution against the Trafigura defendants. It is not clear from these reports whether the settlement precluded any third party claims (i.e., victims) in Ivorian courts, although this seems unlikely. Note that Prime Minister Banny was an appointed interim office; Laurent Gbagbo was then President, although his legitimacy in the position contested and a period of limited civil was ensued.

[50] *Yao Esaie Motto & Ors v. Trafigura Ltd & Trafigura Beheer BV*, Case Nos HQ06XO3370, HQ06XO3342, UK High Court, (Macduff J), settlement approved 23 September 2009.

lawsuit on behalf of victims is dismissed.[51] Claims brought by Ivorian NGOs are attempted in France, but dismissed for lack of jurisdiction, and the European Commission also declined to bring a complaint.[52] How are these events a problem of 'transnational law'?

The Trafigura events could be viewed as an example of the failure of international arrangements respecting the movement and disposal of toxic waste to cope with the problem of transnational shipment of it; an example of a more general problem of transnational environmental regulation.[53] This approach could consider the actions and omissions of the exporting authority (Amsterdam Port Authority, Netherlands); the investigation and proceedings in the importing port (Abidjan, Ivory Coast), the broader problems of coordination of regulatory schemes across borders, the adequacy of the settlements and penalties eventually concluded and imposed. More broadly, there are two possible treaty regimes covering different forms of waste product that might have applied to the process by which the toxic slops were created, the MARPOL (normal ship waste) and Basel (toxic waste) regimes, but there may be gaps and ambiguities in and between them as well.[54] That was, in fact, the primary defence of Trafigura companies to the regulatory prosecution in the Netherlands. So, these events might be characterised as a failure of public international law, resulting from the lack of coordination between states in the manufacturing and transport of toxic waste. Through this lens, Trafigura is a 'public international law' problem.

A second, related approach views the Trafigura events as an example of the failure of domestic legal proceedings to provide a substantive justice outcome for the victims, either idiosyncratic to these particular circumstances (Abidjan in 2006), or, more frequently, as an example of the systemic failure of specifically those norms that are designed to come to the rescue of the most vulnerable and affected parties under the impact of transnational corporate conduct.[55] This view emphasises the possibilities of

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[51] *Stichting Union Des Victimes De Déchets Toxiques D'abidjan Et Banlieues v Trafigura Beheer BV*, C/13/581973 1 HA ZA 15-195 (Amsterdam) 30 November 2016.

[52] *Toxic Truth* (n 48) 168.

[53] For example, Gary Cox, 'The Trafigura Case and the System of Prior Informed Consent Under the Basel Convention – A Broken System?' (2010) 6(3) *Law, Environment and Development Journal* 263; Laura Pratt, 'Decreasing Dirty Dumping? A Re-evaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste' (2011) 35 *Wm and Mary Envtl L & Pol'y Rev* 581; Rachel Anglin, 'International Environmental Law Gets Its Sea Legs: Hazardous Waste Dumping Claims Under the ATCA' (2007) 26(1) *Yale Law and Policy Review* 232; Robert Percival, 'Global Law and the Environment' (2011) 86 *Washington Law Review* 578.

[54] These were discussed by the Netherlands court: *Trafigura Beheer BV, LJN* (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS); see also, *Toxic Truth* (n 48) 81.

[55] For a volume applying a criminogenic lens to the Trafigura actions and defendants, but published too late for a fuller consideration in this chapter, see Thomas MacManus, *State-Corporate Crime and the Commodification of Victimhood* (Abingdon, Routledge 2018). Earlier work includes Lisbeth Enneking, 'Crossing The Atlantic? The Political And Legal Feasibility Of European Foreign Direct Liability Cases' (2009) 40 *Geo Wash Int'l L Rev* 903; Carmen Otero García-Castrillón, 'International Litigation Trends In Environmental Liability: A European Union–United States Comparative Perspective' (2011) 7(3) *Journal of Private International Law*

private transnational claims (in this case, toxic tort claims) brought in jurisdictions other than the Ivory Coast, the legal and administrative barriers to, and features of, such litigation. Transnational torts may be viable ,or considered appropriate, on two related bases. First, there may be no viable claim possible in the jurisdiction of the harm due to the power of the defendant vis-à-vis the local courts or government, or merely ineffective local procedures (as was alleged by the plaintiffs in Trafigura). Second, a corporate actor may have no substantial assets in the jurisdiction where the harm occurs, and enforcing a judgment from that jurisdiction in the home jurisdiction of the corporate actor may be difficult (despite available principles of comity: this is, for example, the problem of enforcement in *Chevron*). Both are based on a particular understanding and, indeed, appreciation of the quality of domestic legal procedures in the jurisdiction of the harm. Cases such as *Trafigura*, however, prompt the question, in whose interest does the shift from domestic to transnational litigation occur?.

