

Human rights violations in the *ChevronTexaco* case, Ecuador: Cultural genocide?

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Abstract: This article discusses the *Chevron* contamination case in Ecuador with the aim of illustrating the scope of the human rights violations suffered by the affected indigenous communities. The contribution is inserted into a broader debate on the need for business to respect human rights, in a society where profit seems to be corporations' only concern. The facts of the case and the damage to the indigenous peoples' rights and culture are presented. The legal developments of the case are illustrated, with the focus falling on *Chevron's* delaying strategy before the judicial system. The risk of new forms of colonisation hidden in cases like the *Chevron* Ecuador case is highlighted. When threats resembling colonisation are posed to the rights, culture and dignity of the local inhabitants, ex post reparations seem inadequate. However, participatory processes of defining the remediation together with the affected communities may restore some of the values lost. The analysis of the facts leads to the assertion that the *Chevron* Ecuador case could be regarded as cultural genocide and even as a crime against humanity. The supposed reasons that induced the multinational to intentionally 'destroy' the local culture are outlined. Numerous international treaties to which Ecuador is a party support this statement. Moreover, it is suggested that the case should be considered not only from the perspective of the Inter-American system, but also from the European Union's normative framework. EU action on behalf of the Ecuadorian affected people is presented as advisable and recommendations on possible forms of this action are highlighted.

Key words: environmental crime; indigenous rights; human rights violations; oil exploitation; cultural genocide; United Nations system; European Union system

1 Introduction

In a world where the environment and the rights of the people living therein constantly seem under threat by the insatiable greed of corporations, an increasing consensus has arisen on the duty of companies to respect human rights principles and ethical parameters. The formulation of the United Nations (UN) Guiding Principles on Business and Human Rights (UN 2011) – aimed at providing an authoritative global standard for preventing and addressing the risk of human rights violations caused by businesses – is evidence of this trend. Another milestone of the described process undoubtedly is the enshrinement in international law of

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the principle of free prior informed consent (FPIC), as defined by the United Nations Permanent Forum on Indigenous Issues (UNPFII).¹ The principle found recognition at the international level through its inclusion in article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):²

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the *free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Lastly, considerable progress has been made regarding the reconsideration of the role of businesses in society, namely, a shift has been registered from a solely profit-oriented company to a company that equally values its profits and its environmental and human rights impact. For example, the movement of the B Corps,³ a new type of company using the power of business to solve social and environmental problems, demonstrates this tipping point. The aim of this article is to contribute to this fundamental debate by reflecting on whether unregulated and irresponsible natural resources exploitation may be regarded as a *new wave of colonisation, cultural genocide* and even a *crime against humanity*.

This contribution strongly advocates the ever-growing presence of international eyes where there is the risk of crimes by businesses to the detriment of local inhabitants. When a powerful company enters a territory, the defence of the local inhabitants' rights must be promoted, in particular through a proactive role played by the international community. International bodies have a duty to watch over wrongdoings by multinationals and to put pressure on corporate strategies to respect human rights.

This contribution illustrates the *Chevron* oil contamination case that occurred in the Ecuadorian Amazon rain forest. The case is analysed through the lens of the human rights violations perpetrated on local indigenous communities by the oil company. The article focuses on the harm caused to the indigenous peoples by the oil exploitation conducted by Chevron in the area. An insight into the indigenous culture is provided, with a view to presenting the human rights violations associated with Chevron's operations.

The article progresses through the areas of impact of the oil company, namely, the consequences for indigenous peoples' cultures and their *cosmovisión*; the deprivation of their territories; the effects on their health; the changes in their traditional diet; the misinformation about the oil-related dangers; the impact on their demography; and the alterations in the

1 FPIC: 'Free' means that there is no manipulation or coercion of the indigenous people and that the process is self-directed by those affected by the project. 'Prior' implies that consent is sought sufficiently in advance of any activities being either commenced or authorised, and the time for the consultation process to occur must be guaranteed by the relative agents. 'Informed' suggests that the relevant indigenous people receive satisfactory information on the key points of the project, such as the nature, size, pace, reversibility and scope of the project, the reason for it, and its duration. 'Consent' means a process in which participation and consultation are the central pillars. Sources: Fontana & Grugel (2016: 49); Barelli (2012); Doyle & Carino (2013).

2 UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly by Resolution A/61/295, 61st session (13 September 2007).

3 See <https://www.bcorporation.net/>.

composition and stability of families. Subsequently, the article briefly outlines the legal developments of the case, underlining Chevron's illicit strategy during the litigation. The scope of Chevron's opponents' network is presented in order to illustrate the aversion of a large segment of the public's opinion to Chevron's operations worldwide.

The core of the discussion is represented by the assertion that the *Chevron* case could be regarded as a form of colonisation, cultural genocide and even a crime against humanity. This reflection is rooted in the analysis of international instruments enacted in defence of indigenous peoples' rights. The article suggests that the case should be considered not only from the perspective of the Inter-American system, but also from the perspective of the normative framework of the European Union (EU). In conclusion, the new wave of colonisation represented by natural exploitation at the detriment of local peoples' rights is condemned. The opportunity of an intervention at the European level on behalf of the Ecuadorian affected people is discussed, through the elaboration of possible responses by the EU.

2 Business obligations, ethics and human rights

The *Chevron* case presented in the article primarily is an occasion to reflect on the *status quo* of today's global business practices. The fact that companies nowadays do not in principle have human rights duties is the central cause of crimes, such as those occurring in the Ecuadorian rain forest. The fact that the firm can bind itself only *voluntarily* to respect for human rights is not enough. The *Chevron* case is proof that human rights and an environmental ethics today more than in the past must orient business activities and investment choices. However, the logic of the economic convenience often wins over the ethical reasoning.

This appeal to put a human rights and environment-based moral first in orienting the conduct of companies dates from long ago. The German philosopher, Hans Jonas, in the early 1980s in the text *The imperative of responsibility. In search of an ethics for the technological age* (1984) already called for an ethic regulating the growing power humans (and thus businesses) were acquiring on nature. More than about drastic environmental apocalypses, Jonas was concerned about a gradual one, resulting from the inadequate use of human progress. Cases of massive oil contamination exactly are examples of what Jonas warned of the 1980s.

Once nature and the people living therein are the power of under businesses, as in the case of oil drilling operations, the companies acquire a relationship of *responsibility* towards them, despite not being acknowledged in binding texts. This contribution endorses the business ethic proposed by Jonas, which considers not only the human profit but also the wellbeing of nature and the local inhabitants as crucial components of the common good, together with environmental developments. An ethic of conservation, of prevention and of prudence must prevail over progress and economical growth at any cost because the preservation of the environment and of the native inhabitants, in the end, coincides with the preservation of *life*.

The business ethic proposed here is oriented towards the future, a future where future generations will judge this generation's choices. This

view requires from companies to be responsible for the impact they have on society and on nature. The economic progress is not neutral: Now, more than in the past, it should be ethics-based and submitted to human-rights control.

The challenge of introducing ethics into corporative strategies will be analysed through the example of the *Chevron* case, as a clear example of the failure by society to subject a business to obligations with regard to human rights. The case serves as the basis to affirm that the respect for human rights can no longer be left to companies' *voluntary* initiatives and best practices. Although recognising the complexity of protecting human rights against corporate abuses (see below *Chevron's* mechanisms to avoid accountability), this contribution aligns with the debate claiming mandatory human rights due diligence legislation in order to substantially reduce corporate human rights violations, pursuant to the United Nations Guiding Principles on Business and Human Rights.

3 The case of contamination by Chevron in Ecuador

Chevron is responsible for major environmental crimes around the world (Kinman et al 2011).⁴ Nevertheless, this analysis focuses only on the company's conduct in Ecuador. The *ChevronTexaco* case in Ecuador represents one of the world's largest oil contaminations, which has affected and continues to affect the Ecuadorian Amazon rain forest. The case concerns the area where the firm conducted its extractive operations from 1964 to 1992 under the name of Texpet in the concession area called Concession Napo. These operations were controlled by *Texaco Ecuador*, the head of the consortium formed by the state oil company, *CEPE (Corporación Estatal Petrolera Ecuatoriana)*, and *Texaco Gulf*.

