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TEXACO ON TRIAL

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by EYAL PRESS

Like virtually everyone else in San Carlos, Ecuador, Hugo Ureña never imagined that danger might lurk in the shiny black liquid that began appearing in the water near his home roughly thirty years ago. "The creeks and rivers around here were suddenly full of oil," Ureña told me from the front porch of his modest, tin-roofed farmhouse in San Carlos, a small community nestled in the heart of the Ecuadorean Amazon, "and everyone thought, 'oil is good.' Many animals, especially cows, would drink the water and die. And we had no idea why."

Thirty years later, Ureña and 30,000 other Ecuadoreans, including several indigenous tribes, are among the plaintiffs in a billion-dollar class-action lawsuit that the people of the Amazon have filed against one of America's largest oil companies, Texaco. They accuse Texaco of causing vast destruction to the Oriente, a spectacular stretch of rainforest that dips beneath the Andes Mountains to form the eastern half of Ecuador. It's a unique--and potentially historic--case, not only because corporations like Texaco have rarely had to answer to people like Hugo Ureña but because the plaintiffs, convinced there is no way they can obtain justice in Ecuador, are attempting to sue Texaco in a US district court in lower Manhattan, a short drive from the company's headquarters in White Plains, New York. The case, like the current effort to bring Gen. Augusto Pinochet to justice, represents a bold attempt to expand the scope of international human rights law, only this time the target is not a dictator but a US corporation.

Thousands of miles from White Plains, beyond the wild flowers, potted plants and coconut trees at the entrance to Ureña's home, it is easy to make out the most enduring physical monument to Texaco's presence in the Amazon: a large, rusting metal pipeline, built in the early seventies, that cuts across the center of the

Oriente. Through this pipeline, which snakes its way across the Andes to the port of Esmeraldas, Texaco, working in partnership with Petroecuador, the state oil company, pumped more than 1.4 billion gallons of crude out of Ecuador--and in the process created one of the great environmental catastrophes of modern history.

According to Judith Kimerling, whose 1991 book, *Amazon Crude*, first exposed the impact of oil development on the Oriente, the Trans-Ecuadorean Pipeline alone has accounted for oil spills totaling 16.8 million gallons, a figure that dwarfs even the Exxon Valdez spill in Alaska. On top of this, during its twenty years of operations in Ecuador, which ended in 1992, Texaco discharged an estimated 4.3 million gallons of highly toxic "produced water" *per day* into the Oriente, ignoring oil industry standards that call for reinjecting the wastes back into the ground. Instead, these viscous byproducts, laden with heavy metals and cancer-causing hydrocarbons, were dumped into hundreds of open, unlined pits that now pockmark the region and have been leaching into local streams and rivers ever since. When the pits threatened to overflow, Texaco simply burned off the excess, sending dark plumes of smoke into the air that would eventually result in what the locals came to know as "black rain."

In Shushufindi, a short drive from Ureña's home, I waded through a marsh of shoulder-high bushes that opened onto one of these pits. The smell of petroleum, sharp and overwhelming, filled the air as I neared the edge of an enormous pool of bubbling black liquid. One hundred feet away fresh water trickled through a creek, but just barely, for a thick bed of black-gold petroleum waste had formed along the banks. The entire Oriente is crisscrossed by these streams and rivers, part of the reason the watershed is home to more than 10,000 varieties of plants, fishes and birds, many of which are now endangered. The tropical biologist Norman Myers has called the Oriente "the richest biotic zone on earth...a kind of global epicenter of biodiversity." In the area I traversed, everything was eerily still, the fish and birds nowhere in sight and the vegetation stained black with petroleum residue.

For indigenous tribes like the Cofán, who were displaced from their land as Texaco carved roads and pipelines through the jungle, the poisoning of streams and rivers has amounted to, in Kimerling's view, nothing short of "ethnocide." For Hugo Ureña, it has meant living with the fear that by drinking the local water, he is literally risking his life. "Everyone around here is dying," he says, ticking off

the names of neighbors suffering from chronic skin lesions, headaches and, as in the case of Ureña's recently deceased father, a wave of deadly cancer. Dr. Miguel San Sebastian, who lives one hour south, in the town of Coca, is completing a study of health patterns in Oriente communities affected by oil development. His preliminary analysis of the cancer rate among men in San Carlos indicates that the risk of larynx cancer is thirty times higher than that for men of comparable age in Ecuador's capital, Quito; the risk of stomach cancer is five times higher; and the risk of cancer overall is 2.3 times higher.

