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A legal guide for communities seeking environmental justice

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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.

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Abstract

The endless increase of environmental injustice in the world is directly impacting more and more people on a daily basis. While impunity seems to be the order of the day, the need for procedural justice is growing. Making the most of the competences and knowledge brought together under the EJOLT project and its work on Law and Institutions the CDCA has compiled a manual that presents a number of legal tools and concepts already used by EJOs all over the world.

These concepts and tools from the civil and criminal system at international, regional and trans-national levels are presented together with interactive links to more details and technical information and to useful contacts for legal strategy capacity building of EJOs.

Keywords

Procedural justice

Legal strategies

Criminal law

Civil law

Environmental law

Environmental crime

EJO capacity building

Contents

Acronyms

AAU	Act of the African Union
ACHPR	African Commission on Human and Peoples' Rights
ATCA	Alien Torts Claim Act
AU	African Union
CDES	Center for Economic and Social Rights
CEJIL	Center for Justice and International Law
CESR	Center for Economic and Social Rights
CGC	Compañía General de Combustibles
CMW	Combustible materials derived from waste
CoE	Council of Europe
CSO	Civil Society Organisation
EBID	ECOWAS Bank for Investment and Development
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECOWAS	Economic Community Of West African States
ECHR	European Court of Human Rights
EIA	Environmental Impact Assessments
EJO	Environmental Justice Organisation
ELD	Environment Liability Directive
EP	European Parliament
ESCR	European Committee on Social Rights
EU	European Union
HR	Human Rights
IACHR	Inter-American Commission for Human Rights
IACHR	Inter-American Court for Human Rights
ICC	International Criminal Court
MEPs	Member of the European Parliament
MOSOP	Movement for the Survival of the Ogoni People
OAS	American States Organisation
ODS	Ozone-depleting substances
OCSE	Organization for Security and Co-operation in Europe
SERAC	Social and Economic Rights Action Center
SPDC	Shell Petroleum Development Company of Nigeria Ltd
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
UNICRI	United Nations Interregional Crime and Justice Research Institute
WWII	World War II

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 to defend or reclaim their rights. This has been 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 is increasing EJOs' capacity in using scientific concepts and methods for the quantification of environmental and health impacts, as well as their knowledge of environmental risks and of legal mechanisms of redress. On the other hand, EJOLT has enriched 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. In this respect, 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?

This report is part of the final outcomes of EJOLT's WP9 (Law and institutions). This WP is centred on cross-cutting methodological activities feeding into the capacity of EJOs working in different thematic areas of the project. In particular, this report follows the publication of two previous reports developed by the Centre of Environmental Law (CEDAT) at the Universitat Rovira i Virgili, in 2012 and 2013: "Legal avenues for EJOs to claim environmental liability" (EJOLT report 4) and "International law and ecological debt. International claims, debates and struggles for environmental justice" (EJOLT report 11).

Against this background, this new report gathers the contents and knowledge brought together in the project by different organisations and legal experts from different parts of the world. A legal workshop organised in Rome in November 2013 was a milestone for information exchange that allowed, among other interesting developments, the preparation of this document. This report has been thought as a manual, easy to read and accessible, for self capacity building of environmental justice defenders and community members interested in developing legal strategies. The manual responds to the need of initial training inputs for users that lack legal expertise and want to deepen their understanding of legal processes in the context of environmental justice issues.

Introduction

Why this manual?

When looking carefully at the implications of environmental conflicts in the world, as the EJOLT network (www.ejolt.org) has done since 2010, one can barely contain the sense of injustice that inevitably arises. The impacts of economic industries and the direct environmental threats they pose to communities under the dominant development model have taken on previously unseen proportions. The Documentation Centre on Environmental Conflicts (CDCA) (www.cdca.it), has worked since its foundation in 2007 on such burning issue. Over the years it has accumulated much information and many testimonials in its mission to raise awareness and to build the capacities of impacted communities to resist injustice.

As an Environmental Justice Organisation (EJO), our mission is to support actions in defence of impacted communities struggling for justice. Legal avenues are a core element of these efforts. The general impunity with which corporations and institutions are treated means that challenging the reluctance of legal systems has become an important strategic priority.

In an attempt to answer core questions like how individuals and EJOs can demand justice, and which rules and tools are most useful for fighting against environmental injustice, the CDCA wanted to condense lessons from EJOLT's work on Law and Institutions into a manual for EJOs and citizens. The manual provides legal tools and strategies at international, regional and cross-national levels for the knowledge and use of EJOs worldwide. It gives a basic insight into the world of procedural justice and presents selected tools and institutions that can be utilised by citizens involved in environmental conflicts. Specific attention has been paid to directly and indirectly accessing courts and other institutional tools in cases of environmental injustice.

The manual does not pretend be exhaustive but hopes to be the first of a series of updated and specialised versions. This first edition provides basic capacity building content for legal strategies in cases where national legal responses to environmental injustice have been low or insufficient. The manual also provide interactive inputs for accessing further information and useful contacts.

Who bears liability for impacted communities and environmental damage?

The phenomenon of environmental justice in itself is rooted in an economic system based on the guarantee of benefits through the shifting of environmental costs to local communities and the environment. Accordingly, the strongest limit to justice

can be found in the discord between a political system based on nation-states and the globalisation of the market in which economic power is overwhelming political power. On one hand, states have the duty to protect citizens' lives and the environment. On the other hand, peoples' lives and the environment are threatened by economic activities that expand the frontiers of their impacts beyond the political and judicial power. The conflicts engendered by extractive, productive and disposal activities at the hands of corporations, institutions and in some cases organised crime, have slipped out of states jurisdiction. In this respect we recommend the reading of Ejolt report "Legal avenues for EJOs to claim environmental liability" by the Tarragona Centre for Environmental Law Studies – CEDAT.

How procedural justice sanctions compensation, reparation and conviction? Does it answer the needs of environmental justice?

The first question to ask when deciding on legal procedures against an environmental injustice is:

> *Who is/are liable? Before which body, institution or court and in the breach of which law**?***

Even though legal avenues can only achieve partial results and should be taken in conjunction with the use of other tools to defend communities, they remain a fundamental field of action. It is our belief that the more legal systems are pressured by demands to deal with environmental injustice, the more they will evolve to answer them. With this manual, we address fundamental questions useful for EJO, and aim to provide some practical tools:

> *How is it possible to prosecute a multinational corporation, an institution, an individual for its liability? Can a "mother" company be held responsible for its local affiliatel? What happens to corporate liabilities when a company is merged into another? Is a host-country, responsible for protecting its citizens, or is the country of the company accountable for the ethical behaviour of its national corporations?*
> *When are institutions liable and how can this be addressed? How can individuals be held responsible for environmental injustice? How procedural justice sanctions compensation, reparation and conviction? Does it answers the needs of environmental justice?*

Some insights into domestic judicial systems worldwide

Common law vs civil law

One of the **biggest challenges** to obtaining justice is the great **disparity among international legal systems**. First, there is a qualitative disparity. Some states provides a set of rules that protect the interests of citizens and the environment using criminal, civil and administrative approaches, while in many countries (often former colonies), the citizen welfare comes second to the interests of the state and important foreign investors. Countries that provide the best rules of environmental protection are generally, but not always, countries those of the global north, from where the largest and most established multinational corporations are based.

Trials are often based on the non-application of norms, of risk and security measures, or more generally speaking, on the failure of operators to act in respect of law and duty

Secondly, there are large differences between the two most common judicial systems: common law (with British origins, in place in most English speaking countries), and civil law (of Roman origin, in place in most Spanish, French and Portuguese speaking countries). Some states, like South Africa, combine both systems, while other countries have religious based judicial systems, notably *Shari'a*, the system of Islamic law. The **common law** system gives substantial importance to judi cial decisions (court decisions can become law where no law exists, which support the creation of precedents) so judges play an important role in shaping the law. On the contrary, in **civil law** systems, courts lack power to act where there is no law (less interpretation on precedents is possible) and judges rule on the basis of codified rules.

The two branches of law: criminal vs civil law

It is important for citizens and EJOs intending to undertake legal action in cases of environmental justice to be clear on what the strengths and the weaknesses of the different branches of law in building a legal strategy. On one hand, in **civil law**[1], we speak about damage suffered for which courts provide sanction, mainly economic reparation or compensation. This branch of law has become quite developed in terms of environmental issues, providing numerous tools for tackling environmental damage. However, trials in civil and administrative courts can be expensive for claimants, slow, and lead to sentences that produce minimal impacts in terms of publicity or have little influence via either the press or reparation or compensation (except in high profile multi-national cases). On the other hand, **criminal law**, can lead to sentencing in the form of incarceration. Criminal law is the route less travelled in terms of environmental crime and is much less applied. However, the costs of criminal procedures are less burdensome on claimants, are in some countries quicker, and sentencing results can create more impact in the press and on economic activities at stake.

Trends and perspectives from 'good practice' trials

Some well-known environmental lawsuits that we present in the following chapters show general tendencies and useful tips for obtaining justice. Among the major trends, we can observe a fundamental role of collective or class action, where bottom up processes have been implemented as in the cases of Shell in the Netherlands or Chevron Texaco in Ecuador. Trials are often based on the non-application of norms, of risk and security measures, or more generally speaking, on the failure of operators to act in respect of law and duty.

Recent decades have given rise to new questions and disputes, increasingly related to trans-national trials and dynamics among stakeholders. Legal processes are improving in their ability to address these disputes, although the overall results remain limited. Moreover remediation, precautionary measures and non-recurrence measures prevail.

A great victory lies however in the growing role of communities and EJOs in such trials. These actors have produced innovative legal strategies, supported

[1] Here civil law is referred to as a branch of a given judicial system, in opposition to criminal law.

fundamental information and proof collection and implemented community participative processes for the development of claims and requests. They have also contributed to higher visibility of cases of environmental injustice, crucially placing pressure on corporate reputations and bringing media attention to trials, increasing the spread of information and awareness.

We at CDCA view legal avenues as a cultural battle field on which the charge is led by EJOs that can challenge the normative and judicial systems, influencing an evolution in order to properly address environmental crimes and respond appropriately to impacted communities.

Fig. 1

Colleferro, Italy

Source: Marica Di Pierri

New concepts have come to light in the last decade, such as the introduction in the new Constitution of Ecuador of the principle of Rights of Nature in recent years. This has enabled experimentation with completely new fields of legal action. We do not review such experiences in this manual in detail, but they are noteworthy in terms of the way they challenge existing legal frameworks. For example, In 2010 a group of international activists forced the opening of a trial in the Constitutional Court of Ecuador on the Rights of Nature and the Rights of the Sea, enabling the territory of Ecuador to claim justice in the case of the Deepwater Horizon disaster, the famous BP oil spill in the Gulf of Mexico.

The claim challenged the usual territorial jurisdictions and mobilised new rights and visions existing only in a few countries like Ecuador and Bolivia, although few cases such have been brought to trial. It challenged traditional requests for compensation in the form of direct monetary compensation, instead ordering BP to undertake a number of actions, for example to keep the same quantity of oil spilled underground, or to apply mechanical techniques for clean-up. This implied economic sacrifice and a behavioural change for the company, pushing it towards non-recurrence and away from compensation. These examples teach a very basic but important lesson: that environmental justice needs to evolve towards embracing a plurality of values in the judgements it passes.

A brief guide to the manual

This provides information on key concepts and sources of guidance and gives practical examples on lessons learned from past experience. It also contains numerous hyperlinks to further documentation and technical information, and contacts of legal institutions, legal support and EJOs active in this field.

The manual is composed of 3 main parts. The first part contains information regarding civil law tools at international, regional and trans-national levels. The second section contains information regarding international, regional and national criminal tools and bodies. The third and final part holds information on the defence of EJOs and the use of other instruments and strategic views based on good practices.

1 Civil Law tools at international, regional and trans-national levels

1.1 General overview

In the world today, finding justice before a court is not always easy: it is difficult to identify the appropriate tools at the appropriate level, to overcome the frustration created by the gap between procedural justice and the real implementation of justice Environmental injustices remain mostly unaddressed. It remains difficult to access justice systems as citizens or EJOs and environmental justice defenders suffer criminalisation.

The probability to succeed depends a lot on the nationality of the plaintiff and on the nature of the respondent. Are companies “too big to be punished”? In many cases, the interests of a governmental institution, a company or an individual behind an environmental damage are such that it is unlikely that the victims get justice through national channels. **In this regard**, the international framework can force a country to respect the international conventions they are parties of.

So far, international environmental law has been enforced through instruments of **international public law**. This means that legal actions at the international level **address States** and not the private sector. It doesn’t give the possibility to civilians of different nationalities to resolve their private conflicts. It gives the possibility to members of the civil society to address indirectly such problems, by making pressure on their state to make it protect them against the corporations they fight. The International courts usually rule against states, in order to make national judges rule then against corporations.

It is interesting to look at the international legal system potential: whether it allows citizens to complain against multinational corporations before international courts, enabling them to be heard if they did not obtain justice in their own country

Box 1 International public law Courts of justice

The following international Courts rule on the basis of international legislation, issued within international organisations.

International competences

United Nations (UN):

- The International Court of Justice, The Hague, rules to resolve legal disputes among Member States who have accepted its jurisdiction, and on the basis of the UN Conventions.
- The International Criminal Court is a permanent court to try those accused of genocide, crimes against humanity, crimes of aggression and war crimes.

Regional competences

European Union (EU): Between other procedures, the Court of Justice of the European Union deals with the non-compliance of the Member States with the EU law when the European Commission judges it adequate. The Court also addresses complaints by citizens against European institutions.

Council of Europe (CoE): The European Court of Justice for Human Rights has the duty to enforce the European Convention for Human Rights and Fundamental Freedoms. After completion of the internal procedures, citizens of the Member States can bring cases to the Court against a State violating their rights as described in the Convention or in the Social Charter.

Organisation of American States (OAS): Inter-American Court of Justice for Human Rights is related to the American Convention on Human Rights, signed by 35 States of Organisation of American States. It receives the cases brought by the Inter-American Commission on Human Rights when the latter witnesses a Member State's violation of the American Convention, when it has already taken measures by recommending changes but which have not been enforced by the Member State. This court is not directly accessible to citizens.

African Union (AU): The African Court of Justice on Human and People's Rights has been created to address conflicts in relation with violations of rights described in the African Charter on Human and People's Rights. The Court is working with the African Commission on Human and People's rights. The Commission is a quasi-judicial body, which means that it is enabled to take first measures against a Member States violating the African Charter. Unlike the Inter-American Court, the Member States citizens have direct access to the Court, under strong conditions though.

Economic Community of West African States (ECOWAS): The (ECOWAS) community court of Justice aims to resolve conflicts between institutions of the Community and their officials and to handle cases dealing with liability for or against the Community. Moreover, the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State, on the basis of the African Charter of Human and People's rights.

1.2 Regional tools, justice bodies and precedents to tackle environmental injustice

Citizens have various possibilities to make things change in their country. But they also can make an international complaint. They have to identify the international forum that can receive their complaints. Therefore, they have to focus on the

international/regional/supranational organisations their country is part of, and understand the possibilities of action given by each international forum.