Each of these approaches (failure of public international law, failure of private domestic remedies and need for trans-jurisdictional litigation) has something to say about the role of the state and sovereignty; in each case, we are inclined to point to a failure of some sort of a state role, either *narrowly* (as in government actors failing to prosecute) or more *widely* (referring to the dysfunctionalities of legal systems, perhaps aggravated by a recent civil war).

These views of the capacities of state and domestic legal systems fit within the view that those actors and processes are not appropriate or able to deliver desired justice outcomes and form, hence, a precondition for transnational claims, which justifies their potential characterisation as transnational law. Instead of basing transnational law's emergence on the fact alone that rising conflict phenomena have a border-crossing, spatialised character, the turn to 'transnational law' as an organising concept is, arguably, also a normative one.[56] The call for an adaptation of existing legal forms and instruments in order to more adequately respond to transnational ordering or governance challenges such as that informing the *Trafigura* case is a normative one in the sense that it forms a critique of 'state failure'. State failures, in other words, become, for some interests (the victims, the NGOs) a precondition for transnational law. This is the site of one of the anxieties of transnational legal theory: how have domestic legal proceedings been characterised as ineffective, unavailable or otherwise failed? In whose view, and interest? Are those views and interests just another form of 'environmental colonialism' or 'legal disaster capitalism', or more politely, a failure to fairly and properly evaluate the capacities of a state and its legal system in its own evolution?

As will be discussed below, the Ivorian government and court system's responses in the *Trafigura* actions are heavily criticised by the NGO actors, but we do not have available, absent close research, other perhaps more textured evaluations of the state's

551; Nicola Jägers and Marie-José van der Heijden, 'Corporate human rights violations: The feasibility of civil recourse in The Netherlands' (2008) 33(3) *Brooklyn Journal of International Law* 833, among others.

[56] Peer Zumbansen, 'Manifestations and Arguments: The Everyday Operation of Transnational Legal Pluralism' in Paul Berman (ed), *Oxford Handbook of Global Legal Pluralism* (Oxford, Oxford University Press 2019, forthcoming); TLI *Think!* Paper series 02/2018.

capacities at that time.[57] The second reason state failure is or should be a point of anxiety for transnational law is that, for some interests, state boundaries, especially as policed by legal systems, have a role in forming the boundaries and perhaps content of transnational law. In *Trafigura*, the NGO actors, Greenpeace Netherlands and Amnesty International, called for exclusively state-based actions to remedy the problems in the *Trafigura* case, in a traditional problem – policy response formulation. Another way that states define the boundaries of transnational law is in the ways transnational private tort litigation is formed and developed.[58] We turn next to this framework.

3. BUILDING A TORT CASE AS TRANSNATIONAL LAW

The issues that most of the (English language) legal literature on the *Trafigura* actions engaged with were those of corporate accountability, and more specifically, transnational tort claims as a framework to create such accountability. As just discussed, these accounts begin with 'the facts', or at least, the ones useful to framing a piece of transnational litigation – an intentional distribution of toxic waste in sites around Abidjan resulting in perhaps 100,000 victims of poisoning and further environmental harm, and there is assumed or express statement about the failings of the government and legal system in the Ivory Coast.

The next step is to discuss ways in which the primary defendants – a domestic corporation apparently created for the specific purpose of dumping the waste, but in reality, the Trafigura corporate entities based in the UK and Netherlands – can be held accountable within the bigger picture of the supply chain of which they are part.[59]

The next step is then to consider which defendants to bring a proceeding against, on behalf of whom, in which jurisdiction or jurisdictions, and under what procedures. This step brings up a series of questions that are in many ways the 'housekeeping' of transnational tort, environmental and human rights litigation. These questions warrant deeper discussion on their own, because this moment is a key moment in the process of developing what we might call transnational private law.[60]

There are two claims in the *Trafigura* actions that are typically discussed as something we could consider transnational law: primarily the tort claim in the UK on behalf of victims, and secondarily the prosecutions in the Netherlands, one on behalf of victims (dismissed) and against the corporate defendants for breaches of environmental

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[57] But, see, for a parallel consideration, the critique of government failure in the context of the Haiti earthquake: Francois Pierre-Louis, 'Earthquakes, Nongovernmental Organizations, and Governance in Haiti' (2011) 42(2) *Journal of Black Studies* 186.

