The Rio Tinto Case in Papua New Guinea

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- Gold Mine

Google Maps – Location of the Panguna mine, Bougainville island.

1. Factual background

The company Rio Tinto has an extensive history of conflicts related to human rights violations and environmental damage, and over the years numerous countries have been affected. The case discussed here centres on Bougainville, the largest of the Solomon Islands,[1] where the company began operations in 1960. The case revolves around the Panguna mine and the political awareness generated since the mine was established.

Between 1969 and 1972, the colonial Australian administration leased land on the island to the australian company Bougainville Copper Limited (BCL), a subsidiary of Conzinc Rio Tinto of Australia Ltd (controlled in turn by the British company Rio Tinto Zinc, later renamed Rio Tinto Limited, one of the existing pillars of the company), in which the Papua New Guinean administration was involved.

The company began to occupy adjacent lands in spite of the claims of the landowners, and residents of Bougainville were often forced to relocate or else to flee the island. Very soon thereafter, the residents of Bougainville started to become ill from exposure to the toxins, chemical products, and air pollution produced by the mine. Respiratory ailments such as asthma and tuberculosis became more common, even leading to the death of some patients.

The copper and gold mine located in the town of Panguna was one of the world's largest, eventually reaching five km in depth and more than one km in diameter, with the removal of 300,000 tonnes of minerals and water each day between 1972 and 1988.

The pleading describes the environmental impacts of the mining activities as follows:
"To build the mine, Rio chemically defoliated, bulldozed and sluiced off an entire mountainside of rain forest. During the years of the mine's operations, billions of tons of toxic mine waste was generated and dumped onto the land and into pristine waters, filling major rivers with tailings, polluting a major bay dozens of miles away, and the Pacific Ocean as well. As a result of its flagrant disregard for the environment and the people of Bougainville, Rio dispossessed the people of Bougainville from their land, destroyed their culture and polluted their environment and lifestyle. Rio destroyed previously pristine rivers and land that provided substance and a way of life for the native people and went to the heart of their local culture."

Google Maps – Location of the Bougainville island.

Freshwater fish as well as entire forests disappeared, depriving residents of their main sources of food as well as the income derived from growing crops. Villagers lost the use of their land because of environmental contamination and water became undrinkable, forcing them to search for other resources for survival.

In 1988, residents of the region began to protest against the practice of racial discrimination in the area of Panguna as well as the environmental damage caused by the mine. Over time these protests became more intense and some even became violent. Rio Tinto closed its Papua New Guinea mine in 1989. On 17 May 1990, the Republic of Bougainville unilaterally proclaimed its independence.

[1] Currently, Bougainville, the island of Buka, and the Carteret Islands form the Autonomous Region of Bougainville within the nation of Papua New Guinea. Bougainville was previously a German colony, and was separated from the rest of the Solomon Islands, which were under British control, in 1899. In 1921 it was subjected to the regimen of a League of Nations mandate under Australian Guinea after World War II, continuing to exist under Australian fiduciary administration. Papua New Guinea gained its independence in September 1975.
[2] UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, United Nations, Treaty Series, Vol. 1833, p.396, available at: http://www.unhcr.org/refworld/docid/3dd8fd1b4.html [accessed 2 January 2012].
[3] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: http://www.unhcr.org/refworld/docid/3ae6b3ac0.html [accessed 2 January 2012].

http://japanfocus.org – Bougainville Revolutionary Army forces.

http://www.alastairmcintosh.com– The Papua Guinea's news about the civil war.

The government of Papua New Guinea responded to this process with an attack against the civilian population, but did not succeed in occupying the territory. The situation devolved into a civil war that lasted for ten years (1989-1999), with Bougainville declaring its independence from Papua New Guinea. The claimants allege that, during this period, Rio Tinto was complicit in war crimes and crimes against humanity committed by the Papua New Guinea army.

According to the pleading, Rio Tinto facilitated the transport of troops from Papua New Guinea and played a key role in the establishment of a strict military blockade of the island, which lasted for almost 10 years. The blockade impeded access to medicine, clothing, and other critically necessary items, as well as access to electricity.