Moreover, it is important to keep in mind that even if there are many international environmental agreements, a good strategy is still to look after the Human Rights legislations and treaties and challenge environmental injustice with Human Rights tools. The reasons are two

- The Human Rights protection system is older and more efficient than the environmental law;

- The link between environment and human rights strengthens environmental justice cases and helps building precedent. Many judicial systems recognise the right to a healthy environment as a human right, as for example in the case when indigenous and rural communities relying strongly on natural resources are affected.

Even if there are many international environmental agreements, a good strategy is still to look after the Human Rights

The regional and trans-national justice framework accessible to EJOs in a nutshell

In signatory American countries, citizens may address the *Inter-American Commission for Human Rights*, if they believe that a right of the American Convention on Human Rights have been violated by a state. After all international remedies are finished, the Commission will enter in contact with the government, and if it doesn't do anything to improve the situation, the Commission will bring the case before the *Inter-American Court for Human Rights* that can fine the state. It has the power to enforce its sentences.

In Africa, the *African Commission of Human and People Rights* looks after the states' good compliance of the African Charter on Human and People Rights. The *African Court for Human and People Rights* receives the Commissions' complaints in case of a State's non-compliance, as well as complaints of civil society members of state parties. Another regional African Court of justice can also been approached by the civil society to address environmental conflicts.

Indeed, the Court of the *Economic Community of West African States* (ECOWAS) ruled on a complaint regarding Nigeria, brought by a Nigerian organisation. The Court sent strong recommendations to the Nigerian government, giving thereby echo to the African Commission judgement on the same case few years before. Both bodies recalled the States' duty to protect citizens instead of (foreign) economic activities and interests.

In Europe, two different bodies offer this kind of legal procedure. The Council of Europe (47 member states) created in 1949 adopted in 1950 the European Convention on Human Rights. The *European Court of Human Rights* examines the complaints of victims of Human Rights violations by their State when all the internal remedies are exhausted. Generally, the State is asked to address the environmental damage, and to indemnify the victims.

The Committee of Ministers, in collaboration with the Parliamentary Assembly, monitors the Court's decisions. When a country does not respect the sentence, it can be suspended from the Council of Europe. Through the European Convention on Human Rights, citizens have the opportunity to pressure their countries for

implementing legal responses. The role of the Commissioner for Human Rights of the Council of Europe is also important at this regard.

The European Union has developed a strong environmental law to be transposed into national law. When a member state has failed to implement it, individuals and members of the civil society can let it know to the *European Commission* (the guardian of the Treaties) through complaints, or inform the *European Parliament* through petitions. The Parliament is allowed to ask the Commission to investigate on the facts of the petitions.

When the Commission recognises a member state's non-compliance to the community law, it contacts the State representatives to resolve the situation. In cases in which the state doesn't listen to the Commission's recommendations, the *Court of Justice of the European Union* intervenes, on the request of the Commission. The member state is forced by the Court to comply with the EU law. Individuals and civil society members can also bring complaints against European Institutions before the court. The EU consolidated an important step with the development of a directive, *Directive 2008/99/EC*, setting common environmental crimes to be prosecuted in member states.

Transnational level

There are **other legal instruments** that address international environmental conflicts with more flexibility. In the USA, the Alien Tort Claims Act (**ATCA**) was enacted the same year as the French Revolution (1789). It gives the possibility to any human being to ask a US court to rule on a tort that violates fundamental rights (as a human being), even if the tort was not committed by an American citizen on the American territory. Since 1980, the ATCA has been often used to address human rights violations committed outside the US territory. Environmental conflict cases have been presented to US courts under the ATCA for their human rights aspects.

Other recent developments in national law have been really promising to address multinational environmental conflicts too. First of all, the Chevron-Texaco lawsuit in Ecuador, which is the most famous case of a foreign corporation being sentenced in the host-country for environmental damages, with the involvement of the damaged indigenous communities in identifying the ways to solve the environmental and social deteriorations. This case has taken in 2014 another route: a case against Chevron's CEO before the International Criminal Court at The Hague.

The Chevron-Texaco lawsuit in Equator is a famous case of a corporation being condemned in the host-country for environmental damages

A civil Dutch court of The Hague, too, has given hope to the environment defenders, by declaring the Royal Dutch Shell's responsibility on egregious pollution in the Niger Delta. Strictly speaking, the Court condemned the Nigerian filial and not the corporation's core, but by receiving the case, it accepted the unity of the company. It is hope that this kind of ruling will appear again, and also in other northern countries.

1.2.1 The Council of Europe

1.2.1.1 Key information to better understand the possibilities to access Justice at the Council of Europe level

Location	Strasbourg
Established	1949
Main bodies	- Committee of Ministers (1949) - Parliamentary Assembly (1949) - Secretary General (1949) - Court of Justice (1959)
Member States (47)	The EU Member States Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, including Greenland and Faroe Islands, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom And the other European States Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Republic of Moldova, Monaco, Montenegro, Norway, Russian Federation, San Marino, Serbia, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine
What is the Council of Europe?	The Council of Europe (CoE) is an international organization gathering 47 European countries and created in 1949 in order to establish European binding agreements that would protect from Human Rights violations. On this purpose, the European Convention on Human Rights has been conceived in 1950. The European Convention on Human Rights is an international treaty under which the member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. To make the Convention respected, an international Court of Justice has been set up in 1959: the European Court of Human Rights. Based in Strasbourg, this international court rules on **individual or State applications alleging violations** of the civil and political rights set out in the European Convention on Human Rights. Some articles of the European Convention on Human Rights and the European Social Charter **can be extended to environmental matters**.

The European Court of Human Rights	The Court of Justice of Human Rights deals with cases in which State Member(s) are violating directly or indirectly (by lack of decision or intervention, for example) the European Convention on Human Rights. Countries must comply with the court's verdicts, although the court cannot directly enforce this. The nations which have signed the human rights convention have usually incorporated its principles into their own laws. A citizen of a Member State who is not satisfied by the sentence at the national level can present a case before the European Court of Human Rights. The Court studies the case and decides to rule on the issue or not. This decision mainly depends on whether there is a violation of the European Convention on Human Rights. The plaintiffs must be the direct victim of an alleged violation. They can bring cases against their country, not against individuals or private bodies. The following articles from the European Convention for Human Rights can be used related to the environment: article 2 (right to life), article 8 (right to respect for private and family life), article 1 of the Protocol 1 (protection of property), article 10 (freedom of expression), article 6 (right to a fair trial), article 13 (right to an effective remedy). The Social Charter also provides legal instruments for environmental matters: article 11 (right to protection of health). The European Court of Human Rights should not be confused with the European Court of Justice - the EU's highest court.
Environmental policies areas addressed by the Council of Europe	Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Convention of Lugano, 1993) European Landscape Convention Convention on the Conservation of European Wildlife and Natural Habitats Framework Convention on the Value of Cultural Heritage for Society European Regional/Spatial Planning Charter (Torremolinos) Guiding Principles for Sustainable Spatial Development of the European Continent Spatial planning and landscape Biodiversity

Legal enforcement	Lawsuits are brought before the Court against Member State. The role of NGOs is crucial on the judgements' implementation: Firstly, NGOs can help identify the right approach to implementation by proposing amendments to national law or government policy. Secondly, NGOs can provide information on the implementation process to the public and international monitoring institutions. Indeed, the State is not likely to provide information on the ways its implementation is lacking, so it is important that the Civil Society does it. Thirdly, NGOs can use judgments to support lobbying or advocacy activities. A judgment from the Court recognises that a violation has occurred, and gives rise to a legal obligation to make changes.
What can be expected by citizens of the Member State?	The Court's sentences put the attention on the Member State, which has a strong symbolic dimension, but countries have also to pay fines. Court decisions include a section at the very end of the judgment awarding damages as well as legal costs and expenses to the victim of a human rights violation. In case of non-compliance with the Court's judgement, the Committee of Ministers is enabled to refer a case back to the Court asking for a declaration that the State has failed to implement the Convention. If the State continues to refuse to implement the judgment, the ultimate sanction is suspension or expulsion from the Council of Europe. This sanction has never been used.

Fig. 2

European Court of Human Rights

Source: Flammerkueche, Creative Commons

What opportunities for the citizens and EJOs to access justice?

The Commissioner for Human Rights is a figure of the Council of Europe that help raise the standards of human rights protection and report on human right issues in Council of Europe Member States

In 1993, the Council of Europe opened the signature of the **Lugano Convention**, which aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement. It considers that the problems of adequate compensation for emissions released in one country causing damage in another country are also of an international nature.

The Convention explains some technical terms as "dangerous activity", "dangerous substance", "genetically modified organism" and so on. The Convention is based on objective liability (strict liability) taking into account the "polluter pays" principle. Specific rules are provided concerning the joint liability of the operators of installations or sites for damage, and a compulsory financial security scheme to cover liability under the Convention. The Convention provides the right to access to information (by bodies with public responsibility for the environment). A Standing Committee is responsible for the interpretation and implementation of the Convention, may make recommendations and propose any necessary amendments to the Convention.

From 1959 to 1998, the European Court of Human Rights was working a few days per month, and **individuals were not allowed to apply to it directly against Member States**. Since 1998, the Court has sat as a full time court, to be able to address a larger number of cases. This reform is important, because individual cases are now welcomed.

The CoE legislation does not contain a guarantee of the right to a healthy environment. **However**, through the European Court on Human Rights (the Court, ECHR) jurisprudence and the European Committee on Social Rights (the Committee, ESCR) decisions and reports, **many aspects of the right to a healthy environment are now included in the Council of Europe system for protection of human rights**. Essentially, the right to a healthy environment can be related to the Article 8 of the Convention and under Article 11 of the European Social Charter.

At this point should be mentioned the existence of the **Commissioner for Human Rights**. This is a figure of the Council of Europe that helps raise the standards of human rights protection and report on human right issues in Council of Europe Member States. The Commissioner's Office works with the governments, the Civil Society and the international organisations, **but not on individual complaints**. However, this institution might be useful to EJOs as the official website offers relevant data and information, such as country monitoring, issue papers, third party interventions, opinions of the commissioner, recommendations, activity reports and other publications.

More info at: http://www.coe.int/en/web/commissioner.

What results are to be expected? If the Court finds that there has been a violation, it may award “just satisfaction”, a sum of money in compensation for certain forms of damage. The Court may also require the State concerned to refund the expenses you have incurred in presenting your case. If the Court finds

that there has been no violation, the applicant will not have to pay any additional costs (such as those incurred by the respondent State).

The system of **collective complaint** was introduced in 1995. So far it has been ratified by only 14 states. **It is of particular interest for citizens and EJOs of Member States not members of the EU** (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Republic of Moldova, Monaco, Montenegro, Norway, Russian Federation, San Marino, Serbia, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine).

Box 2 Justice scheme at CoE level

Source: own elaboration

Court	Legal ground	Applicants	Respondents
European Court of Human Rights	*Council of Europe conventions*	*Citizens of the Member States*	*Member States*
		Member States	Member States

Seeking for environmental justice: what falls under the CoE legislation?

The European Convention for Human Rights

The Court found that the States may apply this article in the context of dangerous activities such as nuclear testing, chemical plants activity whose emissions emanate toxics, or operation of waste storage sites. These activities are under the responsibility of the States, even when they are perpetrated by private companies. The extent of the obligations of the authorities depends usually on factors such as the degree of harmfulness of dangerous activities and the ability to anticipate the damage to life. This entails the right of people to access information on activities that might be harmful. Moreover, the state has to establish legalisation that would anticipate or adequately punish the author of the activity. Some important cases related to article 2 of the ECHR (Öneryıldız v. Turkey, Budayeva and Others v. Russia, and Murillo Saldías and Others v. Spain) can be found at http://hudoc.echr.coe.int.

Respect for private and family life (article 8)

The right to respect for private and family life and the home are protected under Article 8 of the Convention. Degradation of the environment is not necessarily a violation of Article 8. Therefore, the factors related to the environment must directly and seriously affect private and family life or the home.

This obligation does not only apply in cases where the harm is caused by the State's activities, but also when it results from activities of the private sector. Public authorities should ensure the implementation of measures to guarantee the rights

protected by article 8, and they have to answer for it before the Court if they don't do so.

Some important cases related to article 8: Powell & Rayner v. the United Kingdom, Moreno Gómez v. Spain, Brânduşe v. Romania, Dubetska and Others v. Ukraine, Kyrtatos v. Greece, Hatton and Others v. the United Kingdom, and Guerra and Others v. Italy can be found at http://hudoc.echr.coe.int.

Access to information and justice and participation to decision-making (articles 2, 6 and 13)

The Council of Europe believes that access to information to justice and for environmental matters are crucial, as well as participation to decision-making forum.

EJOs who take legal action to defend the interests of their members may invoke the right of access to information in court. However, if they defend a general public interest, they may not have the right to address the Court.

The Council of Europe and the corporations' liability abroad

In general, the Convention applies to the territory of States which are parties to it. The Court is presumed to be competent, in principle, on the territory of the State. In other words, it is unlikely that the Court rules against a State one of whose national corporations violates Human Rights.

The European Social Charter

Right to protection of health and the environment (article 11)

The European Committee of Social Rights interprets Article 11 of the European Social Charter as guaranteeing a healthy environment. Important enough: the states are responsible for activities damaging the environment, whether those are carried out by public authorities or by a private company.

Other useful links

- European Court of Human Rights: questions and answers: http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf
- Manual created by the CoE on Human Rights and the environment (2013) http://www.echr.coe.int/Documents/Pub_coe_Environment_2012_ENG.pdf
- Council of Europe and the Right to a Healthy Environment (2011) http://uaces.org/documents/papers/1140/marochini.pdf

1.2.1.2 How to access justice in the Council of Europe

Individuals who are convinced that they have personally and directly been the victim of a violation of the rights and guarantees set out in the Convention or its Protocols may present lawsuits to the Court, but only against one of the States bound by the Convention.

Individuals who have directly been victim of a violation of rights set out in the Convention or its Protocols committed by a member state may present lawsuits to the European Court of Human Rights.

The conditions to fill a lawsuit before the Court

- The violation must have been committed by one of those States against a person within its territory (not necessarily a national).
- The Court never deals with complaints against individuals or private institutions, but exclusively against member States.
- Individuals and Civil society organizations are welcome to bring cases, but only in cases they have directly and personally been the victim of the violation alleged. Lawyers, as official representatives, are the exception, and might bring a case on the behalf of a victim. General complaints are not receivable.
- All the remedies in the State should have been exhausted, and the complaint shall be presented less than six months from the date of the final decision at domestic level to be receivable.
- The complaint shall be a letter addressed to the Court, and shall give a detailed description of the violation. Otherwise, an online application form directly is available on the official website.