[58] Richard Meeran, 'Tort Litigation against Multinational Corporations for Violations of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *University of Hong Kong Law Review* 1.

[59] Grietje Baars et al, 'The role of law in global value chains: a research manifesto' (2016) 4(1) *London Review of International Law* 57.

[60] In this line of thinking see Peer Zumbansen, 'What Lies Before, Behind and Beneath a Case? Five Minutes on Transnational Lawyering and the Consequences for Legal Education' in Helge Dedek and Shauna Van Praagh (eds.), *Stateless Law: Evolving Boundaries of a Discipline* (Abingdon, Routledge 2015) 215.

laws. Generally speaking, there are both legal and administrative barriers to bringing these kinds of claims.

In the Anglo-American common law systems there are two significant legal barriers to transnational tort claims, one being the rules of private international law and in particular the *forum non conveniens* doctrine, and second, and perhaps more fundamentally, where there are related corporate entities, the doctrine of separate legal personality. Each has traditionally formed an effective defence to transnational claims in tort or some similar cause of action. The former requires[61] a proceeding in the jurisdiction the wrongful conduct took place, and the latter creates a legal separation of responsibility for actions that is difficult to overcome on the basis of common law theories.[62] These two defences to claims are typically argued in motions early on in litigation in common law countries (where corporate defendants are based or incorporated) in an attempt to deflect the claims to the jurisdiction of the harm (perhaps for the reasons that that jurisdiction was rejected in the first place), or to attempt to show no cause of action against the parent or lead corporate entity in its own jurisdiction. As many have wryly observed, globalised activity and porous borders are useful to conduct business, but a stiff assertion of sovereign barriers and rules remains important to corporate defendants; theorists call it bifurcated sovereignty or the bifurcated state.[63]

Different jurisdictions have addressed these legal barriers one way or another: in the EU, corporate actors may be sued in their jurisdiction of incorporation.[64] More creatively, Latin American jurisdictions have used 'blocking statutes' to manipulate the rules of private international law.[65] More generally, there was a period of optimism in the extraterritorial jurisdiction using the *Alien Tort Claims Act*,[66] which slowed down after the *Kiobel* case (also discussed in this volume), although key questions of whether corporate defendants are captured by that ordinance remain unresolved.[67] There were also proposals for similar assertions of global jurisdiction in other common law

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[61] Subject to exceptions one of which is discussed below.

[62] The primary exceptions are statutory.

[63] Among many examples: George Monbiot, 'Taming corporate power: the key political issue of our age' *The Guardian*, 8 December 2014, www.theguardian.com/commentisfree/2014/dec/08/taming-corporate-power-key-political-issue-alternative, accessed 28 February 2018; Dick Pountain, 'The battle between countries and companies' *Open Democracy* (10 July 2013) https://www.opendemocracy.net/ourkingdom/dick-pountain/battle-between-countries-and-companies, accessed 28 February 2018. The same observation applies to transnational treatment of taxation, the contours of which have been apparent through the Panama and Paradise Papers.

[64] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 27 September 1968, 1998 O.J. (C 27) 1 (consolidated version).

[65] Henri Saint Dahl, 'Forum Non Conveniens, Latin America and Blocking Statutes' (2003–2004) 35 *U Miami Inter-Am L Rev* 21.

[66] 28 USC § 1350 ('ATCA') and much-discussed line of jurisprudence under it, including *Filártiga v. Peña-Irala* (1980) 630 F 2d 876 (2d Cir), *Sosa v. Alvarez-Machain*, (2004) 542 US 692.