Had all this happened in, say, Texas or California, the grounds for a lawsuit would be clear. But can an American company be sued in a US court for environmental crimes committed overseas? Six long years after the Texaco case was originally filed, in 1993, there are no answers yet. In order to sue Texaco in the United States, the plaintiffs must persuade a US court that Texaco's actions in Ecuador constitute fundamental human rights violations that the world should not allow to go unpunished. They must, in addition, convince the court that they cannot possibly obtain justice in Ecuador. If Federal Judge Jed Rakoff, whose ruling on the case is expected soon, accepts these arguments, the impact will be felt not only in White Plains but in corporate boardrooms throughout the world.

The origins of the Texaco lawsuit date back to the spring of 1991, when Cristóbal Bonifaz, a lawyer who lives in Massachusetts but was born and raised in Ecuador, was helping his son, John, also now a lawyer on the case, move out of his college dormitory at Harvard. "John handed me this publication of Oxfam America," says Bonifaz, a handsome, silver-haired man who speaks English in short, staccato sentences with a heavy Spanish accent, "and in it was a paragraph on what Texaco had been doing in the Amazon. 'Here,' John told me, 'this is your country; why don't you go do something about it?'"

Bonifaz proceeded to make a round of phone calls to various people he knew in Ecuador, including numerous government ministers (he was well positioned to do so, being the grandson of a former Ecuadorean president, Neptalí Bonifaz, and the son of one of the country's most celebrated conservationists). "Everyone told me it's not true, it's all lies," Bonifaz recalls. But then he spoke to Manuel Pallares, the brother of his former sister-in-law, who had witnessed the impact of Texaco's oil production firsthand when he

spent two years living in the Oriente with the Secoya tribe, now among the parties to the lawsuit. Bonifaz was soon aboard a plane, on his way to the Oriente.

"Once I got there, I was flabbergasted," says Bonifaz. Before becoming a lawyer, Bonifaz had spent twenty years working as a chemical engineer for Du Pont, so he knew something about the byproducts of petroleum production. "I recognized right away that what Texaco was doing--dumping the produced water straight into the environment--is not something that's done anywhere." On his second trip to the region, in 1993, Bonifaz brought along a team of scientists from Harvard who took water samples from thirty-three sites. Their tests revealed polycyclic aromatic hydrocarbons, crude oil toxins linked to cancer, at levels up to one hundred times the amount permitted in the United States.

Bonifaz was committed to bringing a case against Texaco. The question was, how? As he was well aware, Ecuador's judicial system does not even recognize the concept of a class-action lawsuit and has no history of environmental litigation whatsoever. (The system is also notoriously corrupt; a poll by George Washington University found that only 16 percent of Ecuadoreans have confidence in their judiciary, lower than in any other Latin American country except Guatemala.) It was then that Bonifaz spoke with the Philadelphia-based law firm Kohn, Swift & Graf and learned about the Alien Tort Claims Act.

Passed by Congress in 1789, the ATCA was originally designed to grant noncitizens access to US courts in cases involving a breach of international law, including treaties (the so-called "law of nations")--in part, at least, so that the United States could safeguard its global reputation by holding its own residents accountable for inflicting wrongs on aliens. For much of US history, the statute was rarely invoked, but in the late sixties Peter Weiss, a lawyer with the Center for Constitutional Rights, stumbled upon it as he was searching for grounds to bring a lawsuit against the US military officers responsible for the My Lai massacre in Vietnam. Weiss never filed the case, but a few years later he and CCR did bring a successful lawsuit on behalf of the father and sister of Joel Filártiga, who was tortured to death by a Paraguayan police official who later fled to Brooklyn.

Since the Filártiga case, more than twenty successful lawsuits have been filed under the ATCA on behalf of foreigners against human

rights abusers who have ventured onto US soil. In 1986 Kohn, Swift & Graf filed a successful suit under the ATCA against the Philippine dictator Ferdinand Marcos. When Joseph Kohn reviewed the facts of the Texaco case with Cristóbal Bonifaz, he reasoned that if such suits could be brought against former police officials and dictators for international human rights violations, why not against US corporations, which, after all, enjoy the status of individuals in the US legal system? Shortly thereafter, in November 1993, they filed suit.

Other victims of corporate abuse have since done likewise. In the past two years, the Alien Tort statute has been used to file lawsuits against Unocal (for alleged use of slave labor and forced expulsion of villagers in Burma), General Motors (for alleged collusion in human rights abuses committed during World War II in Nazi Germany) and, recently, a half-dozen apparel companies, which are charged with knowingly benefiting from forced labor in the sweatshops of the island of Saipan.

