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Digging deep corporate liability

Environmental Justice strategies in the world of oil

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with contributions by

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Abstract

The impacts provoked by the expanding oil industry encompass environmental destruction, health impacts and violations of human rights. The increasing contamination jeopardizes safe conditions of life and destroys means of livelihood of vulnerable communities and of those relying on healthy ecosystems. Local communities, feeling that they are simply sacrificed to the oil industry, see themselves involved in social conflict. They are experiencing forms of environmental discrimination and might even face criminalisation of the protest when they stand up to defend their rights promoting the chilly effect on others who need and want to defend themselves and the environment.

In fact, the number of lawsuits demanding justice for environmental, social, economical and cultural damages provoked by oil companies are increasing as well as their media visibility. Yet most outcomes are not satisfactory in tackling impacted communities claims for justice. This paper describes the most recent trends regarding oil corporations' responsibilities and use of procedural justice by civil society through the review of emblematic legal cases.

Keywords

corporate accountability

environmental justice

corporate social responsibility

environmental liabilities

economic valuation

oil frontier

environmental crime

procedural justice



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Acronyms

ACA	Arbitration and Conciliation Act (nigeria)	EJ	Environmental Justice
ACTA	Alien Tort Claims Act	EJOs	Environmental Justice Organisations
ADR	Alternative Dispute Resolution	IOCs	International Oil Companies
BOSCEM	Basic Oil Spill Cost Estimation Model	IUCN	International Union for Conservation of Nature
BP	British Petroleum	MEND	Movement for the Emancipation of the Niger Delta
bbl/d	barrels per day	MOSOP	Movement for the Survival of the Ogoni people
CEJ	Coalition for Environmental Justice	ppm	Parts per millions
CFRN	Constitution of the Federal Republic of Nigeria	SAN	Senior Advocate of Nigeria
CLO	Civil Liberties Organisation	UNDP	United Nations Development Programme
CSR	Social Responsibility	UNEP	United Nations Environment Programme
CVM	Vinyl Chloride Monomer	UNCITRAL	United Nations Commission on International Trade Law
ENI	Ente Nazionale Idrocarburi	YPF	Yacimientos Petrolíferos Fiscales

The ISO 4217 standard is used for the currency codes (e.g. USD for US dollar).



Foreword

Conflicts over resource extraction or waste disposal increase in number as the world economy uses more materials and energy. Civil society organizations (CSOs) active in Environmental Justice issues focus on the link between the need for environmental security and the defence of basic human rights.

The EJOLT project (*Environmental Justice Organizations, Liabilities and Trade*, www.ejolt.org) is an FP7 Science in Society project that runs from 2011 to 2015. EJOLT brings together a consortium of 23 academic and civil society organizations across a range of fields to promote collaboration and mutual learning among stakeholders who research or use Sustainability Sciences, particularly on aspects of Ecological Distribution. One main goal is to empower environmental justice organizations (EJOs), and the communities they support that receive an unfair share of environmental burdens to defend or reclaim their rights. This is done through a process of two-way knowledge transfer, encouraging participatory action research and the transfer of methodologies with which EJOs, communities and citizen movements can monitor and describe the state of their environment, and document its degradation, learning from other experiences and from academic research how to argue in order to avoid the growth of environmental liabilities or ecological debts. Thus EJOLT increases EJOs' capacity in using scientific concepts and methods for the quantification of environmental and health impacts, fostering their knowledge of environmental risks and of legal mechanisms of redress. On the other hand, EJOLT contributes to enrich research in the Sustainability Sciences through mobilising the accumulated 'activist knowledge' of the EJOs and making it available to the sustainability research community. Finally, EJOLT is translating the findings of this mutual learning process into the policy arena, supporting the further development of evidence-based decision making and broadening its information base. We focus on the use of concepts such as ecological debt, environmental liabilities and ecologically unequal exchange, in science and in environmental activism and policy-making.

The overall **aim** of EJOLT is to improve policy responses to and support collaborative research on environmental conflicts through capacity building of environmental justice groups and multi-stakeholder problem solving. A key aspect is to show the links between increased metabolism of the economy (in terms of energy and materials), and resource extraction and waste disposal conflicts so as to answer the driving questions:



Which are the causes of increasing ecological distribution conflicts at different scales, and how to turn such conflicts into forces for environmental sustainability?

Among these conflicts, those related with fossil fuels extraction and burning are primary concerns of expressed by our partner EJOs. A previous EJOLT report (No. 2) focussed on the issue of Climate Justice by demonstrating that, while the impacts of climate change are distributed unequally, mitigation measures might be shifting the environmental burden to the poorest countries under mechanisms such as carbon trading. The most effective way to tackle climate change is, in fact, to reduce the rate of fossil fuels consumption. This idea, proposed by EJOs after decades of severe conflicts caused by major oil companies, is developed in the EJOLT report No. 6, which explains the different attempts around the world to leave oil and other fossil fuels in the ground.

The present report refers to the original environmental and social injustices caused by the oil industry by analysing impacts and corporate accountability of oil extraction companies. Specific instances of oil conflicts (related with either extraction or refinery) in Africa, Latin America and Europe are examined, together with legal actions against the responsible companies, or responsible actors within the companies. Such a review of highly relevant lawsuits is helpful to recognise the scope and limits of procedural justice to achieve real advancements for environmental justice, and to go deeper into the understanding of environmental crime in the world of oil.



1

Introduction

Civil society is increasingly able to attract public attention to oil-related crimes

Oil business represents the principal means for the worldwide expansion of the neoliberal economic regime. The pervasive presence of multinational oil companies in national and international centres of power shapes global geopolitics by articulating a complex entanglement between public power and private interests. While the protest against the consequences of oil extraction, transformation and transportation have been on the agenda of international civil society, social movements and progressive NGOs for decades, the possibility for them to actually break down the hegemony of the oil-based economic model has often been doomed to fail. Nonetheless, in recent years, some events, such as the Chevron-Texaco lawsuit in Ecuador or the sentence of the Court of Cassation in the Montedison case (see **chapter 3**), have confirmed that civil society, by enforcing existing legal provisions or asking for the elaboration of new ones, is increasingly able to attract public attention to oil-related crimes, demanding the acknowledgement of human rights violations and environmental or ecological disasters caused by the negligent or malicious behaviour of oil companies.

The successes of civil society activism in bringing recognition and condemnation of, and punishment for, the offensive behaviours of private or governmental subjects are even more significant when considered in the light of the flourishing development of alternative energy production and consumption models. On the basis of an articulated critique of the effects of the current oil-based international regime in terms of environmental justice (particularly climate justice) and conflict generation, civil society advances a number of post-oil society proposals, being the Yasuni leaving-oil underground proposal the best known. This proposal to leave over 800 million barrels of oil underground in the ITT block of the Yasuni World Biosphere Reserve, Ecuador, has been supported and promoted by the Federal Government, which, since 2007, has been involved in an international campaign to symbolically collect half of the value of crude oil that the government would abstain from extracting. Unfortunately, the last news report that the proposal would be cancelled and the block ITT extracted.



1.1 Oil-based geopolitics: regimes, models and perspectives

With the rise of economic and financial crises in the global North from 2007 onward, progressive energy policies (notably the Green New Deal in the U.S. and the E.U 2020 Strategy), investments in green technologies and social welfare have decisively been substituted by political economy programs focused on stability and competitiveness. This substitution has gone hand-in-hand with massive private intervention in the State political economy.

A long-lasting dependence on oil-generated gains and the consequences of oil-related activities has determined the difficulty faced by many oil-based economies in the global South in turning toward alternative energy sources. Most of these countries suffer from conditions of political and economic insecurity and the mere shift from an oil-based model of production and consumption toward other forms of energy supply – like solar power, wind power and biomass – is likely to reproduce old power geometries. Such a trend is already apparent in several cases. For instance, while renewable energy has strong potential for enabling decentralised power production and distribution, in Italy the development of sustainable energy has reproduced a centralised model in terms of production, distribution and accumulation of capital.

In the global frame of incipient peak oil, with 50% of all known oil reserves already exhausted (Oilwatch, 2006), the turnover of the oil industry is likely to decrease. As a consequence, on the one hand, oil companies are including new energy sources like biofuels in their business profile and investments; on the other hand, looming peak oil induces private companies and governments to explore new frontiers for oil extraction in most remote areas, including deep sea where new reserves are most likely to be discovered (International Monetary Fund, 2011). The development of more advanced extraction technologies, coupled with weak social, humanitarian and conservation legislation, particularly in Southern countries, has supported audacious projects of oil exploration and exploitation in protected and fragile natural regions, at the expense of indigenous peoples, as is the Yasuni case in Ecuador (Bravo, 2005).

This global geopolitical condition opens up new arenas for socio-environmental conflicts, especially where a lack of democracy fuels non-transparent and non-participatory decision making processes. Requests from social movements for greater share of extraction revenues and substantive rights for the population at large have influenced the economic policies of many 'leftish' governments that have been unable to find other solutions than turning toward neo-extractivism (Gudynas 2010). This includes the State taking a more active role in the oil business and granting new extraction permissions in previously unspoiled areas. The rents collected from extraction projects are aimed at funding social policies and compensation.

The global geopolitical condition opens up new arenas for socio-environmental conflicts, especially where a lack of democracy fuels non-transparent and non-participatory decision making processes



The neo-extractivist ideology continues to rely on the appropriation of nature and on the integration in international energy market while promoting an active intervention of the State in the economic and financial sectors

However the recognition of social movements' claims in constitutional or national law has not made societies dominated by extractive economic models more equal, nor has it effectively combated environmental degradation, or prevented the emergence of new violent conflicts. While promoting a more active intervention of the State in the economic and financial sectors together with an explicit commitment toward social justice policy measures, the neo-extractivist ideology continues to rely on the appropriation of nature and on the integration in international energy market (Haarstad, 2012).

For instance, in the transition toward re-nationalisation of the oil sector, some countries such as Ecuador under the Correa government implemented a tax system for foreign oil companies and imposed new constraint on oil companies' investments. The income generated by oil taxes has allowed the implementation of new socio-economic policies and welfare state (Acosta et al, 2009). Thanks to these measures, the extractive economic model generated immediate and short-term benefits for citizens in general, but it did not stop producing social and environmental long-term negative impacts (Gudynas, 2011). As the possibility for an equal distribution of the revenues from natural resources extraction can improve some aspects of peoples' quality of life, generating strong political approval, oil-dependent countries are likely to remain trapped in a political condition that encourages the reproduction of energy intensive economies with their inefficient energy usage. Their subordinate position in the carbon-based global capitalist system is maintained as a result of the long time socio-technological systems take to transform socio-economic relationships. By slowing this process down, industrialised countries increase the gap between poor oil dependent countries and themselves, with the latter confined to use old technologies, often as a result of the 'complicity' of local elites.

In fact, while Northern countries, together with continuing in oil-extraction activity, are still able to invest in energy efficiency and alternative energy sources (leaving aside the evidence that new sources do not necessarily mean new regimes), oil-dependence keeps Southern oil exporting countries in the role of raw materials reservoirs for foreign consumption (CEECEC, 2010). In this way, the so-called 'disaster capitalism', fuelled by a scarcely democratic political environment, encourages the privatization of collective resources, which is turning out to be the very last frontier of capitalism (CDCA, 2011). A growing number of social mobilisations worldwide has illustrated that this is not a process happening only in low income export countries.

1.2 Socio-environmental impact of oil extraction, transformation and trading

It is widely recognised that the impact of exploitative activities, both at local and global scales, is overwhelming from ecological, environmental, social, economic and cultural points of view. In some circumstances these activities have led to the flagrant violation of human rights; in other cases, with more stringent legal control,

violations have taken decades to manifest and to be recognised as in the Porto Marghera case presented in **chapter 3**.

Regarding environmental aspects, exploration and exploitation activities and the construction of related infrastructures cause deforestation and contamination of soil and water, contributing to land transformation, and increasing material flows, energy consumption and climate change. The exploitation affects animals and plants through oil spills and gas flaring, condemning some to extinction and irreversibly damaging ecosystems, thus causing an important loss of biodiversity. Deforestation associated with oil-extraction induces not only the destruction of biodiversity reserves, it also destroys a major sink of CO₂ turning forests and swamps into a significant source of greenhouse gas emissions, exacerbated by discharges of toxic chemicals. Toxic waste leaks and the incineration or flaring of unwanted chemicals and gases pollute air, rivers and water basins on a large scale (gas flaring is one of the principal problems connected with oil extraction in Southern areas like the Niger Delta, also in **chapter 3**). Crops are destroyed because of water and soil pollution and food is contaminated. Even areas appearing to be untouched are in fact affected by long, continuous and still unnoticed spills.

The impacts experienced by communities affected by oil extraction, transport and processing (e.g. the refining/chemical industries) are no less dramatic. The loss of control over a people's own territory is one of the first and most harmful consequences of social and cultural disruption. Moreover, the impacts of contamination of local ecosystems tend to exacerbate a decline in economic, and in particular for indigenous people or isolated communities, and food sovereignty. Important health problems related to the oil industry have also been registered, such as the increased incidence of skin, intestinal and respiratory diseases. The deterioration and irreversible contamination of the environment has provoked a shocking number of illnesses amongst local populations (Oilwatch, 2007).

Fig. 1
Oil spill in the Ecuadorian
Amazon

Source:
www.chevrontoxico.com





Despite the recent efforts to ascertain responsibilities of oil-business companies, it is not possible to compensate irreparable damages, like biodiversity loss and the extinction of or human cultures

Local communities moreover suffer repeated violations of their individual and collective rights, including forced displacement, militarisation of their territories, irreversible mutations of their traditional ways of life, psychological damages, sexual violence, destruction of social and cultural networks, and the risk of extinction of ethnic groups (Bonilla, 2007; CDCA, 2011).

Oil-related activities have also lead to the deterioration of societal relationships and the emergence of internal disputes. Once the social fabric is weakened it is easier for oil companies to intervene without fuelling local resistance (Bassey, 2007). The formula of direct negotiations oil companies adopt overturns local people's traditional societal structure, values and habits. In fact, while internal conflicts regarding the control over land and natural resources are always possible, it is clear that the most violent and uncompromising means of disrupting the social and natural equilibrium are introduced by external actors (Borrini-Fayerabend et al., 2004). The simple fact that machinery and external workers arrive on a given territory affects the relation of communities with their territories and among themselves. Furthermore, it is current practice of multinationals to apply the strategy of dividing to rule in order to create tensions within a community – e.g. offering money or compensation to some persons of the community and not others. In this way, companies increase their profits when oil becomes a hotbed for conflicts (Bassey, 2007).

For decades, civil society, human rights, and environmental associations have put forward allegations of human rights abuses, primarily with regard to the right to health (compromised by flaring, spilling and burning practices), the violence of security forces and force abuses (unjustified arrests, repression of protest, torture, legal pursuits against activists, etc.), violation of property rights and of the right to housing, particularly in cases of displacement. A few international and national courts worldwide have recently begun to ascertain the responsibility of private companies for oil-business consequences and clean-ups, providing remediation and compensation for recognised and unaccounted damages. However, it is not possible to compensate irreparable damages, or to attribute a value to the loss of biodiversity, the extinction of natural species or human cultures. Juridical mechanisms are powerless in this regard, as it is discussed in detail in **chapters 3 and 4**.

Quite often, the hidden costs of extraction are neither immediate nor direct. National economies depend on external financial inputs subsidising an oil-dependent model of society in which detrimental social effects are seldom compensated by the gains obtained from oil exploitation. This process is characterised by the private appropriation of public resources in exchange for a payment that, instead of pursuing the benefit of many, enriches few selected elites (Teran, 2007). As a matter of fact, several studies demonstrate that an increase in natural resource exports is likely to stimulate little job creation, and to provoke unfair income distribution: “*Dependence on petroleum exports has resulted in low growth and diversification, poor social performance and high environmental impacts*” (Larrea and Warnas, 2009). Industrialised countries have transferred the



negative effects generated by an inefficient industrial development model and the externalities it produces to low and middle-income countries.

In economies based on the exportation of natural resources, a system of clientelism, corruption and renters' patrimonies is reinforced. In both the Global North and South - e.g. Italy, Nigeria, and Ecuador, the cases presented later - international oil lobbying has been fundamental to the undermining of public goods, the deterioration of public policy conditions and the decrease in the capabilities and rights of peoples, together with the drainage of public money through exorbitant contracts granted to companies for cleaning disasters they caused in the first place (Accion Ecologica, 2007).

1.3 Oil business and environmental justice

In this context, the lens of the environmental justice (EJ) paradigm becomes central to reviewing oil business responsibility for damage inflicted and violations of human and natural rights.

Box 1 The Rights of Nature in the Ecuadorian Constitution Source: Constitution of the Republic of Ecuador, published on October 20, 2008

Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Article 72. Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.

The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living. Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.

EJ understands that all persons have equal rights to be protected from contamination, to live in a healthy environment they can enjoy thanks to a fair distribution of environmental benefits and opportunities, and to be fully involved in decision making regarding those issues (De Marzo, 2012). As stated by the Coalition for Environmental Justice (CEJ), a civic action network of activists, lawyers and researchers promoting environmental justice in Central and Eastern Europe, the Caucasus and Central Asia, EJ is a work in progress, a condition to



Environmental justice invokes the precautionary principle to extend rights to communities and ecosystems and to shift back burdens produced by companies, through the integral restoration of impaired communities

reach where environmental risks, hazards, investments and benefits are equally distributed without discrimination so to satisfy fundamental human needs (McDonald, 2002). EJ invokes the precautionary principle, focusing on the need to tackle hazards before damages happen, to extend rights to communities and ecosystems and to shift back burdens produced by companies, through the integral restoration of impaired communities. It is intertwined with distributive justice, participative justice, inter- and intra-generational justice, procedural justice (the latter in terms of both decision making and judicial power) and social, economic, political and cultural justice. But as Agyeman emphasised, EJ has not only to be interpreted from a negative perspective but should also be seen as a proactive tool for accessing and distributing the environmental benefits necessary for sustainable societies with a high quality of life (Agyeman, 2005).