[67] *Kiobel v. Royal Dutch Petroleum Co*, (2013) 133 S Ct 1659. *Jesner v. Arab Bank*, PLC, 137 S Ct 1432 was granted leave by the US Supreme Court and may determine the question of corporate liability under this ordinance.

countries (but never adopted),[68] and expansion of universal jurisdiction to certain forms of claims.[69]

One line of these transnational cases – those dealing with the ATCA and those with universal jurisdiction – have entered periods of remission or retreat from initial expansion of jurisdiction, which some view as a form of defensive sovereignty re-asserting itself. US courts in particular have narrowed grounds on which transnational cases may be heard.[70] Finally, over the past 20 years, innovations in tort law have found ways around these traditional defences, although they are not yet widely established and fully tested. It is relevant to note that the firm that pioneered these developments in the UK – Leigh Day & Co. – was the firm that brought the action in the UK court against Trafigura. Most recently, the Leigh Day & Co. firm has engineered another interesting innovation, by conducting a part of a proceeding against a UK corporate defendant using UK courts, but sitting in the jurisdiction of the harm – Sierra Leone.[71]

The innovation in tort law just mentioned is worth a brief comment because it is perhaps stereotypically thought of as transnational case law. In order to 'work around' the two legal barriers just mentioned, a case is framed as one of wrongful conduct in the home jurisdiction of the defendant. In effect, it is the tort of negligent supervision of a subsidiary or related party.[72] That tort is alleged to have occurred in the boardroom of the parent or lead corporate actor; it is only the effect of that behaviour, somewhere down a longer chain of causation, that is the harm that occurs in another jurisdiction – whether it is asbestos poisoning for workers of a subsidiary, wrongful death caused by security guards hired by the subsidiary, or dumping of toxic substances. It is a clever theory and being tested in other common law jurisdictions,[73] at least until corporate

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[68] For example, Private Member's Bill C-323 (2011) *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, October 16, 2013 <online: http://www.parl.ca/DocumentViewer/en/41-2/bill/C-323/first-reading?col=2>.

[69] Craig Scott, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford, Hart 2001).

[70] See *Kiobel* (n 67) and discussion of the case in this volume, but more generally, and not based on ATCA, *Morrison v. National Australia Bank*, (2010) 561 US 247. In that case, a securities fraud class proceeding that, despite sales taking place on a US exchange, did not have sufficient connection to the US to take jurisdiction. We might view these trends as a form of re-assertion of sovereignty, insofar as wider jurisdiction is denied and there is a stricter policing of legal borders.

[71] See: AFP, 'Landmark case against British mining firm begins in Sierra Leone' *The Guardian*, 7 January 2018, <https://www.theguardian.com/global-development/2018/feb/07/landmark-case-against-british-mining-firm-sierra-leone-tonkolili-iron-ore-ltd-police-brutality>, accessed 28 February 2018.

[72] *Lubbe v. Cape Plc* [1998] CLC 1559; [2000] 1 WLR 1545 and finally culminating in *Chandler v. Cape Plc* [2012] EWCA Civ 525.

[73] Attempts elsewhere include *Das v. George Weston Limited*, [2017] ONSC 5583 (CanLII) (rejecting the applicability of the theory in *Chandler* on a supply chain); *Choc v. Hudbay Minerals Inc*, [2013] ONSC 1414 (CanLII) (dismissing preliminary motions to strike and permitting the theory in *Chandler* to be tried). In a case with comparable issues to the *Choc v. Hudbay* action, Leigh Day & Co is also prosecuting a case in Sierra Leone alleging corporate

defendants find ways to organise to defeat it.[74] For the purposes of this discussion, it is relevant to note that this innovation might equally be viewed as entirely one of domestic law – the theory of the case rests on that fact.

The administrative barriers to these types of claims are both procedural (and hence, also legal), and economic, and these considerations raise several questions about who is involved in the case, and why. Again, each of these aspects is written on more thoroughly elsewhere, and so can be passed over more quickly here.[75] When considered as a commercial proposition, bringing a transnational claim only becomes viable when the expected fees from a case can sustain the costs and risks of it. Speaking very generally, to bring a transnational claim, a plaintiff law firm might budget €2–3 million in total costs, including disbursements and legal fees.[76] The categories of costs in a transnational litigation are similar to those in domestic mass tort litigation of the same type, but, unsurprisingly, considerably more. There may be significant fees associated with gathering and processing evidence, expert fees for both subject matter and procedural law, translation and travel costs, and not least, significant legal fees involved in dealing with standard legal tactics involving collateral motions and appeals designed to drive up costs of litigation, and fighting other related tactics like judgment-proofing.[77]