The impacted area covers the territories surrounding the wells, the stations where the extracted crude was processed and the open-air pools into which the oil produced was directly discharged, without any safety precautions. The consequences of this irresponsible conduct negatively affected the entire ecosystem, from water resources to soil and air. It is estimated that *Texaco (ChevronToxico 2017)*,⁵ over the time that it operated the sites, spilled directly into bodies of water a total of 18 billion gallons of formation water, at a rate close to 10 million liters of toxic water per day, and 16 800 million gallons of crude. This amounts to about 30

4 Examples of legal cases involving *Chevron* in countries other than Ecuador can be found in Kinman et al (2011). In particular, noteworthy are the following cases: For example, *Chevron's* Pascagoula Refinery located at the Mississippi Gulf Coast, home of *Chevron's* largest refinery, on a daily basis produces benzene, a known carcinogen, and paraxylene, causing eye, nose or throat irritation in humans. The US Environmental Protection Agency (EPA) reported that the company had released more than 1,1 million pounds of toxic waste from the site in 2009 (report 16). In addition, *Chevron* is known to be operating on projects creating revenues for criminal military regimes. For example, in Myanmar (Burma), the firm partnered with the state-owned oil and gas enterprise on the Yadana natural gas project, one of the largest sources of income for the Burmese military regime, convicted of human rights abuses (report 27). In the report, other evidence of crimes perpetrated by *Chevron* against local communities worldwide, from Angola, Thailand, Colombia, Ecuador, Kazakhstan and Nigeria to Australia, Canada, Alaska, California, Mississippi and Texas.

5 For more information, see <http://chevrontoxico.com/about/environmental-impacts/> and <http://chevrontoxico.com/about/rainforest-chernobyl/>.

times the oil spilled in the Exxon Valdez disaster in Alaska. Due to the use of outdated techniques for oil-associated gas combustion, around 6 667 million cubic meters of gas were burned outdoors during the operation period. The overall area affected reached 450 000 hectares and the population impacted amounts to 30 000 victims. This contamination, as explained below, not only harmed the ecosystem, but also destroyed the subsistence of the affected people and deeply influenced their cultures (Beristain 2009).

The firm decided to conduct exploratory drilling and full-scale production without properly disposing of toxic byproducts such as excess crude, chemicals, and produced water. In contrast, Chevron dumped the toxic byproducts into badly-constructed pits,⁶ or directly into surrounding rivers and streams (Maldonado 2013). This is particularly reprehensible given that proper disposal techniques were not only available⁷ and known to be cost-effective, but also were already in use by the company in the United States and other countries.⁸

In 1993, a group of Ecuadorian indigenous peoples and farmers living in the vicinity of the contaminated sites filed a class-action law suit (*Aguinda v Texaco Inc*)⁹ against Texaco in the Southern District of New York, under the Alien Tort Claims Act (ATCA). The plaintiffs denounced the company's intentional use of substandard environmental practices, which caused massive soil and water pollution. The Ecuadorian plaintiffs were acting on behalf of 30 000 inhabitants of the Oriente region of Ecuador affected by the company's oil operations. Some years later, the company petitioned to have the case transferred to Ecuador. The case, *Aguinda v Texaco*, was reopened against Chevron in Ecuador in 2003,¹⁰ before the Superior Court of Justice of Nueva Loja, Province of Sucumbíos. In the meanwhile, Chevron acquired Texaco (2001), *de facto* purchasing Texaco's legal, financial and reputation liabilities stemming from the Texaco operations in Ecuador.

After nearly two decades of litigation, on 14 February 2011, one of the most severe court judgments ever for environmental damage, in terms of damages awarded, was issued against the multinational. On this day, the

6 Texaco's pits were simply dug out of the jungle floor without any of the hydrologic studies necessary to place them outside groundwater flows, and without any of the technology, such as synthetic liners, leachate collection systems, or leachate monitoring systems, which at the time was customary in the industry.

7 Indeed, at the time Texaco held leading patents on produced water monitoring (Patent 3,680,389) and subsurface reinjection (Patent 3,817,859).

8 Texaco's Ecuadorian operations in the 1960s and the 1970s evidently were in violation of regulations then in effect in major oil-producing US states. For example, in Louisiana, where Texaco operated several wells, the discharge of produced water into natural drainage channels had since 1942 been outlawed. See Louisiana Department of Conservation (Minerals Division) State-Wide Order Governing the Drilling for and Producing of Oil and Gas in the State of Louisiana, Order 29-A, 20 May 1942. In Texas, where Texaco had extensive operations, the use of open or earthen pits was outlawed in 1939. See Railroad Commission of Texas, Open Pit Storage Prohibited, Texas Statewide Order 20-804, 31 July 1939. Among the European countries where Chevron was and is active are Norway, Denmark and the UK (see <https://www.chevron.com/operations/exploration-production/exploration-production-in-europe>).

9 No 93 Civ 7527 JSR, filed 3 November 1993) <http://chevrontoxico.com/assets/docs/complaint-1993.pdf>.

10 (Case 2003-002) <http://chevrontoxico.com/assets/docs/2003-ecuador-legal-complaint.pdf>.

Ecuadorian Provincial Court of Sucumbíos, first instance, issued its final judgment¹¹ condemning Chevron to be liable for \$19 billion in compensatory (\$9,5 billion) and punitive damages (equivalent to an additional 100 per cent of the aggregate amounts of the remedial measures, therefore another \$9,5 billion). The Court explained that the punitive damages awarded were based on 'Texaco's misconduct, the bad faith with which the defendant has acted in [this] litigation and the failure to publically acknowledge the dignity and suffering of the victims of the defendant's conduct'.

On 3 January 2012, the Ecuadorian Provincial Court of Justice of Sucumbíos, second instance, confirmed the judgment in its entirety.¹² The judgment read (Judgment: 12):

This Court holds that the analysis of civil liability contained in the lower court's ruling is correct in the procedural situation in question, since this is a situation involving objective civil liability regarding activities which, conducted as a result of the defendant's corporate purpose, imply risk ... The operations of Texpet could have been avoided solely by using available technology ... Therefore this Court finds no reason to modify the ruling issued by the lower court and holds that it is appropriate to confirm the pecuniary amounts specified as proportional for the reimbursement and indemnification.

On 12 November 2013,¹³ the Supreme Court of Ecuador partly upheld the lower court's ruling. While removing the punitive damages, the Supreme Court assessed the compensation for the victims as amounting to \$9,51 billion.

On 23 December 2013, Chevron appealed the ruling to the Ecuadorian Constitutional Court, through an extraordinary recourse,¹⁴ the so-called Extraordinary Action of Protection (EAP). Under this action, a judgment can be challenged in terms of the violation of constitutional rights. Chevron claimed that the Supreme Court of Ecuador, through its judgment, had violated its following constitutional rights: due process rights; legal certainty; the right to defence; the right to submit and challenge evidence; and proportionality. The main aim of Chevron in pursuing this action was to invalidate the cassation judgment. At the end of 2017, the file remained pending before the Constitutional Court. Despite the status of this action, the discussion about the lack of justice and reparation remains appropriate. This is because, as the country's court of last resort, The Supreme Court's judgments are considered definitive and already enforceable pursuant to the Ecuadorian *Ley de Casación*.

Meanwhile, Chevron has removed all its assets out of Ecuador to avoid enforcement. Therefore, the lawyers of the affected people are undertaking legal actions in different countries, such as Argentina, Brazil and Canada, to recover the payment of the fine (Amazon Watch 2015). On 4 September

11 <http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgment-English.pdf>.

12 Cause 2011-0106 <http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf>.

13 Case 2012-174) <http://chevrontoxico.com/assets/docs/2013-11-12-supreme-court-ecua-dor-decision-english.pdf>.

14 http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/68eca69b-9eda-42a6-83b7-2779aeb49c62/demanda_0105-14-ep_parte1.pdf?guest=true.

2015, seven judges of the Supreme Court of Canada unanimously decided that the *Aguinda* plaintiffs, representing the 30 000 victims of the Chevron oil contamination, could sue Chevron in Canada. The decision set a worldwide precedent for global environmental justice. Nonetheless, the dilatory actions and misuse of laws by the company aimed at avoiding payment mean that the affected people are forced to continue living in a contaminated environment, without justice and reparation.