Other useful links

- Consult the European Court of Human Rights' application form: http://www.echr.coe.int/Documents/Application_Form_2014_1_ENG.pdf
- Read more information regarding applications to the Court: http://www.echr.coe.int/Pages/home.aspx?p=applicants
- See complaints to the ECHR and their state of procedure: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp
- Basic guide for applicants taking their case to the ECHR: http://www.ihrc.ie/download/pdf/europeanctguidefinal.pdf

The letter has to be written in one of the Court's official languages (English and French) or in an official language of one of the States that have ratified the Convention. The application form has to be filled out carefully and legibly and returned in the shorter delays to:

Contact
The Registrar
European Court of Human Rights Council of Europe
F-67075 Strasbourg cedex
FRANCE

1.2.1.3 What has been done? Examples to follow

Lawsuit	CASE OF FADEYEVA v. RUSSIA (Application no. 55723/00)
Period of the trial	1995-2011
Target	Force Russia to regulate the environmental pollution from the Severstal plant which affected the quality of life at the applicant's home and resettle the applicants.
Results	The European Court for Human Rights unanimously found in 2005 that the Russian Government was in violation of Article 8 of the European Convention on Human Rights (related to the right of respect for private and family life) and that it had failed to regulate the environmental pollution from the Severstal plant which affected the quality of life at the applicant's home. The Court held (a) that the respondent State is to pay the applicant, EUR 6,000 in respect of non-pecuniary damage; (b) that the respondent State is to pay the applicant: (i) EUR 6,500 in respect of costs and expenses incurred by her Russian lawyers and their fees, less EUR 1,732, already paid to Mr Koroteyev in legal aid; (ii) GBP 5,540 in respect of costs and expenses incurred by her British lawyers and advisers and their fees; (iii) any tax that may be chargeable on the above amounts.
Basic facts	Nadezhda Fadeyeva and other Russian brought an action in local court against Severstal, Russia's largest iron-smelting company. The level of air and noise pollution from Severstal's steel plant located in their town exceeded the maximum emissions permitted by Russian law and made the area in which they lived unsafe for habitation. The local court found that the applicants had the right to be resettled, but it made such resettlement conditional on the availability of funds, and Ms Fadeyeva ended on a waiting-list for relocation. She appealed before the local court, which confirmed that the first judgment had been properly executed.

	Mrs Fadeyeva subsequently lodged an application against the Russian Government with the European Court of Human Rights (ECHR) in 1999.
Applicants	Nadezhda Fadeyeva and other Russian citizens
Respondents	Russia
Court	European Court of Human Rights
Legal background	European Convention of Human Rights
More information	Council of Europe Information Document: https://wcd.coe.int/ViewDoc.jsp?id=1094807&Site=DG4&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679 Sentence: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69315#{"itemid":["001-69315"]} Information by Business and Human Rights: http://business-humanrights.org/en/fadeyeva-v-russia-re-severstal-smelter#c9334

1.2.2 The European Union

1.2.2.1 Key information to better understand the possibilities to access Justice at European Union level

Location	Brussels (Commission and Councils) Luxembourg (Court) Strasbourg (Parliament)
Established	1951
Main bodies	European Commission European Council Council of the European Union European Court of Justice European Parliament European Central Bank Court of Auditors
Main treaties	Treaty on the Functioning of the European Union Treaty of the European Union The treaty of Lisbon[2] The Charter of Fundamental Rights of European Union Euratom Treaty

[2] With the Treaty of Lisbon, the Charter of Fundamental Rights acquires a binding legal force for Member States, the United Kingdom and Poland having been granted a derogation.

Member States (28)	Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, including Greenland and Faroe Islands, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom
Environmental related areas addressed by EU	Air, water, marine and coast, biodiversity, soil, land issues, waste, circular economies, noise, chemical, industries, resources efficiency, sustainable development; Green public procurement, international issues, climate change, energy. Official websites on the topic: http://ec.europa.eu/environment/policies_en.htm http://europa.eu/legislation_summaries/environment/index_en.htm
Legal enforcement	Complaints to the European Commission and petitions to the European Parliament Other: European citizens' initiative and European Ombudsman (regarding EU institutions and bodies)
What can be expected by EU citizens?	EU has issued many legal texts regarding environment and supports the "operator's" liability, with the famous "polluter pays" principle. If European citizens witness a lack of compliance regarding the European environmental law, they are enabled to complain about their State. To do so, they have to address the European Commission with a complaint to the Commission or a petition to the European Parliament. The State might be condemned and forced to take the appropriated measures to enforce the polluter's liability through national jurisdiction (article 260 of the TFEU).

Brief introduction to the European Union Court of Justice

The ECJ ensures since 1952 that the EU law is observed, by forcing, when necessary, the Member states to implement and enforce the EU law.

The Court of Justice of the European Union is in reality a set of three courts: the Court of Justice, the General Court and the Civil Service Tribunal

What is usually called "the Court of Justice of the European Union" is in reality a set of three courts: the Court of Justice, the General Court and the Civil Service Tribunal (it resolves the conflicts between EU civil servants and the institutions).

The Court is enabled to receive the following types of complaints:

- direct actions brought **by natural or legal persons** against acts or decisions of the EU, i.e. "direct actions";
- actions brought by the commission or by a member state against a member state when it believes it does not fulfil its duty i.e., "proceedings for failure to fulfil an obligation" art. 258 and 259 of the TFEU;

- actions brought by a member state, the Council, the Commission, the Parliament or private individuals if a specific law is considered illegal, i.e. “action for annulment”;
- action brought member states, other Community institutions and individuals or companies when they believe the Parliament, the Council or the Commission did not act needed decisions, i.e. “actions for failure to act”.

Appealing against a ruling made by the General Court is possible, but within less than two months after the judgement.

Brief introduction to EU law

The original idea (1950) was to foster economic cooperation in order to promote peace in the divided Europe, and to face two emerging powers, the USA and URSS. The European Community has evolved into an organisation spanning many policy areas, among which environment.

“Environment” falls under the shared competence of the EU institutions and the Member States. UE treaties refer to healthy environment, especially since 2009, with the new revision of the EC Treaty in Lisbon (called the Lisbon Treaty), which included more references on the environment than before. The European institutions have issued various European legislations regarding this thematic.

The EU is based on the rule of law founded on Treaties (primary law) agreed by all member countries. These binding agreements set out the EU's goals in its many areas and give the European authorities (the Parliament, the Council of the European Union and the Commission) the ability to establish together new legislations (secondary law). The European legislation is incorporated immediately to state domestic legal order.

When a State fails to transpose or implement the European legislation, the European Commission or other states through the Commission might demand the State to do so. This is called an “**infringement procedure**”. If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

The purpose of this pre-litigation stage is to enable the Member State to voluntarily comply with the EU law. The letter of reasoned opinion represents the first stage. If the Commission’s request is not followed by notable changes, the Commission turns it into a case before the European Court of Justice. Referral by the Commission to the Court of Justice opens the “litigation procedure”. Civil Society Organisations, individuals and other states have the possibility to provide the impulse to the infringement procedure, by sending a complaint to the Commission.

Box 3 Environment in EU policies

Source: Article 191 of Treaty on the functioning of European Union (2009), Title XX

Respect of the environment is at the core of the UE's policy

"*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and assured in accordance with the principle of sustainable development*".

Charter of Fundamental Rights (2001) article 37

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,

— protecting human health,

— prudent and rational utilisation of natural resources,

— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

3. In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union."

Some concepts

European Law

We can identify 3 levels of law: primary law, secondary law and supplementary law. The main sources of **primary law** are the Treaties establishing the European Union. **Secondary** sources are legal instruments based on the Treaties and include unilateral secondary law and conventions and agreements. The regulations, directives, decisions, recommendations and opinions make up the "secondary law". **Supplementary** sources are elements of law not provided for by the Treaties and not all are binding. This category includes Court of Justice case-law, international law and general principles of law.

EU regulations must be applied by all member states within 20 days after publication in the Official Journal and should be binding within national legislations.

An **EU Directive** is one of the main legal instruments for implementing European environmental policies. It is a tool mainly used in operations to harmonise national legislations. The directive is a very flexible instrument; it obliges the Member States to achieve a certain **result but leaves them free to choose how to do so within a period of time**.

The **decision** is a legal instrument available to the European institutions for the implementation of European policies. Decisions, like regulations and directives, are binding acts which may have general direct application or may apply to **a specific addressee** (one or several Member States, agencies, etc.).

More info on http://europa.eu/legislation_summaries/glossary/community_legal_instruments_en.htm

The polluter pays principle

As defined by Nicholas Moussis in its online encyclopedia "Europedia", The "polluter pays" principle, mentioned in Article 191 § 3 of the TFEU, means that "*the cost incurred in combating pollution and nuisances in the first instance falls to the polluter, i.e. the polluting industry. Given, however, that the polluting industry can pass the cost of the prevention or elimination of pollution on to the consumer, the principle amounts to saying that polluting production should bear: the expenditure corresponding to the measures necessary to combat pollution (investment in apparatus and equipment for combating pollution, implementation of new processes, operating expenditure for anti-pollution plant, etc.); and the charges whose purpose is to encourage the polluter himself to take, as cheaply as possible, the measures necessary to reduce the pollution caused by him (incentive function) or to make him bear his share of the costs of collective purification measures (redistribution function). The European guidelines on State aid for environmental protection […] are designed to ensure that aid granted for environmental purposes complies with the "polluter pays" principle*."

The precautionary principle

As defined by the European Union on its website on "summaries of UE legislation", the precautionary principle *"enables rapid response in the face of a possible danger to human, animal or plant health, or to protect the environment. In particular, where scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous."*

The prevention principle

As defined by Oskam, *Vijftigschild* and *Graveland in 1997 in their book* Additional EU Policy Instruments for Plant Protection Products, a definition used by the European Environmental Agency in their Environment Terminology and Discovery Service online, the prevention principle *"allows action to be taken to protect the environment at an early stage. It is now not only a question of repairing damages after they have occurred, but to prevent those damages occurring at all. This principle is not as far-reaching as the precautionary principle. It means in short terms: it is better to prevent than repair*".

Fig. 3

Court of Justice of the European Union

Photo credit: Cédric Puisney / Creative Commons

The Aarhus Convention

Since 2005, the European Union is party to the Aarhus convention, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted in 1998. The core mission of the convention is to established basic rights regarding the environment for citizens and their organisations. As presented by the European Commission on its website, the Convention establishes:

- "*The right of everyone to receive environmental information that is held by public authorities ("**access to environmental information**"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;*

- *The right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("**public participation in environmental decision-making**");*

*- The right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("**access to justice**").*"

Through the Convention's Compliance Committee, party to the convention, the convention secretariat or citizens can report concern regarding the compliance of the convention by its parties. It is not a binding process but the Compliance Committee can issue recommendations to the Convention parties to be reported during the Convention Meeting of the Parties.

This Convention is so far one of the most interesting legislation in term on Environmental law in the world, and witnesses the change in the mentalities. It officially recognises the right of people to know (getting information on damaging activities), to react (justice) and to make the things change (decision-making).

European environmental law

Since the Treaty on the Functioning of EU's update in 2009, the EU environmental policies are based on four main objectives (title XX): the protection of human health, the rationalisation and prudent use of natural resources, the preservation, protection and improvement of environmental quality, the promotion of international measures regarding global environmental issues like climate changes.

Environmental inspections in all Member States aim to improve compliance and ensure EU environment legislations are applied and implemented

The environment is different in each Member State, and so are the measures taken by each Member state. However, Member states are submitted to a procedure of inspection. Even if in a non-prescriptive way, minimum criteria for organising, performing, following-up and publishing the results of environmental inspections in all Member States with the aim of improving compliance and ensuring that EU environment legislation is applied and implemented more consistently. The "environmental inspection" instrument is particularly interesting regarding prevention or monitoring previous complaints. For more information: http://europa.eu/legislation_summaries/environment/general_provisions/l28080_en.htm

Since 2004, UE has aimed at ensuring that the financial consequences of certain types of harm caused to the environment will be borne by the economic operator who caused this harm. For this purpose, a part from many specific directives related to environmental issues, the "**Environment Liability Directive**" (ELD, 2004/35/EC) provides for the financial responsibility of any natural or legal, private or public person who operates or controls the damaging occupational activity, the prevention and remedy to environmental damages.

As defined in the European Commission's website in its section on environmental liability, the directive "*establishes a framework based on the **polluter pays principle** to prevent and remedy environmental damage. As the ELD deals with the "pure ecological damage", it **is based on the powers and duties of public authorities** ("administrative approach") as distinct from a civil liability system for "traditional damage" (damage to property, economic loss, personal injury)*."

Read the Directive:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0035

Citizens can address complaints to the European Commission about a member state failing to implement EU law and the Commission can start an infringement procedure

Since 2008, EU felt the necessity to strengthen the sanctions for environmental damages. On this purpose, was proposed a directive on "environmental crime" that lists the offences that should be sanctioned more severely by the Member States. Learn more on Directive 2008/99/EC in part 2 of the manual.

How to tackle environmental damages and corporation liability in the EU?

Since 2004, European Union enabled the European citizens and EJOs to ask for corporations liability regarding environmental deterioration.

Who can complain? Affected natural or legal persons and EJOs have the right to request the competent authority to take remedial action if they deem it necessary.

Who might be the respondent? Any natural or legal, private or public person who operates or controls the damaging occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.

How to complain? If the problem has not been resolved at the national level, an EJO/individual has the opportunity to inform the Commission by filling in the "complaint form".

Download it: http://ec.europa.eu/environment/legal/law/pdf/natureform.doc

What to complain about? Environmental damages done or to be done: (a) "Damage to protected species and natural habitats", which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The habitats and species concerned are defined by reference to species and types of natural habitats identified in the relevant parts of the Birds Directive 79/409 and the Habitats Directive 92/43. (b) "Water damage", which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the Water Framework Directive 2000/60, of the waters concerned. (c) "Land damage", which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms. The establishment of a causal link between the activity and the damage is always required.

What results can be expected? The operator liable under the ELD must bear the cost of the necessary preventive or remedial measures. If the Commission receives the complaint, the Member State will be contacted by the Commission to solve the problem out of the Court. If the Member State does not act in order to fully implement the EU law (by making the polluter pay), the Commission will allege a procedure before the European Court of Justice. In case of non-compliance of the EU law, the State will be condemned to pay and enforce the EU law: the State has to recognise the operator's liability and make him pay.

1.2.2.2 How to access justice at the European Union level?

EJOs and citizens are enabled to bring cases in front of the ECJ against EU institutions and bodies. These **direct actions** can be brought by individuals, companies or organisations against EU decisions or actions. They cannot bring cases before the ECJ against private sector, but they can address the Commission a complaint about member States that do not properly rule on corporation liability under the European directive (ELD). In the same line, they are not authorized to bring cases against Member states, but they can address the Commission complaints about the member State that fails to implement EU law. When the Commission addresses the Court against a Member States, it is an **infringement procedure**.

Read more on the infringement procedure for environmental matters: http://ec.europa.eu/environment/legal/law/statistics.htm.

Citizens can also address a petition to the parliament as we will see below.