In order to achieve that as payment for the case, there must be an extraordinarily well resourced plaintiff or supporting group, or more likely, arrangement to be paid from the proceeds of an award or settlement of the claim – what are referred to as contingency fees in US and Canadian law, and as no-win no-fee in the UK. Contingency fees might reasonably range from 10% to 30% of total recovery, which implies at least €20 to 30 million in total damages to meet the proposed litigation budget.[78] Such damages are typically only available if a group proceeding is possible. And so procedural considerations – the type of fee arrangements permitted, and the availability of group proceedings – will be key determinants of viability of claims brought by private lawyers.

These law firms will then seek to diversify and mitigate their risks by developing a portfolio of cases across types, and seek outside financial assistance, by way of investors or insurance, in bringing them. As a result, we have a rapidly developing

control of local police force resulting in false imprisonment, assault and battery, trespass and theft of property. See n 71.

74 It seems likely that this theory could be defeated by greater intermediation by formally independent actors (more subsidiaries or coordination along a supply chain) combined with careful due diligence steps at the lead or parent entity level.

75 See, for example, Meeran (n 58) 29; for a standard textbook treatment, see John Haley, *Fundamentals of Transnational Litigation: The United States, Canada, Japan, and the European Union* (Durham, NC, Carolina Academic Press 2012).

76 For a review of the costs issues in Trafigura UK action and settlement, see *Motto & Ors v. Trafigura Ltd & Anor* (Rev 3) [2011] EWCA Civ 1150. The costing was found disproportionate to the process and reduced to 58% of the original costs claimed.

77 Meeran (n 58).

78 In the Trafigura UK tort proceeding, the original claim was for about £100 million. The settlement amount of about £30 million was to be distributed to victims.

market in litigation insurance and third party financing.[79] These developments raise issues of possible conflicts of interest and the traditional common law rules against generating litigation ('champerty and maintenance').

There are other ways to finance and organise transnational litigation. Firms may partner with other firms in the jurisdiction of the harm, or more commonly, with non-governmental organisations who work with the communities and plaintiffs. Private firms may not be involved at all, and instead, cases may be brought by lawyers working with NGOs for purposes consistent with their mandates. The role of NGOs will be discussed more below.

These procedural and administrative considerations, which are primarily governed by the rules of domestic procedure, the impact of the domestic bar's regulation of its lawyers, and the economics of law firms, will cause some claims to be brought and others not; perhaps traditional issues of access to (transnational) justice, and likely to be highly idiosyncratic to events and actors. The fact that there are a small number of law firms and only some jurisdictions with the legal frameworks that permit the economics of a case to be viable means these factors will have considerable influence over the shape of transnational private law. The relatively small number of cases and actors will lead to closer consideration of them (as has been done with other transnational legal processes).[80] One such literature focuses on 'cause lawyering' as it is called in the US,[81] of which there are various typologies.[82] Their specificities have significant potential for research into what we think transnational law is or could be. The portfolio of cases of these firms could be a topography of these types of transnational legal cases; the backgrounds of the key lawyers and other actors in these firms a biography of the discipline.

The *Trafigura* case can fit into these analytic frameworks. A transnational toxic tort claim is brought in the UK by the Leigh Day & Co. firm, perhaps because domestic remedies were not preferred or available. The claim is eventually settled. The decision

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[79] Meeran (n 58) 24; Cassandra Robinson, 'The Impact of Third Party Financing on Transnational Litigation' (2011) 44 *Case Western Res J Int'L L* 159.

[80] There are many variations. For activist networks and transnational environmental law, see Margaret Keck and Katherine Sikkink, *Activists Beyond Borders* (Ithaca, NY, Cornell University Press 1998); for transnational litigation and arbitration, see Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55(4) *International Organization* 919 and earlier seminal work by Yves Dezalay and Bryant Garth, *Dealing in Virtue* (Chicago, IL, University of Chicago Press 1996); for applications in West African legal contexts, see Sara Dezalay, 'African Extractive Economies and Connected Histories of Globalization – A Case Study of the Africa Bar in Paris' (18 July 2017) <https://ssrn.com/abstract=3004973>, accessed 18 February 2018 and 'Building a Political Sociology of Legal Professions in Africa: Stakes for an Open Research Agenda' (2 August 2017) <https://ssrn.com/abstract=3012719>, accessed 28 February 2018.