4 Aspects of the reparation

The reparation process for which compensation is sought consists of five elements, according to what was demanded by the plaintiffs in *Aguinda v Chevron Texaco*:

- remediation of soils and sediments;
- restoration of ecosystems;
- research on alternative methods for the treatment of contaminated water (plants, fungi, and so forth) and the creation of a drinking water system;
- the construction of health centres and research centres in the area; and
- the preservation of indigenous peoples' culture.

Each of the five actions has to be run on a participatory basis, directly involving the affected communities.

Currently, the reparation plan has been defined by the *Unión de Afectados por las Operaciones Petroleras de Texaco* (Union of People Affected by Texaco's oil operation),¹⁵ representing the 30 000 victims of the environmental damage. The organisation has entrusted the preliminary studies to *Clínica Ambiental*,¹⁶ an association specialised in integral environmental reparation.

With regard to the ecosystem's restoration, up to the present date the company has not implemented proper reparation. The contaminated sites were simply covered with soil or left untouched. Consequently, the contaminants continue to leak into groundwater and soil (Basteiro Bertoli 2015). Nonetheless, grassroots studies are being launched with the aim of evaluating the potential of nature-based solutions to remediate contaminated sites. For example, the Amazon Mycorenewal Project,¹⁷ also known as *Alianza de Biorremediación y Sostenibilidad de Sucumbíos* (ABSS), a non-profit organisation based in the Sucumbíos, is researching to find a way in which to bio-remediate the region through the cultivation of fungi and bacteria, at the same time creating a platform for environmental education. Furthermore, the use of plants to achieve the treatment of this hazardous waste ('phytoremediation') is under investigation. Nonetheless, further studies are indispensable to assess the potential of these techniques. Unfortunately, field researches and funding are still limited, although immediate action is vital in the contaminated area as the environmental harm worsens daily.

With regard to health, currently numerous strategies have been developed in order to create health centres in the region and to study the

15 See www.chevrontoxico.com.

16 See www.clinicambiental.org.

17 See www.amazonmycorenewal.org.

real effects of the oil contact on people's lives. Moreover, a training programme on how to deal with oil risks has been included as a central part of the reparation plan. Furthermore, a series of studies on the psychosocial impacts of oil extraction on people living in the operated sites has been identified as crucial, along with the need for psychological support for the victims of the contamination.

5 Impact of Chevron's operations

5.1 Ancestral indigenous cultures and the *cosmovisión*

The area where Chevron deployed its illicit practices were inhabited by indigenous peoples who had retained most of their ancestral culture, as a result of a centuries-old adaptation to tropical ecosystems transmitted across generations. Although they already had had previous contact with foreigners, the inhabitants of the area were still living on the land of their ancestors, in harmony with nature, basing their subsistence on the use of local resources. The indigenous communities living in the concession area before the arrival of the multinational were the *Kichwa*, *Huaorani*, *Secoya*, *Siona* and *Cofán* peoples, each with its own cultural practices, language and territories.

This harmony was destroyed upon the arrival of the company, the employees of which introduced forced acculturation processes and customs, without any respect for the native peoples' culture (Beristain 2009). Urbanisation and the construction of roads altered the local equilibrium between man and nature, causing pollution, deforestation and considerable losses of fauna and flora. The introduction of money highly affected the local commercial practices based on barter, which generates increasing dependence (Burger 2014). A true form of modern colonisation was introduced and, as with any type of colonisation, this left behind a spoiled culture (Kimmerling 2000; Vickers 1989). Under 'colonisation', the article understands a series of practices entailing natural resource exploitation, conducted through the subjection of the local inhabitants and the violation of their human rights, without any respect for the longstanding decisions of indigenous communities and their traditional culture and livelihoods (Kinman et al 2011: 2). The new generations currently inhabiting the region no longer speak the language of their ancestors nor celebrate their cultures and practices. They have forever lost the priceless link their grandparents held with nature. The judges addressing the case took account of this invaluable loss and established a compensation for cultural reconstruction, as long as it will be possible.

Furthermore, many communities suffered the loss of their *shamans*, which represented the mayor authority of the clan. A well-known case is that of a *shaman* Cofán who died after the excessive consumption of alcohol, tempted by Texaco's workers (Beristain 2009: 75).¹⁸ Each *shaman* is considered to have the power to communicate with spirits of nature,

18 The episode was intentionally induced by Texaco workers, giving as a gift to the local dwellers big quantities of alcohol, despite being aware of the fact that they were not at all accustomed to alcohol consumption; (Beristain 2009: 75): '*Además en una de las comunidades se recogieron numerosos testimonios de cómo el consumo de alcohol conllevó la muerte de un shaman cofán como consecuencia de un episodio propiciado por trabajadores*

animals and ancestors. The loss of the *shaman* accompanied the annihilation of the indigenous view of the world, the *cosmovisión*, based on the existence of a god, *Chiga*, who is the creator of the universe and of its different parallel worlds, and who governs the interaction between humans, animals and nature.

In addition to the consequences directly caused by Texaco, it is important to also discuss the role of the *Instituto Lingüístico de Verano* (the Summer Linguistic Institute), an evangelic mission from United States, which settled down in the Northern Ecuadorian Amazon with the aim of converting these peoples to Christianity, and of 'civilising' their way of living. This process strongly transformed the traditional lifestyle of these peoples and, at the same time, facilitated the settlement of the oil firm because these missionaries, conversant in both Spanish and English, became the principal interlocutors between the native communities and Texpet's technicians (Jochnick et al 1994).

The damage to the indigenous culture can neither be truly repaired nor quantified, but this does not mean that actions aimed at recovering the traditional culture should not be undertaken. Both the representatives of the affected people and independent organisations active in the area have developed guidelines for the recovery and preservation of the indigenous culture. These plans have been drafted differently in consideration of the contacted/uncontacted nature of the community at issue. The importance of local peoples' direct engagement and empowerment in the process has been stressed, as well as the necessity for them to gain awareness of their own cultural loss. More specifically, three methods of cultural recovery have been pinpointed: the restoration of the identity of each community; of its traditional medicine; and of its traditional education. The better way to achieve this goal has been identified in the creation of a centre for indigenous education, addressed to each community's members but in particular to the youngest members.

5.2 Indigenous territories

Apart from culture, the two other crucial elements of indigenous life are their territory and sources of subsistence. As far as the first is concerned, Texaco's operations caused the massive displacement from ancestral lands due to a twofold reason: the fear of the *cusmas*, which in the *Cofanes'* language means 'white' or *mestizo* people; and the alteration of ecosystems, which adversely affected their hunting and fishing practices (Beristain 2009).

For example, the centre of the *Cofanes'* ancestral lands was situated in what today is Lago Agrio, which is precisely where Texaco's oil extraction began. In the 1970s, the *Cofanes*, no longer capable of sustaining the

de la Texaco. Según los relatos de la comunidad y de un testigo presencial, dicha acción tuvo un carácter intencional (Yumbo 2007: 53; Criollo 2006: 53). 'El impacto también fue indirecto. Según un testimonio individual en el grupo focal de Dureno otra persona (hermano del testigo) se alcoholizó como consecuencia de los abusos sufridos por su mujer a manos de los trabajadores de la compañía. El alcohol inicialmente era regalado por los trabajadores a los indígenas según numerosos relatos de consenso en los grupos focales. Estos ejemplos muestran el impacto psicológico y colectivo de la introducción de dicho consumo en al menos una parte de las comunidades indígenas.'

pressure from the firm's operations, moved 20 kilometers down the Aguarico river and settled down in Dureno. However, in the mid-1980s Texaco opened the Guanta oil field, just a few kilometres from Dureno. Rapidly, wells, pipelines, and stations surrounded Dureno. The *Cofanes*, who had chosen Dureno to escape the oil enterprise, once again saw their lands being threatened.

The community attempted to legalise their territory under Ecuadorian law in an attempt to avoid the oil exploitation, but this was not enough to stop Texaco from opening numerous oil pits in the area. Most of the *Cofanes* decided to leave Dureno and move to Zabalo, another territory located more than 100 kilometres from their previous lands. This second territory was the ancestral property of the *Secoya* people, but they fortunately reached a compromise and divided the land. Currently, the *Sionas*, *Secoyas* and *Cofanes* communities aim to recover around 40 000 hectares of land, considered as belonging to them ancestrally.