Direct access to justice: addressing the ECJ

Every victim of damage caused by the action or inaction of the EU institutions or its staff can bring an action to get compensation before the General Court. Cases can be brought by individuals only against European institutions. The first step EJOs and individuals shall take is contacting the Court. You can send your demands by mail or by post using the following electronic form after previous registration online. Once the complaint is sent to the Court, a judge and an advocate general are assigned to it. The judge in charge has to write a summary of these statements and the case's legal background. In a second time, the court organises a public hearing. This is the *oral stage*. A panel of 3, 5 or more judges (or the whole court) will examine the case. The number of judges depends usually of the complexity of the case. The lawyers expose the positions of both sides to the judges and the advocate general, who question them. The advocate-general takes position. The judges discuss the case and vote (majority) a judgment that does not always coincide with the advocate-general's opinion. The Court's judgements are made public and accessible on the official website.

The direct access to ECJ is limited, but EJOs can find support through indirect mobilisation of judicial and legislative powers through the Commission and the Parliament. See Brief introduction the European Union Court of Justice.

Indirect access to justice: addressing the European Commission and the Parliament

Addressing the European Commission

The Commission has the responsibility of the implementation of the treaties, by detecting breaches of EU environmental law and gathering information on the field. More efficient however is the system of complaints brought by citizens' victims of a violation of a Treaty.

This way of proceeding gives the opportunity to European citizens to complain to the EC with a non compliance in their own state. When several cases refer to the same problem, they are merged and processed under the same reference. Of

Addressing the parliament with a petition helps to raise attention on a specific matter. It could impulse a new legislation, a field visit or more exceptionally lead to a vote in plenary

course, a high number of complaints for the same problem will gain major importance.

In order to facilitate the dialogue with EJOs/individuals, the Commission has created a special complaint form accessible online. Through this form, the Commission provides the information needed to assess any type of complaints. If the claimant prefers to write a letter explaining the facts, he must describe the facts, the steps previously taken at local and national level and the EU law considered to have been infringed, providing as much detailed information as required in the form.

Each Directorate General in the Commission is in charges of the complaints that concern its specific field of competence. Environmental complaints are examined by the Environmental Directorate General.

The Commission receives the complaints, examines it, and decides on the admissibility of the claim. If receivable, further investigations must be realised within a month. The Secretariat-General of the Commission is supposed to let the plaintiffs know about the evolution of the procedure within fifteen working days from the receipt.

If there is a real and visible violation of the EU law, the Member State concerned is contacted through a letter; or meetings are organised with national representatives to discuss the matter. The action the Commission takes against a member state is called the infringement Procedure. If the Commission is not satisfied by the reaction of the member state, it presents a lawsuit to the Court of Justice of the European Union, as applicant.

The actions taken by the Commission before the Court can be three:**"proceedings for failure to fulfil an obligation"**, **"actions for annulment"** and **"actions for failure to act"**, see "Brief introduction to the European Union Court of Justice".

Most of the information is easily available online, were you can find further information on the procedure, like the method of submitting a complaint, the stages of infringement proceedings, national means of redress, administrative guarantees, and protection of the complainant and personal data, etc.

The Commission is enabled to investigate complaints from civil society, but also petitions filled in by citizens and relayed by the European Parliament.

Addressing the European Parliament

Anyone has the right to send a petition to the Parliament. This includes also residents in a European Union Member State, associations, companies or even organisations with its headquarters in a European Union Member State.

The role of the European parliament is limited, as it is enabled to pass judgement on, nor revoke decisions taken by national Courts. However, addressing the Parliament ends usually up in raising the European attention to a matter. It can give thereby the impulsion to the proposal of new legislation.

The **Petitions Committee of the European Parliament** (assisted by a permanent secretariat) manages the petitions process. It is responsible for assessing the admissibility of the petitions. If the petition is about a European Union policy, it is

usually considerate as admissible. The Committee has different options in reacting: it might choice to refer the petition to other European Parliament committees for further action; it might, in exceptional cases, ask the petition to be voted upon in a plenary session. The committee might also request a visit to the place of the facts. The meetings of the Committee on Petitions take place every month.

To address the Parliament with a petition, there is the possibility to submit it online, or to send a letter in one of the official EU languages providing name; nationality; address and signature as well as the information requested in the online form.

Contact

European Parliament
Committee on Petitions
The Secretariat
Rue Wiertz
B-1047 Brussels
BELGIUM

Other useful link

About the petitions to send to the EU Parliament:
http://www.europarl.europa.eu/aboutparliament/en/00533cec74/Petitions.html
http://ec.europa.eu/justice/citizen/complaints/petition/index_en.htm

1.2.2.3 What has been done? Example to follow

Lawsuit	**Judgment of the Court (Fourth Chamber) of 4 March 2010 - Commission of the European Communities vs Italian Republic** (Case C-297/08)
Period of the trial	2008-2010
Applicants	Commission
Respondents	Italian Republic
Court	European Union's Court of Justice
EU law	Infringement of Articles 4 and 5 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9)

Target	The Commission aimed to force the administration dealing with waste to do so according to the EU law. Indeed, the Commission alleged that Italy violated Articles 4 and 5 of the EU Directive 2006/12. (http://ec.europa.eu/environment/waste/index.htm).
Basic facts	The present action concerns the region of Campania. The region is faced with problems in managing and disposing of its urban waste. As early as 1994, a state of emergency was declared in Campania and a *Commissario delegato* was appointed, to implement rapidly the measures designed to overcome 'the waste crisis'. An urban waste management plan was approved in 1997. It provided for a system of industrial installations for the recovery of waste through thermal treatment (incineration), which could be supplied through a system for the sorted collection of waste, organised at regional level in Campania. By Ministerial Order No 2774 of 31 March 1998, the decision was taken to organise a tendering procedure in order to entrust waste treatment operations, for a period of 10 years, to private operators capable of constructing installations for the production of combustible materials derived from waste ('CMW'), as well as installations for the incineration of waste or its recovery through thermal treatment. The procurement contracts in question were awarded to two companies belonging to the Impregilo group. Those companies had to build and manage seven CMW production plants and two thermal recovery plants. The municipalities in the region of Campania were required to have their waste treated by those companies. However, implementation of the plan ran into difficulties, first, because of opposition from some of the local inhabitants concerning the sites selected and, secondly, because of the low volume of waste collected and deposited with the regional service. Moreover, plant construction ran into delays, and flaws were detected in the design of the installations, with the result that waste accumulated to saturation point in the available landfills and storage areas because it could not be treated by the facilities in question. The Public Prosecutor's Office of Naples also opened an investigation to establish fraud in the award of public procurement contracts. The CMW production plants in Campania were placed in receivership, which means that it was impossible to bring the equipment in question up to standard. Lastly, the contracts under which the administrative authorities were tied into a relationship with Fibe SpA and Fibe Campania SpA were rescinded, but efforts to make a fresh

	award of those contracts for the disposal of waste in Campania, by means of a tendering procedure, are reported to have met with failure on more than one occasion, chiefly because of the insufficient number of eligible tenders.
Results	The Court found that Italy had failed regarding the measures necessary to ensure that waste is recovered and disposed of without endangering human health and without harming the environment and, in particular, in establishing an integrated and adequate network of disposal installations. Therefore, the Italian Republic has failed to fulfil its obligations under Articles 4 and 5 of Directive 2006/12/EC on waste. The Court orders the Italian Republic to pay the costs, but Italy never pays and no concrete enforcement of the procedure occurred.
More information	http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2010.113.01.0008.01.ENG http://europa.eu/rapid/press-release_IP-13-575_en.htm Sentence: http://curia.europa.eu/juris/document/document.jsf?docid=82679&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=150381 http://www.ceecec.net/wp-content/uploads/2008/09/CAMPANIA_FINAL_19-05.pdf

Lawsuit	**Stichting Natuur en Milieu & Pesticide Action Network Europe v. European Commission** Case T-338/08 (Judgment of the General Court (Seventh Chamber), June 14, 2012)
Period of the trial	2008-2012
Applicants	Stichting Natuur en Milieu & Pesticide Action Network Europe
Respondents	European Commission
Court	European Union's Court of Justice
EU law	Aarhus Convention
Target	Internal review of pesticide regulations under the provisions of the Aarhus Convention.

Basic facts	• The applicants were NGOs (Stichting Natuur en Milieu & Pesticide Action Network Europe) concerned about EU Commission regulations which delineated maximum pesticide residue levels in various products, food, and feed. • They made request to the Commission for an internal review of these regulations under the provisions of the Aarhus Convention. • The Aarhus Convention puts forth that members of the public society have the right to access administrative or judicial procedures to challenge acts and omissions by private persons and public authorities in matters regarding environment. • The Commission denied the NGOs' request for internal review, arguing that the EU regulation that implements this Convention in EU limited the extent of public requests. • The NGOs brought their complaint to the Court, arguing that thereby, Regulation's provision contravenes the Convention.
Results	The Court annulled the decisions of the Commission of 1 July 2008 rejecting as inadmissible the requests for the Commission to review some legislation on pesticides in progress.
Lessons learned	International treaty [Aarhus Convention] prevails over secondary EU legislation. The Commission, as guardian of the treaties, protects the citizens against the member states who fail to strictly follow the EU law. This case shows that the Civil Society can protect the citizens against the Institutions when they fail to respect the Treaties or the Conventions. It proves that the Civil Society can take part to a dialogue with the European Institutions. Unfortunately, the civil society's role is limited to a defensive one. The NGOs cannot propose new legislation.
More information	UNEP Compendium p. 90 (Accessible online: http://www.unep.org/environmentalgovernance/Portals/8/publications/UNEP_Compendium_HRE.pdf). Link to the sentence: http://curia.europa.eu/juris/document/document.jsf?text=&docid=123824&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=151899

1.2.3 The Inter-American Human Rights System

1.2.3.1 Some key information to better understand the possibilities to access Justice at intern-American level

Location	San José, Costa Rica (Court) Washington, D.C. (Commission)
Main bodies and date of their establishment	1959: The Inter-American Commission of Human Rights (CIDH) 1979: Inter-American Court of Human Rights
American States Organisation (OAS)	OAS is the world's oldest regional organization. Founded as the International Union of American Republics in 1890, it built the foundation of the inter-American system which was officially sealed with the signature of the Charter of the American States Organisation in 1948. As it stipulates in Art. 1 of the Charter, the organisation was established to achieve "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." After the creation of the OAS, the American Convention on Human Rights was adopted in 1969. 35 American states are parties of the Convention, and can be judged on the basis of the Convention of Human rights and the American Declaration of the Rights and Duties of Man. Canada and the United States did not ratify the Convention for Human Rights and therefore can only be judged under the American Declaration of the Rights and Duties of Man. The organisation is based on four main pillars: human rights, democracy, development and security and divides its actions towards cooperation, inclusiveness, political dialogue, legal and follow-up instruments.
Member States	The Member States of the OAS are 35: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Colombia, Cuba, Costa Rica, Chile, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vicente and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.
Legal	• The American Convention on Human Rights

Background	http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm • The American Declaration on the rights and duties of the Man http://www.hrcr.org/docs/OAS_Declaration/oasrights.html • The Additional Protocol to the American Convention on Human Rights in the Area of. Economic, Social and Cultural Rights "Protocol of San Salvador" http://www.oas.org/juridico/english/treaties/a-52.html
Legal enforcement	Complaint to the Inter-American Commission against a Member State.
What can be expected by South American individuals?	The Commission and the Court can make pressure on a State so that it enforces the American Convention on Human Rights.

The Inter-American Court for Human Rights

The Court (IACHR) is based on the American Convention on Human Rights and has been established with the adoption of its Statute in 1979 by the OAS General Assembly. The Court can prosecute cases against the Member States that have specifically accepted the Court's jurisdiction.

Fig. 4

Oil contamination

Source: Lucie Greyl

The key aspects of the Court are described in the American Convention on Human Rights (articles 61-69). First of all, the Court is not open to direct individual complaints. Only the State and the Commission shall have the right to submit a case to the Court (article 61). If the Court finds that there has been a violation of a right or freedom protected by this Convention, it rules that the injured party be ensured the enjoyment of its right or freedom that was violated. It shall also rule, if

appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party (article 63). The judgment of the Court is not subject to appeal (article 67). Further details on the Court's Rules of Procedure are available on the Court's official website.

The States that have recognise the Court's jurisdiction are the following: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

The inter-American Commission

The Commission (IACHR) is enabled to monitor the human rights situation in the Member States of the Organization of American States who are part of the American Convention on Human Rights or the American Declaration of the rights and the duties of the Man.

As previously said, individuals cannot directly access the Court. The Commission can do it on their behalf, if it finds it necessary. By examining individual petition or complaints before bringing the relevant ones before the Court, the Commission "filters" the individual complaints and unblock the work of the Court.

Article 44 of the Convention specifies who is allowed to lodge petitions with the Commission (any person or group of persons, or any non-governmental entity legally recognized in one or more member organisation), and provides indications on the nature of the petitions: they must be denunciations or complaints of violation of the Convention by a State.

After investigation, when the relevance of the complaint is justified, the Commission addresses the Member State involved with recommendations. If the Commission determines that a State is responsible for having violated the human rights of a person or group of persons, it will issue a report. The report can have different form. Some demand the suspension of the acts in violation of human rights; others ask for an investigation and the punishment of the persons responsible. The Commission makes official, in its reports, the necessity for the state to make reparation for the damages caused, or to change irrelevant legislation. The Commission is also entitled to ask the State to adopt other measures or actions.

When the Member States does not respect the Commission's recommendations, the Commission can turn the complaint into a case and bring it before the Inter-American Court. The second part of this section will present the procedure to follow to use this instrument.

So far, the existence of the Convention and the work of the Commission and the Court have been of particular interest for the indigenous peoples. Indigenous people show strong relationship with nature: the environment is sacred, closely integrated in their culture, and they often strictly rely on it to live. Environmental degradation caused by extractive or productive activities might affect them more strongly or frequently than other groups. States do often fail in defending indigenous people against impacting projects. The international and regional

Human Rights system tends to offer them protection. In most cases, the legal procedure is slow and the damages done are often irreparable. However, the increasing number of cases ruled to protect indigenous people from environmental deterioration represents a trend in improving their defence. Accordingly, the legal cases in the third part of this section illustrating the work of the Human Rights system in America are related to indigenous people and their rights.

1.2.3.2 How to Access Justice at Intern-American Organisation level?

Indirect access to the Court through the Commission system of petitions

Individuals or EJOs cannot directly address the Court, so they have to officially contact the Commission.

If the Commission observes that the Member State is indeed violating the American Convention on Human Rights, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "**Error! Referència d'enllaç no vàlida.** (1988) or the American Declaration of the rights and duties of Man, and if the Member State doesn't show willingness to make the things change, the Commission will bring the lawsuit before the Inter-American Court.

However, the Commission can only examine the petitions if the plaintiffs have exhausted national judicial opportunities. It is important to take in consideration that the claimant has to address the Commission less than six months from the national final judicial decision.

There is no need for the applicant to be represented by a lawyer to file and process the petition, which shall preferably be written in Spanish, English, Portuguese, or French. Only one document has to be sent (no copies needed), but it should not be the original, as documents can be lost during the sending.