An oil-export-based economy increases the frailty of less-industrialised countries because it weakens democratic processes, and creates and perpetuates intra- and intra-generational inequality (Teran, 2007). The concept of EJ calls for recognition that, through peculiar mechanisms of spatial displacement and uneven distribution of environmental damages, a disproportionately large part of environmental risks is borne by poor and ethnic minority groups. Material wealth, opportunity, health outcomes, educational attainment, job creation, and virtually none of the metrics of quality of life are ever equally distributed across space (Harvey, 1973; Soja, 2001). In recent decades the relation between social justice and environmental issues has shown that not everyone suffers equally from environmental degradation (Sachs, 1993). First of all, through particular spatial displacements, environmental problems may overburden lower income countries, marginal peoples and neglected areas of the planet. Secondly, the consequences of environmental problems are not randomly distributed, rather they reinforce already existing inequalities (Sachs, 1993). In general, marginalised groups and ethnic minorities are exposed to more environmental problems because they lack social and economic power, and this, in turn, provides fewer opportunities to counteract the poverty and social discrimination they suffer from.

The issue of social justice is strictly linked to environmental problems and poverty. Indeed, the fulfilment of environmental justice, as philosopher John Dryzek (Dryzek, 1987) suggests, also entails a displacement problem. Displacement is defined as the transferring of environmental risks and damages toward places, time and people that are not able to counteract them. The resulting geographies of injustice, i.e. the space-related distribution of injustices, are characterised by peculiar geometries of injustice, i.e. the set of relationships determining the distribution of injustices, showing persistent or recurrent patterns of environmental racism, marginalisation and inequalities. Marginalized groups and ethnic minorities are exposed to higher environmental risks because they lack social and economic power, and this, in turn, gives them fewer opportunities to counteract discrimination and market dictated choices. In fact, socio-economic disadvantages influence education levels and limit the capabilities of affected groups for shaping their own identity and voice, and therefore for taking collective action.



The idea of EJ originated in the articulation of social justice theory, specifically in the recognition of the multiple dimensions of social justice. As civil society claims for a fairer redistribution of oil-generated gains shows however, the allocation of material resources through redistribution is insufficient if not combined with the two fundamental mechanisms of recognition, which entails the acceptance of cultural differences, and representation, or the establishment of procedures for participation and inclusion in the political sphere (Haarstad, 2012). The complex phenomenon of increasing poverty in Southern countries signals that in the absence of a wider criticism of capitalist processes of production and consumption, mere redistributive measures will not be sufficient to overcome the poverty trap.

1.4 Social movements and alternative models

Social movements, NGOs and civil society have begun to target the effects of the neoliberal and neo-extractive models of oil business, in particular democracy, disempowerment, and the proliferation of environmental injustices. While the consequences of oil-related activities have been on the agenda of social movements for decades, it is today interesting to note that social movements themselves have radically changed (De Marzo, 2009). The outward delocalisation of political agency allows new actors, such as oil corporations, to gain influence in the political arena at sub- and supra-national levels. This can be interpreted as an incipient unbundling of the exclusive authority over territory and people that has been long associated with nation states (Massey, 2005). The growing relative power of external agents such as transnational corporations narrows the possibilities for public authorities to implement an effective control system, and reduces the institutional democratic capability to control and determine private initiative. This state of affairs has led to increased social criticism and mobilisation (Haarstad, 2012).

Social movements state that oil-exploitation and export, unsustainable development, poor social conditions and the perpetuation of poverty are part of the same self-reinforcing cycle. They particularly focus on the positive relations between non-extractive policies and social justice, as exemplified by the issue of climate justice (Oilwatch, 2006). The increasing effects of climate change do not imply merely a (disastrous) increase in the earth's temperature, but a combination of devastating physical, ecological and social changes. Not only is the oil industry highly contaminating and destructive, but the use of the resource itself is among the main causes of carbon emission. According to the IEA, global annual oil consumption in 2012 was 89.8 million barrels per day (bbl/d), an estimate of 5.2 billion tonnes per year corresponding to about 14.11 billion metric tonnes of emitted carbon dioxide ¹.

Social movements state that oil-exploitation and export, unsustainable development, poor social conditions and the perpetuation of poverty are part of the same self-reinforcing cycle

¹ Estimates of the authors, based on calculations from: <http://www.bp.com/conversionfactors.jsp>, <http://www.epa.gov/greenpower/pubs/calcmeth.htm>.



The oil industry must be considered one of the principal sources of direct and indirect social injustice

Several evidences confirm that the consequences of climate change will be more severe in Southern countries. First, their ecosystems have been dramatically altered with no care for the survival of marginalised peoples. Second, they are often dependent on agriculture, the most greatly affected sector, and forestry, which is also suffering. Third, they have no funds with which to deal with change, no or insufficient resources for developing precautionary or adaptive measures, and a generally limited level of disaster preparedness.

In many instances, oil is extracted in zones of mature forests, affecting the access to basic resources of those depending on free ecosystem services they can mobilise and appropriate, such as indigenous people, peasants, and fishermen. These are the first victims of climate change (Tsosie, 2007) and the primary advocates of greater climate justice. The expansion of the oil-based economy produces impressive social inequalities, ecological imbalances and geographical injustices like displacement, eradication of peoples, and flows of environmental refugees. As such, the oil industry must be considered one of the principal sources of direct (via deforestation, displacement, pollution spills) and indirect (through biodiversity loss, ecosystem service degradation, greenhouse gas emission and climate change) social injustice.

1.5 Methodological framework and reporting format

Building on this background, this report aims at exploring the question of oil company liability and the agency of emerging Environmental Justice Organisations (EJOs) in putting forward their claims regarding socio-environmental conflicts. This report intends to provide greater understanding of oil conflicts and civil society responses in seeking environmental justice by providing this general description and an analysis of 6 cases investigating the aspect of corporate liability and important related lawsuits. The cases included focus on oil production in the Niger Delta and the Ecuadorian Amazon forest, oil extraction and petrochemical refining in Italy, and deep-water exploration in the Gulf of Mexico. Activists and scholars of the CDCA (Documentation Centre on Environmental Conflicts) in Rome, Italy, and the ERA (Environmental Rights Action/Friends of the Earth) in Nigeria have compiled the cases in this report, adopting an action research approach. This includes the integration of data from private companies, scientific and official institutions as well as university institutes and civil society.

In recent decades action research has experienced a considerable transformation, both in terms of science production protocols and in terms of the participatory methodologies adopted. The studies presented here, most of which are based on personal involvement of scholar-activists, have taken a participatory / crowdsourcing approach to knowledge production. While the goal of participatory research is to share research objectives and results with involved stakeholders, the degree of participation can vary from case to case, but the very core of this approach is to enable people to actively collaborate with research activities. Knowledge production thus shifts from being solely a process for people, to being a process by people. The cases reported in this report have adopted a number of



methods, including informal chats, observatory walking, extemporaneous meetings and collection of primary research material. The ERA for example, undertook semi-structured interviews with lawsuit stakeholders including community members, lawyers, and ERA staff to elicit responses to problems encountered during litigation for environmental degradation. Beyond participatory processes ERA also used desk based research, consisting of literature, databases and expert discussions, and its collaborating authors are actors in the litigations reported.

These methodologies have been preferred to a top-down research approach on the basis of the belief that public involvement in science production may increase direct participation in political life and encourage an expansion of the public debate on the most pressing issues affecting society. This aspect is particularly relevant today when the governance of public affairs seems to be increasingly placed in the hands of experts and technicians. Indeed, the exclusion of people through the top-down scientific research model is entwined with their exclusion from the management of public affairs, and even from public debate in general. In a knowledge society where the availability of scientific and technical data broadens the power of those who produce and hold it, the proliferation of participatory research programs and the development of post-normal science may help reverse the geometries and the geographies of power generation and use.

In a knowledge society, participatory research programs may help reverse the geometries and the geographies of power generation and use



2

The Niger Delta

2.1 The despoliation of the Niger Delta and globalising

The civil society response to the impending environmental cataclysm occasioned by transnational oil companies is witnessing a new turn in advocacy strategies that embrace litigation across spatial scales. This response on the wings of globalisation has implications for ecological devastation and remediation valuations for social and environmental justice. On a global scale growing energy scarcity marked by increasing demand is aggravating resource conflicts at the site of extraction, prompting a refocusing on the nature of oil-dependency and development (Maas, 2009). For the last two decades, distressing daily news reports have highlighted the earth's burden of environmental degradation, expanding deserts, increased carbon dioxide levels, rising temperatures, melting glaciers, and disappearing species (Brown 2001), posing serious threats to survival on planet earth (Bassey, 2012). Since environmental issues transcend territorial boundaries, the impacts have been significant in industrialised North America and Europe as well as at the sites of extraction mostly in Africa, Asia, and Latin America.

Persistent fossil fuel dependency is leading to conflicts at sites of natural resource extraction, especially those related to associated pollution and environmental degradation. For instance, 'Blood Diamonds' from Congo and Sierra Leone, armed conflicts around oil in Angola, Sudan, and Nigeria, and resource conflicts in Ecuador, Bolivia, Columbia, are prompting new ways of conflict resolution in the establishment of liabilities and peaceful resolution. The negative impacts of oil extraction from faulty pipelines, oilrig blowouts and spills from transportation vessels are universal. The Exxon Valdez oil spill in Alaska in 1989, and the unprecedented BP oil Deepwater Horizon disaster in the Gulf of Mexico that spilled 4.9 million barrels of crude oil over a period of 3 month from April 2010 caused monumental ecological devastation despite considerable attempts at remediation.

Yet, similar oil blowouts, like the Shell Bonga Spill in December 2011, or the Mobil Idoho platform oil spill in January 1998 hardly commanded any remediation measures or adequate compensation for livelihood destruction. Biologist Professor



Steiner (Steiner, 2012) has further noted that oil spills have a significant impact on the natural resources upon which many poor Niger Delta communities depend. Drinking water is polluted, fishing and farming are significantly impacted, and ecosystems are degraded. Oil spills significantly affect the health and food security of rural people living near oil facilities. Additionally, oil spills and associated impacts of oil and gas operations have seriously impacted the biodiversity and environmental integrity of the Niger Delta. The spread and severity of such damage on the environment and local livelihoods are usually more extensive in developing countries that often have lack strong environmental laws, social justice systems, and access to curtailment technology which are more advanced in developed countries.

Oil spills have a significant impact on the natural resources upon which many poor Niger Delta communities depend: drinking water is polluted, fishing and farming are impacted, and ecosystems are degraded

In Nigeria, transnational corporations supported by European and North American national governments have been largely responsible for environmental degradation during extraction. This power laden export-based system of extraction has historical roots partly in colonial relations that have persisted until now, creating a very similar picture in all developing countries that have continued to maintain periphery-core relations with their erstwhile colonial masters. In the case of Nigeria, the country became a nation state under Britain following the amalgamation of the Northern and Southern Protectorates in 1914. To maintain a firm grip on the resources of the Niger Delta, Lord Lugard enacted the first mineral act called the Mineral Oil Act, Laws of Nigeria, 1914 to the extent that *“the power conferred upon the Governor General to grant licenses and leases for mineral oils shall be exercised subject to the condition that no lease or license shall be granted except to a British subject or to a British company”* (Ikein, 1990: 2). The law later ceded the exclusive rights of oil prospecting to British Shell D’Archy (now Royal Dutch Shell) in 1937.

Shell discovered oil at Oloibiri, in the eastern Delta in 1956 and started commercial drilling in 1958. Since the discovery of oil in commercial quantities in 1956, the Niger Delta has known no rest, and now in Nigeria, natural resource extraction, especially of crude oil, is posing a serious problem for development. Repressive strategies of the International Oil Companies (IOCs) backed by the Nigeria pariah state have witnessed the continued flow of oil behind military shields. Cases of human rights violations, ecological devastation, and extra-judicial killings have been well documented in a region dubbed a ‘violent environment’ virile with petrol insurgency (Watts 2007). In 1959, the Colonial government enacted the Petroleum Profits Tax Ordinance with a 50-50 profit sharing arrangement between the Nigerian government and foreign oil companies. By the time the civil war broke out in July 1967, the volume of oil produced had reached 367,000 bbl/d (Khan, 1994: 9, quoted in Okonta and Douglas 2001:38).

With an average current production of about 2.3 million bbl/d when the oil fields are not riddled with violence, the oil industry has expanded in Nigeria at the expense of other previously important production sectors, such as agriculture and manufacturing. This has created regional imbalances and an increasingly unequal distribution of wealth between different sectors of society, deepening the potential



for conflict in this complex multi ethnic nation. Although the oil industry has been diversified allowing other players, it is still dominated by the Dutch, US, British, Italian, French and German – superpowers who had partitioned Africa into their spheres of interests. In the last two decades corporations from late entrants such as China and Korea have entered as well. Shell is still the largest oil operator in Nigeria, and – according to the Shell Dirty Secrets report (2010) – Shell is also the most carbon intensive oil company in the world - for every barrel of oil produced in the future, Shell will contribute more to global warming than any other company, owing in part to the fact that it holds more acreage in Canada's tar sands than any other corporation. In Nigeria, Shell holds controlling operational shares and continues to lead the joint venture production sharing arrangement with Chevron, ExxonMobil, Texaco, Agip, and ENI. The National oil trading company NNPC is also the regulator of the industry, a fact signalling governance problems which have made the oil sector one of the most opaque sectors in Nigeria. Transnational oil companies exert political and economic power over the state, contributing over 85 percent of national income.

The result of over two centuries of palm oil trade and over half a century in petroleum has been a harrowing experience for the people and communities that live in the Niger Delta. While external colonialism has come and gone, there is now firmly in place a form of internal colonialism where local leaders are collaborating with Shell against their people with support from the national government. Indeed, the proposition cannot be more right in asserting that just as *“Britain colonized Nigeria and exploited its resources for the benefit of British metropolises, Nigeria is exploiting in the like manner the resources of its mostly rural oil areas for the benefit of its own and other metropolises, at the costly expense of rural degradation”* (Ikein, 1990: 51). Ecological destruction, social exclusion, and poverty are visibly destroying sources of livelihoods. Impoverishment is continuing under neocolonialism and the second scramble for Africa in which parcels of land are being carved out for foreign interest in Europe, North America and Asia, in a land grabbing race that has witnessed over 11 million hectares of land appropriated at well below the market value prices (Ojo, 2011).

Politically, the Niger Delta has been defined as the oil producing area covering the states of Akwalbom, Bayelsa, Delta, Edo, Cross River, Imo, Rivers, and Ondo in southern Nigeria. The Niger Delta occupies a total surface area of 112,000 square kilometres and is home to nearly 3000 communities. It is the largest wetland in Africa and one of the three largest drainage areas in the world. The Niger Delta is home to over 31 million people grouped into several ethnic nationalities including the Ijo, Urhobo, Itsekiri, Isoko, Efik, Ibibio, Etche, Ikwerre, Andoni, Ogoni, Edo and Kwale-Igbo. These are the ethnic minorities of Southern Nigeria, while the three major tribes comprising of Hausa/Fulani live the north, the Yoruba live in the west and the Ibo live in the east and make up about two-third of the Nigerian population of about 160 million. As it is to be expected in a democratic system, the majority tribes continue to dominate the political and economic agenda, however with little respect for the rights, needs and demands of the minorities. As a result, cries of



marginalisation and neglect continue to resound in community protests and violence. Only recently, in 2011, did a southerner from the minority tribes ascended to the presidency. President Goodluck Jonathan will serve for a four year tenure. Yet, half way through his presidency there have hardly been any changes to the problems of the Niger Delta, indicating that whoever governs the country will require significantly more mettle to rise above the thicket of business and bureaucracy.

Economically, the Niger Delta remains the poorest part of the country, with inadequate social amenities, and lacking basic infrastructure such as motorable roads, hospitals and pipe borne water. From 1989, the atrocities of environmental degradation were evident even to the blind in terms of social and environmental impacts, reduced fish catch and farm infertility. The people of the Niger Delta were impoverished with little or no benefits accruing to them from the oil in their backyard. In 1989, Ken SaroWiwa mobilized his Ogoni community under the Movement for the Survival of the Ogoni people (MOSOP) to protest against the state neglect and the devastation of their communities from Shell oil facilities in Ogoniland. In the mid 1990s, frequent peaceful protests were the order of the day culminating in the eventual withdrawal of Shell from Ogoniland in 1993, following mammoth peaceful protests against the state and the oil companies. Protests however were suppressed by military force with thousands of Ogonis killed, in particular MOSOP membership and supporters. In 1995, at the height of government repressive regime, Ken SaroWiwa and 8 other leaders of MOSOP were hanged having been framed with frivolous charges by a federal tribunal. The late environmental rights activists and writer, Kenule Saro Wiwa and the eight leaders killed by the then military government of the late General Sani Abacha, will be remembered for their struggles against oil pollution.

Environmentally, the Niger Delta has been rendered a wasteland. Frequent oil spills and gas flaring have continued since 1956 and remain unabated to date. Writers and environmentalists in Nigeria claim that there have been over 5,000 oil spills in the Niger Delta, equalling one Valdez oil disaster every year, and not one of these has been adequately cleaned up. The occupation of the people, mainly fishing and subsistence farming, has suffered from massive pollution of farmlands, rivers and streams, placing a heavy burden on rural livelihood sources (Okonta and Douglas 2001). A Google search for 'oil pollution in the Niger Delta' produces over 1,830,000 cases, showing stories, news or headlines on major oil spills or responses of local communities in the region. The issue is serious enough to have warranted enormous media and academic attention. This has also been a key factor in the conflictive relationship between local communities on the one hand and oil companies and government on the other hand.