Many women died during childbirth for lack of medical attention and access to basic medical supplies, and many children died from easily treatable illnesses. According to the Red Cross, the blockade caused the deaths of more than 2,000 children during their first two years of life. By the time the war ended in 1999, approximately 15,000 civilians, or 10% of Bougainville's population, had died.

A peace accord was signed in January 2001, supported by Australia, and provisional legislation granting autonomy for Bougainville was adopted on 27 March 2002. Elections were subsequently held, and the Autonomous Bougainville Government was established in June 2005.

2. International legal framework

The impacts of Rio Tinto's activities in Bougainville have affected the land and marine environments, as well as the human rights of the island's people. With regard to the impact on the water, the United Nations Convention on the Law of the Sea of 10 December 1982[2] is applicable, especially its Part XII, which is concerned with protection and preservation of the marine environment. It was ratified by Papua New Guinea on 14 January 1997.

Some basic rules of international human rights have also entered into play, such as those prohibiting genocide, war crimes, and racial discrimination. Such standards are a part of international customary law or else are recognised in specific international treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948,[3] the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949,[4] and the International Convention on the Elimination of All Forms of Racial Discrimination.[5]

Rio Tinto plc is considered to be a participant in the United Nations Global Compact as of 26 July 2000,[6] although the acts involved in the case occurred prior to this date. It is widely known that the Global Compact is a voluntary regulatory framework based upon compliance with ten principles of conduct in the areas of human rights, labour, the environment, and the fight against corruption.[7]

3. Development of the Rio Tinto case in Papua New Guinea before national courts

3.1 United States

On 6 September 2000, during peace negotiations, the residents of the island of Bougainville brought claims supported by the Alien Tort Claims Act (ATCA) against the U.K. company Rio Tinto plc and the Australian company Rio Tinto Ltd in the case of Sarei v. Rio Tinto. The claimants alleged serious, multiple human rights violations and damages caused by gold and copper mining

[4] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: http://www.unhcr.org/refworld/docid/3ae6b36d2.html [accessed 2 January 2012].

[5] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, A/RES/2106, available at: http://www.unhcr.org/refworld/docid/3b00f1931c.html [accessed 2 January 2012].

[6] http://www.unglobalcompact.org/participants/search.

[7] These are the following:
"Human Rights
Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
Principle 2: make sure that they are not complicit in human rights abuses.
Labour
Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
Principle 4: the elimination of all forms of forced and compulsory labour;
Principle 5: the effective abolition of child labour; and
Principle 6: the elimination of discrimination in respect of employment and occupation.
Environment
Principle 7: Businesses should support a precautionary approach to environmental challenges;
Principle 8: undertake initiatives to promote greater environmental responsibility; and
Principle 9: encourage the development and diffusion of environmentally friendly technologies.
Anti-Corruption
Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery."
http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

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operations in the region, beginning in 1972 and especially during the armed conflict that affected the island between 1990 and 2000. The claims alleged included, among others, the complicity of Rio Tinto in the commission of war crimes and crimes against humanity carried out by the army of Papua New Guinea; racial discrimination against black workers in the company's labour practices; violation of the rights to personal life and health as a consequence of the environmental impacts of the mining activities in Panguna; and violation of the principle of sustainable development and the United Nations Convention on the Law of the Sea of 1982, by massive contamination of ocean waters.[8] In the pleading, a direct connection is made between human rights and environmental rights.[9]
In response to this suit, the U.S. State Department issued a statement opposing the continuation of the process, which stated, among other arguments, that:

"The success of the Bougainville peace process represents an important United States foreign policy objective as part of our effort at promoting regional peace and security. In our judgment, continued adjudication of the claims identified by Judge Morrow in her August 30 letter would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations. According to local custom, the concept of 'reconciliation' is at the heart of the peace process. We understand that acts of reconciliation have already occurred as a foundation to the August 30 agreement, and that adjudication in a foreign court of the issues alleged in this case could invalidate these steps and sweep away the basis of the peace agreement. Countries participating in the multilateral peace process have raised this concern with us as well."[10]

This echoed the interest shown by the government in seeing that the process would not move forward,[11] a perspective also supported by Australia.