For a community, the deprivation of its territory, as is seen in this example, does not mean just the loss of a physical place but of all their cultural and religious practices linked to these lands. For instance, certain plants, such as the *banisteriopsis caapi*, or *yagé*, which is found in particular territories only, represented for the *Secoya* and *Siona* peoples an instrument for communicating with their ancestral spirits.

It has been affirmed that the connection between the indigenous peoples and their lands is a 'deeply spiritual special relationship ... basic to their existence as such and to all their beliefs, customs, traditions and culture' (Cobo 1986: para 196; Ksentini 1994: paras 77, 78-93). This special relationship is seriously threatened in the case of forced displacement and massive contamination.

Moreover, the appropriation of ancestral territories by the company destroyed the balance that the communities had over centuries established. This balance was based on collective ownership, not on any officially-recognised title but on a shared consensus. This made it very difficult for the indigenous inhabitants to defend their territories (Beristain 2009: 27).

5.3 Traditional diet

The eating habits of the indigenous communities in the north-western region of Ecuador were based on what nature offered them. They fed themselves by hunting, fishing and collecting the products of the forest. The exploitation of local resources by the oil firms greatly reduced the primary forest's extension, its biodiversity and the animals inhabiting it, therefore hampering the variety in their diet.

The contamination of the watersheds and, in particular, that of the principal river in the sector, the Aguarico river, not only adversely affected the quality of the water the inhabitants drank, but also the fauna present in it and the flora reached by these rivers (Beristain 2009: 43,¹⁹ 67, 69, 120, 143, 184). As a consequence of all these alterations, the indigenous

19 In Beristain (2009: 43) a statement is reported by a focus group organised in the *Cofán* community in the area of Dureno: '*Donde hay pozos petroleros hay piscinas abiertas y ahí cuando llueve y se llena de agua se va circulando a río pequeño después a río Pisuli y se pasa al río Aguarico por eso se contamina todo hasta el río Aguarico.*'

peoples had to modify their ways of subsistence, from itinerant agriculture to new forms of farming their lands. As a result, their diet was significantly impoverished by these changes and, consequently, they became more vulnerable to diseases.

In order to restore the traditional eating habits of these indigenous communities, some proposals have been made based on the breeding of species that have suffered as a result of the oil contamination in specifically-dedicated sites free of pollution. For example, a solution may be to breed native fish in special pools in order to gradually reintroduce them to those uncontaminated rivers. The same technique can be applied to endemic mammals, by breeding them in special breeding centres in order to subsequently reintroduce them.

Lastly, it is also important to consider the variations in local peoples' eating habits due to the introduction by foreign workers of the firms of new imported products. Often, these foods were not nutritious, and fattier or sweeter than those to which the indigenous populations were used. In addition, the alcohol introduced by the foreigners greatly affected the drinking culture of the indigenous people, causing alcoholism and related diseases, as well as social issues for families and the community at large. In particular, the *Huaorani* people do not have in their bodies the dehydrogenated enzymes of alcohol, which made them much more vulnerable to the effects of alcohol as their bodies were unable to process alcohol.

5.4 Health of local inhabitants

Several studies conducted in the area demonstrated a direct relationship between the presence of contaminants and the diseases registered among the members of the local communities (Maldonado 2013). Among the elements identified by the World Health Organisation (WHO) as carcinogenic, the bodies of water in the areas analysed show an amount of Cadmium, Chrome and Chrome VI higher than the WHO's settled maximum values. In particular, 26 site inspections conducted in the framework of the lawsuit *Aguinda v ChevronTexaco* (2011) showed a cancer rate three times higher than the state average, with a greater frequency of stomach (20 per cent) and uterine cancer (20 per cent), and in leukemia (9 per cent) (Basteiro Bertoli 2015; Beristain et al 2009; Jochnick et al 1994). In addition, the population concerned experienced skin diseases, hepatic diseases, kidney diseases, respiratory diseases and, in the case of women, a higher incidence rate of miscarriage. These infirmities were much more frequent in the case of those people living less than 500 metres from oil infrastructures, while they were nearly absent in communities not exposed to oil activities (Maldonado 2013).

All this occurred amidst a total lack of regional health care infrastructure and limited access to reliable diagnostic tools, which meant that illnesses often were diagnosed too late. The poor medical intervention increased the vulnerability of the affected population. Inadequate health care may be ascribed both to the oil company operating the sites and to the Ecuadorian government's failure to provide health care (namely, infrastructure, materials and medical personnel) to these remote provinces (Maldonado 2013).

Currently the health goal in the reparation process is to create health centres in the region and to launch studies aimed at a better understanding of the real effects of oil exposure on people's wellbeing. Moreover, a training programme on how to deal with oil risks has been included as a central part of the reparation process. Lastly, a series of studies on the psychosocial impacts of the oil extraction on people living in the operational sites has been identified as crucial, along with the need for psychological support for the victims of the contamination.

5.5 Misinformation about oil-related dangers

A key element in handling toxic byproducts of oil extraction is the awareness of the people cohabiting with these activities about the potential harm deriving from these materials. This awareness inevitably depends on the information about the oil effects that the corporation responsible for producing the toxic products discloses to them. In contrast, the level of information provided to the local communities by Texaco on the risks the daily contact with oil residues had for human health was low or, in some cases, absent.

The lack of awareness about health consequences of oil exposure was one of the main reasons for the increase in ailments and even deaths of the local inhabitants (Davidov 2010: 5). A passage of the affidavit presented in the framework of *Aguinda v Texaco* (Inc Case 93-CV-7527) reads:²⁰

Our health has been damaged seriously by the contamination caused by Texaco. Many people in our community now have red stains on their skin and others have been vomiting and fainting. Some little children have died because their parents *did not know* they should not drink the river water.

Although knowledge alone is not enough to prevent people from oil-related threats, misinformation worsens the exposure to the risk. The inhabitants of the affected regions, even if properly informed about diseases caused by oil, would have kept on living in those dangerous areas as they had nowhere else to go. However, the lack of knowledge caused them to live confidently in close contact with oil and oil byproducts, even unnecessarily using these in their daily lives. For example, they used oil to treat wood in their homes or for other purposes without any protection.

The reasons for the contact of the local dwellers with the oil and its toxic byproducts must be associated with the fact that Chevron dumped the oil and byproducts untreated directly into the waterways relied upon by local people for drinking, fishing and bathing. The company also erected unlined open-air waste pits filled with crude and toxic sludge in areas surrounding and inside the native villages.²¹ As an open letter from

20 Excerpt: Affidavit of the Secoya Tribe made by Elias Piaguaie, *Aguinda v Texaco* Inc Case 93-CV-7527.

21 Letter from Chevron/Texaco lawyer Rodrigo Pérez Pallares to Xavier Alvarado Roca, president of *Vistazo* magazine, published in *El Comercio* newspaper 16 March 2007. In the letter, Pérez Pallares writes that '15,834 billion gallons of produced water were spilled in Ecuador during the operations of the Texaco Consortium between 1972 and 1990'. See also Technical Summary Report by Engineer Richard Stalin Cabrera Vega, Expert for the Court of Nueva Loja, 24 March 2008, 43.

an inhabitant illustrates, the oil menace often was right inside the villages, without any chance of escape:²²

We even had an oil well, Dureno 1, *inside our own community*. That affected our people tremendously. There were spills and massive amounts of produced water. The flames from refinery towers were visible day and night. Animals abandoned the forest and fish disappeared from the river.

The focal group study conducted by Beristain (2009: 63) – in which six focal groups were set up on the basis of ethnicity (indigenous and *mestizo*) – demonstrated that the community often did not complain (at least at the beginning of the exploitation) because they had not been informed about the risks. A telling passage reads as follows (Beristain 2009: 63):²³

No nos quejamos porque no sabíamos que era tóxico y malo para la salud, por eso incluso la bebíamos y nos bañábamos en ella, ya que el río era nuestra fuente de vida. (We did not complain because we did not know it was toxic and harmful for our health. Hence, we even used to drink and bath in that water, given that the river was our life.)