[81] One well-known line in socio-legal literature is developed by Austin Sarat and Stuart Scheingold in several volumes beginning in the late 1990s. See for e.g., *Cause Lawyering and the State in a Global Era* (Oxford, Oxford University Press 2001) and *Cause Lawyers and Social Movements* (Palo Alto, CA, Stanford University Press 2006).

[82] For example, Thomas Hilbink, 'You Know the Type: Categories of Cause Lawyering' (2004) 29 *Law & Soc Inquiry* 657; Anna-Maria Marshall, Daniel Crocker Hale, 'Cause Lawyering' (2014) 10 *Ann Rev L and Soc Sci* 301.

is a settlement, and not one we discuss for its doctrinal innovation – that had already been achieved by the Leigh Day & Co. firm as discussed above – but as an application of that innovation. The settlement we can place within the ranges of costs and risks mentioned above – a claim amount of initially about £100 million, a settlement for £30 million.[83] Distributions to the plaintiffs should have been in the range of €1,000 each. Those figures could be placed within the wider costs of the proceedings (apparently £14 million in defence costs in the UK action alone; see plaintiff cost claims of £100 million at footnote 76); compare to the NGO's estimates of the total economic cost of the dumping to the defendants (€254,000,000) and total revenues of the defendant of about US$122 billion. These figures represent a critique in themselves.

We might equally view the *Trafigura* claim (and if they are part of or become a pattern of claims, settlements and decisions, this form of transnational law) as the development and maturation of a business model: one of the portfolio of cases brought by the Leigh Day & Co. firm,[84] and a small number of firms like it, that developed a series of legal claims against corporate defendants operating transnationally out of the UK, and the realisation of the risks taken in that portfolio. Leigh Day & Co. now has a division of the firm named 'International Claims', and a portfolio of cases in over 14 jurisdictions. From this perspective, some of the initial preconditions to bringing a transnational claim, one being lack of viable domestic remedy for groups of victims in the Ivory Coast, might appear more as opportunities to diversify risk in a portfolio of claims and ultimate an opportunity for profit. The plaintiff law firms' economic incentives are, in a sense, based on there being a lack of domestic remedy, and the need to bring transnational claims. This raises several considerations which thicken the analysis: to what extent are the possibilities of domestic remedy really considered, exhausted or more to the point, inappropriate to the situation?[85] Furthermore, how are the relationships between the firms and plaintiffs created and mediated, how does the firm mitigate or syndicate its own risks?[86] From the 'business model' perspective, the *Trafigura* actions could be viewed, then, as twice an opportunity to profit, the first time in attempting to avoid expensive toxic waste processing in Amsterdam, and second, for

[83] Settlement amounts are often far less than claimed amounts for a variety of reasons. In the US, settlement amounts in (largely domestic) securities class proceedings are routinely less than 5% of the total claim, and declining for larger claims. For an example in a parallel field, see NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review, (NERA, 2017) <http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf>, accessed 28 February 2018, 26. Settlement data is difficult to interpret, but the point for this discussion is a picture of the general economics of mass tort litigation.

[84] This portfolio is set out neatly (and not for the purpose discussed here) in Meeran (n 58) 24 and on the Leigh Day & Co. website.

[85] Chimène Keitner, 'The Three C's of Jurisdiction Over Human Rights Claims in U.S. Courts' (2015) 113 *Michigan Law Review First Impressions* 67.

[86] In this case we know that it was Greenpeace Netherlands that requested Leigh Day & Co. become involved in the case and presumably mediated the relationship with plaintiff groups, at least initially. Another French-based NGO, SHERPA, was also contacted by Leigh Day & Co.: see *Motto & Ors v. Trafigura Ltd & Anor* (Rev 3) [2011] EWCA Civ 1150 [11] et seq.

law firms from the global north to provide a form of justice outcome.[87] Is this, then, transnational law?

And, indeed, the role of Leigh Day & Co. in the *Trafigura* actions is not straightforward: while the claim was brought and settled, the distribution of the proceeds was not satisfactory; depending on the source of information, the funds were improperly appropriated by an Ivorian group with the aid of a domestic Ivorian proceeding, or were imprudently administered and lost by Leigh Day & Co. In the result, many victims did not receive compensation, and some resorted to claims against Leigh Day & Co. in the UK, which proceedings continued until 2016.