And, indeed, on 20 March 2002 and in an amended version on 9 July 2002, Judge Margaret Morrow of the U.S. District Court, Northern District of California, rejected the complaint by observing the existence of non-judiciable political questions, by the Act of State Doctrine, and for international comity, among other arguments and in keeping with case law.[12] However, she also ruled that, like war crimes, crimes against humanity, and racial discrimination, violation of customary law as reflected in the United Nations Convention on the Law of the Sea of 1982 constituted an admissible claim, with this being the first time that a U.S. Federal Court had ruled that an environmental standard could be the basis for a claim under the framework of the ATCA.[13] Specifically, the ruling considered the stipulations of Article 194, which are related to measures for preventing, reducing, and controlling pollution of the marine environment, as well as those found in Article 207, related to pollution originating in land sources. On the other hand, the allegations related to the rights to life and health and to the principle of sustainable development were not considered valid, for their failure to represent defined, obligatory, and universal norms. The decision also considered the possibility that the company could be held responsible for some of the government's actions, a necessary requirement when jus cogens[14] norms are not involved. The possibilities opened up in the Sarei case were confirmed by the decision on appeal. Meanwhile, since 2003 the new administration in Papua New Guinea has expressed unequivocally that it did not oppose continuation of the litigation and that the litigation did not affect the country's peace process.

[8] On this case, see Dhooge, Lucien J., "The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism", cit., pp. 56-62.
[9] Judge Weeramantri's opinion is also mentioned directly in the judgment of the International Court of Justice on the Gabcikovo-Nagymaros matter: "The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments." ICJ, *Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, Separate Opinion of Vice-President Weeramantry, ICJ, Rec. 1997, p.88. See also Judge Weeramantri's considerations with respect to the principle of sustainable development.
[10] Available on the U.S. State Department's web site at http://www.state.gov/documents/organization/16529.pdf.
[11] See the government of Papua New Guinea's statement contained in the letter of 17 October 2001, addressed to the United States ambassador in Port Moresby, in which it indicates the importance that the case could have for relations between the two countries. Available on the U.S. State Department's web site at http://www.state.gov/documents/organization/28992.pdf.
[12] *Sarei v. Rio Tinto PLC,* 221 F. Supp. 2d 1116, (C.D. Cal., 2002), 1183.
[13] *Ibid*., 1139. Along the same lines, Wilson, Mark W., "Comment: Why Private Remedies for Environmental Torts under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of *Jus Cogens* and Exhaustion" 39 *Environmental Law*, 451, 468-471, spring 2009.
[14] *Ibid*., 1148.
[15] "We further agree with the district court's conclusion that the plaintiffs' claims for war crimes, violations of the laws of war, racial discrimination and for violations of the [**15] UNCLOS all implicate "specific, universal and obligatory norm[s] of international law" that properly form the basis for ATCA claims, Sarei, 221 F. Supp. 2d at 1132, and that Sosa's gloss on this standard does not undermine the district court's reasoning. All of the plaintiffs' remaining claims, with the exception of the UNCLOS claim, assert jus cogens violations that form the least controversial core of modern day ATCA jurisdiction. Sarei v. Rio Tinto, PLC, 456 F.3d 1069 (9th Cir., 2006), 1077-1078.

For the U.S. Court of Appeals for the Ninth Circuit, a first version of its decision from August 2006 reflects the opinion that the United Nations Convention on the Law of the Sea constitutes a basis for admissible action, even though the condition of jus cogens is lacking.[15] Specifically in this respect, it affirms: "As for the UNCLOS claim, the treaty has been ratified by at least 149 nations, which is sufficient for it to codify customary international law that can provide the basis of an ATCA claim."[16]

However, in a revised version of the decision from April 2007, the court avoided entering into these considerations and based its jurisdiction on a more general and novel doctrine: that the alleged causes were not frivolous:

"Thus the district court had subject matter jurisdiction under the ATCA so long as plaintiffs alleged a nonfrivolous claim by an alien for a tort in violation of international law. [...] Plaintiffs here have alleged several claims asserting jus cogens violations that form the least controversial core of modern day ATCA jurisdiction, including allegations of war crimes, crimes against humanity and racial discrimination. [...]. Plaintiffs' claims are thus not frivolous." [17]