Ogoniland provides a well documented example (of countless others) of how oil pollution impacts local environments and populations in oil producing countries of Africa. In 2011, The United Nations Environment Programme (UNEP) undertook an environmental assessment of Ogoniland that remains a significant contribution to the existing body of knowledge on oil pollution. Covering groundwater, land,

The late environmental rights activists and writer, Kenule Saro Wiwa and the eight leaders killed by the then military government of the late General Sani Abacha, will be remembered for their struggles against oil pollution



Years after Shell was compelled to withdraw its operations, oil spills have remained a regular feature of Ogoniland

surface water, vegetation, sediments, air pollution, public health, industry practice and institutional issues, the report indicts Shell Petroleum Development Company (SPDC) for massive pollution of land sediments and swamps through regular oil spills and gas flaring in the Ogoniland. The UNEP report concludes that nineteen years after Shell was compelled to withdraw its operations, oil spills have remained a regular feature of Ogoniland. UNEP scientists examined more than 4,000 samples, taken from different locations including 124 groundwater wells, drilled for that purpose, concluding that oil pollution in Ogoniland is severe and wide ranging. Both surface water and groundwater have high concentrations of hydrocarbon, and benzene in drinking water comes in at 900 times more than the standard set by the World Health Organization, and 1000 times above standards set by the Nigerian government (UNEP, 2011). According to United Nations Under Secretary General and Executive Director of UNEP Achim Steiner, the history of the oil industry in Ogoniland is not only long and complex; it is painful and pig headed.

Within the context of objectives set out in the UNEP environmental assessment project in Ogoniland, there are a number of conclusions that can be made and applied across the entire oil rich Niger Delta. It implies that, to some extent, the state of oil pollution in Ogoniland represents the situation in the entire Niger Delta. The findings of the UNEP assessment add credence and vindicate activists and non-activist groups who have campaigned against oil pollution in the region for decades. However, although UNEP recommended that an initial USD 1 billion clean up and restoration fund be established by Shell for remediation activities, to be implemented over the course of 25-30 years. Yet, no money has been paid, nor is remediation in sight. Nonetheless, the baseline information provided by UNEP's study cements the knowledge of oil production impacts and adds a quantitative dimension for remediation, which can be utilised by social movements and policy makers (UNEP 2011).

Item	Cost (USD)
Emergency measures (80% in alternative drinkable water)	63750
Clean-up land contamination	611,466,100
Clean-up of benzene and MTBE contamination in Nsisioken Ogale	50,000,000
Clean-up of sediments	20,000,000
Restoration of artisanal refining sites	99,452,700
Mangrove restoration and rehabilitation	25,500,000
Surveillance and Monitoring	21,468,000
Ogoniland restoration authority operating expenses	44,000,000
Centre for excellence in restoration	18,600,000
Alternative employment initiatives for those engaged in artisanal refining	10,000,000
Third party verification and international expert support for recommendations' implementation (5%)	48,211,840
TOTAL	1,012,448,640

Table 1
Evaluation of costs for Ogoniland restoration

Source: UNEP, 2011



The failure of peaceful protests due to escalating state violence may have motivated the armed struggle against the state and the oil companies. Community after community followed after the Kaiama Declaration of 1998 to produce a Community Bill of Rights demanding self-determination and the ownership and control of the resources in their region and a halt to environmental devastation by the oil companies. By 2000 the Niger Delta was on the boil with frequent spate of kidnappings for ransom and sabotage of oil facilities. Led by the Movement for the Emancipation of the Niger Delta (MEND), armed groups quickly multiplied with diverse interests, some of which are motivated by greed, or by grievance (although in many instances these are not mutually exclusive). The armed rebellion against the state and the oil companies ended in 2008 through an amnesty package of demobilization and rehabilitation which has secured fragile peace, and increased oil production from less than 1.8 million bbl/d to 2.4 million bbl/d in the post-conflict era.

In short, the Niger Delta remains militarized and oil continues to flow behind military shields. Thousands of youths are also helping themselves to the treasury by puncturing crude oil pipelines, which has become a major source of income for many. Dozens of youths die daily from the illegal oil refinery activities while the more lucrative oil bunkering at the oil terminal and high seas are ever increasing. Government has shown great weakness to curtail this menace because those involved are allegedly well connected in the corridors of power (former and serving army officials and policy makers). Thus, the nature of the Nigerian state follows a deeply entrenched colonial legacy of exploitation, divide and rule, murders and suppression which have been instruments variously deployed in the region to gain access and control of the regions' oil wealth. Out of these doldrums, conflict resolution mechanisms within an advocacy framework by civil society groups across spatial scales are finding relevance. One of its advocacy actions entails litigation against the oil companies, some cases of which are reported in the next section.

2.2 Brief background to Environmental Justice struggles in Nigeria

There is a growing interest in the adoption of litigation as a component of environmental justice struggles by civil society groups across the globe. Civil society groups all over the world such as EarthRights USA, Friends of the Earth International and its affiliate grassroots member groups from over 77 countries, including Environmental Rights Action/Friends of the Earth Nigeria are pursuing litigation in the quest to secure corporate liability for offences committed by corporations from North America and Europe in their overseas operations. Although this phenomenon has spread universally, its origin is traceable to the environmental consciousness in the United States of America following the robust environmental regulations by the USEPA Act of 1969. Then, the concept of environmental racism denoting the localisation of toxic industries and dumping of harmful wastes in black neighbourhoods faced stern resistance and was fought as a component of the general quest for social justice, fairness, and the rule of law.



In Nigeria, the corporate promotion of double standards could stand for environmental racism

Environmental racism implies the “disproportionate impact of environmental hazards on people of colour”. It also refers to the “geographic relationships between environmental degradation and low income or minority communities”². In Nigeria, the situation is different even though corporate promotion of double standards could stand for environmental racism. Although environmental justice struggles in Nigeria date back to the Ken Saro Wiwa era in the 1980s and 1990s, these have been circumstantial ‘probings’ aimed at supporting populist advocacy strategies and raising public awareness, in contrast to struggles in the USA, where institutions and juridical processes are more strongly developed.

Environmental justice struggles for corporate liability gained prominence during the military era from 1983 to 1998, when dissent was considered anathema and met with brutal force. Military repression culminated into arrests and detention, and frequent extra-judicial killings of community leaders, activists and dissenting public figures including government officials. Massive organized and well orchestrated civil society protests from 1993 to 1997 were mopped from the streets, with protestors backs pinned to the wall as hails of bullets were fired into crowds of protesters (Manby, 1999). In fact, during this period, progressive gatherings and dissenting voices were declared unlawful with indefinite incarceration or long prison terms ‘for the interest of national security’.

Prominent lawyers rose to the occasion to approach the law courts mainly on grounds of human rights violations, civil and political rights. One such legal luminary, Gani Fawehinmi, Senior Advocate of Nigeria (SAN), seen popularly as the ‘custodian of Nigeria’s national conscience’ sued the military government on several counts and paid the price of being detained over a dozen times in his lifetime. Yet, some of the cases by these courageous lawyers were successful with the courts ruling against the brutal regime. In a detailed case study focusing on the effectiveness of the Nigerian courts during this period, it was rather surprising that even though not many people dared go to court to seek redress, and even though the courts were by no means independent of government, the court ruled in favour of citizens and against government in over 60 percent of the cases of human rights violations (Frynas 2000). This trend from civil and political struggles was rather surprising but may have influenced the choice of litigation for environmental justice struggles during this period.

During the same period community resistance to decades of environmental degradation from oil extraction was emerging in Ogoniland, in Nigeria’s Niger Delta. The campaign for environmental justice in Nigeria, particularly in the Niger Delta region, received both national and global attention due to the work of the late Ken Saro Wiwa, popularising environmental justice struggles. The writer and activist and others working with him through the formation of the Movement for the Survival of the Ogoni People (MOSOP) in the late 1980s drew global attention to the plight of the Ogonis in the present day Rivers State of Nigeria. This process gave birth to the campaign for environmental justice in Nigeria, eventually

² See www.ejnet.org/ej/Environmentaljustice/environmentalracism, accessed 12 February, 2013.



nurturing a dramatic turn from a focus on civil and political rights campaigns to environmentalism and the quest for environmental justice.

The gruesome State murder of Ken SaroWiwa was facilitated by a kangaroo tribunal with lawyers and judges presiding. In some respects, that justice could not be attained raised some thought-provoking, jurisprudential issues in the Nigerian public. It was therefore not surprising that the global opposition against the Nigerian state and the Shell Oil Company in response to the mindless act of the then Gen. Sani Abacha military junta culminated in the Commonwealth's economic sanctions against Nigeria.

It is therefore gratifying to note that barely nearly two decades after Ken and his community leaders' State-sponsored execution, a court sitting in the USA has, through arbitration, compelled Shell to pay USD 15 million as compassion to its victims. Working in tandem, some civil society groups such as MOSOP, ERA/FoEN, and some individuals, in spite of the difficult terrains, continue to use the law courts at the local, national and international levels. These efforts, spanning nearly twenty years, have led to cases that provide bitter lessons of discouragement as well as moments of assurance and victory that point to a bright future on the horizon.

2.3 ERA's environmental justice struggles: Strategies of resistance

Environmental Rights Action, since its formation in 1993 has been vocal and visible in its environmental justice campaigns. Initially, as an arm of the Civil Liberties Organisation (CLO) focusing on human rights and democracy, ERA/FoEN was equally involved in the struggle for civil and political rights. This rich experience has effectively been applied to environmental activism and social justice struggles.

It is noteworthy that some prominent environmental court cases such as that of Farah (an indigene of the Niger Delta) versus Shell led to the award of 5 million Naira about (USD 100,000) against Shell in the 1990s³. Ironically, some of these cases were mainly based on compensation, and devoid of concerns for environmental remediation. To date, environmental compensation continues to override the need for environmental remediation, with attendant grave consequences for sustainable development (Fagbohun and Ojo, 2012). It is thus interesting that the Farah case, on grounds of inadequate compensation and environmental degradation, may hopefully soon commence if collaboration between Farah and ERA bring about the desired outcome.

In the early 1990s, environmental problems became even more prominent as community protests spread across the Niger Delta region, mostly against transnational oil companies such as Shell, Chevron, AGIP, Texaco, and others. In

³ Shell V. Farah (1995) 3 NWLR (Pt 382).

its quest to wrest environmental justice for the Nigerian people, ERA devised a number of advocacy and campaign strategies including environmental education/enlightenment of various stakeholders of Nigerian society, policy change advocacy targeted at policy makers at all levels, naming and shaming of environmental destroyers, and building solidarity and linkages between impacted peoples both within and outside Nigeria (Ojo and Gaskiya, 2003).

To compliment these mechanisms, ERA deployed litigation as a far reaching and more radical way of bringing environmental justice, especially to the people of the Niger Delta a region where the negative impacts of the extractive companies, especially of oil and gas, are worst.



Fig. 2

Oil spill in a wetland in Goi, Niger Delta

Photo credit: Lucie Grey!

It was not a strategically planned process in the sense that ERA, did not at inception consider having a legal department for dealing with environmental litigation. Rather, the legal approach developed as an ad-hoc effort, mostly based on goodwill and a pro bono basis. Litigation cases were merely 'default actions' embarked upon only when other advocacy strategies failed (See also Morka 2003: 116). According to Nnimmo Bassey, *"court cases if properly deployed could provide a signal of hope and voice to the voiceless. This stems from ERA's belief that justice may be found in the courts and we embrace this as part of our environmental justice struggles and conflict resolution strategy."*

The first direct initiative was in fact, somewhat disastrous or the struggle for environmental justice. The case was between one of ERA's founding fathers, *Oronto Douglas versus Shell Petroleum Development Company and Ors – Suit No: FHC/L/CS/573/1996*. The plaintiff had dragged Shell, Nigerian LNG Ltd,



NNPC, Mobil Oil and the Attorney General of the Federation to court claiming that the joint project for the production of liquefied natural gas did not comply with the provisions of the *Environmental Impact Assessment Decree No. 86 of 1992*. Douglas also claimed that the project would have negative impacts on the people and environment of the Niger Delta. This case was swiftly dispensed with on the grounds of *locus standi*, that is, that the plaintiff failed to show direct injury suffered by him more than any other Nigerian.

The issue of *locus standi* remains a major obstacle in the Nigerian judicial system where plaintiffs are expected to show scientific proof of injury or damage suffered by them, and that injury must be far above that of the ordinary Nigerians. (Fagbohun and Ojo, 2012; Ojo and Gaskiya, 2003) ⁴. In other words, environmental issues are rather personalised in Nigerian law and this situation is marred with controversies and debates that are yet to be adequately resolved. Thus, in choosing to litigate, ERA has had to focus its attention on the positive as well as negative components of the process of litigation, and maintain its resolve in the face of this early experience that could well have backfired to frustrate the psyche of the organisation.

As there was no legislature or parliament during the military era where people could go to complain in Nigeria's political system, it became inevitable that a legal strategy was adopted as an important part of advocacy strategies. It was recognised that "*litigation if used creatively can be more than a means for winning court judgment*". Litigation is also "*a valuable tool for mobilizing and rallying public support for a stated objective*" (Morka, 2003: 117). ERA's belief was rooted in this view that saw the courts as a means of populist orientation toward ending military rule that did not respect the rule of law.

Public interest litigation or public interest law, is generally the province of lawyers as well as human rights and access to justice organisations deeply interested in, and committed to, human rights causes. This type of litigation is concerned with the practice of committed public-spirited individuals or bodies seeking to bring about social change through court rulings or decisions that facilitate paradigm shifts by reforming rules, ensuring compliance with existing laws, promoting the rule of law and due process, and articulating public opinions and norms judicially for the benefit of the society at large.

Mr. Femi Falana (SAN), himself a leading public interest lawyer in Nigeria, conceives of public interest litigation as a legal action initiated in a court of law for the enforcement of public interest or group interest in which the public or class of the community have a pecuniary interest or some interest by which their legal

The first litigation initiative was swiftly dispensed with on the grounds of *locus standi*, that is, that the plaintiff failed to show direct injury suffered by him more than any other Nigerian

This issue remains a major obstacle in the Nigerian judicial system

⁴ The Environmental Rights Action/Friends of the Earth Nigeria has been fighting relentlessly to shift the burden of proof from victims to culprits. The NGO has proposed some legal reforms to the National Assembly for legislative consideration. In particular, legal reforms in the following major areas such as Evidence Law that would shift the burden of proof from the Claimant to the Defendant/Respondent is necessary as in the FREP Rules 1979 & 2009.



rights or liabilities are affected. Falana relied on Honourable Justice P. Bhagwati, a former Chief Justice of India, who claimed that public interest litigation is *“essentially a collaborative effort on the part of the petitioner, the State or Public Authority and the Court to secure observance of the Constitutional or legal rights benefits and privileges conferred upon the vulnerable sections of the community and to bring social justice to them”*⁵.

Falana (2010, ii-iii) opines that public interest litigation is a way of working within the law to promote the law; an attitude towards the law, a demonstrated attempt at rights empowerment, and that law in this context broadly encapsulates the Constitution, legislation, policy measures, executive orders or governmental actions and inaction. He goes further to view public interest litigation within the Nigerian context, from two historical perspectives. The first includes the military era when human rights activists and civil society groups sought to resist the oppressive dictatorship by utilising national and international human rights provisions. The second perspective is embedded in constitutional reform in a civilian regime which allows greater liberty for individuals and right of access to the law courts to challenge democracy, a more direct and constitutionally recognised guarantee of access to court to challenge government excesses and inequality, arising from prolonged military autocracy.

It should be noted however that filing cases in the courts is not the exclusive or sole strategy of public interest litigation. This approach equally implicates law review, legal research, law reform, public hearings, legislative advocacy, continuing legal education, and human rights education.

ERA's adoption of litigation as a means to pursue environmental justice was informed by several reasons. First, legal strategies to defend citizens' rights to a healthy and satisfactory environment, and protection of citizens livelihood sources as well as to compel respect for citizens' fundamental rights by corporate entities and governments was adopted as the organizational mandate. Second, many poor rural communities were suffering from environmental degradation without any form of compensation. In Nigeria, litigation is said in local parlance to be the 'last hope of the common man', a strategy that is employed as a last resort in the course of negotiation and conflict resolution. Yet, few were seeking redress at the law courts for several reasons.

At one level, the choice of litigation in a country with high illiteracy levels can be a daunting task. There is suspicion that the court system is both money and time consuming. In fact legal fees are crucifying, well beyond the reach of the average Nigerian. ERA had to accept to be patient in the litigation process as it is not a quick fix solution and cannot be done as a one-off campaign given that there are

⁵ Supreme Court of India. *People's Union For Democratic Rights & Others. vs Union Of India & Others* on 18 September, 1982 (1982 AIR 1473, 1983 SCR (1) 456). Available at <http://www.indiankanoon.org/doc/496663/>. Last accessed: September 27, 2013. Cited in Falana (2010: ii).



cumbersome processes and procedures that must be followed but which are sometimes inimical to justice.

In many instances, moreover, legal processes and procedures are out of the control of the proponents and therefore are not determined by them. For example, the strategies of seeking adjournments and appeals to prolong cases (dilatory tactics) in the event of unfavourable decisions are designed to wear out plaintiffs by the oil companies. Such strategies are currently being deployed to gain arbitration and payment of compensation far below the statement of claims. A recent case in point is the agreed settlement of one community in Delta to accept the payment of 20 million Naira compensation, instead of the 100 million Naira being litigated in the law courts.