The qualitative data collected by Beristain in the area (2009: 64), in which 1 064 individuals of more than 24 years of age from different families were interviewed, demonstrated a lack of information before and during the period of Texaco's operations. Ninety per cent of the interviewees by Beristain's research group reported *a total lack of proportioned information* from the company with regard to the risk deriving from oil contamination. Seven per cent reported limited information, and only 2,9 per cent reported adequate information.

The company even deceived the people by telling them that the crude was beneficial to their health (Beristain 2009: 66). This argument has been tested by Beristain by way of targeted questions regarding this aspect. A minor but still significant number, namely, 13,7 per cent of the interviewees, affirmed that the workers and managers of the company had told them that the oil was beneficial to their health (Beristain 2009: 66). This conduct represents not only a form of minimisation of the risk, but also denotes an increase in the exposure of the community to the oil-related dangers, as captured in the following words of an interviewee:²⁴

Nosotros les decíamos a los señores de Texaco, que los químicos estaban haciendo daño a los animales, y ellos decían que no es dañino: 'despreocúpense, pueden bañarse y utilizar porque no es dañino, el petróleo cura. (We told the Texaco's people that the chemicals were harming the animals, and they said that the oil was not dangerous: Do not worry, you can bath in it and use it because it is not noxious, it is like a medicine.)

As a consequence, the people used to bath themselves in oil-contaminated rivers and wash their laundry therein. Unaware of the harmful effects of oil exposure, the inhabitants often simply removed surface crude from the watersheds to drink the water running underneath. Despite the lack of information and the wrong messages, the affected population by

22 Open Letter from Emergildo Criollo, May 2009, <http://collazoprojects.com/2009/05/27/carta-abierta-a-los-estados-unidosopen-letter-to-america/>.

23 Encuesta KICH067, Kichwas, Huamayaku.

24 Grupo Focal, mujeres mestizas, Coca.

experience learnt the consequences of oil pollution on their animals, crops and own health (Beristain 2009).

5.6 Demography of the indigenous communities

Several years of investigation demonstrated how the operations of Texpet strongly reduced the number of the local indigenous peoples (*Consejo de Desarrollo de las nacionalidades y pueblos del Ecuador* 2007: 32). The considerable decrease in the number of the native inhabitants is to be linked to two main causes. The first is represented by the higher death rate due to the health effects of the exposure to oil and its toxic byproducts (see section 5.4 above). The second cause of the reduction in the number of dwellers lies in the induced displacement caused by the arrival of the company. The local inhabitants indeed were forced to move to areas different to those where the company operated, for instance, along the rivers Dureno and Cuyabeno (Beristain 2009: 60-62; Bertoli 2015: 48).

For example, the *Cofanes* community, which for centuries have inhabited the area between the Rivers Aguarico and Guamués, formerly numbered around 15 000 individuals. Now, only 849 people remain in the region. The *Secoya* community also suffered a sharp decrease in its numbers, now counting only 260 members. Similarly, the *Sionas* decreased to 390 people after Texpet's exploitation. The *Huaorani* people, characterised by their warrior's aptitude and limited contact with the outside world, originally occupied the southern area of the oil concession. They have defended their independence for centuries; however, the temptations of the oil firms' gifts in the end undermined this independence. There are now around 3 000 people. Because of the lack of information on the uncontacted *Huaorani*, it is difficult to determine their exact number. After the Texaco era, there no longer is evidence of the existence of two nationalities, the *Sansahuari* and *Tetete*, inhabiting the Sucumbios province. The two peoples, uncontacted by the outside world when the company arrived, probably were decimated and gradually wiped out completely due to conflicts that arose upon arrival of the company and diseases and epidemics brought on by contact with the outside world (ChevronToxico; Gould 2015: 15).

5.7 Composition and stability of the families

Another important impact of the oil exploitation in the region was the shift from a traditional extended conception of family life to a 'nuclear' one, mainly determined by a newly-introduced model of development. The ancestral idea of the extended family, comprising three or four generations, was abandoned for a 'nuclear' way of conceptualising the family unit (Ruiz 1992: 99). This change generated individualism and produced a sense of loneliness and abandonment among the inhabitants. Families were divided by the temptations and changes brought by the company. In particular, family members who refused the company's gifts – such as alcohol, cigarettes, clothes and money – blamed those who accepted these gifts.

The increase in prostitution due to the influx of wealthy workers' groups affected the psychosocial balance in many families. Indigenous men were forced to work for the oil company, taking the most dangerous jobs for the lowest pay. The family structure was broken down from two points of view: The women were forced into prostitution, while the men

became the firm's under-paid employees under sub-standard conditions. This meant less time together as a family. Further damage was done as the men of the community began to spend time in brothels.²⁵ The combined result was a degradation of the family unit (Beristain 2009: 172).

Not surprisingly, a substantial increase in violence was registered in the communities. Domestic violence heightened as men's frustration grew in the face of these dramatic changes; sexual abuses perpetrated by Texaco's workers plagued the region; concurrently the rate of suicides and murders²⁶ markedly increased in the area (Beristain 2008: 109, 172). Many children, born with white or partially white skins, were the tangible proof of these rapes, and this brought shame on their mothers (Beristain 2009: 109). Overall, these changes in the family balance and violent behaviour demonstrated the trauma caused to the inhabitants of the region.

6 *Aguinda v ChevronTexaco* as cultural genocide and a crime against humanity

Under international law, genocide is recognised as the gravest of international crimes. In the *Aguinda* case, although it is not possible to speak of a physical genocide, there may be grounds to argue that a cultural genocide has occurred. The concept of genocide was created to protect vulnerable groups against powerful antagonists, an aim which fits the circumstances of this case. The vulnerable group is the Ecuadorian Amazon's indigenous communities, while the antagonists are the American oil corporation ChevronTexaco.

An act of genocide is defined by the Convention on the Prevention and Punishment of the Crime of Genocide as aimed to 'inflict on [a] group conditions of life calculated to bring about its physical destruction in

25 With regard to alteration of the families, it is worth mentioning a passage from the Legal Analysis 2006 – submitted on occasion of the proceedings of *María Aguinda y Otros v ChevronTexaco Corporation*: 'The indigenous peoples not only suffered the environmental destruction unleashed by Texaco, they also claim to have suffered directly at the hands of Texaco employees themselves. According to firsthand witness testimony gathered by the plaintiffs in the *Aguinda* case, some Texaco employees heaped abuse on indigenous individuals and subjected indigenous women to sexual harassment. Among the stories that are now tragically part of the oral traditions of the region's indigenous peoples are [about] the girl who accepted an offer of a "thrill ride" in a Texaco helicopter, only to be taken to a remote site and *raped by oil workers*. The foreign oil workers told a group of upset indigenous individuals not to worry about the pollution because petroleum was natural and healthy – "like milk". As their traditional ability to live off the rainforest declined – as the fish died, the animals fled due to the seismic testing and excessive hunting by oil workers, and the forest itself was chopped down to clear land for roads, platforms, or provide materials for the same – indigenous women *were forced to prostitute* themselves to provide for their children, and indigenous men were forced to enter oil company service, taking the most dangerous jobs for the lowest pay.'

26 About the episodes of violence in Beristain (2009: 109), an interview with Cofán people is reported: '*Estas respuestas se refieren a amenazas directas y violencia intencional ejercida contra personas y comunidades que se resistían a la destrucción u ocupación de sus tierras, pero también en una buena parte de los casos se incluyen descripciones sobre accidentes de tráfico con carros a gran velocidad por la zona que generaron inseguridad. ... Las mujeres cuando escuchaban acercarse a una canoa a motor corrían a esconderse o se lanzaban al río para evitar ser abusadas. Quien no lograba esconderse era abusada y por eso había bastante inseguridad.*'

whole or in part'. With regard to the discussion of genocide, it is worth mentioning an analysis submitted in 2006 to the framework of the case of *Maria Aguinda y Otros v ChevronTexaco Corporation*. The analysis claimed that the company's prolonged conduct of personal abuse and intimidation against the indigenous peoples, and its strategy to divide families and alter their customs, were intended to destroy indigenous identity, thus resulting in a violation of the above-mentioned Convention.²⁷

The Convention in its final form does not literally mention the concept of cultural genocide, although the Polish law professor, Rafael Lemkin, who first developed the concept, described three forms of genocide: *physical* genocide (articles II(a)-(c) of the Convention); *biological* genocide (articles II(d)-(e) of the Convention), and *cultural* genocide (article III of the Convention). The reasons for the exclusion from the final Convention of the explicit mention of 'cultural genocide' is to be linked to the political necessities of the time, among which is the fact that at the time there was insufficient international discussion of the notion (Kingston 2014: 63). However, it can be affirmed that the prohibition of cultural genocide is enshrined in customary international law, and aligns with the aims of the Convention. Indeed, Professor Lemkin himself firmly claimed that 'if the diversity of cultures were destroyed, it would be as disastrous for civilisation as the physical destruction of nations' (Draft Convention 1947: 27).