What's unique--and potentially precedent-setting--about the Texaco case, says Bonifaz, is that it is the first lawsuit to claim that a company's environmental practices so depart from acceptable international standards that they constitute a violation of the "law of nations." Until now, the ATCA has been confined to cases of torture, genocide and other more conventional human rights abuses. But in the Filártiga ruling, Bonifaz notes, the court emphasized that international law is not static but should be interpreted "as it has evolved and exists among the nations of the world today."

In a motion to dismiss the suit, Texaco firmly denies that the law of nations applies to this case, arguing that, unlike torture and genocide, environmental misdeeds are defined differently from country to country. "Environmental debates rage today among developed and underdeveloped nations," Texaco contends. "What some nations prohibit, others encourage, and environmental priorities vary wildly."

Yet while nations do have a right to set their own environmental standards, a growing body of international accords--from the 1972 Stockholm Declaration, signed by more than 100 countries, including Ecuador and the United States, to the 1992 Rio Declaration--identifies the right to a clean and healthy environment as a fundamental and inalienable human right, and prohibits both

state and private actors from recklessly endangering "the environmental needs of present and future generations," as Rio states. It's true that enforcement of these conventions has been rare--but not unprecedented. "After the Persian Gulf war," notes J. Martin Wagner of the Earth Justice Legal Defense Fund, which has filed a brief in support of the plaintiffs' claims, "the UN Security Council relied on customary international law to impose liability on Iraq for spilling into the Persian Gulf less than one-quarter of the amount of oil that Texaco is estimated to have spilled in the Oriente, and for having, like Texaco, polluted the air by burning oil."

In April 1994, in what appeared to be a historic ruling, Federal District Judge Vincent Broderick cited the Rio Declaration and other conventions in ruling that he would accept jurisdiction over the Texaco case. One year later, however, Judge Broderick died of cancer, and the case was passed along to Jed Rakoff. A former partner at a New York firm that has represented Texaco in patent litigation (though he did not personally handle those cases), Judge Rakoff, it seems safe to say, is unlikely to be as receptive to the environmental claims in the lawsuit. In a 1991 *New York Law Journal* essay titled "Moral Qualms About Environmental Prosecutions," he railed at US courts for prosecuting corporate officers for environmental violations carried out by their subordinates--violations that, according to Rakoff, they are often not aware of. "To imprison a morally blameless person in the name of social policy always appears in hindsight as an act of barbarity," Rakoff charged.

There can, however, be little doubt that Texaco was aware that its production methods in the Amazon departed from accepted standards. In a phone interview Texaco spokeswoman Faye Cox insisted that the company's methods, including its dumping of produced water, "adhered to prevailing industry standards.... How you manage produced water is done case by case." Yet in testimony before Congress in 1971--one year before Texaco began drilling in the Oriente--the oil industry's own leading spokesman, Richard Byrd, general counsel for the Interstate Oil Compact Commission, informed Congress that dumping tainted water "into unlined pits is not considered to be an acceptable practice." What's more, according to Bonifaz, "Texaco actually owned several patents on technology that made the reinjection of produced water cheaper. How can the company that owned these patents claim it did not know what it was doing?"

Texaco has justified its actions by noting that its operations were conducted "in compliance with Ecuadorean law" and indeed with the full approval of the Ecuadorean government. Yet Texaco's contract specifically required it to "adopt suitable measures to protect the flora, fauna, and other natural resources, and to prevent contamination of water, air, and soil," an obligation reaffirmed in Ecuador's civil code. And while there is no doubt that the Ecuadorean government, as Texaco's partner, shares responsibility for what happened in the Amazon, there is evidence that Texaco played the preponderant role. Manuel Navarro, a former high-level official at Petroecuador who later founded the country's Environmental Protection Unit, has stated in an affidavit that Texaco "designed, built, and managed all the installations and facilities required to extract and transport the crude oil" and also "trained national technicians and transferred its technology to the Ecuadorean state oil company."

"The fact that Texaco was in partnership with the government of Ecuador by no means releases the company from responsibility," says Arthur Berney, an expert on international law at Boston College. Indeed, in the recent case that was filed against Unocal, which is now proceeding to trial, a US court rejected Unocal's claim that as a mere partner of the Burmese government, the company could not be held accountable for violating international law.

In Texaco's view, even if all of the plaintiffs' allegations were true--which the company vehemently denies--the case should still not be tried in the United States. Like nearly all companies that have been sued in this country for their actions abroad, Texaco has sought to have the suit sent back to Ecuador on the grounds of *forum non conveniens*, arguing, in essence, that holding the trial in the United States, thousands of miles from where the alleged misconduct took place, would be inconvenient. "The Ecuadorian judicial system," the company explains, "is fully capable of fairly adjudicating this issue."