In most cases, ERA has had no option but to respect the wishes of the people in the acceptance of out of court settlements. One needs to be aware of other obstacles such as 'sleeping on your rights', pre-action notice, the corrupt nature and lack of independence of the judiciary, and other rules and regulations destined to deny the rights of local communities.

The problem with the issue of litigation is also related to the fact that due to the poverty level of some community people, and in full realisation of the issues above, litigants may easily be compromised by the super rich corporations and half way abandon the process. When this happens, it creates a dangerous twin-pillar situation, whereby potential litigants who may not get the nitty-gritty of the transaction and conclude that there is no way out or no justice for the common man are dissuaded, or, the culprits are buoyed by the situation to continue in an even more devious way, believing they can always buy their way out or pay anyone at any point in time.

Notwithstanding the above impediments to litigation, there is still much merit in its use as a campaign strategy. Adopting litigation can provide positive results. First, the litigant must be aware of the litigation challenges. Thus, a litigant must present to the best of his/her ability the strongest evidentiary materials to convince the court of the need to enter in favour of his/her claims. Apart from expensive legal research and cost of hiring lawyers, some scientific research is conducted in order to adduce evidence. Researchers and good lawyers are not usually cheap to come by, hence, parties with good cases, may not either be able to present them for litigation or may be unsuccessful due to paucity of resources to effectively prosecute the case. In such cases, strategies of media advocacy and publicity can provide an added advantage in mounting greater public pressure for social and environmental change.

Successful litigation outcomes can on their own create new laws and rules of engagement. This is more particularly in common law country situations where the rule of *precedent* applies. Consequently, when the highest court of the land makes a new pronouncement on any legal, regulatory or even operational issue as a court of final instance, such pronouncement remains the law governing the sector

In Nigeria, litigation is said to be the 'last hope of the common man', a strategy that is employed as a last resort in the course of negotiation and conflict resolution

Notwithstanding many impediments, there is still much merit in its use as a campaign strategy



of its coverage until either there is a review of such law or there is an Act of Parliament to the contrary.

The outcome of litigation also creates an enforceable process. Where a court of competent jurisdiction makes a judicial declaration or pronouncement, the beneficiary of such a pronouncement or declaration is bestowed with an enforceable right.

Another benefit of litigation is that it can lead to a positional alteration of either of the parties, what we may call a balancing effect. In this way, a successful litigation outcome can bestow on a hitherto weaker party a position of strength to compel a once stronger opponent to act in one way or the other, thereby balancing their original position toward one of equality.



3

Legal case studies

3.1 Legal case studies on oil extraction in Nigeria

This section presents some case studies involving local communities and individuals against Shell in both Nigeria and abroad that ERA has been deeply involved in. The cases were conducted locally and at the international level especially in the United States of America, and in the Netherlands. Another court case regarding oil spills against Shell by a Nigerian NGO involving about 11,000 plaintiffs from Ogoni is currently on-going in London. There are other cases which are still in their embryonic stages that might come up against other oil companies such as AGIP, an Italian based company that has taken about five years in pre-action preliminary preparations.

To illustrate, we present court cases that have been concluded that provide advocacy lessons. These cases are exemplary because they deal with the two most intractable environmental problems in the Niger Delta region occasioned by the mindless negative operational methods of oil and gas companies operating in Nigeria - the twin pillars of the menace of environmental degradation involving gas flaring and oil spills. They are also chosen for the timeliness of available reports, their novelty, impact, focus and the outcome of the cases.

3.1.1 Jonah Gbemre vs. SPDC: Brief background of the case

The first case involves Jonah Gbemre (for himself and as representing Iwherekan community) vs. SPDC & 2 Ors (Suit No: FHC/B/CS/53/05). SHELL in joint venture partnership with the Nigerian National Petroleum Corporation NNPC, an agency of the Nigerian government that has been engaged in oil exploration and production activities in Iwherekan Community, a community in the Niger Delta region of Nigeria for many years. Most of the oil found is associated with gas which means that the oil pumped is not pure oil but mixed with gas. In order to separate the oil from the gas, the company engages in the obnoxious, outdated and harmful practice of burning the gas associated with the oil, known as gas flaring.

The burning of gas has caused the community many problems in terms of health, social, economic and environmental impacts. With their understanding of the problems associated with gas flaring as made known to them by the



The case of Jonah Gbemre was a class action brought in a representative capacity for the enforcement of the Iwherekan community people's fundamental rights against the continued act of gas flaring

Environmental Rights Action/Friends of the Earth, Nigeria, they became interested in standing to challenge the continued act of gas flaring by the company, the Nigerian joint venture partner and the Attorney General of the Federation as the Chief Law Officer of Nigeria for allowing Shell and NNPC to continue the act of gas flaring as against the spirit and letters of operative laws in the country, especially those regulating the oil sector.

Main Issues in the case:

Statement of Claims in the Case bothers on human rights violations

The claim against the company (defendant) is for the court to make an order compelling it to stop forthwith the act of gas flaring because of its negative impacts on the people's health and the environment, including contribution to climate change.

The main issues in the case were:

- 1) That continued flaring of gas in the Iwherekan community by SHELL violates the peoples' rights to life and dignity of their human persons which are rights protected by the constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples Rights.
- 2) That the activities of SHELL in continuing to flare gas in the Iwherekan community seriously pollutes the air, causes respiratory diseases, and generally endangers and impairs the health of inhabitants.
- 3) That SHELL has carried on gas flaring continuously in the Iwherekan community without any regard to its deleterious and ruinous consequences to the health and lives of community members, concentrating only on pursuing their commercial interest and maximising profit.
- 4) That burning gas by flaring by SHELL in the Iwherekan community:
 - (a) poisons and pollutes the environment in the community as it leads to the emission of carbon dioxide, the main greenhouse gas. The flares contain a cocktail of toxins that affect the health, lives and livelihood of local citizens.
 - (b) exposes them to an increased risk of premature death, respiratory illnesses, asthma and cancer.
 - (c) contributes to adverse climate change in their community as it emits carbon dioxide and methane which cause warming of their environment.
 - (d) pollutes their food and water.
 - (e) causes painful breathing, chronic bronchitis, decreased lung function and death in their community.



- (f) reduces their crop production and adversely impacts their food security.
- (g) causes acid rain. Their corrugated house roofs are corroded by the composition of the rain that falls as a result of flaring. The primary causes of acid rain are emissions of sulphur dioxide and nitrogen oxides which combine with atmospheric moisture to form sulphuric acid and nitric acid, respectively. Acid rain acidifies their lakes and streams and damages their vegetation.

Remedies sought in the case

The remedies sought include:

- 1) A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean, poison-free, pollution-free and healthy environment.
- 2) A declaration that the actions of SHELL in continuing to flare gas in the course of its oil exploration and production activities in the applicant's community is a violation of the applicant's fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004.
- 3) A declaration that the failure of SHELL to carry out any environmental impact assessment in the Iwherekan community concerning the effects of its gas flaring activities is a violation of section 2(2) of the Environmental Impact Assessment Act, Cap. E12, Vol. 6, Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said fundamental rights to life and dignity of human person.
- 4) A declaration that the provisions of section 3(2) (a) (b) of the Associated Gas Re-Injection Act, Cap. A25, Vol. 1, Laws of the Federation of Nigeria, 2004 and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations S.1. 43 of 1984 under which continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's rights to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9, Vol. 1, Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution and;



5) AN ORDER of perpetual injunction restraining SHELL by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicant's said community.

Outcome of the case and conclusion

On the 14th day of November, 2005 the Federal High Court, sitting in Benin City delivered a landmark judgment declaring gas flaring in Iwherekhan community illegal, in violation of the peoples constitutional rights to life and dignity of their human person, and ordered Shell to stop immediately the act of gas flaring in the community.

The case of Jonah Gbemre (for himself and as representing Iwherekhan Community of Delta State, Nigeria) vs. Shell Petroleum Development Company Of Nigeria Limited, Nigerian National Petroleum Corporation and Attorney-General of the Federation was a class action brought in a representative capacity for the enforcement of the Iwherekhan community people's fundamental rights against the continued act of gas flaring by the first defendant and her joint venture partner, the second defendant.

The third defendant was sued alongside the first and second defendants for allowing them to continue with the act of gas flaring without intervening as the Chief Law Officer of the Federal Republic of Nigeria. The community people's argument was that gas flaring is illegal as it had been outlawed long ago by the *Associated Gas Re-injection Act, 1979*. They equally contended that even if the exception to the rule outlawing gas flaring had been met by the defendants, the act of gas flaring still violated their constitutionally guaranteed rights to life and dignity of the human person as well as the provisions of African Charter on Human and People's Rights, which provides protection for the environment of the people under its Article 24.

This case, being for the enforcement of fundamental rights, was brought under the Constitution of the Federal Republic of Nigeria, 1999 and the Fundamental Rights - Enforcement Procedure - Rules made by the Chief Justice of the Federation pursuant to the powers conferred on him to so do by the constitution.

The rule was made to ensure the speedy dispensation of justice in cases involving a breach or likely breach of citizens' fundamental rights.⁶ The rule is meant to circumvent the technicalities and obstacles associated with regular legal trials⁷ and sets a different standard of proof from the usual common law standard of he who alleges have the onus of proving his allegation.⁸

⁶ See S. 42 (3), Constitution of the Federal Republic of Nigeria, 1979; See also S. 46 (1) and (2) Constitution of Federal Republic of Nigeria 1999 (as amended).

⁷ Olisa Agbakoba Vs. Director, SSS (1994) 6 NWLR (Pt. 351) 475 at 500.

⁸ See, Evidence Act, Ss. 135-137.



Under this rule, it is the incumbent on whom an allegation of violation or likelihood of violation is made against to show that he is not in violation.⁹ This rule makes the case more of an affidavit case in that, except to resolve issues to lead to the just determination of the case, no oral evidence is taken from any of the parties.¹⁰ The result of applying this method in the legal process was that judgment was delivered in favour of the community people within a space of less than six months. All the stumbling blocks and delay tactics usually employed by the defendants against quick trial of cases brought against them by poor community indigenes were not allowed.

Application of Judgment

The judgment in this case has created enormous changes in the application of human rights standards on the issue of environmental rights protection in Nigeria. The decision has been used as the basis for a number of policy and legislative initiatives. For example, in 2008, it was used to identify and associate environmental rights as human rights in the drafting of the proposed environmental management bill for Nigeria by the consultants of the Federal Ministry of Environment, EALEX Legal Consultants. The same law firm later formed a legal opinion for the Pan Ocean Oil Company Limited based on the principles laid down in the case regarding the legality of gas flaring by other oil companies. The case was foundational for the enactment of the Gas Flaring Prohibition and Punishment Bill of 2009 by the Senate of the Federal Republic of Nigeria. It has been used and applied by policy makers, academics etc. both locally and internationally. A few instances of such use are annexed in this report for further reading, including the full judgment of the Jonah Gbemre vs. SPDC case. Yet, due to lack of political will, gas flaring persists.

3.1.2 Shell Nigeria oil spill case in the Netherlands: Brief background to the Case

Between 2004 and 2007, oil spills from Shell facilities variously impacted communities and fisherfolk in the Niger Delta, destroying their fish ponds and farmlands. Some of these incidents arose as a result of poor facility maintenance, lack of supervision and protection of facilities, third party interference, or at times as incidents beyond human anticipation, generally termed as 'acts of God' in law. Chief among these was incidence of oil spills. Oil spills pollute the environment, destroy farmland and pollute watercourses. As a direct consequence of spills, Niger delta residents, predominantly fishermen and farmers, lose their livelihood sources with attendant problems of health, economic and social dislocation. In this case, that of Friday Alfred Akpan & Another vs. Royal Dutch Shell Plc & Another.

⁹ It is trite law that where a party alleges an infraction of his constitutional or fundamental right, the onus is on the Respondent to justify the infringement as laid down in *Olisa Agbakoba Vs. Director, SSS* (1994) 6 NWLR (Pt. 351) 475 at 495 C.

¹⁰ *Adekunle Vs. Professor Grace Alele Williams* 2 NPILR 363.

(Docket No: C/09/337050/HAZA 09-158), dozens of people had been impacted from various communities.



Fig. 3

Contamination Public notice in Goi

Source: Lucie Greyl

Most worrisome is the manner in which Shell and other oil majors respond to incidents of oil spills when they occur. Shell pipelines crisscross the entire Niger Delta region of Nigeria including the communities of the plaintiffs, yet Shell has a proven track record of unkept promises of cleanup and remediation. Owing to several oil spill incidents in the plaintiffs' communities, four fishermen from the villages of Ikot Ada Udo in Akwa Ibom state, Goi in Rivers state, and Oruma in Bayelsa state sued Shell, with support from Environmental Rights Action/Friends of the Earth Nigeria and her sister organization, *Milieudefensie/Friends of the Earth Netherlands*, also a plaintiff, decided to bring Shell to court in The Hague, Netherlands to seek redress for the destruction of the plaintiffs' farmlands and fishponds by Shell oil spills in the Goi (2004), Oruma (2005) and the Ikot Ada Udo communities (2007).

The case was initiated in furtherance of environmental justice concerns by civil society groups working in defence of community rights. The case of the four Niger Delta fisherman/farmers and *Milieudefensie vs. Royal Dutch Shell and Shell Petroleum Development Company Ltd.* are actually five cases rolled into three with *Milieudefensie* involved in each of the three cases¹¹.

Generally, the principles, applicable arguments and laws are the same for the three cases. The issues and claims, including supporting arguments, are the

¹¹ (a) District Court Of The Hague in the matter with case number/docket number: C/09/337050/HA ZA09 - 1580 of Friday Alfred Akpan & The Association with corporate personality Vereniging Milieudefensie Vs. The legal entity organized under foreign law Royal Dutch Shell Plc & The legal entity organized under foreign law Shell Petroleum Development Company Ltd.
(b) District Court of The Hague in the matter with case number/docket number: C/09/337058/HA ZA09 - 1581 of Barizaa Manson Tete Dooh & The Association with corporate personality Vereniging Milieudefensie Vs. The legal entity organized under foreign law Royal Dutch Shell Plc & The legal entity organized under foreign law Shell Petroleum Development Company Ltd.
(c) District Court of The Hague in the matter with case number/docket number: C/09/330891/HA ZA09 - 1579 of Fidelis Ayoro Oguru, Alali Efanga & The Association with corporate personality Vereniging Milieudefensie Vs. The legal entity organized under foreign law Royal Dutch Shell Plc & The legal entity organized under foreign law Shell Petroleum Development Company Ltd.



same, with the only noticeable difference between them in the proof of cause of spill.¹²

Claims in the suit

Plaintiffs seek the following reliefs from the Dutch Court:

- (a) a declaratory judgment to the effect that Shell *et al.* committed tort against the Plaintiffs and are jointly and severally liable to them for the damage that they suffered and will suffer in the future as a result of these torts on the part of Shell *et al.*, which damage is to be assessed by the court and to be settled in conformance with the law, all this plus the statutory interest from the date of the summons until the date of payment in full;
- (b) a declaratory judgment to the effect that Shell *et al.* are liable for the infringement of Plaintiffs physical integrity by living in a contaminated living environment;
- (c) a declaratory judgment that Shell *et al.* committed tort against Milieudefensie and are jointly and severally liable for the damage to the environment near the villages of Ikot Ada Udo, Goi and Oruma in Nigeria as a result of these torts on the part of Shell *et al.*;
- (d) an order compelling Shell *et al.* to commence bringing the wellhead near Ikot Ada Udo in Nigeria in conformance with today's standards for wellheads within two months after the judgment is served, or at least within a term to be determined by the District Court, and to complete this work within three months after the commencement, or at least within a term to be determined by the District Court;
- (e) an order compelling Shell *et al.* to commence the clean-up of the pollution caused by the oil spills so that this will comply with the international and local environmental standards within two weeks after the judgment is served, and to complete this clean-up within one month after commencement, in evidence of which Shell *et al.* will present Milieudefensie *et al.* with a unanimous clean-up declaration – within one month after completion of the clean-up – to be prepared by a panel of three experts, who will be appointed within two weeks after the judgment and in which one expert will be appointed by Shell *et al.* collectively, one expert will be appointed by Milieudefensie *et al.* collectively and one expert will be appointed by the two experts appointed in this way, or at least within the terms to be determined by the District Court and providing evidence of the clean-up to be determined by the District Court;

Shell pipelines crisscross the entire Niger Delta region of Nigeria, yet the company has a proven track record of unkept promises of cleanup and remediation

¹² All the judgments can be found at: www.eraaction.org or <http://milieudefensie.nl/english/shell/oil-leaks/courtcase/press/documents/documents-on-the-shell-legal-case>. Also the set of interlocutory judgments of the district court of The Hague have been published at www.rechtspraak.nl under the LJN-numbers BK8616, BM1469, BM1470, BU3521, BU3529, BU3535 en BU3538.

