

Digging for dirty oil

Reviewing corporate oil liabilities and EJO legal strategies for environmental justice

EJOLT
Briefing

006

Keywords

- > Oil frontier
- > Environmental liabilities
- > Environmental crime
- > Corporate responsibility
- > Procedural justice
- > Corporate accountability



Oil contamination in the Ecuadorian Amazon

Photo: www.chevrontoxico.com



View of Porto Marghera

Source: Abxbay.



March against BP in New Orleans

Photo: Infrogmaton

In 2012, an average of 89 million barrels of oil were consumed every day, 30 percent more than in 1992, producing 14.11 billion tonnes of carbon emissions

With the progressive decline of oil resources, oil companies have responded to increasing global demand with new forms of technology, expanding the oil frontier into increasingly remote and inaccessible areas of the seas, Arctic regions and tropical forests. These new extraction zones often provide lower quality oil at **greater environmental risk**.

Oil-impacted communities seek justice

The expanding oil industry provokes **environmental destruction, health impacts and violations of human rights**. Increasing contamination jeopardizes safety and destroys the livelihoods of vulnerable communities, and of those relying on healthy ecosystems. **Local communities**, feeling sacrificed to the oil industry, see themselves involved in social conflict. They experience forms of **environmental discrimination** and might even face **criminalisation of protest** when they seek environmental justice. These experiences can make others reticent to exercise their legitimate rights to defend themselves and the environment.

Corporate liabilities lack implementation and respect

Oil companies, including European ones, are socially obligated to respect all internationally **recognized human rights**, and to protect the environment. In the case of indigenous communities, International Labour Organization (ILO) Convention 69 obliges governments to consult indigenous people before approving any potentially impactful project. However, contrary to what companies promote in their corporate social responsibility discourse, due controls, security measures or use of **best practices are often neglected**. Many oil companies in the global South and North act with impunity, **violating human rights and contaminating the environment** on



Contamination public notice in Goi, Nigeria

Photo: Lucie Greyl

scales that are environmentally criminal. These are not only tort crimes, but crimes against nature and humanity that could be considered **'ecocide'** or **'biocide'**. Even states may fail to protect their people or nature, and could be unable or unwilling to force oil companies to answer to their home or host countries for their liabilities.

Institutional and judicial responses are insufficient

The number of high profile lawsuits demanding justice for environmental, social, economic and cultural damages provoked by oil companies **is increasing**. Yet most outcomes are unsatisfactory in terms of tackling the justice claims of impacted communities. **Justice systems face limits** in dealing with principles and values that are not part of their language, culture or traditional jurisdiction. Such is the case of the **incommensurability of sacred land** and the absence of concept of private property over land. In countries like Ecuador where new legal concepts like the **Rights of Nature have been introduced**, implementation is still weak. Even when procedural justice recognises the legal responsibility of companies, the means to fully enforce sentences may be insufficient. In Europe, **corporate law can create significant legal obstacles** to holding European corporations accountable for abuses committed by their third-country subsidiaries or contractors. Private international law can impede access to European courts for human rights and environmental abuses.

The procedural law of EU Member States can create significant additional legal and practical barriers to access to justice for third-country victims.

Policy Recommendations for better access to justice, binding legal obligations and more transparency

To European Political and Judicial Institutions:

On access to justice:

- To promote new (or reinforce existing) **legal tools to address environmental crime as a crime against humanity and protect Rights of Nature**. This entails development of existing jurisdiction and creation of a European Court of Environmental Crimes, eventually within the European Court of Human Rights (ECtHR).
- The establishment of an **International Criminal Court for companies**, including its mandate to environmental issues.
- The enforcement of the **Aarhus Convention** in all European countries.