Contact

Email: cidhdenuncias@oas.org
If you wish to send your petition via the electronic form, you have the option of drafting your petition in a separate document and uploading it to the Commission's website: https://www.cidh.oas.org/cidh_apps/login.asp
Fax: +1(202) 458-3992 or 6215

Inter-American Commission on Human Rights
1889 F Street, N.W.
Washington, D.C. 20006
United States

Box 4 Model of petition to the Inter-American Commission on Human Rights

Source: www.aos.org [3]

SECTION I. INFORMATION ON THE ALLEGED VICTIM AND PETITIONER

1. INFORMATION ON THE ALLEGED VICTIM(S)

Please provide the information about the person or group affected by the violation(s) of human rights.

It is important to notify the Commission immediately and in writing if the alleged victim(s) wish/wishes to change representation or become the petitioner in his/her/their own petition. If there is more than one victim, please add the data in the "Additional Information" Section.

Name of the alleged victim

Sex of the alleged victim

Date of birth of the alleged victim: (day/month/year)

Mailing address of the alleged victim (including the street or avenue, number/name of the building or house, apartment, city, state or province, postal code, country)

Telephone number of the alleged victim (include area codes if possible)

Fax number of the alleged victim (include area codes if possible)

Email of the alleged victim

Is (are) the alleged victim(s) deprived of liberty?

Additional information about the alleged victim(s)

INFORMATION ON THE FAMILY MEMBERS

Please provide information regarding the close family members of the alleged victim(s) who are likely to have suffered harm as a result of the alleged violation of human rights.

Name of the family members and relationship to the alleged victim

Mailing address of the family members (including the street or avenue, number/name of building or house, apartment, city, state or province, postal code, country)

Telephone number of the family members (include area codes if possible)

Fax of the family members (include area codes if possible)

Email of the family members

Additional information on the family members

DATA ON THE PETITIONER

Please provide information about the person or group that is submitting the petition. It is important to notify the Commission immediately of any.

[3] Download at: https://www.oas.org/en/iachr/docs/pdf/HowTo.pdf
In Spanish: https://www.cidh.oas.org/cidh_apps/manual_pdf/MANUAL2010_S.pdf, https://www.cidh.oas.org/cidh_apps/login.asp

Box 4 (cont.)

DATA ON THE PETITIONER (cont)

Name of the petitioner (In the event that it is non-governmental organization, include the name of the legal representative(s) who will receive the communications. If it is more than one organization or person, include the additional information in the space provided)

Acronym of the organization (if applicable)

Mailing address of the petitioner (including the street or avenue, number/name of building or house, apartment, city, state or province, postal code, country) (NOTE: The Commission requires a mailing address to send notifications related to your petition.)

Telephone number of the petitioner (include area codes if possible)

Fax of the petitioner (include area codes if possible)

Email of the petitioner: In certain cases, the Commission can keep the identity of the petitioner confidential, if expressly requested. This means that only the name of the alleged victim will be communicated to the State if the IACHR decides to process your petition.

Do you want the IACHR to keep your identity as petitioner confidential during the procedure?

Additional information about the petitioner(s):

IS YOUR PETITION RELATED TO A PREVIOUS PETITION OR A REQUEST FOR PRECAUTIONARY MEASURES?

Have you previously submitted a petition to the Commission concerning these same facts? (If yes, indicate the number of the petition):

Have you submitted a request for precautionary measures to the Commission concerning these same facts? (If yes, indicate the reference number)

SECTION II. FACTS ALLEGED

1. MEMBER STATE OF THE OAS AGAINST WHICH THE COMPLAINT IS SUBMITTED

2. THE FACTS

Provide, in chronological order, an account of the facts that is as thorough and detailed as possible. In particular, specify the place, the date, and the circumstances in which the alleged violations occurred. (Add more pages if necessary or attach a separate document in which you describe the facts alleged)

3. AUTHORITIES ALLEGEDLY RESPONSIBLE

Identify the person(s) or authorities who you consider responsible for the facts alleged and provide any additional information as to why you consider the State responsible for the alleged violation(s).

4. HUMAN RIGHTS ALLEGEDLY VIOLATED

Indicate the rights that you consider have been violated. If possible, specify the rights protected by the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, or the other Inter-American human rights treaties. If you wish to consult a list of the rights or treaties, see the Petition and Case System: Informational Brochure, in particular the section referring to Human Rights in the Inter-American System.

Box 4 (cont.)

SECTION III. LEGAL REMEDIES PURSUED TO RESOLVE THE FACTS ALLEGED

Describe the actions pursued by the alleged victim or the petitioner before the judicial bodies. Explain any other remedy pursued before domestic authorities, including administrative agencies, if any.

If it has not been possible to exhaust domestic remedies, choose from the following options the one that best explains why it was not possible: ( ) the domestic laws do not ensure due process for the protection of the rights allegedly violated; ( ) access to domestic remedies has not been permitted, or exhausting them has been impeded; ( ) there has been unwarranted delay in issuing a final decision in the case. Please explain the reasons.

Indicate whether there was a judicial investigation. Indicate when it began, when it ended, and the result. If it has not concluded, indicate why.

SECTION IV. AVAILABLE EVIDENCE

1. Evidence

The available evidence includes any documents that may prove the violations alleged (for example, the principal pleadings and exhibits in judicial or administrative records, expert reports, forensic reports, photographs, and video or film recordings, among others). If possible, attach a simple copy of these documents. (The copies do not need to be certified or legally authenticated). Please do not attach originals. If it is not possible to send the documents, you should explain why and indicate whether you will be able to send them in the future. In any event, you should indicate which documents are relevant to proving the facts alleged. The documents should be in the language of the State, so long as it is an official language of the OAS (Spanish, English, Portuguese, or French). If this is not possible, the reasons should be explained. List or indicate the evidence that is the basis of your petition, and, if possible, identify which evidence you are attaching or sending with your petition.

2. Witnesses

Identify, if possible, the witnesses to the alleged violations. If those persons have given statements to the judicial authorities, send, if possible, a simple copy of the witness statements given to the judicial authorities, or indicate whether you will be able to send them in the future. Indicate whether it is necessary to keep the identity of the witnesses confidential.

SECTION V. OTHER COMPLAINTS LODGED

Indicate whether these facts have been presented to the Human Rights Committee of the United Nations or any other international organization. If yes, indicate which organization.

SECTION VI. PRECAUTIONARY MEASURES

In certain serious and urgent situations, the Commission may ask a State to adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings. For the criteria the Commission has used in practice, you may go to www.cidh.org, where a summary of the granted precautionary measures is periodically published. If you wish to submit an application for precautionary measures, please refer to the Petition and Case System: Informational Brochure, in particular the section entitled Serious and Urgent Situations. Indicate whether there is a serious and urgent situation of risk of irreparable harm to persons or to the subject matter of the proceedings. If yes, please explain the reasons.

1.2.3.3 What has been done? Examples to follow

Name of the case	**Yanomami v. Brazil**
Period	1980-1985
Applicants	Non-governmental organizations on behalf of the Yanomami Indians
Respondents	Government of Brazil
Body	Inter-American Commission of Human Rights
Target of the complaint	Mitigate the consequences of the building of a highway through the Yanomami territory and of a mining project. The implementation of the legislation that should protect the Yanomami Indians, in particular with the establishment of a Yanomami Indian Park of 9,419,108 hectares.
Basic facts	The Yanomami are an indigenous people living in the Amazon regions of Brazil and Venezuela. They have a close relationship with their territories on which they rely for subsistence. The complaint is related to the approval by Brazil in the 1960s of the exploitation of gold in the region, followed by the discovery of mineral deposits. More than 200 illegal miners came hoping to make fortune. In parallel, Brazil raised the project to build a trans-Amazonian highway through Yanomami territory. The Petitioners alleged that the Brazilian government had violated the American Declaration of the Rights and Duties of Man (the right to life, liberty, and personal security [Article I]; the right to residence and movement [Article VIII]; and the right to the preservation of health and to well-being [Article XI]) by constructing the trans-Amazonian highway through Yanomami territory and by authorizing exploitation of the territory's resources by private enterprises. The arrival of outsiders on Yanomami territories had negative consequences on their society (i.e., prostitution) and introduced sexually transmitted diseases and tuberculosis. The lack of medical care resulted in many deaths.

Results of the complaint	The Commission recommended to Brazil to provide the Yanomami People with preventive healthcare and treatment, education. It has to consult the indigenous people for important matters that concern their communities. It also has to establish a Yanomami Park.
Particularity of the case	This case is one of the first reports in which the Inter-American Commission acknowledged the need for indigenous people to receive special protection to enable them to preserve their cultural identity and right to health. The commission recognised the indigenous people' lack of legal title over the land, their vulnerability against economic interests and the confluence between their cultural and environmental rights. The Commission found that Brazil had violated the Yanomamis' rights to life, liberty, and personal security guaranteed by the American Declaration, as well as their rights of residence and movement and their right to the preservation of health and well-being. The violations arose from the government's failure to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians". The Commission found that the main elements of the violations were to be found in the Brazilian state responsibilities in the highway's construction, failing to establish the Yanomami Park, allowing exploitation of the subsoil, failing to provide medical care and the forced displacement of the Yanomami.
Reference	UNEP COMPENDIUM p. 93: http://www.unep.org/environmentalgovernance/Portals/8/publications/UNEP_Compendium_HRE.pdf Official text of the resolution: http://www.cidh.org/annualrep/84.85eng/brazil7615.htm International Network for Economic, Social, and cultural heritage's analysis: http://www.escr-net.org/docs/i/412519 Business and human rights' analysis : http://business-humanrights.org/en/brazil-govt%E2%80%99s-operation-launched-to-combat-illegal-gold-mining-on-yanonami%E2%80%99s-land-miners-accused-of-polluting-rivers-exposing-indigenous-to-diseases#c79531 http://www.cidh.org/annualrep/84.85eng/brazil7615.htm

Name of the case	**Kichwa Peoples of Sarayaku community and its members v. Ecuator**
Period of the trial	2004-2010
Applicants	The petitioner: the Association of Kichwa Peoples of Sarayaku, the Center for Justice and International Law (CEJIL), and the Center for Economic and Social Rights (CDES)
Respondents	The State of Ecuador
Body	Inter-American Commission Inter-American Court The complaint has been brought by the EJOs (Association of Kichwa Peoples of Sarayaku, the Center for Justice and International Law, and the Center for Economic and Social Rights) to the Commission. The latter has decided to address the Court to enforce its recommendations, as the State refused them.
Target	• Adopt the measures necessary to ensure and protect the right to property of the Kichwa indigenous People of Sarayaku. • Remove the explosives planted on their territory. • Ensure the participation of indigenous representatives in the decision-making of projects that may affect them. • Take measures to prevent a recurrence of similar events in the future. • Full individual and communal reparations for the Kichwa People of Sarayaku and its members, not only pecuniary.
Basic facts	The Sarayaku, an indigenous group of the Kichwa people of about 1,200 members, live in a remote area of the Amazonian region of Ecuador. In 1996, the State Petroleum Company of Ecuador (Petroecuador) contracted the Argentine oil company, Compañía General de Combustibles' (CGC), for oil exploration and exploitation of crude oil in a 20,000 hectare area of land in the Amazon region, 65% over which the

	Sarayaku people has a legal or ancestral claim. In 1998, two years after entering into the contract with CGC, Ecuador ratified ILO Convention No. 169 which encompasses the right of indigenous peoples to adequate consultation "whenever consideration is being given to legislative or administrative measures which may affect them directly" or before resource exploration/exploitation activities commence which may prejudice their interests.
Results	After the petition was presented, the Commission granted precautionary measures in 2003, and found the claim admissible in 2004. The claim was inadmissible, argued the State, because domestic remedies have not been exhausted, and because the ILO Convention 169 had not yet ratified it at the time of the contract. In January 2010 the Commission referred the complaint to the Inter-American Court due to Ecuador's non-compliance, and, the Inter-American Commission on Human Rights turned the Sarayaku case over to the **Inter-American Court of Human Rights for a final ruling**. The Commission asked the Court to find Ecuador responsible for violations under the provisions of the American Convention. Sarayaku community members travelled to Costa Rica to testify about the human rights violations perpetrated on their communities, and in 2012, the Court conducted its first-ever onsite visit to an Indigenous territory. During this visit, the Judicial Secretary of State of Ecuador offered the Sarayaku a deal to repair damage and pay compensation. They refused the government's offer in order to let the Court issue its ruling. The Court found Ecuador (under the government of the time) guilty of violating the right to prior consultation and threatening the physical and cultural wellbeing of the Sarayaku people by allowing the oil company to enter their territory. Ecuador now had to pay the community USD$ 1.40 million in compensation for damage done on tribal land, as reported in the Kichwa Indigenous People of Sarayaku v. Ecuador Judgment of June 27, 2012 (Series C No. 245).

Particularity of the case	The ruling is significant for indigenous peoples because the Court provided a binding sentence for the Ecuadorian State and set a mandatory precedent for the countries in the Organization of American States. “The court has been very clear and reiterative regarding the consultation process; they have repeatedly conveyed that consultations should be conducted in good faith following appropriate cultural procedures and must aim to reach agreement,” says Mario Melo, attorney, as quoted by Cultural Survival International.
Reference	The official document of the application of the Court: http://www.cidh.oas.org/demandas/12.465%20Sarayaku%20Ecuador%2026abr2010%20ENG.pdf; http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf Frontline defenders’ analysis: http://www.frontlinedefenders.org/fr/node/19826 EJOLT’s article on the trial: http://www.ejolt.org/2012/08/sarayaku-wins-case-in-the-inter-american-court-of-human-rights-but-the-struggle-for-prior-consent-continues/ Cultural Survival International’s publication on the case: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/confirming-rights-inter-american-court-ruling-marks-key Arturo Hortas, EJOLT’s documentary film: http://www.ejolt.org/2012/11/new-ejolt-video-sarayaku-v-ecuador/

1.2.4 African regional tools

1.2.4.1 Key information to better understand the possibilities to access Justice at regional African level

African Union Human Right system

On the African continent, the Organisation of African Unity (OAU) gathers African States since 1963. In 2002, it was replaced by the African Union (AU). All African States, except Morocco, are part of it. Its goals are to “rid the continent of the remaining vestiges of colonization and apartheid; to promote unity and solidarity among African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation within the framework of the United Nations”. The organisation is based on three main institutions: the African Union Commission (not to be confused with the African Commission on Human Rights), the Parliament and Council of the Pan-African peace and security.

In 1987, the Organisation of African Unity set up the African Charter on Human Rights, and created a body to monitor it: the African Commission on Human Rights. In 2006, the African Union created the African Court for Human Rights to "complement and reinforce" the functions of the African Commission on Human and Peoples' Rights. The African Human Rights system is based on the Charter and monitored by two bodies: the Commission and the Court.

The African Human Right system is charged with interpreting and applying a number of regional human rights instruments, which include:

- African Charter on Human and Peoples' Rights ("Banjul Charter")
- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
- African Union Convention on the Conservation of Nature and Natural Resources
- Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa

Useful links
Read the *Guide to the African Human Rights System*: *http://www.achpr.org/files/pages/about/african-hr-system-guide/human_rights_guide_en.pdf#_blank*
African Union handbook:
http://summits.au.int/en/sites/default/files/MFA%20AU%20Handbook%20-%20Text%20v10b%20interactive.pdf
Open Society Factsheet on the African Commission:
http://www.opensocietyfoundations.org/fact-sheets/african-commission-human-and-peoples-rights

African Court on Human and Peoples' Right
The African Court on Human and Peoples' Rights is a judicial body that delivers binding judgments on compliance with the African Charter.