From this perspective the outcomes of the *Trafigura* actions are highly problematic. And that is certainly the view of the NGOs who have developed a lengthy report on the *Trafigura* actions,[88] and, in addition, their roles in these actions open another dimension of inquiry. Amnesty International and Greenpeace view the totality of the proceedings as effectively failing to properly sanction the key corporate defendants, a failure to properly compensate victims, a failure, even, for Trafigura to make a profit on the entire transaction.[89]

Interestingly, the NGO reports contain more detail about the domestic Ivorian legal procedures, settlement, clean-up and distribution of compensation to victims. These events are ultimately characterised as failing to make Trafigura accountable for the dumping, but consider the processes undertaken (at least formally) by the Ivorian government. Key local actors were immediately arrested, including Trafigura employees. Eventually an Ivorian court finds insufficient evidence for conviction in all but two cases, and those two are sentenced to 20 years in prison. The local environmental agency attempts to stop the ship leaving port. An emergency management team is appointed by the President a week later, and two commissions are established to investigate the dumping. A clean-up is undertaken by two different companies (French and Canadian). A settlement is eventually reached with Trafigura which releases their employees and pays nearly US$200 million for the clean-up. Some of this settlement fund is distributed to victims.

The NGO's report lists several failures of the Ivorian government to enforce existing laws that would have avoided the dumping, including licensing the domestic company and insufficient controls at the port of Abidjan. It also criticises the conditions of the settlements made by the Ivorian government and Leigh Day & Co., in particular for the Ivorian government's release from liability of the corporate defendants and Leigh Day & Co.'s agreement to keep terms of settlement confidential.[90] And the report is equally critical of state responses in the Netherlands and the UK. It even goes so far as to request Mexico commence an inquiry into why the raw, unprocessed fuel was sold in the first place.

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[87] A third opportunity to profit lies, of course, with the eventual response of the corporate bar to the business model developed by the plaintiff firms.

[88] *Toxic Truth* (n 48).

[89] Ibid., 137.

[90] The report also notes the very limited number of actors willing to engage in these cases and criticised Leigh Day & Co. for agreeing not to pursue further litigation.

Although the conduct and effectiveness of these measures is criticised by the NGOs, even as purely formal exercises, the array of domestic responses do not fit easily within the typically brusque characterisation of the availability or quality of domestic justice often used as a practical precondition for a transnational claim.[91] We might expect a similar range of responses in any jurisdiction, and similar outcomes. There may have been serious problems in these processes, but it is too easy to gloss them as problems of developing countries' legal systems.

Although the report is lengthy, the thrust of it is that there should be a much more robust public enforcement of criminal or quasi-criminal sanctions against corporate actors in these circumstances by all states, and a more transparent process of remediation and compensation. It grounds its primary arguments on an international ordinance, the UN Convention on Economic, Social and Cultural Rights, and frames much of the report in terms of these rights.

Seen through the lens of transnational law, the NGOs frame it as a collective action problem of states and ground their analysis in 'rights talk' expressed in international agreements, in contrast to the innovation in private law of obligations used by the private law firms. It is one of the interesting features of the NGOs' perspective that in their description of the problem, we can simultaneously discern a wider legal lens – a socio-legal lens that renders a trenchant critique of all the actors involved in the problematic – while at the same time cleaving to state-based and rights-based solutions to the problem. We might call this solution the utopian formulation of transnational law; the properly coordinated state-state solution addressing pressing problems in the problem-and-policy-response mode. Put another way, these actors employ heterodox perspectives of socio-legal investigation combined with policy development, in which rights are conceived of as the justice outcome, and state instrumentality the mode of it. This approach may be quite consistent with the culture, modalities and objectives of the NGOs themselves; it is less clear whether this approach "fits" with the realities of a jurisdiction , politics and political economy. Further work into these NGOs, their cultures, economics and roles in the formation of transnational law is required.