On legal obligations:

- The EU and Member States (MS) do not always make full use of existing legal opportunities to protect Human Rights and the environment in relation to **European corporations operating outside the EU**. The EU has to **extend such protection through multilateral agreements** where not yet covered by international legal regimes.
- Give effect to the jurisprudence of the ECtHR and enhance energies between environmental and human rights protection. The EU and MS have to explore possibilities to **integrate human rights protection more systematically** in existing legal tools and regulation protecting the environment. This encompasses safeguarding local and indigenous communities, public consultation and participation, access to information and sustainability impact assessments.
- There should be mandatory due diligence **to oblige companies to map the negative effects** of their activities, to do everything possible to **minimize** them and to **remediate damage and compensate** for it. This has to be an obligation at the same level as that of shareholders to maximize their profit (shareholders can take a company to court if it doesn't do what it requires to maximize profits).
- Transnational companies operating overseas should be obliged to **adopt the same standards prevailing in their home countries** and should apply advanced corporate responsibility policies everywhere. **CEOs should be personally accountable** for the social and environmental damage their company causes.
- Regulations on **trade and investment** should include **strict and legally binding regulations to protect human rights and environment** against extraterritorial corporates. Some examples include General System of Preferences (GSP) systems or Forest Law Enforcement, Governance and Trade Scheme (FLEGT) and the OECD Guidelines for Multinational Enterprises.

More policy recommendations
to European institutions in p.3



Background

Our statements and recommendations are grounded on an international effort at systematising several legal cases related to oil industry impacts in Ecuador, Nigeria and Italy. The report **'Digging deep corporate liability. Environmental Justice strategies in the world of oil'** gathers first-hand information on experiences that support and promote legal advancement to tackle environmental injustice related to the oil industry. Emblematic cases reviewed include those against:

(1) Chevron-Texaco in Ecuador, required to pay over USD 19 billion for restoration, compensation and mitigation, (2) Shell in the Netherlands, brought by Nigerian citizens to Dutch court for liabilities related to Shell's subsidiary activities in Nigeria; and (3) Enichem and Montedison in Italy, condemning company heads for intentionally exposing workers to health and death risks. All show the core role of civil society (individuals, organisations, communities) in pioneering innovative strategies that foster justice.

On transparency and reporting:

- Require all large companies operating in the EU **to report on the social, human rights and environmental impacts and risks** that their operations **worldwide** (including their complete supply chains) have on society and not just the bottom line.
- Require the Commission **to develop indicators on key social, human rights and environmental impacts** to ensure companies measure and report on their impacts and risks, for example, resource use, in a comparable way through European harmonized indicator methodologies (Global Reporting Initiative).
- **Introduce effective monitoring and enforcement measures** to ensure full, accurate and credible disclosure, including the possibility for external stakeholders to challenge the information provided.
- In order to better implement the **Aarhus Convention, introduce a new EU directive on access to justice** to ensure that members of the public from countries in which European corporations operate may hold such corporations accountable through court processes.

To the Nigerian and Ecuadorian Government:

- States should ensure that their legal systems **extend existing criminal laws to business enterprises** for crimes directly relevant **to the protection of human rights**, such as violent crimes and environmental crimes that may threaten the right to life or the right to health. Criminal liability should arise for acts of business enterprise as well as for failure to act with human rights due diligence to prevent such crimes by its own conduct or by conduct of its employees or agents, or of the companies belonging to the corporate group throughout its operations globally as well as all business partners.
- Accede to the **Aarhus Convention**, as a means of demonstrating serious intent to strengthen democratic accountability.

To national governments in impacted countries:

- Governments should muster the **political will** to ensure the enforcement of court decisions.
- In the case of Nigeria, the government should **overhaul its judicial system** and promote institutional capacity building of the judiciary so as to attain independent status from the influence and control of politicians and powerful elites.