(f) an order compelling Shell *et al.* to commence purification of the water sources in and near Ikot Ada Udo, Goi and Oruma within two weeks after the judgment is rendered, and to complete this purification within one month after commencement, in evidence of which Shell *et al.* will present Milieudéfensie *et al.* with a unanimous purification declaration – within one month after completion of the purification – to be prepared by a panel of three experts, who will be appointed within two weeks after the judgment and in which one expert will be appointed by Shell *et al.* collectively, one expert will be appointed by Milieudéfensie *et al.* collectively and one expert will be appointed by the two experts appointed in this way, or at least within the terms to be determined by the District Court and providing evidence of the purification to be determined by the District Court;

(g) an order compelling Shell *et al.* to implement an adequate oil spill contingency plan in Nigeria and to ensure that all the conditions have been met for a timely and adequate response in the event that an oil spill near Ikot Ada Udo, Goi and Oruma occurs again; Milieudéfensie *et al.* in any case consider this to include making sufficient materials and resources available in order to limit the damage of a potential oil spill to the extent possible – in evidence of which Shell *et al.* will provide overviews to Milieudéfensie *et al.*;

(h) an order compelling Shell *et al.* to pay Milieudéfensie *et al.* a penalty of EUR 100,000.00 - or any other amount to be determined by the District Court in the proper administration of justice - for each instance in which Shell *et al.* individually or jointly, act in breach of - as the District Court understands - the orders referred to in paragraphs IV, V, VI and/or VII above;

(i) an order compelling Shell *et al.* jointly and severally to pay the extrajudicial costs;

(ii) an order compelling Shell *et al.* to pay the costs of these proceedings, or at least orders each party to pay its own costs.



Fig. 4

Ikot Ada Udo 'Christmas Tree', source of oil spills

Photo credit: Lucie GreyI



Remedies sought

Several options were canvassed during the pre-action notice leading to the filing of the case. In the end, the team of lawyers in The Hague and Nigeria agreed to streamlined statements of claims thus: To “Hold Shell liable for the oil spills in the three communities of the Plaintiffs and order her to:

- a. Maintain her pipelines to guarantee no more oil spills in the future,
- b. Clean up the oil pollution in their communities, and
- c. Pay adequate compensation to the farmers for the damages suffered as a result of the spills.

Processes enroute to judgment in the Case

The case was commenced in 2008 with all the preliminary processes cleared including the issue of jurisdiction being determined in favour of the Plaintiffs in February, 2010 that the court in The Hague has the jurisdiction to hear the case.¹³ Here, initial legal obstacles to frustrate the case were many. First, in an attempt to dismiss the case, the issue of *lis pendens* was determined in favour of the Plaintiffs in December, 2010 - that the case in The Hague is not the same as the one in Nigeria in the case of Elder Friday Akpan of Ikot Ada Udo¹⁴.

Secondly, in 2011, the litigants’ application calling on Shell to open their books for inspection by the Plaintiffs was decided in favour of the Defendants.¹⁵ There were constraints on the number of Shell’s internal documents that could be released to the plaintiffs that were limited to three rather than the dozens of documents requested. Access to information about Shell’s operations concerning the spills that were crucial to the case was denied. This key element is crucial and perhaps influenced the outcome of the case. The protection of European industries in the heat of grave economic meltdown could be seen as a key determinant of how the industry stands shielded against justice. In this regard, The Hague, while it may not have been influenced by political cleavages like those in Nigeria, has a semblance to the not so independent judicial system in Nigeria for economic protectionism. Pulling out of this case in protest to this initial judgment could have been considered an option, but the litigants kept an apparent blind faith with the system. That there was no protest or legal battle to overturn this denial of access

¹³ Judgment in the jurisdictional question delivered on the 24th February, 2010 is published at: www.rechtspraak.nl as LJN BM1469.

¹⁴ Judgment in the *Lis Pendens* motion of 1st December, 2010 is published at: www.rechtspraak.nl as LJN BU3521.

¹⁵ Judgment in the motion to produce documents of 14th September, 2011 is published at: www.rechtspraak.nl as LJN BU3529. The set of interlocutory judgments of the district court of The Hague have been published under the LJN-numbers BK8616, BM1469, BM1470, BU3521, BU3529, BU3535 en BU3538.



to information is significant, and this might become a change factor in the appeal process currently being considered.

Thirdly, the question of jurisdiction is central in cases involving transnational oil companies. In an attempt to have the case dismissed, Shell Nigeria objected to being tried in The Hague. Just as they contended that they should not be tried in the Netherlands for offences committed in Nigeria, also Shell Dutch pleaded that it should not be tried for offences committed in Nigeria in a Dutch court of law. Both arguments served one purpose, namely to have the case thrown out, having it referred back to Nigeria where both politics and economic considerations would consign it to the dustbins, letting Shell off the hook to continue business as usual.

Thousands of court cases in Nigeria end up at this stage, failing to meet the stringent procedural technicalities shielding the companies. Thus, the historic court decision in The Hague to put Shell on trial is significant and to be applauded.

Outcome of the case

On October 11th, 2012, the court commenced the trial of the case in an open court. The final judgment was delivered on January 30th, 2013, after four years of doing legal battle with Shell.¹⁶

The judgment was rather surprising to the plaintiffs, and drew mixed reactions. While holding Shell Petroleum Development Company Ltd. - the Nigerian subsidiary - liable to Friday Alfred Akpan for its negligence in failing to take reasonable steps to stop a foreseeable sabotage from occurring on their crude oil wellhead (called Christmas tree in local parlance) and spilling onto Friday Alfred Akpan's farmland and fishponds, the court exonerated the parent company, Royal Dutch Shell, from any liability. This was rather surprising in light of the fact that direct and indirect links had been established between the Shell in the Netherlands and Shell in Nigeria being two cooperating firms of one single entity.

Similarly, the claims in the two other cases of Barizaa Manson Tete Dooh of Goi and Fidelis Ayoro Oguru and Alali Efanga of Oruma villages were dismissed. The court had believed the testimony of Shell that the spill resulted from sabotage, and in this way, Shell was able to evade their responsibilities. Some community residents in the Niger Delta disappointed in the claims of Shell, responded by stating that Shell's *"practice of calling a dog a bad name in order to hang it is unfortunate"*. *"How can a community cause sabotage in order to leave its ancestral home, community, communal living and cultural artefacts,"* they queried.

With the outcome of the case seen as unsatisfactory by the plaintiffs, the team involved has gone back to the drawing board to prepare its appeal against some aspects of the judgment.

¹⁶ "Dutch judgments on liability Shell. The Hague, 30-1-2013. Decision on oil spills in Nigeria". Press release by the Netherlands Judiciary available at www.rechtspraak.nl.



The beauty of the case: Setting precedent - Paradigm shift

The court case has set a useful precedent in determining other future cases in relation to jurisdiction. It is a novel and unique case in that it is the first time that Nigerian citizens have succeeded in bringing a multinational corporation before a court of law in its home country for environmental degradation and damages caused in Nigeria.

The case has also set some new legal standards, especially with the declaration and assumption of jurisdiction to hear and determine the case in the first place. This means that aggrieved Nigerians can challenge the actions or inactions of Shell in a court in Netherlands. In a post-victory statement, the ERA/FoEN (2013) said the judgment is 'commendable' for holding Shell liable in a Dutch court. This is because, until now it has been very difficult to bring cases against these companies to court in their home countries, because the legislation on procedures and jurisdiction is often not advanced or properly applied.

That only one farmer won and the others lost is also significant. According to ERA/FoEN Executive Director, Nnimmo Bassey, the judgment is 'groundbreaking' because while failing on substance it was a huge success procedurally. The win for the farmer has set *"a precedent as it will be an important step that multinationals can more easily be made answerable for the damage they do in developing countries. We anticipate other communities will now demand that Shell pay for the assault on their environment"*. Further, ERA/FoEN Director, Godwin Uyi Ojo also commended the court noting that:

It is now time the western countries pass laws compelling companies to enforce the same environmental responsibility standards abroad as at home. Shell's volte face in the face of incontrovertible evidence has again shown the double standards of the oil companies in treating spills incidents in Nigeria differently from their pollution in Europe or North America. We are still optimistic that this landmark judgment will instigate more communities to seek justice (ERA/FoEN, 2013).

Perhaps the real success has been the sidestepping of the controversial *locus standi* which ERA people have been able to escape in Nigeria by seeking refuge in the Dutch courts. Nevertheless, at least in Nigeria, it has set a standard for Shell and perhaps other multinationals engaging in environmental degradation, that questions the protective cloak of claims of sabotage, one that is now coming under scrutiny and may not in all situations exculpate multinationals. The innovative global civil society coalition driving this process have arguably contributed to this success of this case. The combined efforts of the Milieudefensie/Friends of the Earth Netherlands as co-plaintiff with four Niger Delta farmers/fishermen, supported by Environmental Rights Action/Friends of the Earth Nigeria, proved formidable in asking the court in The Hague to hold Shell liable and pay compensation.

In the Shell Nigeria oil spill case in the Netherlands, Nigerian citizens have succeeded in bringing a multinational corporation before a court of law in its home country for environmental degradation and damages caused in Nigeria



The ugly side of the Case: Letting Shell off the hook?

There are strange exhumations from the litigation in The Hague on the powers of big corporations and their influence, even in high-income societies. That the court in The Hague would deny litigating parties access to Shell documents vital to the just determination of the veracity of their claims exposes how much respect the Europeans accord their Freedom of Information Laws.

That in the final judgment the same court used almost the same parameters to reach different conclusions also demands explanation. It is rare in litigation (except for settlement out of court) for opposing parties to rejoice and claim victory by the same judgment. According to a BBC report "*The fact that two opposing sides heard the same judge's decision and yet each are claiming victory, reveals a lot about how much both have to lose*"¹⁷. But this victory was not a win-win situation, as in this case, on substance, the winners are clearly Shell backed by forces not yet in the open.

Rather, it seems feasible to conclude that the economic meltdown of Europe could mean protectionism with all sorts of ramifications, including protection of transnational corporations. Insinuations that Shell has been let off the hook are backed by observations that it was the weakest case that received a positive judgment, while the stronger cases failed to convince the judges. In fact, insinuations of 'some wins', and 'some losses' were in the air in the Netherlands and Nigeria before the judgement was officially read in court.

When all is said and done, the whole question of enforcement of court decisions is vitally important for environmental justice. Perhaps what separates developed countries with near independent judicial system from developing countries are strong institutions to ensure enforcement. In Nigeria, many community members are sceptical about Shell's reactions to the court decision. One commentator said:

*"Given the way Shell wields economic and political power and influence to disdain community and Nigerian law and authority, one is apprehensive if the judgement will be executed to the latter."*¹⁸

All eyes are on the court as it is yet to decide the amount for compensation and the level of environmental remediation and fines based on the magnitude of damage, nuisance and injury suffered. It may turn out that handling Shell with kid-gloves might be counterproductive and result in injustice spurring resource violence if Shell is not compelled to face the full wrath of the law.

¹⁷ BBC News Africa, January 30, 2013. Shell Nigeria case: Court acquits firm on most charges (at http://www.bbc.co.uk/news/world-africa-21258653?print=true#story_continues_2). Last accessed: September 27, 2013.

¹⁸ Interview with community resident, Niger Delta, Benin City, 8 February 2013.



3.1.3 The Kiobel Case: An injustice that would not go away?

In brief, the Kiobel case is an off-shoot of the case featuring Ken SaroWiwa and 8 others versus Shell over their extra-judicial killing by hanging on November 10th, 1995. Saro Wiwa and the other plaintiffs were the principal leaders in the protests against Shell and the Nigerian state over pollution of Ogoni in the Niger Delta. Shell had settled out of court for a paltry USD 15 million compensation and development packages for the victims' families and the Ogonis, on compassionate grounds. Mr Kiobel was hanged along with Ken but his wife Esther Kiobel, now an American citizen, was apparently not satisfied with the out of court settlement and sued Shell over the death of her husband.

The Kiobel case is an off-shoot of the case featuring Ken SaroWiwa and 8 others versus Shell over their extra-judicial killing by hanging in 1995

Her claims hinged on the USA Alien Torts Claims Act of 1789 which provided some exploratory legal scope to seek redress in the US District court. She aimed principally to hold Shell culpable for complicity in the killing of her husband and claims for damages.

The case which started in 2002, in the United States District Court for the Southern District of New York is facing retrial at the US Supreme Court having failed to impress the lower court over its universal civil jurisdiction and applicability of the Alien Torts Act. The lower court dismissed the case in 2006 on grounds that the Alien Torts Act does not apply to corporations but individuals.

So far, at the Supreme Court things are not looking rosy. Professor John Ruggie observed that the process was contradictory and could undermine the case. He stated that "*extra-territoriality was not the issue before the court, corporate liability was*" (Ruggie, 2012). Thus, the Supreme Court has ordered the Parties to re-argue some areas of the case within its 2012 and 2013 terms. Since the case is currently on-going all eyes are on the judicial process in the USA.

The Kiobel Case in the US and the fisherfolk case in the Netherlands: What lessons?

A comparative analysis of the Kiobel Case in the USA and the fisherfolk case in the Netherlands shows some notable similarities and differences. First, court processes in Nigeria, North America and Europe are characteristically time consuming 'uphill battles'. Second, it is perhaps not by accident that both cases are being pursued by NGOs (in the USA by EarthRights, and in the Netherlands by a coalition of NGOs based in Nigeria and Europe) under public interest litigation initiatives rather than through regular national level court cases. Thirdly, both cases involve Shell which shows that there is something the oil company is not doing right. Shell is having to fight many legal battles on many fronts, not only in Nigeria, but in the United Kingdom, the USA and the Netherlands. These cases put mounting pressure on Shell to change its stance toward the environmental impunity being perpetrated in Nigeria. Fourthly, the substantive issues underpinning the various cases are for the most part, matters of environmental pollution and destruction of farmlands, fishponds and other sources of income (yet



only in the Kiobel case did protest against pollution result in the death of activists and thousands of others in the 1990s). Finally, there is the bigger question of whether the resolution of environmental conflicts in Nigeria through lawsuits outside of Nigerian judicial jurisdiction can be considered a type of neo-colonialism ('judicial colonialism').

A comparison of the American and Dutch cases also reveals differences, crucially, in the application of legal instruments, which can have a great bearing on outcomes. The Kiobel case is based on human rights violations requiring proof of damage and quantification of real losses. In contrast, the case of Shell in the Netherlands is based on environmental destruction and damages involving remediation and compensation. This implies both real and anticipatory losses that may not allow exact quantification. While The Alien Torts Act allows non-US citizens to make claims before the courts in the US on human rights violations, the Dutch case was based jointly on the application of Dutch civil codes and Nigerian property law. This marked difference arguably leads to different outcomes in the quest for environmental justice. The global watch and furore over the cases has ignited public debate on the independence of courts, and observers believe that such action has its own impact beyond that of trial. In this sense, the role of civil society groups and environmental groups is critical in exerting pressure on the courts and national governments, particularly in countries with poor human rights records, to be transparent and accountable in ways that do not sacrifice justice on the altar of technicalities.

Arbitration vs. Litigation: Friday Akpan vs. Shell

Arbitration is in some cases favoured by victims and community members as an immediate reprieve for long-suffering victims, but finding balance between interests groups in seeking environmental justice is crucial. Arbitration is a method of settling disputes through an impartial third party or parties called arbitrator(s) rather than through the courts. Arbitration is strictly speaking not classified as Alternative Dispute Resolution (ADR) since most of the features of litigation through the court apply in arbitration proceedings. For example, as with the courts, decisions of arbitrators are generally binding; pleadings are exchanged before arbitrators; and the process of cross-examination of witnesses is applied. In addition, where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons of their choice in a judicial manner, an *arbitration agreement* or a *submission to arbitration* is made. When a dispute has arisen, it goes into a process of *arbitration* and a decision is awarded (Oddiri, 2004).

Arbitration can be effectively used with contracts, employment disputes and compensation claims (Ojukwu and Ojukwu, 2005) in the form of statutory arbitrations and voluntary arbitration by agreement of the concerned parties. In 1999, for the first time in Nigeria, arbitration and other forms of ADR were given constitutional backing as a means of dispute settlement. Specifically, Section 19(d) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 provided



for the settlement of disputes by Arbitration, Mediation, Conciliation, Negotiation and Adjudication, signifying recognition of the crucial role arbitration and other forms of ADR had come to play in the resolution of various types of disputes). In Nigeria, both state and federal laws regulate arbitration. However, the Federal Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004 applies throughout Nigeria to both domestic and international arbitration, and its provisions prevail over any state laws to the extent of any inconsistency (*section 58, Arbitration and Conciliation Act*). States routinely apply the Federal Arbitration and Conciliation Act, which is substantially similar in language to the principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, with minor modifications.

The Arbitration and Conciliation Act (ACA) is the federal procedural law on arbitration in Nigeria and can be likened to the High Court Laws of the various states; except that in the ACA, there is no provision for appealing to a higher arbiter. Thus an arbitral award can only be set aside or refused to be enforced (Oddiri, 2004). All parties to the arbitral process must be treated equally and have a full opportunity of presenting their cases (*section 14, Arbitration and Conciliation Act*). If the parties do not specify in the arbitration agreement the procedure for appointing an arbitrator, the provisions of the Arbitration and Conciliation Act are applied, determining the appointment of arbitrators, the arbitral procedure and, the award, enforcement or setting aside of the award.

Arbitration proceedings are confidential and conducted in private unless the parties agree otherwise (*Article 25.4, Arbitration Rules*) and the award cannot be made public unless both parties agree (*Article 32.5, Arbitration Rules*). However, if the award becomes the subject of enforcement proceedings or an action to set it aside, then a copy must be filed with the court. At that time it becomes part of the court record and is made public.

Advantages of arbitration

Numerous advantages of arbitration over and above litigation have been cited. For instance arbitration is seen to lead to speedier conflict resolution, although there can be exceptions due to the roles of multiple parties, arbitrators, and lawyers, and litigation strategy. Arbitration is also seen as less costly, still there can be exceptions here to due to the factors just mentioned above. Exclusionary rules of evidence do not apply to arbitration, meaning all forms of evidence are valid so long as it is relevant and non-cumulative. Arbitrations are furthermore, not public hearings, so no public record of proceedings is made, and confidentiality is required of the arbitrator. The whole dispute and its resolution can also be subject to confidentiality among the parties, their experts and attorneys if specified by provisions in the arbitration agreement. Additionally, a party may record a *lis pendens* even if there is an arbitration pending by filing a law suit and then holding the case in abeyance until the arbitration is resolved. The arbitration process is seen as less adversarial than litigation, and can therefore help to maintain business relationships between the parties. From the point of view of the



defendant in particular however, arbitration is preferred due to the fact that discovery is limited, controlled by what the parties agree upon and by the arbitrator, and owing to the decreased risk of punitive damages and runaway juries that can be characteristic of litigation.