The sub-concept of cultural genocide has been strengthened by numerous subsequent forms of recognition. For example, in 1981 the UN-sponsored San José Declaration affirmed that 'ethnocide, ie cultural genocide, is a crime against international law, as is genocide'. The UNDRIP in article 7(2) mentions generically 'any act of genocide', and affirms that indigenous peoples

have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to *any act of genocide* or any other act of violence, including forcibly removing children of the group to another group (emphasis added).

Again, political concerns seem to prevail over the recognition of the notion of cultural genocide. Arguably, crimes involving direct physical killing or violence were more easily recognisable as 'genocide', whereas cultural rights violations, often not involving bloodshed, were hard to be assimilated with the notion of genocide. However, as Kingston (2014: 63) points out, the concept of 'cultural genocide' must be endorsed as a tool for human rights promotion and protection, whenever the violations go beyond the physical sphere.

Although less explicitly, many other legal documents have supported this concept. Among these, article 27 of the International Covenant on Civil and Political Rights (ICCPR) states that members of ethnic, religious or linguistic minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture'. Despite the breadth of the article, it can be affirmed that the right to the enjoyment of one's own culture is the positive side of the coin containing also a negative side, namely, the denial of this right, which may entail a cultural genocide.

27 *Aguinda v Texaco* (2006) 38 *New York University Journal of International Law and Politics* 413, 417, 449-68, 473-74. See also Kimerling (1991: 31, 37-84, 111-1).

The impediment for a community to fully develop its culture and enjoy it together with the other members of the community is exactly what occurred in the *Chevron* case, as presented above.

Furthermore, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labor Organization's Convention Concerning Indigenous and Tribal Peoples, as well as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), implicitly recognise the concept discussed. In addition, a wide range of case law dealing with aspects of cultural genocide against indigenous peoples has emanated from the UN Human Rights Committee,²⁸ the Inter-American Commission on Human Rights,²⁹ and within the framework of the special procedures of the UN Human Rights Council dedicated to the theme of indigenous rights.³⁰

The state of Ecuador has since 1948 been a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide and ratified the Convention in 1949. Moreover, the Ecuadorian Constitution in article 23(2) recognises genocide as a crime that is not covered by the statute of limitation. However, given that the *Aguinda* law suit is a civil trial and not a criminal trial, a civil forum was not appropriate for raising a charge of genocide. Notwithstanding, demonstrating that the indigenous plaintiffs have suffered a form of genocide would strengthen their claims even under civil law.

Substantially, according to article II(c) of the Genocide Convention, the act to be considered under this legal category should be 'calculated to bring about physical destruction in whole or in part (of a group)'.³¹ Therefore, the specific intent to achieve genocide is crucial, whatever the motive may be (land expropriation; national security; territorial integrity; and so forth), as stated by the International Campaign to End Genocide.

Chevron's intentions are difficult to prove. However, the following circumstances suggest that the intention of the company could be assimilated to the intentional production of a cultural genocide: These circumstances are listed as follows:

- First, the company was aware that the negligent environmental practices adopted had the potential to destroy indigenous nationalities (two nationalities, not in contact with the outside world before Texaco's arrival, have no longer been seen in the area after the Texaco era). In section 5 of this article, the various components of Chevron's misconduct are listed. For example, not informing the inhabitants about oil-related danger, not adopting the safest practices for oil extraction and not properly managing the toxic byproducts all are avoidable conduct that lead to deaths among the inhabitants (ChevronToxico; Gould 2015: 15). These factors strongly suggest that the company intentionally took the

28 See, eg, *Bernard Ominayak and the Lubicon Lake Band v Canada* in Report of the Human Rights Committee (Vol II) UN GAOR, 45th session, Supp 40, paras 2.3, 11.2, 16.4, 27.4, UN Doc A/45/40 (1990).

29 See, eg, Res 12/85, Case 7615, Inter-Am CHR, OEA/ser. L./V/II.66, Doc 10 Rev 1 (5 March 1985) (*Yanomami* case).

30 See, eg, Martinez Cobo Report (1986).

31 It is important to note that the Convention also criminalises 'attempted genocide'; thus the physical destruction need not actually occur, even in part (art III).

responsibility to expose the native inhabitants to a risk that endangered their survival.

- Second, it is worth noting that the firm would in all likelihood not have attempted these illicit practices in the United States or any other developed country.
- Third, as demonstrated above, Texaco was aware that the indigenous peoples relied for their subsistence on the natural resources that the company was destroying. The intentional choice to use sub-standard practices demonstrates a disregard for the value of indigenous life and culture and may further substantiate a claim of cultural genocide. Racism towards indigenous peoples may be derived from an empirical study performed by Beristain among the affected communities demonstrating a correlation between the ethnicity of the inhabitants and the treatment they received from the company (Beristain 2009: 115). This evidence proves that, in the view of the company, belonging to a supposedly 'inferior' ethnicity was a ground justifying different treatment. Compared to the *mestizos* or *colonos* population, the indigenous people were subjected to greater suffering. A focal group conducted by Beristain on the ground reported that the indigenous inhabitants were considered 'savages, without education or anything' (*Los veían como salvajes, sin estudio y sin nada, Grupo Focal, comunidad Kichwa, Rumipamba*; Beristain 2009: 115). This attitude still is evident today in the way the company handles the litigation.³²

The question remains as to the basis on which Chevron's intention could be said to produce a cultural genocide. The answer emerges from the above-mentioned circumstances. A common tactic in war is to weaken the enemy before attacking. Similarly, it would have been more difficult for Chevron to fight against a solid and strong community of indigenous inhabitants. A community proud of its roots would fight hard to defend its existence. In contrast, a community corrupted by the arrival of foreigners, tempted by gifts, and persuaded with offers of labour is easier to dominate. Moreover, the Latin saying seems appropriate: *divide et impera* (create division to rule). Regrettably, the strategy of the company to create internal division among the local inhabitants and undermine their only strength, their culture, succeeded in the end.

If one considers the genocides in European history, the ultimate example probably would be the Jewish holocaust during World War II. Classic tactics of this genocide included the practice of 'destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group'.³³ In comparative terms, it is possible to see these elements in the rain forest contaminated by Texaco which, for the indigenous people, served not only as the source of their subsistence, but also as the 'institution' fulfilling all the cultural roles that the Draft Convention ascribes to 'libraries, museums, schools and so forth.

32 Eg, in October 2005, Chevron's lawyers persuaded Ecuadorian military intelligence to cancel a crucial judicial inspection by claiming that members of the Cofán community were planning to ambush them during the inspection. See Amazon Watch (2005).

33 Summary Record of Meetings (1948).

Furthermore, the acts committed by Texpet in the Ecuadorian Amazon could be categorised as a crime against humanity, according to the Rome Statute. Chevron's operations could be said to meet the Rome Statute's requirements of being 'widespread or systematic', 'involving the multiple commission of acts', under an 'organisational policy to commit such acts' (Rome Statute: art 7(1)). Among the acts considered crimes against humanity are deportation, broadly defined as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present', and 'inhumane acts ... intentionally causing great suffering' (Rome Statute: arts 7(1) & 7(2)). This definition could coincide with the forced displacement of the entire *Cofán* people from the Lago Agrio area, and later from Dureno, as explained above. Despite the absence of physical transportation of people, the massive contamination by the company arguably is sufficiently coercive in nature to meet the threshold of 'forced' displacement. It may be argued that cases of serious environmental destruction, causing great suffering to the civilian population due to forced displacement or deprivation of means of subsistence, qualify as crimes against humanity. This argument can be substantiated on the recent trends registered at the level of the International Criminal Court (ICC). Indeed, a recent ICC Policy Paper on Case Selection and Prioritisation (2016) announced that the Office of the Prosecutor would start considering the advisability of prosecuting under the Rome Statute crimes 'committed by means of, or that result in' environmental destruction.