In late March I traveled to Lago Agrio, an oil town perched on the Oriente's northern edge (where Texaco first struck oil in the Amazon), to inspect the courthouse where the trial will take place if the case is returned to Ecuador. After repeated inquiries, I discovered that there is no courthouse in Lago Agrio. I did find the judge who would be assigned to the case, Dr. Luis Naranjo Jara. A polite, soft-spoken man, Jara works out of a small office on the third floor of a brown cinderblock building off the main road in town, a building that, he informed me, has one computer, no fax

machine, no Internet connection and no law clerks to assist with paperwork.

Since Ecuador has no equivalent of a class-action lawsuit, how, I asked Jara, would he be able to handle the tens of thousands of cases that would likely flood his office were the suit sent back to Ecuador? He smiled politely and explained that in such a situation he would have to work "late into the nights." Would the government of Ecuador increase his office's budget if this were to happen? "No," he flatly replied.

"It's very clear why Texaco wants to have this sent back to Ecuador," says Bonifaz, who, as it happens, wrote his master's thesis on the issue of *forum non conveniens*. Bonifaz points to the affidavit submitted by Dr. Alberto Wray, a noted authority on Ecuador's judiciary and now the government's top legal adviser. Judges in Ecuador, Wray noted, almost never compel witnesses to testify if they don't want to and require all questions to be submitted in writing, which would make it virtually impossible to extract any meaningful confessions from Texaco's officers. In addition, if the company wished to withhold any subpoenaed documents from the court in Ecuador, it could simply do so and pay a paltry \$180 fine--whereas in the United States such an action would likely land the company's officers in jail.

Beyond the inadequacies of Ecuador's judicial system, there is another reason, in the plaintiffs' view, the trial should be held in New York. What the plaintiffs intend to prove, after all, is that the decisions that led to the destruction of the *Oriente* were made not in Ecuador but at Texaco's headquarters in White Plains.

Texaco strongly denies this, explaining that the company "operates through subsidiaries" that "are empowered and held responsible for managing their businesses wherever they are located," as Faye Cox told me over the phone. Yet documents obtained by the plaintiffs' lawyers in the initial round of discovery (allowed by Judge Broderick) indicate that even minor expenditures of \$5,000 had to be approved in New York. Bertha Margarita Yopez Silva, an Ecuadorean citizen who worked for Texaco from 1973 to 1989 and was responsible for overseeing issues related to workers' health, says that all the department heads in Ecuador sought authorization virtually "every day" from their Texaco superiors in the United States, for everything from minor expenditures to the enrollment of employees in scholarships for technical training programs. Given all

of this, it would be odd indeed if nobody in White Plains knew about--or gave the orders for--the dumping of oil production waste, which, if reinjected into the ground, would have cost the company up to three extra dollars for every barrel that was extracted over the twenty-year period.

Despite all of this, in November 1996 Judge Rakoff dismissed the lawsuit on *forum non conveniens* and other grounds. The case seemed destined to return to Ecuador. But last October the US Court of Appeals for the Second Circuit, in a unanimous decision, reversed Judge Rakoff's ruling, instructing the district court that the lawsuit could not be dismissed until it was clear that an adequate "alternative forum" existed.

In his spacious, wood-paneled office in Quito, Ramón Jamanez, Ecuador's current attorney general, refused to speculate on where the case would eventually be tried. But Jamanez, an amiable, round-faced man who chose his words very carefully when we spoke, did allow that it was no mystery why Texaco wished to have the trial held in Ecuador. "It is true--it is a fact--that the US justice system has more experience with class-action lawsuits and therefore is more likely to bring a powerful lawsuit against Texaco," he conceded. "That is a fact."

That Jamanez should acknowledge as much is a testament to the remarkable grassroots movement that has arisen in Ecuador in the wake of this case. When the Texaco lawsuit was originally filed, some within the Ecuadorean government went to great lengths to have it dismissed. In a letter to the State Department, Ambassador Edgar Terán wrote that holding a trial in the United States would threaten Ecuador's national sovereignty and deter foreign investment (this in a country heavily burdened by debt and deeply dependent on oil exports). Two years later, the Ecuadorean government cut a deal with Texaco on a \$40 million cleanup operation and last year signed an agreement relinquishing further claims against the company.