Disadvantages of arbitration

In contrast to the above, numerous disadvantages of arbitration have also been noted. As mentioned previously, there is, as a rule, no right of appeal in arbitration even if the arbitrator makes a mistake of fact or law (although there are some poorly defined limitations to that rule). Nor is there any right of discovery, unless provided for specifically under the arbitration agreement, or agreed by the parties or arbitrator. The arbitration process may be lengthy and expensive, as it might involve a panel of arbitrators. Also, unless the arbitration agreement specifies the qualifications or the organisation that administers the arbitration has pre-qualified the arbitrator., there can be questions over possible bias of the arbitrator or his /her competence. Moreover, in arbitration there is no jury, which from a claimant's point of view could be a serious drawback. Finally, although an arbitrator may make an award based upon broad principles of 'justice' and 'equity' (and not necessarily on the basis of rule of law or evidence), an arbitration award cannot be used as the basis of a claim for malicious prosecution.

Advantages of lawsuits over arbitration

In addition to the drawbacks of arbitration cited above, there are other factors that might lead to a preference for lawsuits over arbitration. First of all, there is a large body of substantive law and procedure that exists and automatically controls the lawsuit, so the parties don't have to create rules to govern the lawsuit. Second, in a lawsuit, there is significantly less room for bias – the judge must and can be impartial because his/her livelihood is not dependent upon whether any of the parties use that particular judge again in another matter. The judge is not personally affected by the outcome of the case, and the place of the trial, the courthouse, is on neutral territory. Finally, if a litigant is unhappy with a decision of the judge or the jury the possibility of an appeal exists.

Disadvantages of lawsuits over arbitration

On the other hand, few who have been involved in litigation do not have 'war stories' to share that point to some of disadvantages of litigation arbitration. For example, the time that it takes to get to trial, although it has decreased from the five years that it used to take in Nigeria, can still be substantial. Lawsuits can also be characterised by a 'war of paperwork' between lawyers relating to motions on an infinite variety of topics, not to mention the high cost of legal fees in litigating a dispute. There are also a number of factors that can lead to long, drawn out legal processes. For instance, trials may not commence on the date set by the judge if prior cases do not conclude on time, if there is no courtroom available, or crucially, if dissatisfied parties make appeals to a higher court after losing at the trial court



level, or on procedural issues. There is also the very real possibility that the judge may not have any knowledge or experience with the subject matter of the dispute between the parties, meaning that the parties themselves have to educate the judge as to the law and custom and practice.

It is heartening, however, to mention that even though of limited application, arbitration and expert determinations as binding forms of ADR have developed some case-laws in Nigeria as reported in cases of challenges of award or seeking to set aside an award.¹⁹

3.1.4 Role of litigation

The role of litigation in corporate liability and environmental justice struggles is panning out as a formidable route in oil conflict resolution. Losses in litigation, although they tend to be seen as setbacks that produce discouragement, can be seen to elicit strong public responses that condemn the denial of justice. In addition, litigation successes can stir encouragement from the satisfaction that justice has been done. This view is shared by NGOs and communities conducting advocacy on environmental issues. Yet, some obstacles lie in the way of adopting this strategy for justice. In some instances, consideration of a case is not based on its own merit, but on mere grounds of procedure and legal technicalities. The independence of the court as a means of resolving violent resource conflicts can also be in question in some countries, making the idea of approaching the courts in more favourable climes such as Europe more appealing.

There is furthermore, a dichotomy between communities and NGOs in relation to pleadings: while communities tend to focus on environmental compensation, NGOs favour environmental remediation. Experience has shown that if improperly handled, “Power of Attorney” if given by a community to Third Parties, can be used to manipulate the type and emphasis of claims, dealing a fatal blow and scuttling even the strongest of cases. For ERA, having a clear cut understanding with communities at the outset of the cases has proved helpful in eliminating doubts and furthering trust that are necessary in the litigation process.

Going by the examples from ERA/FoEN and Niger Delta communities, public interest litigation has become a bold instrument in a drive for corporate liability and environmental justice at domestic and international levels. This trend is growing and with the recent success in the Netherlands a floodgate of court cases could empty itself onto the doorstep of oil companies bent on impunity. Whether these companies will amend their ways, only time will tell., but surely, a day of reckoning is at hand.

¹⁹ See *Kano State Urban Development Board V. Fanz Construction Company* (1990) 4 NWLR (Pt 142), p. 1, and *.LSDPC V. Adold / Stam Limited* (1994) 7 NWLR (pt. 358), p. 545.

3.2 Other emblematic legal case studies related to oil extraction

As seen in the Niger Delta cases, the last decades have seen the development of important and symbolic court cases against environmental crimes committed. We will review in the following sections one class action penal case in Italy against the petrochemical sector and two important civil law cases, one related to the destruction of the Ecuadorian Amazon Forest by Chevron-Texaco that was brought to US and Ecuadorian Courts, the other related to the BP environmental catastrophe taken to US Courts for manslaughter and environmental destruction, and to the Ecuadorian Constitutional Court under the principle of rights of Nature.

3.2.1 Case study on the petrochemical sector in Italy: The Marghera maxi lawsuit

Not only oil extraction related injustices are subject to the development of new judicial processes. The petrochemical sector, a highly contaminating industry, has also been at the centre of media and judicial attention, as the case related to the Italy's Porto Marghera refinery shows.

The Marghera case involving the oil multinational ENI in fact represents an emblematic example of environmental contamination and health impacts related to the oil sector. At the beginning of the 20th century, Venice, lacking an industrial sector and trading port, could not compete with other more industrialized centres of the Mediterranean, leading to the development of Porto Marghera. After World War II and the destruction it caused, the industrial plants were rebuilt, and in the 1950s Marghera became one of the best known industrial centres in the country, especially for its petrochemical activities. Italy became a 'refinery country' for continental Europe thanks to its logistical port facilities, and Marghera continued to expand its size and production activities during the 1960s, attracting many inhabitants from the old town centre of Venice and from neighbouring municipalities.



Fig. 5
View of Porto Marghera

Source: Abxbay



Marghera, situated in the Venice lagoon, a unique ecosystem, and one of the largest and most valuable areas of salt and brackish water in Europe, sits in a transition zone between land and sea that over the course of time has undergone great transformations at the hands of nature and human beings, and has been further destroyed by industrial and petrochemical activities. In the 1980s-1990s, Marghera became symbolic of the impacts of petrochemical activities both in terms of environment and health, and it has become the subject of a major penal pursuit over health impacts on petrochemical workers.

In 1984, the same year in which the Bhopal accident resulted in the tragic deaths of thousands of people, a strike began in Marghera after two workers were injured in a petrochemical plant. In response, a colleague of the injured, G. Bortolozzo denounced the poor maintenance of the plant and the working conditions where workers were in direct contact with highly inflammable and carcinogenic materials to the Venice court. As Benatelli et al. (2006) show in their book *Laboratorio Marghera tra Venezia e Nord Est*, the dedication of Bortolozzo in gathering proof for over 10 years enabled the publication in 1994 in the *Medicina Democratica* journal of a detailed dossier that would have put Marghera's petrochemical activities in crisis (Bortolozzo, 1994). Questioning the low number of deaths officially registered in company records, he showed that workers' mortality was actually much higher. Investigations revealed that between 1970 and 1980 90 out of 424 workers (20%) handling CVM (vinyl chloride monomer, a highly toxic, flammable, and carcinogenic chemical used to produce PVC), had died or were severely ill with various forms of tumour. While the records varied from one department to another, in the CV6 department where Bortolozzo was working, four out of six people of his co-workers died before 1994.

In the name of the editorial committee of the association *Medicina Democratica*, Bortolozzo asked for a judicial investigation into worker mortality and for the verification of the data provided by Enichem (the merged entity consisting of ENI and Montedison) and Montedison (a major actor of the chemical sector in Italy in the late 1960s). The investigation handled by the Venice General Attorney Felice Casson then started to review workers' health, plant management and environmental contamination.

In 1995, research conducted by Greenpeace inside the plants added to the investigation, confirming elements from Bortolozzo's dossier, documenting lack of worker health protection and of plant maintenance, and identifying numerous incidents of illegal underground dumping and potential groundwater contamination. This lawsuit became one of the biggest investigations of its time into the health of the Venetian lagoon, its territory and inhabitants (Benatelli et al., 2006).

After Casson had built the case, the main actors of the chemical sector in Italy, i.e. Enichem and Montedison, were taken to trial in October 1996 at the Venice Lower Court. In 1998, Casson, then Substitute Procurator of the Venice Court, reached an agreement under which the two companies would provide financial

In the 1980s-1990s, Marghera became symbolic of the impacts of petrochemical activities both in terms of environment and health, now becoming the subject of a major penal pursuit over health impacts on petrochemical workers



compensation of 63 billion Lira – over EUR 32 million - for the 149 workers who died in the previous 30 years and for the 377 sick workers. All but 15 persons accepted the agreement.

The legal process was made possible thanks to the work of Bortolozzo who mobilised over 250 individuals – mainly workers and victims' families. As a result of the investigations it emerged that the companies has been aware of the risks related to CVM/PVC without addressing them. This led to the opening of a second lawsuit against 28 high-level managers from contaminating corporations based in Porto Marghera accused of (among others) mass murder, manslaughter, violation of the physical integrity of 157 dead workers, inciting 103 occupational diseases and pathologies, and concealing official documentation.

The main arguments used by the companies to defend themselves in the lawsuit were based on the continuous past reshuffling of managing companies, and the resultant infinite mechanism of mandates for which responsibilities were so far divided that it had become impossible to identify individual liabilities. Notwithstanding the 120 hearings, hundreds of testimonies and the involvement of 90 experts, those dynamics created serious difficulties in ascertaining individual responsibility. The lawsuit in the lower Court took place between March 1998 and November 2001 and ended with the discharge of all accusations.

The discharge was appealed, and concluded in December 2004 with the conviction of acting Enichem and Montedison managers in the 1960s and the early 1970s for the 1999 death of Tullio Faggian, a worker ill with Hemangiosarcoma. Faggian started working in the petrochemical plant in 1967 in the department most at risk for being directly exposed to aerial CVM concentrations, that evidence showed was above 500 ppm between 1968 and 1974²⁰. Numerous medical records had documented the necessity to send Faggian to another department where he would not be exposed to CVM, but it was not until 1985 that he was transferred to the CV laboratory. Moreover, investigations proved that the company had known the risks and deliberately chose not to inform workers fearing that such news would lead to a stop in production. This led to an extreme situation in which ill workers were kept in the CVM department until their death, despite the fact that transfers had been requested for health issues.

The appeal was confirmed by the Court of Cassation in May 2006: two Montedison ex-administrators, Alberto Grandi and Piergiorio Gatti, the ex-director of the petrochemical sector, Renato Calvi, the ex-vicepresident of Montefibre, Giovanni D'Aminio Monforte and Professor Emilio Bartalini, head of the Montedison Health services between 1965 and 1979 were condemned to imprisonment for a year and a half, although the sentence was suspended. Edison S.p.A. – the new entity resulting from the 1966 merger between Montecatini and

²⁰ The regulation is Directive 2004/37/EC “on the protection of workers from the risk related to exposure to carcinogens or mutagens at work” limiting exposition 3 ppm.



Montedison – had to pay EUR 50,000 to both of Faggian's sons, and EUR 8,000 to each of his brothers and sisters. The window for prosecuting another seven cases of manslaughter and twelve other accusations closed however, as the statute of limitations expired (Corte di Appello di Venezia, 2004). The sentence recognised four main elements of culpability:

- The causality in terms of risks between exposure to CVM and some workers' pathologies such as Hemangiosarcoma;
- The responsibility of company managers to protect workers' health from exposure to toxic substances;
- The responsibility of managers for failing to instal air extractors in work places;
- The responsibility of managers for violations of environmental regulations for dumping in the lagoon area up to 1996 (Benatelli et al., 2006).

The statute of limitations on the latter point above also expired, but the courts did recognise that both Montedison and Enichem managers had put public health at risk, in particular by causing water and clam contamination (Raccanelli, Guerzoni, 2003).

The general procurator of the Venice Court, Fortuna also recognised the importance of the lawsuit, stating that *"merits need to be given to Casson for having put in place such a maxi lawsuit, a unique case that tackles the right to health of workers and the duty of companies to protect workers' health (...). These sentences are representative of the crisis of the old production model and they stated the principle that who is in charge must act to protect the security of the collective when a disaster is predictable"* (Benatelli et al., 2006: 17).

At the centre of this legal case lay the protection of human health and the environment as fundamental, and the application of the precaution principle. Casson based his accusations on the violation of article 437 of the penal code on 'intentional omission of precaution' and other civil law which obliges the employer to eliminate the risk of workers' exposition to toxic substances. Casson argued that managers from Montedison and Enichem should have reduced the risks from the start of their petrochemical activities in the 1950s. Moreover, the Cassation Court acknowledged Substitute Procurator Passacantando's thesis on the predictability of worker pathologies.

While the lower court had absolved the defendants because the crimes at stake were declared impossible to prove, the appeal court recognised the crimes committed, even though the long duration of the trial put most sentences in prescription, except for one of manslaughter (Bettin, 2004). Still, this has been an important sentence that advanced core environmental law principles. It established the precautionary principle not only as a cultural value but as legal duty for which those who breach precautionary norms and do not adopt protection measures need to take responsibility. The claimants developed their accusations

Those in charge must act to protect security:

Two Montedison ex-administrators, the ex-director of the petrochemical sector, the ex-vicepresident of Montefibre, and the head of the Montedison Health services between 1965 and 1979 were condemned to imprisonment for a year and a half

connecting the issues of contamination with health, environment and work conditions. The court recognised the legitimacy of citizens, associations and public authorities' to claim justice (there were 507 plaintiffs in the class action) and pursued penalties for the corporations and their managers for environmental crimes that they were responsible for. It is of special importance that not only the companies, but also individual managers were held responsible and sentenced to jail.

3.2.2 Chevron-Texaco in the Northern Ecuador Amazon

The Northern Ecuadorian Amazon is one of the World's richest biodiversity hotspots, and heavily damaged by oil activities. Cumulative research from health, environmental and legal experts (Beristain et al., 2009, Fajardo, Heredia, 2009, Hurtig, San Sebastian, 2005) has shown that over 2,000,000 ha have been deforested and massive groundwater, river, estuaries and soil contamination has been caused. In 2009, Beristain et al. reported a level of child malnutrition of 43%, significantly higher than in similar areas where no oil activity was reported (21,5%), an infant mortality rate of 143 deaths for every 1000 births, a rate of cancer as cause of death at 32%, three times higher than national average of 12%, a miscarriage rate two and a half times higher than in similar communities not exposed to oil contamination, deaths of animals related to the absorption of water contaminated with crude oil or to asphyxiation by gas, the use of contaminated water by 75% of the population studied, and violations of human rights in forms of sexual violence, discrimination, loss of lands, forced displacement, and cultural loss (Beristain et al., 2009).

As the data collected by Universitat Rovira i Virgili's legal team for Ejolt Report 4 *Legal avenues for EJOs to claim environmental liability* shows, Texaco – at the time Texaco-Gulf, now Chevron-Texaco – operated in the Ecuadorian Amazon region between 1965 and 1992, starting from an original concession of 1,500,000 ha, restricted to 491,355 ha in 1973 which were operated by its Ecuadorian subsidiary TexPet (Pigrau et al., 2012). During this period, the company drilled 339 wells in 15 oil fields, abandoned 627 wastewater pits and used outdated and contaminating technologies. Over 26 years of exploitation, the company extracted



Fig. 6

Oil contamination in the Ecuadorian Amazon

Source: www.chevrontoxico.com



over 1.5 billion barrels of crude oil, dumped 19 billion gallons of production water, burnt 2 million m³ of gas/day and during the period it operated the trans-Ecuadorian pipeline, 16.8 million gallons of crude were spilled. 235 Texaco's wells are now operated by PetroEcuador. Acción Ecológica, an EJO and EJOLT partner, has reported the current dumping of 5 million gallons of production water and the flaring of 10 million cubic feet of gas per day (Acción Ecológica, 2003).

The long-suffering local population of indigenous people and small farmers, living with the impacts of oil extraction for decades became organised to defend their rights. The famous class action against Texaco – the *Aguinda vs. Texaco* case – involved over 30,000 inhabitants from the Oriente region represented by the organisation *Frente de Defensa de la Amazonia* – the Amazon Defence Coalition. The lawsuit, led by the Ecuadorian lawyer Pablo Fajardo, was started in 1993 in the New York Federal Court under the ACTA, the Alien Tort Claims Act, which establishes the jurisdiction of district courts for proceeding with any civil action for torts, and crucially, allows U.S. Courts to receive human rights lawsuits for torts committed abroad by U.S. corporations.

The initial claims denounced the destruction of rivers and forests on 14,000 square kilometres and asserted the liability of TexPet, directed and controlled by Texaco from the USA. Claimants demanded that Texaco redress environmental and water contamination, restore the access of the population to drinkable water, reintroduce fish and birds, and fund medical care and operations needed to implement previous measures. The lawsuit in the U.S. was obstructed by Texaco's defence, who called for *forum non conveniens* through a motion of inadmissibility, slowing the trial significantly. The Court decided in 2002 that if the case would not be judged in the U.S. it had to be pursued in Ecuador (Pigrau et al, 2012). In response the company made agreements with Petroecuador and the national government to initiate clean-up measures in Ecuador, even though these were insufficient and not adequately implemented (Acción Ecológica, 2003).