Moreover, Texaco's overall conduct of constant abuses at the detriment of the indigenous peoples, their right to a healthy environment, and their fundamental rights to life and to health, may be defined as 'inhumane acts' within the definition of crimes against humanity.

7 Chevron's unfair strategy in the Ecuadorian case

The oil company must be reprimanded not only for the massive environmental crime committed in the Ecuadorian rain forest, but also for its subsequent strategy during the various trial steps. Firstly, Texaco endeavoured to have the case moved to Ecuador, submitting several affidavits³⁴ on the suitability of the Ecuadorian judicial system to hear the case. The company agreed to respect any adverse final judgment issued by an Ecuadorian court. When the plaintiffs re-filed the case in Ecuador in 2003, Texaco – having since been acquired by Chevron – tried to evade accountability by arguing that the Ecuadorian court lacked jurisdiction over Chevron, in contradiction with the company's own filings in *Aguinda v ChevronTexaco*.

Once the Ecuadorian court ruled in favour of the indigenous plaintiffs, the oil company started a tireless strategy aimed at invalidating the

34 Affidavit of Adolfo Callejas, attorney for Chevron, 1 December 1995: 'The Ecuadorian courts provide an adequate forum for claims such as those asserted by plaintiffs in the *Maria Aguinda* action.' Texaco Inc's Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non-Conveniens and International Comity: 'Ecuador's judicial system provides a fair and adequate alternative forum.' Brief for Chevron, US Court of Appeals for the Second Circuit: 'Ecuadorian legal norms are similar to those in many European nations.' See 'Examples of Chevron's high praise of Ecuador's courts' <http://chevrontoxico.com/assets/docs/affidavit-packet-part2.pdf>.

Ecuadorian court's judgment on the basis of allegations of fraud, bribery and coercion. The company appealed to the Racketeering Influence and Corrupt Organisations Act (RICO) to prevent the enforcement of the judgment in the United States. On 7 March 2011, a US district judge, Lewis A Kaplan, issued a preliminary injunction (*Chevron Corp v Donziger*, 11 Civ 0691LAK, 2011 WL 778052) banning the execution of *any* Ecuadorian court judgment in *any* country outside Ecuador. The aim of the injunction was to prevent Steven Donziger, the American lawyer for the Ecuadorian plaintiffs in the *Aguinda* case and his plaintiffs, to obtain enforcement in the United States of the multibillion dollar judgment issued by the Ecuadorian Supreme Court. The grounds for the ban allegedly lay in the fact that the ruling had been obtained by means of fraud, bribery and coercion. The injunction was also aimed at seeking equitable relief for the claimants for the alleged harm suffered due to the illicit proceedings in Ecuador. The action was filed by Chevron on the basis of the personal jurisdiction that the US district court of New York has on Steven Donziger as an American citizen. In addition, Donziger belongs to the New York bar, and consequently is subject to the relative rules on lawyers' ethic and fair conduct. The decision was repealed by the US Second Circuit on 19 September 2011, but the fraud behind the Ecuadorian judgment was reaffirmed on 8 August 2016 (Case 14-0826L, 14-0832C) by the US Court of Appeals for the Second Circuit of New York.

From this series of events, it appears evident that the company's strategy was to move the attention from the environmental crime to the fraud issue, in order to hide the truth about its responsibilities regarding the as yet unrepaired contamination. This conduct is even worse if one considers it in light of the historical reality of the case, namely, that Chevron itself requested the transfer of the trial from the US to Ecuador on the basis of the adequacy of the Ecuadorian forum.³⁵ Supposedly, the firm made this demand in the belief that it could manipulate and influence the Ecuadorian judiciary for obtaining a favorable ruling, as part of a clear strategy of 'forum shopping' (Kinman 2011: 36-37; *ChevronToxico*).

Among other unfair tactics adopted by Chevron to escape accountability, there is also the manipulation of the judicial process and, in particular, the forced annulment of the judicial inspection of polluted sites; concealing contamination; taking samples selectively; and using techniques designed to minimise the detection of toxins (Amazon Defence Coalition 2009). In addition, the strategy of forum shopping (Chevron even filed an international arbitration claim against Ecuador, seeking to remove the case from Ecuadorian jurisdiction) is condemnable (Cueto 2010). Lastly, the threats by the company to the plaintiffs and their supporters should be mentioned (an example is the lawsuit filed by

35 Affidavit of Adolfo Callejas, attorney for Chevron, 1 December 1995: 'The Ecuadorian courts provide an adequate forum for claims such as those asserted by plaintiffs in the *Maria Aguinda* action.' Texaco Inc's Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity: 'Ecuador's judicial system provides a fair and adequate alternative forum'; Brief for Chevron, US Court of Appeals for the Second Circuit: 'Ecuadorian legal norms are similar to those in many European nations.' See also 'Examples of Chevron's High Praise of Ecuador's Courts' <http://chevrontoxico.com/assets/docs/affidavit-packet-part2.pdf>.

Chevron against the documentary film maker Joe Berlinger for his film 'Crude' exploring Chevron's legacy in Ecuador) (*Los Angeles Times* 2010).

With regard to the unjust annulment of judicial inspections, it is important to mention the event that occurred in Guanta on October 2005. The Confederation of Indigenous Nationalities of Ecuador (CONAIE), among other organisations, denounced that the corporation, allied with the Ecuadorian army's military intelligence, stopped an inspection aimed at assessing the environmental disaster caused by the firm in the territories of the *Cofanes*. The multinational did so by filing a request for suspension of the inspection before the Superior Court of Nueva Loja, along with a report by the head of the Intelligence Special Forces, 24 Rayo, claiming that in the field of Guanta there was the risk of 'problems and incidents between Chevron's personnel and natives of the region'. The Intelligence report wrongly asserted that the intention of the indigenous inhabitants was to 'retain Chevron's personnel by blocking the roads into and out of the site', depicting them as savages. Consequently, a few days later the first inspection in Guanta station within *Cofanes* territory, legally granted under the judicial trial, was unlawfully suspended. The CONAIE demanded the military authorities in the area of Guanta to be held accountable for discriminatory treatment against the *Cofanes* and for being partial to the interests of the transnational oil company (Macas 2005).

Overall, despite the attempts by the corporation to hinder the achievement of reparation, the affected indigenous communities have shown that they are willing to fight for justice, no matter how long it takes. However, quoting the maxim 'justice delayed is justice denied', the indigenous people of the Ecuadorian rain forest have already been denied justice for far too long.

8 Scope of Chevron opponents' network

The Ecuadorian indigenous communities are not the sole victims of the corporation's misconduct. Several other affected peoples are fighting Chevron worldwide, such as in Alaska, Mississippi and California, in the United States, as well as in Canada, Panama, Colombia, Suriname, Brazil, Peru, Nigeria, Angola, Belgium, Poland, Romania, Kuwait, Kazakhstan, Thailand, Indonesia, The Philippines and New Zealand. A global community of opposition strengthens the battle of the affected people of Ecuador.

The network against Chevron is one of the broadest against oil exploitation, and is becoming increasingly co-ordinated and unified. In 2010, when Chevron moved its annual shareholders' meeting from its world headquarters in San Ramon, California, to Houston, Texas, in an attempt to avoid facing the network of opponents (Kinman 2011: 51), the Ecuadorian victims were present to join the battle. Indeed, the company's opponents were not deterred. On the contrary, their number in Houston was even greater. Guillermo Grefa and Mariana Jimenez, *campesinos* from Ecuador, attended the reunion as spokespeople of the Ecuadorian plaintiffs. In Houston, the second edition of *The true cost of Chevron: An alternative annual report* (2011) was released. Ecuadorian spokespeople and activists, together with Nigerian representatives, held a series of

conferences and meetings with regard to the developments of the two cases, and with the aim to keep vital the memory of Chevron's acts.