In response to the government's efforts to reach an accommodation, an array of grassroots organizations in Ecuador, including the Frente, an umbrella group representing indigenous groups in the Oriente, and the Center for Economic and Social Rights, based in Quito, have staged a barrage of protests, pointing out that the deal signed with Texaco had no input from local people and covered a mere fraction of the cleanup costs, which

independent estimates have placed at more than \$600 million for the pits alone. In January, after protesters occupied the attorney general's office and demanded that he support the plaintiffs' right to pursue their claims, Ramon Jamanez sent a letter to Judge Rakoff in which he explained that Ecuador, despite its settlement with Texaco, will fully support whatever decision US courts should reach. When I met Jamanez, he reiterated this pledge and also made note of a measure recently passed in Ecuador, Law 55, which stipulates that once Ecuadorean citizens bring a lawsuit in a foreign domain, Ecuador's courts will not accept the suit on remand. If Judge Rakoff sends the suit back to Ecuador, Jamanez strongly implied, Ecuador will likely send it right back to the United States.

Time, of course, is not on the plaintiffs' side. Six years after the Texaco suit was filed, the people of the Oriente have seen little substantive change on the ground. Down the road from Hugo Ureña's home, I stopped and spoke with Margarita Molina, a thin, brown-haired woman who lives directly across from one of the production sites once operated by Texaco in San Carlos. Sighing, she told the familiar story of pigs and cows dying after drinking water from the pits, and she pointed to the legs of three of her daughters, who were all born with a birth defect that has made them so severely bowlegged they are virtually unable to walk. Strange ailments like this have become common in the Oriente, and the cause, a doctor has told Molina, could well be oil pollution. At the very least, Molina would like to see Texaco pay for providing the region with fresh drinking water, but the look on her face, hard and dejected, suggested she was not expecting the company to be forced into action anytime soon.

Despite how long and undoubtedly frustrating the process of attempting to hold Texaco accountable has been, many of the people I encountered in the Oriente vowed to battle on. "We will fight Texaco till the end," promised Manuel Silba, an organizer with the Frente who traveled to New York this past January with a group of indigenous leaders, their heads adorned in traditional feathered crowns, to attend the latest hearings. The battle against Texaco has clearly taken on enormous symbolic meaning in a country where, as in so much of the world, corporations have routinely done as they pleased. "This case has brought to light the whole problem of corporations using double standards in the Third World," says Paulina Garzón of the Center for Economic and Social Rights, in Quito. Like other activists, Garzón is concerned that the lawsuit could raise false expectations--and meanwhile shift

attention away from ongoing problems in the Oriente to Bonifaz and the lawyers--but she says the effect has already been overwhelmingly positive. "Now," she explains, "we find that the first thing companies say when they come to Ecuador is that they are not like Texaco."

Bonifaz echoes this point. "We've already had people from Occidental and Mobil communicate to us that they will not dump the produced water--they're aware this could bring a lawsuit," he says. "The principal issue in this case is that corporations have to stop looking at the rest of the world as a frontier like the old Wild West. If you go to the *maquiladoras* in Mexico, there are cases of incredible pollution all along the border. How many of them violate the law of nations, I don't know, but the point is that real people live in these countries, and US corporations have an obligation to use the same care there as they do at home. That is what this lawsuit is ultimately about."

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Background and Related Information

[The Center for Economic and Social Rights](#)

CESR was one the first organizations to protest economic injustice as a violation of international human rights. Its basic aim is to "mobilize people to confront the policies that keep them poor." Among other projects, CESR has worked with a broad coalition of local groups to hold Texaco accountable for damaging Amazonian communities. It has implemented scientific missions, human rights campaigns and a community-based monitoring system.

<http://www.cesr.org>

[Oil Exploration in the Amazon](#)

Abya Yala's web site contains "Fueling Destruction in the Amazon," which includes an interview with Dr. Luis Macas, a Quechua Indian who is president of the Confederation of Indigenous Natives of Ecuador (CONAIE). Macas has been spearheading indigenous protests against Texaco for years. The site offers several articles on Texaco's Ecuadorian involvement and resistance to it.

<http://abyayala.nativeweb.org/ecuador/amazon/oil>

The Coalition for Amazonian Peoples and Their Environment

Founded in 1994 and based in Washington DC, the Amazon coalition supports indigenous claims to the Amazon and "urges environmental groups to develop policies and strategies that value the Amazon as a biosphere of flora, fauna and human life." Their site posts "Amazon Update," their monthly publication, as well as images from the Amazon and opportunities to contribute and/or volunteer.

<http://www.amazoncoalition.org>

Kohn, Swift & Graf, P.C.

One of the legal firms representing the Ecuadorian plaintiffs. Its site has a summary and full-length version of the US Second Circuit Court of Appeals' decision to reinstate the class-action suit filed against Texaco.

<http://www.kohnswift.com/texclasrein.htm>