In 2003, the class action against Texaco was brought to the Provincial Court of Sucumbios in Nueva Loja (also called Lago Agrio), Ecuador, in the area of contamination at the centre of the trial. Claimants denounced the environmental contamination of over 500,000 ha produced by Texaco that had caused cancer and health impediments. Under the framework of Ecuadorian civil action and environmental management law, they claimed repair for the environmental damages and sought actions for the elimination of contaminating elements, for the treatment and disposal of waste, for the clean up of water, the removal of machinery and structural elements left behind, and for soil and building clean-up.

The lawsuit was also characterised by procedural incidents created by Texaco. It was not until February 2011 that Judge Ortiz finally published a decision in favour of claimants, condemning Chevron-Texaco to a USD 8.6 billion fine, to be doubled if they did not express public apologies to claimants, plus 10% of the total fine to create a trust administrated by the Amazon Defence Coalition (Pigrau et al., 2012). Of the total amount, USD 6.196 billion were earmarked for restoration

Over 26 years of exploitation, the company extracted over 1.5 billion barrels of crude oil, dumped 19 billion gallons of production water, burnt 2 million m³ of gas/day and 16.8 million gallons of crude were spilled



actions, USD 846.6 million for compensatory actions – plus a potential USD 8.646 billion compensation if Texaco did not apologise publicly, and USD 2.450 billion for mitigation actions.

Evaluated item		Amount (USD million)
Restoration	Clean up soil	5,396
	Recuperation fauna/flora/aquatic life	200
	Clean up subterranean waters	600
Compensation	Amazon Defence Coalition trust	864.6
	Apologies, if not pronounced	8,646
Mitigation	System for potable water	150
	Health system	1,400
	Community centre for reconstruction and ethnic reaffirmation	100

Table 2

Economic evaluation of damage in Ecuadorian Chevron-Texaco case

Source: A.A.V.V., 2011

As the ChevronTexaco campaign documents, Chevron has still managed to evade the sentence, despite its confirmation by the appeal court in January 2012. According to shareholder sources, over USD 1 billion has been invested in fighting this legal battle over the last 20 years (Ximénez De Sandoval, 2011). The company is now hoping for the nullification of the Lago Agrio sentence at the Hague's Permanent Court of Arbitration, while various forms of persecution against the Ecuadorian lawyers of the class action's plaintiffs can be reported. The powerful multinational in the face of such an important sentence has also reportedly engaged in spying on lawyers in Ecuador and in the USA, with surveillance, threats, and computer and email hacking also reported (A.A.V.V., 2012).

Refusing to accept the outcomes of the lawsuit, Chevron-Texaco launched numerous legal actions aiming to reverse the sentence, and withdrew its assets from Ecuador. Meanwhile, other countries where Chevron operates (notably Brazil, Argentina and Canada) have seen further lawsuits demanding the freezing of Chevron's assets. This was the case in Argentina, where an embargo on Chevron's assets there was put in place as of January 2013. This decision was criticised however by the YPF – *Yacimientos Petrolíferos Fiscales* - a recently re-nationalised Argentinian oil company, for threatening its agreement with Chevron-Texaco on the Neuquen extraction project (Aranda, 2013), and in June 2013, The Supreme Court of Argentina withdrew the embargo on Chevron assets despite the plaintiffs' legal team pointing out that legal action for the compliance of the Ecuadorian sentence against Chevron was still taking place in both Argentina and Canada (Observatorio Petrolero Sur, 2013).

Certainly, the liabilities at stake in this lawsuit made this a historical trial. The fine handed down was significant in terms of its size, but also because it showed recognition that had repeatedly used the same system of operation to contaminate the area of interest. Judge Zambrano, who defined environmental damage as “any

and all loss, diminishment, detriment, harm, damage, caused or inflicted upon the environment or any of its natural or cultural components”, reported that 16 billion gallons of polluted water had been dumped, contaminating water for human consumption and subterranean water and thus putting at risk the health and life of the local people and the integrity of the ecosystems. The sentence recognised that the Chevron model of oil exploitation is based on the externalisation of environmental and social costs. Not only does the sentence underline the material effects of oil exploitation but also the cultural impacts on indigenous communities due to forced displacement, land and river contamination, and diminution of species.

The ruling also highlights the causality between the negligence of risk and the externalisation of negative impacts – population exposure - and the effects on public health and cultural degradation. In this way, the sentence contributed to the enforcement of the precautionary principle in the judicial system. Formidable efforts were made to evaluate different costs – mitigation, restoration, compensation - involving hundreds of experts. The sentence found that the contamination was attributable to Chevron oil activities and, as abusive dumping practices were admitted by TexPet, those threatened by such contingent damages could not remain passive, especially as dumping could have been avoided with the use of other technologies available at that time. TexPet and Chevron-Texaco did not take full responsibility for the activities for which they were accountable, meaning that local inhabitants had a clear and legitimate claim for justice for the damage suffered (Pigrau et al, 2012). Of interest too is the doubling of the penalty in the case of non-excuse. This part of the sentence acknowledges of the value of the dignity of the people affected, and the need to restore this dignity (just as importantly the spoilt environment requires remediation) by means of an apology.

Fig. 7

Lago Agrio Court of Justice

Source:

www.chevroninecuador.com



3.2.3 BP Deepwater Horizon

On April 20th, 2010, the Deepwater Horizon oil rig exploded offshore in the Gulf of Mexico, close to the Mississippi River Delta, causing the largest marine oil spill in history and the deaths of 11 workers. The explosion happened in the Mississippi Canyon Block 252 in the Macondo field, owned by Transocean. The oil rig had been built by Hyundai Heavy Industries and was under lease to BP until September 2013 for deep well drilling operations. In August 2010, the New York Times published a dossier based on government data reconstructing the catastrophe and monitoring the damages it provoked. It reported an estimated spill of 4.9 million barrels of which only 800,000 barrels (17%) were captured. Of the remaining 4.1 million barrels, 1.3 million (26%) were still onshore as tar balls, buried under sand or floating on the ocean's surface (AA. VV., 2010). The environmental impacts were exacerbated by the use of dispersants and other chemicals in the clean-up that caused deformities of marine life in subsequent years. Only on July 15th was the leaking well successfully capped, with the well declared officially closed in September 2010.

The New Orleans case

Hundreds of lawsuits against the companies involved have been registered since the accident. In August 2010, the US Judicial Panel on Multidistrict Litigation consolidated 77 lawsuits initiated by individuals, groups of citizens and businesses for economic loss, environmental damage, wrongful death and personal injury to be tried in the U.S. District Court of the Eastern District of Louisiana, New Orleans presided by Judge Barbier. The first hearings saw complaints for personal injuries and death, private and individual business loss, economic loss for livelihood, clean-up, public damages, chemical exposure and property damage, injunctive and regulatory actions. After these hearings it was decided plaintiffs could file 'master' complaints until December 2010. By that time, three master complaints were presented, one on private economic loss and property damage, one on chemical exposure and property damage and one on injunctive and regulatory claims against private parties involved in the accident (Eastern District Court of Louisiana, 2013).



Fig. 8

March against BP in New Orleans

Source: Infoqmatron



In March 2012, a few days before the trial should have started, BP announced it had agreed with plaintiffs to pay USD 7.8 billion to settle claims for economic loss, property damage and injuries (Business and Human Rights, 2013) while in the previous December the company declared a profit on replacement costs of over USD 11 billion dollars (BP, 2012). In a U.S. regulatory filing in February 2013, BP increased its estimate of claims to USD 8.5 billion and afterwards declared it could not predict by how much the settlement cost could increase (Cronin Fisk et al., 2013). The claims information webpage in the BP website showed meanwhile that BP payments for individual and business claims had reached over USD 9.5 billion dollars (BP, 2013).

Among the many other charges, BP pleaded guilty to felony charges of obstruction of Congress, to 'seaman's manslaughter' for the death of eleven workers, and to two misdemeanour counts of negligent conduct under the Clean Water Act and Migratory Bird Treaty Act. Judge Vance approved agreements including USD\$ 4 billion in penalties and fines. Criminal charges against two BP managers for involuntary manslaughter, seaman's manslaughter, Clean Water Act violations and against BP executive D. Rainey for withholding information from Congress on the amount of oil spilled are still pending (Todd, 2013).

Defending Nature's Rights

If the US justice system is to progress in getting BP and other companies responsible for the Deep Water Horizon accident to pay for damages in monetary terms, efforts to hold BP responsible in the South offer a source of legal innovation. A group of international activists representing 6 countries have called BP in a lawsuit to protect Nature rights, in particular for the defence of the rights of sea, protected under the Constitution of Ecuador. Among the claimants are Vandana Shiva, Blanca Chancoso, Nnimmo Bassey and Esperanza Martinez, as the legal representatives of the group (A.A.V.V. 2010). The lawsuit request presented in November 2010 at the Constitutional Court of Ecuador, was admitted in July 2012 by the Second Labour Court of Pichincha in Quito and is still pending for trial, but promises to add a new ethics of justice to interesting perspective to what could be one of the most advanced trials against Big Oil.

In 2010, the US Judicial Panel on Multidistrict Litigation consolidated 77 lawsuits for economic loss, environmental damage, wrongful death and personal injury to be tried in the U.S. District Court of the Eastern District of Louisiana

Fig. 9

Plaintiffs of the legal case against BP in Ecuador

Source: www.accionecologica.org





A group of international activists representing 6 countries have called BP in a lawsuit to protect Nature rights, in particular for the defence of the rights of sea, protected under the Constitution of Ecuador

At the basis of the claim, the plaintiffs underline that BP must be held responsible for its lack of respect for environmental regulations, prevention measures and an adequate spill plan, for its chaotic efforts to stop and clean-up the spill and the inappropriate use of a highly dangerous dispersant, Corexit, which is in some ways is more contaminating than the crude itself; and for the impact on the marine life both in the short and in the long term. They call for the recognition of the global impacts of oil spills to ecosystems in every one of the countries of which plaintiffs are nationals, referring to the Ecuadorian constitutional principle of universal jurisdiction to carry out recognition of Pachamama – Mother Earth (article 277 on the duty to guarantee the rights of nature; article 389 on the duty to protect nature from negative effects of anthropogenic disasters; and article 397-2 on the duty to establish effective mechanisms for prevention and control of environmental pollution, recovery of degraded areas and sustainable management of natural resources).

In detail, the plaintiffs' legal arguments refer to:

- the Constitution's preamble that celebrates Pachamama and established it as a pact for building *Sumak Kawsay* – *Buen vivir*, or living well;
- Article 275 establishing Sumak Kawsay as the principle that “all persons, communities, peoples and nationalities can effectively enjoy their rights and exercise their responsibilities in a framework of inter-culturalism, respect for diversity, and harmonious coexistence with nature”;
- Article 71 establishing rights of nature as an “integral respect of its existence”, as “maintenance and regeneration of its cycles, structure functions and evolutionary processes”, as a right for “restoration” and as the ability of all persons to demand the fulfilment of these rights;
- Article 318 establishing water as “vital element for nature”;
- Article 424 stipulating that ratified international human right treaties recognising rights more favourable to the content of the Ecuadorian Constitution shall prevail on any other norms;
- Article 426 establishing that the rights in the Constitution and international human rights instruments can be directly applied in the country without the need to transfer international jurisdiction in domestic law.

The innovation of this pursuit is not only in its reference to the new legal principles characterising the Ecuadorian Constitution, but in the nature of claimants' requests for justice directed at BP and national governments. With regard to BP, they organised their requests around four main issues – information, restoration, compensation and non-recurrence – providing a new dimension in procedural justice closest to the principles of environmental justice mentioned in the introduction of this report. Claimants require the company to provide all information regarding the composition, amount and means of application of all dispersants and other products and technologies used during the emergency; on the events prior to disaster that could provide proof of facts which would have



caused sufficient doubt about the safety of the operation making it necessary to stop the exploration; the environmental impacts caused and the list of scientific institutions and scientists who have been commissioned with research in relation the disaster; the eventual disaster management plan or strategy implemented; the lobbying strategy used to obtain an operating licence; and the company's plans for the long term monitoring of the evolution of impacts.

Both restoration and compensation claims are particularly interesting and challenging and they represent in this judicial process the work of EJOs which for decades have articulated demands for actions like oil moratoria and keeping the oil in the ground, including proposals for a transition towards post-extractive regimes. For the plaintiffs, justice would be done if BP would integrate effective measures to protect the rights of nature, starting by abstaining from pursuing deep water exploration in particular in the Macondo field, and shifting from using chemical substances to disperse spills (making them less visible and more toxic) to using mechanical or manual technologies. As compensation they ask BP to leave underground the same amount that has been spilled, and to redirect investment in the original plan for further exploration activities towards non-extraction actions.

Finally, the plaintiffs have tried to tackle the root problems in the application of justice – aiming to guarantee preventive action to avoid similar situations occurring again. In that sense, they ask BP to include in its corporate social responsibility activities the application of a moratorium on deep-water oil exploration to be developed by civil society, governments and other oil companies, to start closing marine extraction activities and to repair the marine environment damage inflicted thus far. They also ask for other normative and programming related actions - BP should for instance abstain from lobbying legislative bodies in operating countries so as to weaken environmental and administrative law and control practices, and from formulating management plans, contingency plans and environmental studies that do not fully and fairly represent and evaluate all dimensions of risk.

The claimants finally request the Federal government of the United States of America to resume the moratorium on oil exploitation in the Gulf of Mexico, which represents about a quarter of US oil production. They also ask all governments to include the issue of the recognition of the rights of nature and the sea into the debate on climate change, biodiversity and development and to gradually implement the elimination of the causes of negative impacts on the sea and nature. Far from any other trial before, this request for justice puts at its centre not a person or a community, but the recognition of nature and its elements, in this case the sea, as a subject of rights. This new subject cannot represent itself and justice can only be done by recognising and respecting its rights and protecting nature elements' resilience. The question is now how the judicial system, even in a country with an advanced Constitutions such as Ecuador, will answer those requests and implement sentencing. Whatever the judicial outcomes, the legal case itself will surely represent an important step towards cultural change as the first international case calling for the application of the rights of nature.

The plaintiffs organised their requests around four main issues - information, restoration, compensation and non-recurrence, providing a new dimension in procedural justice closest to the principles of environmental justice



4

Conclusions: Questioning corporation accountability

4.1 From Corporate Social Responsibility to cost-shifting

As we have seen in the case studies, approaches to hold corporations liable can be highly diverse depending on the stakeholders' perspectives. Representing here the voice of EJOs, our approach to holding corporations accountable looks at such questions through a lens of environmental justice related theories and claims. Corporate Social Responsibility (CSR), through a historical process of social mobilisation and claims, has emerged as a form of 'voluntary' self-regulation of companies through policies and actions that shape engagement with citizens over the social and environmental impacts provoked by their activities (CEECEC, 2010). But as the increased use of procedural justice to tackle corporate liabilities demonstrates, CSR is increasingly being revealed as a system of monitoring and reporting processes in which pertinence, reliability and completeness are not only elusive but may vary from one company to another. CSR might also invoke greenwashing practices, permitting corporations to hide the maintenance of 'business as usual' practices behind a smokescreen of apparently strong company policies (Clapp, 2008).

When looking at corporate liabilities, the concept of 'corporate accountability' seems more adequate to achieving environmental justice. As Friends of the Earth International - who brought the concept onto the international agenda at the World Summit on Sustainable Development in Johannesburg 2002 - specified in its briefing of 2005, corporate accountability would require that those affected by a given company could have a role to play in the control of such company's



operations, challenging the existing legal framework in which companies still operate with a very low level of social and environmental responsibility (FoEI, 2005). A significant example comes from the lawsuit brought in Ecuador against BP for the Deepwater Horizon disaster, which demands clear and concrete corporate policies and actions. Implementing concrete corporate accountability measures would mean recognition of not only the financial but also the social and environmental duties of corporate directors and management boards, to implement the right of communities to be involved in decision processes affecting the management of their territory, and to achieve justice when those duties are not respected (CEECEC, 2010).

In analysing the context in which corporate liability claims are made, some ecological economists have provided environmental justice activists with important tools. Particularly interesting is the concept of cost shifting. Already in the 1950s Karl William Kapp (1950) had recognised that social and environmental damages are not a market failure, but a business success, shifting costs to rest upon society at large. Rodriguez-Labajos and Martínez Alier (2012) build on this analysis, criticising the dominant perspective in neoclassical economics that social and environmental impacts produced by corporations can be adequately dealt with by integrating those costs into pricing systems. 'Getting prices right' cannot address the complex dynamics rooted in the dominant development model that produce social and environmental damages. A core element of Martínez Alier's argumentation draws on Kapp's analysis that by shifting part of the costs of production to third persons or to a community, companies guarantee continuous profits. Implementing strict policies of environmental and human rights protection - in terms of precaution, prevention and reparation - would most probably jeopardise contaminating industrial activities. From this point of view, the so-called externalities should not also be seen as cost-shifting successes, but also as failures of the political process.

It has to be highlighted here that no real progress towards environmentally just behaviour within corporate practices will be realised without external intervention. Justice depends on the political will of local and national governments and international governmental organisations which, driven by social or ethical concerns and/or pushed or supported by EJOs and their bottom-up actions for environmental justice, could implement a systemic process of change. As the General Procurator of the Venice Court Fortuna said referring to local authorities' responsibilities in the Marghera case *"even local authorities, now plaintiffs, should ask themselves what they have really done to protect public health"* (Benatelli et al., 2006: 16).