On the one hand, this international network strengthens the Ecuadorian victims' action. On the other, the *Aguinda* plaintiffs and the organisation representing them, the Union of People Affected by Texaco (UDAPT), have constantly contributed to the network. In recent years, for example, the UDAPT launched an interactive map³⁶ of Chevron's conflicts worldwide (Environmental Justice Atlas, 20 May 2016). In addition, in 2016 and in 2017 the UDAPT committed to contact Chevron's shareholders with targeted letters, particularly directed to pension funds and religious investors, asking for a more responsible and ethical exercise of their ownership rights. Lastly, for several years UDAPT has put its efforts in the organisation of the International Anti-Chevron Day, which is an occasion to call the international attention to the social and environmental impacts of Chevron around the world.

Considering all the presented initiatives, it appears that the network of Chevron opponents is determined to keep struggling and to demonstrate to the firm's own employees, executives, board members and shareholders and to the broader public the wrongdoings of the oil giant.

9 Relevance of Inter-American system and European Union

The Inter-American human rights system guarantees the territorial rights of indigenous and tribal peoples mainly through article XXIII³⁷ of the American Declaration of the Rights and Duties of Man and article 21 of the American Convention on Human Rights.³⁸ Although none of these articles explicitly refers to the rights of indigenous and tribal peoples, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have interpreted these two provisions in a way that protects these rights. In recent years, the jurisprudence of the Inter-American human rights system developed the minimum content of the right granted by the American Convention and by the American Declaration. These treaties have been interpreted in light of the provisions of Convention 169 of the ILO (International Labor Organization), of the United Nations Declaration on the Rights of Indigenous Peoples, and of the Draft American Declaration on the Rights of Indigenous Peoples.

The provisions of the American Declaration and the American Convention are regarded as evolving standards, which must be interpreted in light of developments in the field of international law on human rights. Therefore, both legal instruments include the evolution of standards and principles governing human rights of indigenous peoples. For example, the relevant norms are contained in the subsequent ICCPR; in the Convention on the Elimination of All Forms of Racial Discrimination

36 See <http://ejatlas.org/featured/chevronconflicts>.

37 'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'

38 'The right to private property (1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'

(CERD); in the ICESCR; and in the Convention on the Rights of the Child (CRC). Lastly, also article 8(j) of the Convention on Biological Diversity (1992) deserves special attention as it requires the states parties to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices.

According to this articulated system, the *Texaco* case in Ecuador results in a dispute over various indigenous rights violations. Specifically,

the right to life and the right to health, economic and social rights, the right to cultural identity and religious freedom, labour rights, the right to property on ancestral territories, the right to restitution of ancestral territories, the right to control their lands, the right on natural resources, the right to have their spiritual relationship with nature respected, the right to access their sacred sites and have them preserved, the right to be protected against forced displacement, the right of self-determination and self-governance, the right to psychological and moral integrity, the right to environmental integrity, the right to free, prior and informed consent, the right to participate in the decision-making process, the right to effective implementation of the existing legal standards, the right to state's protection, the right to access justice, and lastly the right to obtain reparation for the harms suffered.³⁹

Moving to the European scenario, the EU in turn supports indigenous peoples' rights, mainly on the basis of the UNDRIP. Since 1997, when the topic first entered its agenda, the EU has played an active role in indigenous people's defence through its external policies (political dialogues, multilateral fora, financial support).

The EU has also implemented several projects on behalf of indigenous nationalities in the framework of the European Instrument for Democracy and Human Rights. The EU also committed itself to integrate indigenous peoples' concerns at all levels of co-operation. The EU supports their full participation in decision-making processes affecting them and their free, prior and informed consent (see discussion above on the FPIC at the international level). This principle has been affirmed in the European Consensus on Development (2005), a joint statement by the Council, member states, the European Parliament and the European Commission in the field of development co-operation.

Furthermore, EU delegations organise events worldwide to celebrate the International Day of the World's Indigenous People (9 August), with the aim of creating global awareness and consensus on their rights. The EU also actively participated to the UN World Conference on Indigenous Peoples held on 22 and 23 September 2014 in New York. On this occasion, the EU underlined the importance of the full and effective participation of indigenous peoples at the conference. During the World Conference, the EU claimed that the protection of indigenous peoples' rights was a top priority for the EU and that the EU would be committed to ensuring that the decisions and recommendations resulting from the Conference be put into action (European Union External Action, 2014).

39 Extract *recursos naturales: normas y jurisprudencia del sistema interamericano de derechos humanos*. from *Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y*.

In 2014, the European Parliament's Sub-Committee on Human Rights requested a study on the impact of extractive industries on indigenous peoples' human rights. In this document, there is a discussion of topics such as the rights to life of indigenous peoples; the prohibition of forced displacement; their rights to consultation and participation in decision making; their rights to self-determination; their rights to lands and resources, their rights to a clean environment, and their cultural rights (Burger 2014). All these rights have for decades been infringed by Texaco's operations in Ecuador. Despite not having issued a specific legal tool to protect indigenous peoples' rights, the EU has demonstrated itself to be deeply concerned about this topic. Therefore, the intervention of the EU on behalf of the Ecuadorian affected nationalities would be coherent with the EU's external policy of indigenous defence.

Although the definition of the intervention sought at the EU level falls outside the primary focus of this article, a few lines and directions are formulated in this regard. The advised forms of intervention may be organised in three levels.

The first level concerns a *knowledge and awareness generation approach*, combined with the creation of scientific expertise. Concretely, this approach could be developed along the following lines:

- A task force of EU experts may be set up to investigate the current status of the polluted sites and to produce a *super partis* expert report.
- A study aimed at confronting environmental and health standards applied by Chevron in the EU (for instance Poland) and those used by the oil company in countries of the south (Peru, Angola and The Philippines) may be initiated and funded.
- EU partnerships for the remediation of the impacted areas, particularly locally supporting the ongoing efforts on alternative remediation techniques (for instance, bioremediation with fungi and plants) may be launched, in order to create value and knowledge in the area.

The second recommended intervention strategy is a *media-oriented approach*. Indeed, it may be very beneficial to the Ecuadorian victims to receive the following from the EU:

- a clear support on the occasion of Anti-Chevron Day (both media and network wise);
- an alignment to the advocacy conducted by the UDAPT on Chevron's stakeholders, also considering that a considerable number of them is in the EU (for instance, the Norwegian Pension Fund Global and the Dutch Pension Fund PGGM).

At a *theoretical and political level*, it could be advisable for the EU to support the following two movements, namely, the international recognition of the notion of cultural genocide; and the inclusion of the crime of ecocide among the crimes against humanity.

10 Conclusion

In this article, the illustration of the *Chevron* contamination case in Ecuador served as a demonstration that processes similar to new forms of colonisation nowadays still occur. Every time a foreign corporation exploits local resources disregarding the rights, culture and dignity of the local inhabitants, this new wave of colonisation takes place. Reparation is not the solution; however, it does bring back some of the values – economical and non-economical – lost in the exploitation process. The *ChevronTexaco* case illustrates how complex and often delayed (or unfulfilled) the reparation is, particularly for environmental crimes involving human rights violations.

A hierarchy of the losses suffered by the inhabitants of the Ecuadorian rain forest cannot be established. However, these have been listed as damage to their cultures and the *cosmovisión*; the deprivation of their territories; the effects on their health, also due to misinformation about the oil-related dangers; changes in their traditional diet; an impact on the demography of the indigenous communities; and, lastly, changes in the composition and stability of the families. In addition, it has been illustrated how Chevron employed delaying and avoidance tactics as part of the litigation process.

The analysis of the facts and of the relevant legal framework has made it possible to contend that the ChevronTexaco oil contamination case could be regarded as cultural genocide and even as a crime against humanity. This affirmation stems not only from the letter of the law but also from its spirit. The promises of an evolving legal scenario protecting indigenous rights, and the consideration of the scope of the network of Chevron opponents bring hope to the affected people. Nevertheless, considerable effort is still needed in order to grant proper restoration to the violated cultures and environment. In this article, it has been argued that the Ecuadorian case should be considered not only from the perspective of the Inter-American system, but also from the perspective of the EU's normative framework. The flourishing activity of the EU in view of the protection of indigenous rights underlines the potential of EU action on behalf of the people affected in Ecuador. The lines along which this action could be developed have been illustrated in this article and hopefully will inspire a series of EU initiatives in defence of the rights of the indigenous people of the Ecuadorian Amazon rain forest.

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