The African Court on Human and Peoples' Rights has been established in 2006 by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Court's jurisdiction applies only to states that have ratified it. So far, only 27 states have done so: Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

The access to the Court is restricted to some actors:

1. African Commission,
2. State parties to the Court's Protocol,
3. African Inter-governmental Organisations,

4. **NGOs** with observer status before the Commission. To obtain this statute, a NGO have to send a written application addressed to the Secretariat stating its intentions. The Commission examines the dossier and decides to grant the statute or not. For more information: http://www.achpr.org/sessions/25th/resolutions/33/ . To consult the list of the NGOs with the statuts: http://www.achpr.org/network/ngo/by-name/

5. **Individuals**, if the State party from which they come from has made a declaration allowing such direct applications. As at 2011, only Ghana, Tanzania, Mali, Malawi and Burkina Faso are concerned.

Because of these restrictions in directly accessing the Court, EJOs and individuals might have more success in addressing the African Commission on Human Rights.

In case of no-compliance with a Court's judgment, "the Court may, upon application by either party, refer the matter to the Assembly, which may decide upon measures to be taken to give effect to the judgment" (see article 52 of the Protocol on the Court of Justice of the African Union). The Assembly may impose sanctions such as "the denial of transport and communications links with other Member States and other measures of a political and economic nature to be determined by the Assembly" (see paragraph 2 of Article 23 of the Constitutive Act of the African Union).

African Commission on Human and Peoples' Right

The Court is constantly in dialogue with Commission. Unlike the Court, the Commission's recommendations are not legally binding on the state. However, the Court can submit a case to the Court when a State shows unwillingness or failure to comply with its decisions. In this way, the Court enforces the work of the Commission, while the Commission "filters" the cases. By bringing them to the Court only when necessary, the Commission relieves the Court's work, which gains in efficiency.

EJOs and individuals can bring complaints to the Commission concerning alleged violations of the African Charter on Human and Peoples' Rights session

The African Commission on Human and Peoples' Rights (ACHPR - 1987) is based in Banjul, Gambia. It has been established with the African Charter on Human and Peoples' Rights (1981). The African Commission is in charge of promoting and protecting human rights in the Member States of the African Union, which – with the exception of South Sudan – have all ratified the African Charter on Human and Peoples' Rights.

EJOs and individuals can bring complaints to the Commission concerning alleged violations of the African Charter on Human and Peoples' Rights. The NGO Forum[4] supports and coordinates civil society engagement with the African Commission, through twice yearly meetings ahead of the Commission's sessions.

[4] http://www.ishr.ch/news/ngo-forum

Fig. 5

Port Harcourt, Nigeria

Photo credit: Lucie Greyl

Another African Regional tool: Economic Community of West African States (ECOWAS)

ECOWAS (1975) is a regional body composed of fifteen countries[5] (Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo).

It has to be distinguished from the African Union, the African Court and Commission on Human Rights, whose Member States have political and cultural interest. ECOWAS goal is to promote **economic** integration. However, ECOWAS has quickly been interested in the maintenance of peace. It is indeed an essential condition for a union to be realized. The jurisdiction of the court allows rulings on fundamental human rights breaches. In this area, the Court applies international instruments (mainly the Charter on Human Rights) related to human rights and ratified by the State. The Court applies the Treaty, the Conventions, Protocols and Regulations[6] adopted by the Community and the general principles of law.

ECOWAS has a Commission, a Community Parliament, a Community Court of Justice, and a Bank for Investment and Development (EBID). **Individuals and members of the civil society can bring lawsuits before the ECOWAS Court**. The sentences are binding and each Member State has to appoint a national authority responsible for the enforcement of decisions of the Court. Its decisions are not subject to appeal, except in cases of application for revision by the Court.

When a case has been presented to the Court, a Judge-Rapporteur is appointed, in order to prepare the case for the Court. He is empowered to ask for further documents, oral testimony, expert reports, or site visits. Then the Court decides when the case will be received. The session is public, and witnesses might be called. This is the oral procedure. Afterwards, the Court will deliberate on the judgment in closed session, and deliver its judgment in open Court.

Individuals and members of the civil society can bring lawsuits before the ECOWAS Court. The sentences are binding and each Member State has to appoint a national authority responsible for the enforcement of decisions of the Court

[5] http://www.comm.ecowas.int/sec/index.php?id=member

[6] http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=53&Itemid=9

Other useful links

Official website: http://www.courtecowas.org/site2012/index.php?lang=en

ECOWAS court of justice jurisdiction: http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=10&Itemid=10

Guide to the ECOWAS Community Court of Justice by the *Conscientious Objector's Guide to the International Human Rights System:* http://co-guide.org/mechanism/ecowas-community-court-justice

Nneoma Nwogu (2007), Regional integration as an instrument of human rights: Reconceptualizing ECOWAS, Journal of Human Rights 345: http://www.tandfonline.com/doi/abs/10.1080/14754830701531112?journalCode=cjhr20#.U9utOoB_uoM

1.2.4.2 How to access justice at African regional level?

Direct access to the ECOWAS' Court of Justice

On its website, the ECOWAS' Court of Justice defines possible case applicants as follows:

- "*All Member States and the Commission, for actions brought for failure by Member States to fulfil their obligations;*
- *Member States, the Council of Ministers and the Commission, for determination of the legality of an action in relation to any Community text.*
- *Individuals and corporate bodies, for any act of the Community which violates the rights of such individuals or corporate bodies;*
- *Staff of any of the ECOWAS Institutions;*
- *Persons who are victims of human rights violation occurring in any Member State;*
- *National courts or parties to a case, when such national courts or parties request that the ECOWAS Court interprets, on preliminary grounds, the meaning of any legal instrument of the Community;*
- *The Authority of Heads of State and Government, when bringing cases before the Court on issues other than those cited above.*"

To submit a case to the court it is necessary to write an application providing the following information: presentation of the applicants and respondents as well as an explanation of the facts at stake and the requests addressed to the Court.

Contact

Registry
10 Dar Es Salaam Crescent,
Off Aminu Kano Crescent, Wuse II,
Abuja, Nigeria.
Tel: (234) (9) 5240781
Fax: (234) (9) 6708210

email : information@courtecowas.org or info@courtecowas.org or president@courtecowas.org

Direct access to the African Court on Human and Peoples' Rights

a. General conditions of admissibility

The application must be directed against a State Party which has made a declaration authorizing direct access for individuals and NGOs with Observer Status before the African Commission.

Civil society organisations recognised by the court as observer are able to bring cases related to a member state signatory directly to the African Court on Human and Peoples' Rights without passing through the African Commission, as provided by Article 5(3) of the Protocol to the African Charter on Human and Peoples' Rights. To guarantee this eligibility, the signatory state must declare to accept the competence of the court to treat cases under such article 5(3). As at 2011, only Ghana, Tanzania, Mali, Malawi and Burkina Faso had filled this requirement.

Civil society organisations recognised by the court as observer are able to bring cases related to a member state signatory directly to the African Court on Human and Peoples' Rights without passing through the African Commission

b. Specific conditions of admissibility

The complaint has to refer to a violation recognised under the African Charter on Human and Peoples' Rights

It is not written in disparaging or insulting language

- the sources shall be serious, the file cannot be made upon mass media's information
- solutions at the national level must have been exhausted
- the complaint shall be done shortly after the attempts at the national level

Cases are to be submitted at the seat of the Court, which is at Arusha, Tanzania. Either by post, email, fax or courier:

Contact
Registry of the Court
P.O. Box 6274
Arusha,
Tanzania
Fax: +255-732-97 95 03
Email: registry@african-court.org

Other useful links

Guidance for litigants: http://www.african-court.org/en/images/documents/Court/Cases/Procedures/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf

For more details on the Court's procedure: http://www.african-court.org/en/images/documents/Court/Cases/Procedures/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf , http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf and

http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

Indirect access: the African Commission

Anyone can send a complaint to the African Commission to denounce violations of Human Rights, which should mention the victim(s). Complaints do not require expert knowledge to be prepared, even though it is advised to have legal support to be able to present in the complaints the specific rights at stake.

The complaint has to be addressed the Secretariat of the Commission in one of the working languages of the African Union (African languages, Arabic, English, French and Portuguese).

Fig. 6

Oil Contamination in Nigeria

Source: Lucie Greyl

Anyone can send a complaint to the African Commission to denounce violations of Human Rights, which should mention the victim(s)

Box 5 Model of complaints to the African Commission on Human and Peoples' Rights

Source: http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf

1. Complaint(s) (please indicate whether you are acting on your behalf or on behalf of someone else. Also indicate in your communication whether you are an NGO and whether you wish to remain anonymous).

Name …….
Age …….
Nationality …….
Occupation and/or Profession ……..……
Address ……
Telephone/Fax no …….

2. Government accused of the Violation (please make sure it is a State Party to the African charter).

3. Facts constituting alleged violation (Explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation).

4. Urgency of the case (Is it a case which could result in loss of life/lives or serious bodily harm if not addressed immediately? State the nature of the case and why you think it deserves immediate action from the Commission).

5. Provisions of the Charter alleged to have been violated (if you are unsure of the specific articles, please do not mention any).

6. Names and titles of government authorities who committed the violation. (if it is a government institution please give the name of the institution as well as that of the head).

7. Witness to the violation (include addresses and if possible telephone numbers of witnesses)

8. Documentary proofs of the violation (attach for example, letters, legal documents, photos, autopsies, tape recordings etc., to show proof of the violation).

9. Domestic legal remedies pursued (Also indicate for example, the courts you've been to, attach copies of court judgments, writs of habeas corpus etc.

10. Other International Avenue (Please state whether the case has already been decided or is being heard by some other international human rights body; specify this body and indicate the stage at which the case has reached).

contact

The African Commission on Human and Peoples' Rights

P O Box 673, Banjul, The Gambia

Tel: 220 392962

Fax: 220 390764

E-mail: au-banjul@africa-union.org

Useful links

http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf - _blank

Guidelines for the Submission of Communications to the African Commission

http://www.ishr.ch/sites/default/files/article/files/roadmap_english.pdf - _blank

Road map for civil society engagement: State reporting procedure of the African

http://www.ishr.ch/sites/default/files/article/files/roadmap_english.pdf - _blank

Commission on Human and Peoples' Rights and A Human Rights Defenders' Guide to the

http://www.ihrda.org/wp-content/uploads/2012/10/ishr-ihrda_hrds_guide_2012-1.pdf - _blank

African Commission on Human and Peoples' Rights *by the International Service for Human Rights.*

African human rights case law analyser: http://caselaw.ihrda.org/

On the African Commission of HPR official documents: http://www.chr.up.ac.za/index.php/documents-by-theme/african-commission.html

On the African Commission of HPR on environment: http://www.chr.up.ac.za/index.php/documents-by-theme/environment.html

Academic paper on ECOWAS: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5546&context=faculty_scholarship

1.2.4.3 What has been done? Examples to follow

Lawsuit	**Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria** No. 155/96, (May 27, 2002)
Period of the trial	1996-2001
Applicants	Social and Economic Rights Action Center and Center for Economic and Social Rights (SERAC)
Respondents	Federal Government of Nigeria
Body	African Commission for Human and People's Rights
African law	African Charter on Human and People's Rights
Target	Make pressure on the Nigerian Federal State to protect the Nigerian citizen and the environment they depend on rather than oil drilling activities.

Basic facts	The region of Delta Niger has been interesting the petroleum companies since 1938. Nigeria is the first African country to export oil. The drilling activity had terrible consequences on the environment and the people's health. A report issued In 2011 by UNEP describes in detail the deterioration on the environment on Ogoniland. Since 1990, an Ogoni social movement (MOSOP) demonstrated pacifically to attract the federal government's attention. As no consideration was given to them, they directly addressed the petroleum companies. The military government perceived it probably as a threat, as the leaders of the movement were arrested and condemned to death penalty in 1995 through a fake trial. As it was clear that the government did not want to resolve the situation, two NGOs addressed the African Commission on the Human and People's rights. The African Court did not exist yet (2006) at the time of the lawsuit.
Results	The Commission appealed to the government of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by "stopping all attacks on Ogoni communities; ensuring adequate compensation to victims of the human rights violations and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities".
Lesson learned	The Ogoniland's deterioration is a very famous one, especially because of the arbitrary execution of the "Ogoni nine". Many trials have been brought before various courts, in US, in the Netherlands. In the US: http://www.law.yale.edu/documents/pdf/LawJournals/Aaron_Fellmeth_YHRDLJ.pdf In the Netherlands: http://www.ejolt.org/2013/01/dutch-court-rules-against-shell-for-damages-in-nigeria/ This decision is one of the strongest one, and directly addresses the Nigerian Government. However, the plaintiffs were not satisfied with the Nigerian's government answers, as they presented new communications to the Commission (2010) and addressed the ECOWAS court. See case Social and Economic Rights Action Center v. Nigeria below.