4.2 General trends

The lawsuits reviewed in this report are mainly transnational civil lawsuits and national penal and civil lawsuits investigating the liabilities of private sector oil companies in terms of environmental contamination, related impacts in particular on workers and local communities' health, and the causes leading to the

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Among the main trends, we note the high number of class actions by new actors demanding the implementation of environmental rights - citizens, associations, communities, local authorities - using various old and new legal tools and principles

contamination, such as a lack of proper planning and monitoring or deficient protection and security measures. Among the main trends, we note the high number of class actions by new actors demanding the implementation of environmental rights - citizens, associations, communities, local authorities - using various old and new legal tools and principles. Whether civil lawsuit outcomes can be resolved with monetary or penal lawsuits sometimes with sentences (the latter of which would lead to prison sentences for individuals, even heads or managers of corporations where personal responsibility can be proven) however, there is the risk that the application of sentencing might never be reached. Companies will probably try to escape sentencing as Shell has done, mobilising all legal means possible to avoid the Lago Agrio sentence.

In other cases, the limits of procedural justice can be counted upon, as in the case for the Montedison managers who never went to jail because their sentences were suspended. Another important dynamic is found in the internationalisation of procedural justice, as seen in the case against BP, whereby companies can be tried in a third country, one that is neither the company's country of origin nor the country where the tort has been committed. This specific case shows how, after a first shift towards legal collective actions, the justice system - and the requests emerging from environmental justice organisations and communities - is becoming globalised, and in the context of environmental crime, being sought through the protection of nature rights.

In all the cases reviewed here, environmental damage is related to the non-application of existing norms. Moreover, the highly technical and specific profiles of each lawsuit has defined the use of procedures, procedures that might not always enable legal representatives of EJOs to tackle environmental crime in its widest sense. For example, the impact of contamination on people might be addressed but not related such as the falsification of documents, the non respect of compulsory procedure, corruption, etc.

The outcomes of current lawsuits related to environmental damages (recognised or not) are also limited by the fact that their punitive action has little preventive impact. An open question remains over how procedural justice can play a role in encouraging preventive behaviours related to the respect of the environment and local communities. From the perspective of the demands of plaintiffs in the Shell and BP cases, there is a need for legal and institutional strategies that require companies to review their corporate policies, including those related to contingency plans, environmental evaluations, and transparency mechanisms. In this sense, the novelty brought by the BP case in Ecuador is the very political – and innovative - essence of plaintiffs demands, including a US moratorium on oil exploitation in the Gulf of Mexico and the integration Rights of Nature rights in world's governments' agendas.



4.2.1 Economic valuations

Economic valuation an important tool for evaluating corporate liability for environmental destruction. Although economic valuation is mainly used in procedural justice, its use could be adapted for use as a preventive, negotiation or judicial tool for EJOs. Rodriguez-Labajos and Martinez Alier (2012) for example, show how the monetary valuation of ecosystem services can be used as a tool for conservation (although it can have counterproductive effects in other cases), for economic valuation of ecosystems, for monetisation of environmental liabilities in court and for the valuation (and to give greater visibility to) of biodiversity loss.

Different methods of evaluation have in fact been used for campaigning and making demands for procedural justice. For example, in 2003, the Ecuadorian organisation Acción Ecológica presented an economic valuation of Chevron-Texaco's debt to the country and its inhabitants in its campaign on ecological debt. They took into account indicators such as the costs of restoration and health treatments and compensation for genocide and integrated new indicators such as the market value of spilled oil and flared gas, the valuation of biodiversity loss and natural resources like water, sand, and wood, the valorisation of underpaid work, the profits made on the back of the country's debt, and the emissions produced. With all of these factors considered, the total amount of Texaco's debt to the country was calculated to be over USD 700 billion (Acción Ecológica, 2003), an apparently enormous cost, but plausible once every kind of damage and opportunity cost is accounted for, in particular taking long term effects into account. Interestingly, a recent business study published by the Sustainable Investments Institute (DeSimone, 2012), an independent research institute directed at investors, reported that corporate liabilities for destruction in the Niger Delta related to oil spills was estimated at between USD16 to 51 billion, without taking into account the punitive costs.

Table 3
Estimates of corporate liabilities of Shell, ExxonMobil, Total, Chevron and ENI for Niger Delta oil spills

Source: DeSimone, 2012

Item	Shell	ExxonMobil	Total	Chevron	ENI
Revenues (USD billion)	470.2	467	166.6	244.4	110.5
Net income (USD billion)	31.2	42.2	12.4	26.3	7.8
Global production (million bbl/d)	1.173	4.506	2.346	2.673	1.523
Nigeria Oil and Gas Production (bbl/d)	384,000	350,000	287,000	260,000	154,000
Global oil spill volume (barrels)	41,300	18,000	11,032	12,139	22,571
Nigeria Oil Spill (barrels)	21,000	ND	ND	ND	ND
Drilling in Nigeria since (year)	1936	1955	1962	1963	1962
Potential liabilities, Nigeria (USD billion)	4-13	3-7	2-5	2-6	1-3
Potential liabilities, Nigeria (% of net income)	13-42	7-17	16-41	7-22	13-38



Although economic valuation is mainly used in procedural justice, its use could be adapted for use as a preventive, negotiation or judicial tool for EJOs

As **Table 3** shows, in addition to the relation between oil spill liability estimates and the net incomes of the five main oil companies operating in the Niger Delta, the Sustainable Investments Institute only looked at oil spill liabilities in terms of cleanup, remediation and compensation costs, a partial estimation exercise aimed at informing investors interested in the Delta Niger (DeSimone, 2012). This author based his calculations on estimates of total spill amounts over the last 50 years for which he underlines the lack of reliable data. Cross checking with data from the IUCN, UNDP, SPDC and the analysis by Nwilo and Bodejo, he estimates over 1 million tons of crude lost in 12,267 spills. DeSimone then applies this estimate to different valuation methods, mainly a model to determine per-unit clean-up costs of spills developed by Schmidt Etkin based on the valuation of influential factors like geography, proximity to shoreline and ecological sensitive areas, oil type, cleanup strategy required and overall spill amount. Initial partial results show a total of USD 16 billion that DeSimone further reviews with the method of the Basic Oil Spill Cost Estimation Model (BOSCEM) developed by the U.S. Environmental Protection Agency and comes up with a calculation of a total of USD 51.2 billion. He uses results from UNEP (2011) extrapolating to the all the Delta Niger area, for investments for the next 30 years to arrive to an estimate of USD 42 billion.

Using the range of USD 16 - 51 billion, DeSimone divides the total amount of accounted for liabilities among the five main oil multinationals in Nigeria, and compares it to their revenue, net income, global and Nigerian production, and global and Nigerian oil spill volume in the first year of activity. Underlining the partiality of the results, the authors also define some categories of costs to be taken into account: spill damage assessment, monitoring and health response, compensation to communities for destroying livelihoods and environmental resources, fines, legal and other costs related to defending or settling lawsuits, impacts on company reputation, improvement of environmental management, and damage solutions and risks limitation.

UNEP (2011) estimated the potential cost for the restoration of Ogoniland only (one among the most affected areas of the Niger Delta), accounting for emergency measures, drinkable water, clean-up operations, land contamination, benzene and MTBE contamination, sediments, restoration of artisanal refining sites, restoration and rehabilitation of mangroves, and surveillance and monitoring, the Ogoniland restoration authority operating expenses, the creation of a Centre for excellence in restoration, alternative employment initiatives for those engaged in artisanal refining, costs of third party verification and international expert support for recommendations' implementation. This amounted to over USD 1 billion to be funded by companies operating in the area and by the government as part of an initial five year plan to be extended at least for the next 25-30 years (see **Table 1**). These outcomes, even if partial, give an idea of the possible scope of environmental liabilities as seen by both institutional and business actors. If DeSimone aims to give some partial indications to potential oil investors, UNEP data could usefully bolster community empowerment in institutional or judicial contexts.



The Chevron-Texaco case in Ecuador also provides an example of detailed economic valuation of damages in an environmental conflict brought to court by a class action claiming restoration, mitigation and compensation (A.A. V.V., 2011).

The payment requested from Chevron-Texaco of USD 9.5 billion (**Table 2**), plus an eventual USD 8.6 billion if they do not apologise for the damage done, represents about 58% of its 2011 net income. If we add this to what it should pay (as estimated in **Table 3**), for damage done in the Niger Delta – assumed at 15% of its 2011 net income – Chevron would have a residual net income in 2011 of 27%, or about USD 7.1 billion. If the social, environmental, health and community value damages are taken into account, the size of the payments requested in the Ecuadorian lawsuit do not appear as disproportionate as the company claims. But even in this most advanced case, the objective of achieving environmental justice is limited by the procedural system, as it has been so far impossible to enforce payments that could act as a deterrent to future damages. Here we face a limitation in terms of sentence implementation in addition to the challenge of economic valuation, which involves calculating the worth of not only economic losses, but of all the many goods and values (lives, sacred land, etc.) which are not and / or should not be treated as commodities to be valued and compensated for.

While in many cases economic valuation can be useful, it necessarily remains limited in its scope and thus insufficient for making good for damage done, in particular because it cannot address the incommensurable dimension of impacts provoked by contaminating activities (Martinez-Alier et al., 1998). Beyond monetary compensation, environmental justice calls for the establishment and legal and administrative enforcement of a new ethic recognising a plurality of values, and to see beyond anthropocentrism.

4.3 Advancing environmental justice through procedural justice

4.3.1 Environmental crimes

Social mobilisation for environmental justice and the increased number and visibility of lawsuits related to environmental criticality have enhanced the attention paid to health and contamination problems, and the concept of environmental crime. Environmental crime is generally understood as any illegal act impacting on the environment, but what is illegal is defined by the legal system, and much improvement will be needed to cover all relevant acts of industrial contamination by prohibitive legislation. When environmental crimes are called to be viewed as a crime against humanity it means that damage done to the environment that has destructive impacts on human life should be considered not only as a tort but as a crime. As stated by the General Procurator of the Venice Court Fortuna, *“the birth of petrochemical activities in the lagoon is now revealed as a crime against humanity”* (Benatelli et al., 2006).



The Marghera example illustrated two main elements of justice provided by the penal justice system: the possibility to sentence physical persons for their responsibilities as representatives of their companies (provided that national legislation allows for that, as in Italy), and the ascription of the causal nexus between contamination and its effects in terms of risks (a major progress as elsewhere the main obstacle for recognising occupational diseases is the request of a causal proof). As penal justice can act on individual liabilities, it can be seen as a tool to influence the world of corporate management. Stressing the individual liabilities of managers could more effectively contribute to a progressive prevention of environmental crimes than the levying of large financial penalties at companies. In the last few years, almost all managers have insurances against the effects of professional misconduct.

4.3.2 Precautionary principle

The concept of the precautionary principle is based on the understanding that, in case of scientific uncertainty regarding the hazard of an element or a technology, preventive measures shall prevail (CEECEC, 2010). This principle is central not only to procedural justice but to environmental justice more broadly. It should be the founding principle of every development and management plan of decision makers and corporations alike, to be concretely applied and not only written on paper.

As the health related Marghera legal case shows, the precautionary principle allows the substitution of demand for a proven causal relation between contamination and its human health effects, for demonstration that the risks known to the culprit were ignored, in favour of a decision to expose others to the known potential injury. As the Venice General Attorney Felice Casson declared in court: *“we need to start from the precautionary principle which is not a merely cultural value but a legal duty that implies that, in case of doubt in regards with hazard, businessmen shall adopt security measures until the risk has been cleared. (...) Who violates the precautionary norm and does not implement protection measures, even for a single worker, shall bear the responsibility for the consequences even if they have been unplanned”* (Benatelli et al., 2006: 26-27). We see here, how a concept that should be applied upstream in company practices is then used in a lawsuit.

In the lawsuit against Chevron-Texaco, judge Zambrano addressed the issue of private profits made on the reduced costs of oil extraction. After recognising that any damage occurred corresponds to a risk taken, he added that strict liability should be applied as the company had derived benefits from the wrong done.

In this sense, we might hypothesise that when profit is involved, economic power tends to dominate normative power, making the effective implementation of the precautionary principle impossible. And so, with all its limitations, procedural justice offers a way to tackle this issue using the causal nexus between contamination and effects through the question of risk to pursue justice.



4.3.3 Creating precedents

One of the tools for the advancement of procedural justice and so, of environmental justice, remains the creation and replication of precedents. Creating novelty in terms of legal arguments, interpretations, strategies and sentences in a specific field, like in the presented cases for related environmental damages, allows new questions to be disputed, stimulates new dynamics among stakeholders and improves solutions to procedural challenges. In the legal outcomes presented in this report, three legal difficulties have been tackled: the precautionary principle, the territorial limits to jurisdiction of the courts, and the division of liabilities between subsidiaries and their mother companies.

The last two have been used by Chevron-Texaco and Shell as strategies to stop lawsuits in Ecuador and Netherlands. On one hand Chevron-Texaco, since the lawsuit started in the USA, tried to deny its liability for the actions of its subsidiary TexPet and for those of Texaco itself, as the merger with Chevron occurred after the fact. Then, after partial out-of-court settlements, the US lawsuit was closed with the understanding that Chevron-Texaco should answer to Ecuadorian justice in case of complaints. On the other hand, Shell's initial strategy to close the case was to plead that it could not be prosecuted in the Netherlands for torts committed by its subsidiary in Nigeria.

It might be important to question the allocation of liabilities to operators alone. Countries and nationals who enjoy the benefits of 'bloody booties' must be held as responsible as these companies. In the same vein, parent companies have responsibilities for their subsidiaries' actions especially if it has been established that they profit from the wrong done. Importantly, overcoming those difficulties allows the diffusion of similar class actions on various levels of competencies in different jurisdictions, depending on the local/national legal frameworks. Most importantly, such changes are brought by new actors, EJOs, communities, groups of citizens, claiming justice in defence of their territory and their right to live in a safe environment, and opening new paths to seeking justice.

4.3.4 Building cultural change

The opportunity to increase the visibility of environmental justice struggles provided by these trials is important, as is the pressure exercised on the image of defending companies. But, although catastrophes have always attracted media and public attention, the unbalanced attention with regards to other socio-environmental impacts is arguably counterproductive. BP Vice president Keller apologised for the loss of eleven men, for injuries to others, and for the harm done to the environment and to impacted communities due to the Deepwater Horizon disaster. He declared the company would plead guilty as an acknowledgment of its responsibilities for the catastrophe. However, the answers given in other cases when the spotlight of media attention was not so bright were different, as we saw in the Shell and Chevron cases.

Innovating in terms of legal arguments, interpretations, strategies and sentences in a specific field allows new questions to be disputed, stimulates new dynamics among stakeholders and improves solutions to procedural challenges.

Such innovation are brought by new actors, EJOs, communities, groups of citizens, seeking environmental justice

Nonetheless, the media attention attracted by those trials has bolstered worldwide information and awareness on those issues. As Casson said referring to petrochemical contamination effects identified during the Marghera lawsuit: *“the truth is now revealed to all”* (Benatelli et al., 2006: 24). Contamination was known or expected but the detailed reconstruction of the lawsuit presented the seriousness of the situation to a large audience. In this way, detailed expertise collected by individuals, NGOs and EJOs that have never been taken very seriously by media and the public at large, has become a valuable, and more importantly, credible source of information upon which judgements, requirements and political action can be based upon. These cases and the media attention they attract can and do stimulate societal debate and contribute to cultural change. This is a point not lost on Casson, who raising core issues of governance, advocates the same vision as the Venice Justice Court - that health and environment are priority collective goods that demand politics to actuate preventive actions. In his own words, *“there are many resistances: this is a cultural battle”* (Benatelli et al., 2006: 25).



Fig. 10

Three of the plaintiffs of the case against BP in Ecuador: Alberto Acosta, Vandana Shiva and the EJOLT collaborator, Ivonne Yáñez from Oilwatch-Accion Ecologica

Source: www.accionecologica.org

From grassroots mobilisation and actions, this cultural battle has penetrated the normative and now the juridical field, in an attempt to widen jurisdiction beyond the limits of anthropocentrism. As previously noted, the Ecuadorian and the Bolivian Constitutions have created a new legal category: the Rights of Nature, according to which every living element is subject to rights and, as it cannot represent itself, it needs protection. This novelty is deeply rooted in the core ruling principle of Pachamama – Mother Earth, the Sumak Kawsay (good life) that requires respect for every living form, their life cycle and resilience. The Ecuadorian BP lawsuit clearly denounces the limits of the international legal system, rooted in anthropocentrism, in focusing on the precautionary principle and the reparations for environmental impacts or damages affecting humans, in violating man-made legislation, and in making justice inaccessible to other living species and the planet.

It is interesting to note that no direct money valuation has been made in the claims presented to the Ecuadorian Constitutional Court, but the essence of the requests affects valuable items for BP, like crude stock and investments. While for BP



implementing requests like keeping oil underground or stopping exploration represents a loss in economic terms, the plaintiffs believe such measures would contribute to compensating for damage done and preventing further risk of contamination, not only for humans but also for the earth. It shows how economic value matters, on its own to deliver justice. The BP case in Ecuador illustrates an advancement for justice for all, human and non-humans, impacted communities and citizens of the world. It also reflects a post-extractivist approach: if the economy has been globalised and the effect of contamination is globalised with climate change, so justice should find effective measures for tackling GHG emissions. As Rodriguez-Labajos and Martínez Alier (2012) argue, the Rights of Nature go beyond monetary value. Its loss cannot be compensated with a uni-dimensional approach but requires embracing a plurality of incommensurable values, a perspective we hope procedural justice will apply and in time integrate into new concepts and tools for achieving environmental justice.



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