4. SUBSTANCE OR APPROACH, DOCTRINE OR PROCESS

The *Trafigura* case is of course not a single case, but a series of them in several jurisdictions and with varying objectives. As an example of transnational private ordering it only has promise in the narrowest of senses, transnational tort law resulting in a settlement for victims where, for some reason, domestic remedies were not workable. This version of transnational law is still troubled in some ways: the innovation in tort law is one that is, essentially, not really transnational, but domestic, and in fact, relies on that to prove the theory of the case: the wrongful conduct was done in a boardroom in the UK; it is only the long chain of effects that causes injury in Abidjan. Doctrinally, the framing could be either domestic or international (the leading UK case is used as an example of how separate legal personality might be overcome in

[91] Recalling that a second reason for this 'precondition' may be difficulty enforcing a domestic claim in foreign jurisdictions.

UK corporate law textbooks),[92] but we can compare *Trafigura* to a number of other *cases*, like *Chevron*, or *Nike*, or *Kiobel*, and characterise them as a grouping of transnational legal cases in private law.

From another perspective, the Trafigura events are primarily about all states failing to act properly, to enact adequate controls, to co-ordinate properly over environmental problems and in each of these jurisdictions, about a failure to vindicate fundamental rights of the victims. This view of transnational law is closer to some form of public international law, using rights-talk to ground normative ordering. This perspective on transnational law is interesting when it is combined with socio-legal analysis of the actors in the NGO's perspective. This might be an example of a utopian transnational law, a call for better multi-state coordination vindicating rights articulated in UN conventions. This view of the *Trafigura* actions also includes a shift, namely one from adversarial litigation to ordering or governance outcomes: although the NGOs call for prosecution in support of corporate accountability, they ultimately propose solutions of better regulatory ordering and coordination.

Digging further into the different *cases* in the Trafigura events, legal proceedings, commissions of inquiry and other processes, it appears that they are riddled with problems of ultimate corporate accountability, enforcement and distribution. As the transnational litigation shows these problems are too complex to be addressed through the mode of adversarial litigation. They are problems of the interests, conflicts and power of actors and behavioural regulation.

If the objective is to consider prospects for transnational legal order, we must engage other perspectives and analytical tools, most notable from sociology of law and legal pluralism,[93] to begin to describe and understand these actors, particularly in relations to the state, and the processes they engage in and the norms they generate – if they generate them. Issues of enforcement of any order and legitimacy of any order – the latter always a difficult concept – arise immediately, in both the private transnational litigation driven by northern law firms' business models, as well as more traditional state roles. Using these methods and lenses leads the inquiry into transnational law away from the case method to those people and events that constitute what we later gloss as cases; the shift is toward some sort of Geertzian 'thicker' understanding. Here transnational law begins to conceive of itself as a process not a subject.

What is the *Trafigura* case about? Is it transnational law as a solution to a problem of sovereignty, or is it another example of the failures of it? Is it a story of failed domestic legal procedures during a period of domestic political instability? Or were domestic

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[92] See, for e.g., Paul Davies and Sarah Worthington (eds), *Gower*: *Principles of Modern Company Law* 10th edn (London, Sweet and Maxwell 2016) 201.

[93] The literatures engaging in legal pluralism have become – plural – and the insights and methods of earlier work by Sally Moore, Sally Merry and John Griffiths and others have become correspondingly fragmented. For an enduring intervention not focused on transnational law, see Boa de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Cambridge, Cambridge University Press 1996, 2002); more recently Berman (n 44), Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141 and in an application to private transnational law, Peer Zumbansen and Ralf-Peter Calliess, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford, Hart Publishing 2010).

proceedings, which resulted in settlement of the claims in a standard way, and as such, perhaps an example of a functioning rule of law, despite the political context.

Is it a story of transnational corporate accountability for a toxic tort through the enterprising actions of a pioneering law firm from the UK, or another example of 'legal disaster capitalism' by law firms and their NGOs based in the global north? Are the strong domestic elements in transnational litigation – from defences asserted by corporate defendants which are systematically successful, to innovations by plaintiff law firms which rely almost entirely on framing the issues as purely matters of domestic law – part of transnational law? Is this not the opposite view to that of Jessup's famous definition of law that occurs across boundaries?

Are these small numbers of firms and lawyers engaged in transnational litigation forming the fabric of transnational law? Is it driven by their business models and those of their NGO partners? Is it a story of the possibilities of incremental improvements in coordination of transnational environmental regulation, or the impossibility of it through sovereign states in globalised networks of exchange?

Do we advance our understanding by conceiving of transnational law as a process of inquiry, not a substantive division in a typology of law?