To Civil Society:

- Intensify the use of **litigation as an advocacy strategy** to promote organisational positions and pursue social change.
- Legal training is required to systematize approaches and **acquaint legal practitioners and environmental advocates** with the prospects of litigation in oil conflicts and environmental justice. Design strategy using newly developed international standards for promoting responsible business conduct, such as UNGP, UNGC, OECD guidelines, etc.
- Make greater use of the **Aarhus Convention**, which obliges public authorities from countries that are parties to the Convention to provide access to information (and in certain cases, access to justice) to members of the public anywhere, i.e. irrespective of whether they are citizens of or residents in a country which is an **Aarhus Party**.

From the cases reviewed, the EJOLT report's analysis underlines four main elements for environmental justice advancement through procedural justice:

- The concept of **Environmental Crime** allows the prosecution of corporations in court and holds physical persons accountable for their responsibilities as representatives of corporations.
- On the **Rio Principles**:
Precautionary Principle: In case of scientific uncertainty about the hazard from a proposed development or technology, precautionary measures shall prevail. This is hardly the case so far, and

its lack of implementation should be reviewed and punished through court processes.

Principle 10 emphasizes the need for citizen participation and appropriate access to information. The principle also urges States to facilitate and encourage public awareness and participation, and provide effective access to judicial and administrative proceedings, including redress and remedy. A global implementation of this principle is necessary, as is already the case for the region of the United Nations Economic Commission for Europe (UNECE) through the *Aarhus Convention*.

"This ground breaking study links environmental crime to ecocide which requires policy response that covers both corporate and individual liabilities and sanctions in the event of any breach."

"The inhibitive veil over international jurisdiction on trans boundary cases has been lifted."



- The **Creation of Precedents** will decrease legal difficulties related to cumbersome procedures, jurisdiction and legal costs usually faced by EJO claimants. The burden of proof and the theory of the dynamic proof burden in legal positivism systems are crucial.

- **Grassroots' experience** is fundamental to changing social and cultural values in society and its institutions, including those of procedural justice, if environmental justice is to be achieved. The Deepwater Horizon case against BP in Ecuador for violation of the Rights of Nature exemplifies how societal change brought by civil society needs to be enforced at the judicial level. A multidimensional approach to tackling environmental crimes and responding to impacted communities' values are necessary. Rather than direct economic claims, requests of compensation directed at prevention of environmental crime (e.g. through non-extraction) may underpin environmental justice.

A glimmer of hope? Environmental Justice across borders

Litigation constitutes a vital aspect of advocacy and the struggle for social and environmental justice. Using tort law based partly on Nigerian laws for damages inflicted in Nigeria's Niger Delta, local fishermen brought Shell to court in the Netherlands. Although the court held Shell liable for destruction of the environment and sources of livelihoods, only one of the fishermen received rights to compensation. The implication of the success of these cases lies in overcoming complicated procedures related to trans boundary claims, and effectively discharging the burden of jurisdiction.

The Nigerian precedent could open a floodgate for more court cases in support of redressing environmental justice cases on a global level.

In April 2013, the **European Commission** published a **legislative proposal** that would require large companies to include a non-financial statement within their annual report. This statement would cover **environmental and social issues, human rights, anti-corruption and bribery.**

Making this kind of reporting mandatory is of course a first step, but is unfortunately too open for flexibility and insufficient to make companies genuinely accountable and transparent. Although such legislation is yet to be adopted, some countries (notably Sweden) and companies have implemented mandatory reporting for state-owned companies, and follow the Global Reporting Initiative (GRI) guidelines to comply with binding obligation.



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The project supports the work of Environmental Justice Organisations, uniting scientists, well known activist organisations, think-tanks and policy-makers from the fields of environmental law, environmental health, political ecology, ecological economics, to talk about issues related to Ecological Distribution. EJOLT aims to improve policy responses to and support collaborative research and action on environmental conflicts through capacity building of environmental justice groups around the world. Visit our free resource library and database at www.ejolt.org and follow twitter.com/envjustice or www.facebook.com/ejolt to stay current on latest news and events.

For more information

Digging deep corporate liability
EJOLT Report No. 9, available at:
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