The Court of Appeals reversed the District Court's decision that would make the case non-judiciable based upon the appraisal of political questions, for all of the alleged causes of action including that related to the Montego Bay Convention on the Law of the Sea. The cause related to the violation of these dispositions had also been rejected by the District Court on the basis of the Act of State Doctrine. The Court of Appeals confirmed, in the first place, that the actions carried out by the government of Papua New Guinea constituted Acts of State, and recognised that they did not involve jus cogens norms.[18] Next, the Court applied what is known as the Sabbatino test[19] to decide whether this fact should represent an obstacle to the exercise of jurisdiction within the United States. Given that the district court's decision was based in part upon a declaration of the interests of the United States government, the effect of which had already been put at issue when the exception of the political question became involved, and given that the government of Papua New Guinea that had committed the acts no longer existed, the Court of Appeals decided to return the matter to the district court for reconsideration. Using similar arguments, the Court of Appeals rejected the abstention in agreement with the doctrine of international comity.[20]

However, one of the judges, in a dissenting opinion, stated agreement with the defendants' appeal, that exhaustion of internal recourse should have been required prior to the commencement of procedures in the United States.[21]

In August 2007, a new decision from the Court of Appeals admitted the request for a review of the case before the court in a plenary session.[22] On 16 December 2008, the Court of Appeals' plenary review led to a decision by a 6-5 majority, although with an extreme range of opinions among its members, to return the case again to the district court in order to examine whether a requirement for exhaustion of internal resources in the original country was applicable to the claimants, prior to having recourse to the United States courts.[23]

On 31 July 2009, the district court issued a negative ruling for the charges by

[16] Ibid.
[17] *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir., 2007), 1200-1202.
[18] "Further, assuming that UNCLOS reflects customary international law norms actionable under the ATCA, it is not yet clear whether "the international community recognizes the norm[s] as one[s] from which no derogation is permitted." Siderman de Blake, 965 F.2d at 715 (internal quotations omitted). Without more, we cannot conclude that the UNCLOS norms are also *jus cogens* norms. Therefore, the UNCLOS provisions at issue do not yet have a status that would prevent PNG's acts from simultaneously constituting official sovereign acts. We further agree with the district court that to adjudicate the UNCLOS claim would require a court to judge the validity of these official acts." *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. Cal., 2007), 1210.
[19] "The act of state doctrine prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory. […]The doctrine reflects the concern that the judiciary, by questioning the validity of sovereign acts taken by foreign states, may interfere with the executive's conduct of American foreign policy. […]. As a result, an action may be barred if (1) there is an "official act of a foreign sovereign performed within its own territory"; and (2) "the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act." […]. If these two elements are present, we may still choose not to apply the act of state doctrine where the policies underlying the doctrine militate against its application. The Supreme Court discussed three such policies in Sabbatino: [1] [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it .. . . [2] [T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.[3] The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence. Sabbatino, 376 U.S. at 428." [references omitted] *Ibid.* 1208
[20] *Ibid.*, 1210-1212.
[21] Judge Bybee's opinion can be found in *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir., 2007), 1224.
[22] *Sarei v. Rio Tinto, PLC*, 499 F.3d 923 (9th Cir. 2007). The decision was adopted by the only judge not recused from the three-judge panel.
[23] *Sarei v. Rio Tinto PLC,* 550 F.3d 822 (9th Cir. 2008).

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which the viability of the case had been admitted – crimes against humanity and genocide, war crimes and racial discrimination, but not for the rest. The only exception was the violation of the of the United Nations Convention on the Law of the Sea, admitted as a cause for the claim, but not considered in the same range as the others by the court, for failing to affect matters of sufficient universal concern.[24] The claimants decided to maintain only the first three causes. After further reconsideration in plenary, on 26 October 2010, the Appeals Court, with opposition from two judges, referred the matter to another judge put in charge of exploring the possibilities for mediation.

On 25 October 2011, the Court of Appeals again took up the district court's initial decision to close the case, and by six votes to five, accepted it only for the crimes related to racial discrimination and crimes against humanity, but not for genocide and war crimes. The case has therefore returned again to the district court, exclusively in relation to these two charges.[25]

[24] 650 F. Supp. 2d 1004, 1032 (C.D. Cal. 2009).
[25] A decision in which the judges adopt specific positions, expressed in their individual concurring or dissenting opinions.

References

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Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir., 2007).

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