More information	Sentence: http://www.worldcourts.com/achpr/eng/decisions/2001.10_SERAC_v_Nigeria.htm UNEP report on Ogoniland: http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx Report EJOLT number 9: http://www.ejolt.org/wordpress/wp-content/uploads/2013/10/131007_EJOLT09-final-Low-resolution.pdf UNEP Compendium: http://www.unep.org/environmentalgovernance/Portals/8/publications/UNEP_Compendium_HRE.pdf

Lawsuit	**Social and The African Commission on Human and People's Rights v. Kenya** Application No. 006/2012, (July 12, 2012)
Period of the trial	2012
Applicants	**Social and The African Commission on Human and People's Rights**
Respondents	Government of Kenya
Body	African Court for Human and People's Rights
AU law	African Charter on Human and People's Rights
Target	Make the recommendations of the African Commission respected by the Government of Kenya (halt the eviction of the Ogiek from the Mau Forest).
Basic facts	The indigenous Ogiek inhabit the greater Mau Forest. In spite of the acknowledgement of their dependence on the Mau Forest as a space for the exercise of traditional livelihoods and as a source of their sacred identity, the Kenyan government issued an eviction notice, which is believed to aim at large-scale logging. After attempting to fight the eviction through domestic channels, the Ogiek filed a case with the African Commission on Human and Peoples' Rights (ACHR). The ACHR referred the case to the African Court on Human and Peoples' Rights "for alleged serious and massive violations of human rights". In particular, the ACHR noted that "eviction will lead to the destruction of their environment, with

	consequences on their livelihoods, culture, religion and identity. This amounts to serious and massive violations of the rights of the African Charter on Human and Peoples' Rights." The ACHR requested that the Court halt the eviction and ordered the Kenyan government to issue the Ogiek people legal title to their historic lands, change their laws to accommodate communal ownership, and compensate the community for losses suffered (para. 5).
Results	The Court held that the government of Kenya had to immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest.
Lessons learned	This case shows that African Court, in operation since 2006, may intervened to protect the rights of an indigenous community.
More information	Sentence: http://www.worldcourts.com/acthpr/eng/decisions/2013.03.15_ACmHPR_v_Kenya.pdf Business and Human Rights: http://business-humanrights.org/en/displacement-and-resistance-the-ogiek-of-kenya

Lawsuit	**Social and Economic Rights Action Center v. Nigeria** Judgment N° ECW/CCJ/JUD/18/12, (December 14, 2012)
Period of the trial	2012
Applicants	Social and Economic Rights Action Center (SERAC)
Respondent	Federal Government of Nigeria
Court	ECOWAS
Regional law	African Charter on Human and People's Rights
Target	The Plaintiffs asked the Court to provide a declaration that everyone in the Niger Delta is entitled to human right, to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to social and economic development; and the right to life and human security and dignity. The plaintiffs asked the Court to make government recognized it failed to effectively and adequately clean up, and ask them to remediate contaminated land and water. The plaintiffs demand a declaration that the failure of the government to establish an adequate monitoring of the human impacts of oil-related pollution, and a declaration that the systematic denial of access to information to the people of

	the Niger Delta about how oil exploration and production will affect them is unlawful. The government was asked to hold the oil companies operating in the Niger Delta responsible for the human rights violations. The plaintiffs demanded the government to consult the people before taking decisions that might affects their health. In addition, the plaintiffs asked for the government to pay adequate monetary compensation of 1 billion USD to the victims of human rights violations in the Niger Delta, and other forms of reparation.
Basic facts	Niger Delta has suffered for decades from oil spills, which destroy crops and damage the quality and productivity of soil. Two oil spills in 2001 and 2008 from Shell-owned pipelines caused the contamination if local waterways, which had consequences on the livelihood, health, and increased considerably the poverty of the people. The government's duty should be to protect the right to health, by investigating and monitoring the possible health impacts of gas flaring. Indeed, the Nigerian government regulations require the swift and effective clean-up of oil spills. However, this has not been done. The government failed to take the case seriously and to take steps to ensure independent investigation into the health impacts of gas flaring and ensure that the community has reliable information, is a breach of international standards.
Results	The Court held that Nigeria had violated the African Charter, but dismissed the claim for $1 billion USD in compensation. The Court argued that the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes. The Court ordered Nigeria to take all necessary steps to halt the occurrence of future damage to the environment, hold perpetrators accountable, and restore the environment of the Niger Delta.
Lessons learned	With this decision, the Court has shown that it will hold Member States of ECOWAS to their obligations to protect the rights of citizens under the African Charter, including by enforcing existing legislation (which is a step some Member States are reluctant to take against foreign companies). The Court has made clear that it will hold ECOWAS Member States are responsible for human rights violations of international companies operating within the State.

More information	Sentence: http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=177:case-serap-v-federal-republic-of-nigeria&catid=10:judgements&Itemid=86 UNEP Compendium: http://www.unep.org/environmentalgovernance/Portals/8/publications/UNEP_Compendium_HRE.pdf

1.3 Trans-national tools and experience: legal opportunities challenging traditional judicial system

EJOs and communities have shown to have a fundamental role in shaping and making such court cases possible

Looking at trans-national best known legal cases – i.e. cases prosecuting nationally foreign actors for facts occurred at national level or prosecuting actors in their state of origin for facts occurred abroad - like the Chevron Texaco case in Ecuador or the Shell-Nigeria case in the Netherlands, we can witness a process of **challenge and advancement** in the field of justice in regards with major environmental injustices. Among the difficulties faced figure the issues of territorial jurisdiction of the Courts and the competences to prosecute liabilities of mother companies, subsidiaries, merged companies.

The development of such challenging legal processes eases the diffusion of similar actions in different judicial systems. New actors are at the source of such court cases often based on a bottom up approach. EJOs and communities have shown to have a fundamental role in shaping and making such court cases possible. In section we review the trans-national tool of ACTA in the USA and the two legal cases of Chevron-Texaco and Shell and identify winning aspects of such tools and experiences.

1.3.1 The ACTA

1.3.1.1 Key concepts for a better understanding the possibility to access justice through ACTA

The Alien Tort Claim Act (ATCA) is an American legal “instrument” that enables any victim of egregious violation of “natural rights” to access justice through the USA law before a USA Court. It states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It means that U.S. considers that some crimes are so important that they can be judged in USA courts, if States where the crime occurred do not provide a relevant forum for an adequate judgement.

Text: http://codes.lp.findlaw.com/uscode/28/IV/85/1350

ATCA grants some basic rights to worldwide citizens but it does not exactly give the victims access to the USA law. It refers to the USA Law (the tort has to violate USA constitutional law or some Treaties to which USA are party of) but it does not give access to the American citizens’ rights.

This view clearly tends toward a "universalist tradition". According to this tradition, some rights are universal, which means applying to every human being precisely because they are human.

The norms that refer to the "human nature" are called "**natural law**". These norms should not be limited to a society, but to all human society. They form thereby the law shared by all nations. They form a part of the so-called "**the law of nations**". This is why the ATCA precisely refers to the "law of the nations". Indeed, a claimant may access justice under ATCA for a crime referring to the "law of nations", or for a violation of the Treaties of the USA.

Natural law should be uniformly understood by everyone. But paradoxically, the content of the natural rights is moving and relative. There is no strict definition on "human rights" or "natural rights" unanimously accepted at the global level. The debate between "universalism and relativism" (which law should apply to anyone and which one depends of the culture?) is particularly relevant in international relations. When does a country have "the right" to interfere in the conflicts within another state? With the ATCA instrument, United States shows that some rights, called "Human rights", are considered as a valid reason to intervene (the contents of the "human rights" are, however, still fluid). Understandingly, this tool has been used carefully and with diplomatic considerations by the judges, as it can have substantial consequences on the American external policy. The political dimension of the tool is maybe one of the strongest obstacles to a wider use.

There are principles or norms defined such as 'accepted and recognized by the international community of States as a whole' from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. These norms form the "***ius cogens***", and generally refer to genocide, slavery, racial discrimination and torture.

Law of Nations: the body of rules that nations in the international community universally abide by, or accede to, out of a sense of legal obligation and mutual concern.

Natural Law: The natural rights of mankind.

Ius cogens: A mandatory legal standard from which no derogation, in domestic law or international law, is allowed.

Source: http://www.duhaime.org/LegalDictionary.aspx

In other words, the "torts" addressed under the ATCA are mostly referring to "human rights". But is the right to a healthy environment a human right? Are the environmental abuses a crime? The link between Human Rights and environment has constantly been strengthening, as the intensity of the environment deterioration has been increasing during the last fifty years. However, "environment" is not yet a concept directly taken into account by the American judges as part of the "law of the nations".

In these times of globalisation and of multinational environment damaging activities, justice at national level is not sufficient anymore. A "universalist" instrument as ATCA is particularly interesting, and it is probably not a coincidence if it has only really been used since 1980, while existing since 1789.

New phenomena (multinational economic activities of big companies) and new kind of damages (deterioration of people's habitat) should lead to a new mentality. Indeed, the content of "universal rights" will probably evolve and include those referring to the environment. For more details on this position, see EJOLT report 11, International law and Environmental debt.

The rulings under ATCA are important because they witness the evolution of the collective perception of environmental crimes and create "precedents"

The rulings under ATCA are important because they witness the evolution of the collective perception of environmental crimes and create "precedents". It is also important to note that USA has developed legal instruments to rule on criminal liability of environmental abuses. Corporate officers, managers and employees have been sued and sent to prison for environmental abuses. In US, environmental crimes are recognised as such.

ATCA is believed to be a promising tool to access international environmental justice. This instrument allows victims to demand the polluter's liability, whatever is their nationality or the operator's origins. It can be used for financial reparations to the victims, not for prevention or a law review. Why promising? Because so far, if the attempts to use ATCA for environmental issues have not been fully satisfying, they suggest that there might be positive evolutions in this direction. Some judgements might not have ended as victims claimed, but they have generated heated debates and the growing recognition of environment as a relevant element to take into consideration regarding the "law of the nations".

The particularity of ATCA is its vagueness, which allows the judges' flexibility. A claimant's argument refused by a Court can be accepted later by another. However, because of this fuzziness, district Courts had had to address Supreme Court to clarify (and sometimes restrict) concepts. In 2013, the famous Kiobel case (regarding again Shell in Nigeria) led to the Supreme Court to narrow the scope of the ATCA in terms of its operation in relation to extraterritorial conduct, stating that the ATCA only applies when the corporate activities in question have a connection with the USA above and beyond the mere existence of a corporate presence in the country. Fortunately, the decision did not define in detail what would constitute a territorial connection to the United States.

Practical considerations for claimants under ATCA

Restrictions (basis requirement and exceptions)

- Plaintiffs: The law requires that the claimant be a foreigner, which excludes any claim raised by United States citizens, but not those of foreign residents in the country. Second, the claimant must have been the victim of an alleged tort, which does not raise any special problems.
- Tort and legal basis: the tort must consist of a violation of customary international law (law of nations), or else involve the violation of a treaty linked to the United States. When international customary law is involved, the courts' interpretations have ruled that the norm violated must be sufficiently specific

(clear and unambiguous), obligatory (irrevocable), and universal (having a sufficiently broad international consensus). However, it is not necessary for the violated norm to be categorised as *jus cogens,* although in some cases the two categories have been confused. ATCA does not have an exhaustion of domestic remedies requirement, but the decision in Kiobel has clearly narrowed the scope of the ATCA in terms of its operation in relation to extraterritorial conduct. The decision has restricted the application of the Alien Tort Claims Act in cases involving allegations of abuse outside the United States.

Customary International Law: International law which does not have a treaty base but, rather, exists because of international custom.

Source: http://www.duhaime.org/LegalDictionary/C/CustomaryInternationalLaw.aspx

- Flexibility of the judges: The different American courts do not always maintain coinciding positions. This means that claims related to certain types of actions may not be considered at one time, but may be considered later by another judge.
- Respondents: The respondents must have certain associations with the United States, especially since the Kiobel trial. When foreign corporations are involved, they have to show a particular degree of economic activity in the USA state where the claim is filed. Therefore, the larger the foreign transnational company involved is, the more likely it has to do with the USA states where the lawsuit is presented.
- Many complaints have been dismissed, arguing the *forum non conveniens* legal concept. A case can be refused for various motivations. The main reason is that a judgement made in USA on a conflict outside US can have unwanted consequences on the USA external policy. To avoid admitting this reason, some courts have argued that the costs for the parties to arrive to the trial are too high for the victims coming from abroad, or that the access to evidences was uneasy.

Forum non conveniens doctrine: This doctrine is a procedural instrument typical of common law systems (Anglo-Saxon tradition), but not so extended in civil law countries (continental-European tradition). It allows the judge to reject a claim that may in fact be admissible under the court's jurisdiction, if it is believed that the litigation would be better resolved under another country's jurisdiction.

Source: http://www.duhaime.org/LegalDictionary/F/ForumConveniens.aspx

Opportunities

ATCA provides an opportunity to access for justice of victims from all over the world. It enables victims to address the lack of liability of corporations in trans-boundary environmental damages. It has a very strong symbolic power: being sued in a Court under the ATCA is extremely bad for the reputation of the companies, as

ATCA refers to egregious violations. In this sense, it also helps to rethink corporate liability.

As mentioned before, the instrument is flexible. Every time that a lawsuit is presented before a USA court, the question of the nature and limits of ATCA is challenged. In the Kiobel case, its extent has been reduced, but next trial, it can be expanded (i.e. to new type of rights).

Fig. 7

Lago Agrio Court, Ecuador

Source: Kevin Koenig in www.chevroninecuador.com

1.3.1.2 How to access justice through ATCA?

For a plaintiff to address environmental harm under the ATCA, she or he has to meet the requirements of the statute, namely bringing the suit as an alien, suing in tort only, and showing that the tort violates the law of nations or a treaty of the United States.

Demanding justice under the ATCA requires addressing a USA district Court.

Lists of the USA district courts can be found at:

http://www.uscourts.gov

http://www.findlaw.com

http://www.ncsc.org

There are two ways of bringing cases:

- To sue the case with **the help of an attorney**

  You can find lawyer in America at:

  http://lawyers.findlaw.com/

  http://www.yourlawyer.com/topics/overview/alien-tort-claims-statutes-lawyers-lawsuit-attorneys

  http://www.losangelesemploymentlawyer.com/Civil-Rights-Law/

  http://www.kelleydrye.com/index

The plaintiffs under the ATCA have to meet the requirements of the statute, namely bringing the suit as an alien, suing in tort only, and showing that the tort violates the law of nations or a treaty of the United States.

- To sue the case **without attorney**. The plaintiff is called a "Pro per se litigant" and has to fill in a complaint form / pro per se litigant guide / pro per se litigant manual. Each court has its own complaint form to fill, so it is necessary to consult the official website of the district court to find the correct form.

1.3.1.3 What has been done under ATCA? Examples to get inspired

Name of the case	**DYNCORP case** two parallel lawsuits: • Aguasanta-Arias et al. v. DynCorp • Arroyo-Quinteros et al. v. DyncCorp
Period of the trial	• 2001- 2006 (plan to appeal) • 2006- ongoing
Applicants	• A group of 10000 Ecuadorian farmers filed a class-action lawsuit (2001) • 1600 affected farmers (2006)
Respondents	DynCorp
Court	• USA district court in the District of Columbia (2001) • USA district court of the Southern District of Florida (2006). But the District Judge granted a motion of Dyncorp to transfer and ordered its transfer to the District Court for the District of Columbia.
Target	Financial reparation to the victims for severe health problems, destruction of food crops and livestock, toxicity of the fumigant caused the deaths of four infants in this region.
Basic facts	DynCorp was the contractor under "Plan Colombia" – a programme ordered by the Colombian and USA Governments. It aimed to combat production of illicit drugs by aerially spraying herbicide on vast territory in Colombia. Ecuadorian farmers from areas bordering Colombia alleged that they were affected by this spraying because DynCorp also sprayed sections of Ecuador bordering Colombia.
Results	In February 2013 the court ruled in favour of DynCorp and dismissed the case finding that the evidence presented was not sufficient to prove the injuries claimed by the plaintiffs. The plaintiffs plan to appeal this dismissal.
Particularity	In this case, an **assertion was made that an environmental norm should be given greater possibilities.** http://www.ejolt.org/wordpress/wp-content/uploads/2012/08/120731_EJOLT-4-High.pdf

Reference	Business and Human Rights analysis : http://business-humanrights.org/en/dyncorp-lawsuit-re-colombia-ecuador#c9308 EJOLT article: http://www.ejolt.org/wordpress/wp-content/uploads/2012/08/120731_EJOLT-4-High.pdf The sentence for the "Aguasanta-Arias et al. v. DynCorp" http://iradvocates.org/sites/default/files/12.10.10%20Opinion%20&%20Order%20denyin%20Defs%20Mot%20Sanctions.pdf Useful link for the Arroyo-Quinteros et al. v. DyncCorp: http://dockets.justia.com/docket/district-of-columbia/dcdce/1:2007cv01042/126008

Name of the case	Rio-Tinto –Papua
Period of trial	2000-2013
Applicants	Residents of the island of Bougainville in Papua New Guinea
Respondents	Rio Tinto
Court	Federal District Court of California
Basic facts	The plaintiffs alleged that the Island had been deteriorated by improperly dumped waste rock and tailings. The waste came from the Panguna mining operations. According to the plaintiffs, Rio Tinto paid local black workers lower wages than white workers and provided poor conditions housing for the black workers. In 1988, residents from the Panguna region started protesting against Rio Tinto regarding labour conditions and environmental harm. These protests became heated. The PNG Government responded by attacks against civilians. In the years 1989-99, a civil conflict occurred, and Bougainville sought independence from PNG. In these conditions, the protestors argued that the corporations ask the government for help for defence, and doing so is complicit of crime against humanity.
Target	The plaintiffs searched for the recognition of Rio Tinto complicity in war crimes and crimes against humanity committed by the PNG army during a secessionist conflict on Bougainville; the recognition of environmental impacts from Rio Tinto's Panguna mine in Bougainville harmed their health in violation of international law; and the recognition of racist approach in the labour policies of the corporation.

Results	The district court granted a dismissal of the case in 2002. On 28 June 2013 the appeals court upheld the dismissal of the case, citing the Supreme Court's reasoning against the extraterritorial application of the Alien Tort Claims Act.
Particularity	The judge to reject the claim by applying the exception of the political question doctrine. He accepted the argument of the respondent, arguing that the judgment would impact the Papua New Guinea conflict. The judge first accepted this argument, but then changed his mind. For the first time, a USA federal court ruled that an international environmental norm was here relevant, even though that treaty had not been ratified by the USA. To consult the norm: http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm This decision was confirmed by the Ninth Circuit Court of Appeals in 2006. In this case, the question of the exhaustion of internal resources in the host country should exist or not before allowing recourse to USA courts was raised, and divided the participating judges. The answer of the court was “no”, but the debate created around this questions lets one hope that in the future the judges may consider favourably the question.
References	Unrepresented nations and Peoples organisations: http://www.unpo.org/article/106 Business and Human Rights’ analysis: http://business-humanrights.org/en/rio-tinto-lawsuit-re-papua-new-guinea#c9304 Sentence of 2006: http://www.internationalcrimesdatabase.org/Case/1135/Sarei-v-Rio-Tinto/ The sentence of the supreme court: http://cdn.ca9.uscourts.gov/datastore/opinions/2013/06/28/02-56256%20web.pdf

1.3.2 Foreign actor’s prosecution in national courts: Chevron/Texaco in Ecuador

So far the praxis of addressing a national court to prosecute foreign companies often liable for environmental injustice have faced many difficulties: few cases brought to court compare to the number of injustices and little results. However, the case “Chevron/Texaco” in Ecuador has shown interesting and promising developments.

The case is particular interesting for the actors involved. The applicants are 30,000 Ecuadorian citizens from the Oriente region in the Ecuadorian Amazon, most of them indigenous people. The respondent is one of the biggest oil companies Chevron-Texaco tackled for its liability in regards with the operation from 1965 to 1992 of Texpet, the Ecuadorian subsidiary of Texaco – now Chevron Texaco after the fusion with Chevron - in Ecuador.

The case "Chevron/Texaco" in Ecuador has shown interesting and promising developments

Legal action started in 1993, when indigenous and rural communities of the Ecuadorian Amazon accused oil company Chevron Texaco to have caused very serious environmental damage in the northeast region of the Amazon Forest. The claim was brought in a New York federal court under ATCA. The court refused to receive the case and applied the *forum non conveniens* exception. The legal action was to transfer to the jurisdiction of Ecuadorian courts and ChevronTexaco accepted such jurisdiction. During investigations, over 106 expert reports where presented, 80,000 chemical analyses were realised and over 40 testimonies were gathered.

The case was transferred to the Court of Lago Agrio, the main city in the area of impact at stake in the trial. In February 2011, the Court charged Chevron with a fine of nearly USD 9 billion for the damages caused, making of this lawsuit the biggest case of compensation for crimes against the environment in history. The judge concluded that the defendants externalised the environmental costs to the local communities to maximise their profits and could have avoided dumping the contaminants, using instead other technologies available at the time.

The sentence is innovative, especially because of its results for the victims. First, the court decision does not just aim to financially indemnify the victims. It also foresee the reparations for the damages caused (the restoration of the natural resources to their original state), but also the compensation for the limitations of the earlier remedies related to full restoration of the natural resources, as well as for the time that had passed without addressing, mitigating, and attenuating the effects of damages impossible to repair.

Secondly, it included punitive sanctions added for dissuasive and exemplary purposes. Chevron and Texaco had to recognize the moral harm to victims and prevent such conducts in the future or the fine would be doubled, The initial fine would thus be (without an apology from Chevron) almost USD 18 billion, but this punitive element was later withdrawn on appeal. Finally, the compensation had to be administered by a trust on behalf of those affected, managed by the "Frente de Defensa de la Amazonía" (front of defence of the Amazon), the coalition of organisations and communities involved in the case, which would get extra money (about 10 per cent of the fine) and be the organisation responsible for managing the implementation of the sentence.

The difficulties faced by this case in the application of the sentence that the company refuses to recognise, led to open further legal and institutional battles for both the company with international arbitration against Ecuador and for Ecuador with request to states where Chevron-Texaco holds assets to freeze such investment to pressure the company to recognise the trial outcomes. The case is still in development. It remains one of the most inspiring experiences in bringing

environmental injustice into Court through innovative approaches. An attempt to bring criminal charges against Chevron's CEO is underway in 2014 in The Hague.

Name of the case	Chevron-Texaco case Aguinda vs. Texaco case Ecuador vs. Chevron Texaco
Period of the trial	1993-2003
Applicants	30 000 Ecuadorian citizens of the Oriente region
Respondents	Chevron Texaco
Court	New York Federal Court Lago Agrio Court
Target	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.
Basic facts	Between 1964 and 1992 the Texaco Company began its oil drilling activities in the northern region of the Amazon forest in Ecuador, with the construction of 357 oil wells and 22 central production stations on land spanning 2.5 million hectares and inhabited by various indigenous communities. Even today, dozens of communities continue suffering the consequences of irreversible contamination to the majority of their territories, caused by Texaco Company (as it was then known) — which did not respect existing regulations on industrial health and safety.
Results	The case was dismissed for "*forum non conveniens*". 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. Condemnation of 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 was 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, flared the gas and spilled 16.8 million gallons of crude, The court decision has been

	ratified twice, on appeal in Ecuador.
Particularity of the case	In connection with the dismissal of the case from the US court, the corporation was obliged to recognise the jurisdiction of Ecuadorian courts in the case. It prosecuted the oil company providing one of the biggest fines for environmental damage in a country impacted by its activities. It recognised the responsibility of Chevron-Texaco notwithstanding the facts occurred before the fusion between Chevron and Texaco and that local activities were managed by Texaco Ecuadorian filial
References	http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#c9332 http://www.cdca.it/spip.php?article1617 www.ejatlas.org http://www.ejolt.org/wordpress/wp-content/uploads/2013/10/131007_EJOLT09-final-Low-resolution.pdf http://chevrontoxico.com/

1.3.3 National actors prosecution in their home state Courts for damage abroad: the Shell case in the Netherlands

In 2008, four lawsuits have been presented by EJOs before the Dutch Court of The Hague against both Shell's Nigerian subsidiary, Petroleum Development Company of Nigeria (SPDC), and Royal Dutch Shell, Shell's Dutch Headquarters. The claims were filed on behalf of groups of residents from three villages in the Niger Delta (Oruma, Goi, and Ikot Ada Udo), along with Friends of the Earth Netherlands and Friends of the Earth Nigeria. The claims referred to repetitive oil leaks that occurred between 2004 and 2006.

For the very first time, a Dutch company has been brought before a court in the Netherlands to answer for environmental damage caused abroad. The company was accused of negligence which led to environmental deterioration having huge consequences on livelihood and human health.

Fig. 8
Contaminated fish pond in Nigeria
Source: Lucie Greyl

In the future, national-home courts may consider the liabilities of "mother-companies", where environmental and human rights rules might be better protected

In that case too, Shell claimed for the "*forum non conveniens*" principle, asserting that the Dutch courts have no jurisdiction over Shell's Nigerian subsidiary and that other similar cases already exist in Nigeria, and the Dutch court confirm its competences to proceed with the case.

One of the four rulings of the Dutch Court on January 30 2013 held Shell Nigerian subsidiary responsible for the pollution of farmlands at Ikot Ada Udo, when in the other cases the pollution was allocated to Nigerian local saboteurs. A limit faced by these cases is that the court dismissed all claims against the mother holding Shell, recognising only the Nigerian subsidiary liabilities.

However, by simply ruling against Shell Nigerian's subsidiary the Netherlands, the Court indirectly recognised the liability of the corporation. The cases are not closed yet (appeal procedures are still a possibility) and follow-ups could develop in the coming years in regards with this legal procedure. It is hoped that, in the future and thanks to similar cases, national-home courts will consider the liabilities of "mother-companies", where environmental and human rights rules might be better protected.

Other useful links

https://milieudefensie.nl/english/shell/news/11-october-dutch-legal-case-against-shell-legal

http://ejatlas.org/conflict/ikot-ado-udo-case-nigeria

http://www.ejolt.org/2013/01/dutch-court-rules-against-shell-for-damages-in-nigeria/

http://www.ejolt.org/wordpress/wp-content/uploads/2013/10/131007_EJOLT09-final-Low-resolution.pdf

2 Criminal tools at international, regional and national levels

2.1 Seeking access to a paradigmatic shift in environmental justice: A criminal justice viewpoint

A comment by Prosecutor Antonio Gustavo Gomez,
from the Prosecution Office of the Federal Chamber of Appeals in Tucuman, Argentina

If there is something that Court cases of civil and administrative justice have taught us is that we need a paradigm shift in the administration of justice worldwide. The mere fact of trying to enforce in metropolitan countries a judgment signed by Latin American or African judges asserting the protection the environment generates paternalistic smiles. The imperturbable image of judges needs to be challenged.

The only depository of power is the people, who delegate to the Executive, Legislative and Judiciary bodies who exercise a partial function. And it is clear that the administration of the justice system, especially in environmental matters, is in crisis.

The failure of the other branches of law requires the immediate assistance of criminal law to ensure effective justice through the introduction of proportionate, effective and dissuasive penalties

But do we mean by a paradigm shift? It is a mutation in how to deal theoretically and practically with a reality in the light of the emergence of a new, better and more comprehensive understanding of such reality. Let us remember the time when the abolition of slavery appeared as a moral earthquake This was only 150 years ago. Were it not for those philosophers and activists who, from an ethical viewpoint influenced the Natural Law, took a new path towards equality, we would not be surprised today if someone “owned” another person. Similarly, today we are facing a return backwards: life is commodified power is exercised more by corporations than by states through “accomplice” judges and the application of double standards in the administration of justice in the courts of the global north and the global south.

In the administration of justice aiming at the defence of the environment, an analogous transformation is occurring. We are moving from a historical paradigm to

a new one. Peoples affected by pollution have begun to declare insufficient the judicial power of the State to face environmental crime. Because of the inaction and sometimes the complicity of States, citizens organised in assemblies, EJOs, committees, etc, denounce the overall impunity in regard to their rights to health and to live in a safe environment. The main instrument remains civil proceedings seeking compensation for the damage suffered. But is it enough? Is it enough even if multinationals would pay every penny? Justice would still be unsatisfied.

Fig. 9

EJOLT team during the Biocide Tour, 2013

Source: A Sud

As the rest of social sciences, Law sciences usually progress by accumulating knowledge but from time to time, crisis occurred and in its solving, the people, as actors of their history, find a new paradigm. Such Kuhnian crises are triggered by new facts that tradition recognizes as abnormal because they cannot be explained by the dominant view. In Environmental Law, destruction of rivers, valleys and mountains is tackled with civil or administrative actions with a strong constitutional invocation as if it were a magic talisman. But people impacted by environmental pollution are now generating a paradigm shift where the "new" - environmental criminal law - coexists for a while with the old dominant view (claiming monetary compensation through civil law or administrative law).

Society is divided and some traditional academics are ready to justify the unjustifiable. Constitutions and treaties on the right to repair environmental damage or on environmental liability insurance are limited. Independent researchers coming from other branches of science have discovered new approaches to explain the critical situation of a planet and how to face it.

Peoples affected by pollution have begun to declare insufficient the judicial power of the State to face environmental crime

They suggest to us new ways abandoning the mainstream approach, as we often lose sight that we are talking about essential human rights. However, in the Stockholm Conference in 1972, directly links between human rights and the environmental rights where recognised and then highlighted by the report of the Brundtland Commission in 1987. Human rights include that fundamental space where people can display their abilities, intelligence, individualities as unique.

There is a clear recognition that the right to a healthy environment is a fundamental Human Right as it is part of the right to life. The failure of the other branches of law requires the immediate assistance of criminal law to ensure effective justice through the introduction of proportionate, effective and dissuasive penalties. The purpose of such penalties is not only a "severe response" to environmental crime but also a preventive action where money is not sufficient to stop polluters. A direction that some institutions are shyly undertaken like the Council of the European Union in the Council Framework Decision 2003/80/JHA on the legal protection of the environment in 2003 or even more recently in 2008 by the European Parliament and the Council with Directive 2008/99/EC on the protection of the environment through criminal law.

Public International Law has seen the development of initiatives such as the new competences of the International Court of Justice in The Hague on environmental issues even if it is limited to disputes between States. But the future holds greater needs to address environmental protection through criminal sanctions. Today, a next frontier could be the creation of an International Criminal Court for the Environment, tackling environmental crimes as crimes against humanity. Perhaps the day is not far when leaders of corporations who abuse our planet for economic purposes will be brought before such courts for their terrible crimes.

2.2 Environmental crime and criminal Law

This section of the manual aims to present the sphere of criminal law and its international dimension in regards to environmental crime. There is no direct access possible for citizens to international criminal instruments to pursue environmental crime, and there few instruments available as most of the criminal system is nationally based. After giving some insight into international criminal law and environmental crimes, we will present in the following paragraphs the International Criminal Court and the EU regulation on environmental offences, Directive 2008/99 on the protection of the environment through criminal law. We will give some insight on prosecutions of environmental crime and provide a basic guide on how to write a letter to request the opening of criminal investigation at national level.

From a non-legal expert perspective and an environmental justice point of view, we generalise the difference between criminal law and civil law as the first being based on punishment and the latest on compensation. Much has to be done to reinforce the role of criminal law to provide justice for environmental crime and to prevent future crimes against the environment. The development of the international protection of corporations often responsible for environmental offences seems far stronger than the development of instruments to prosecute them.

Still, the criminal sphere, in particular at national level, represents a great opportunity in the search of justice in which citizens, EJOs and social movements have an important role to play. Treating environmental injustice through criminal law implies that the regulation of environmental offences (polluting and destroying the environment become a crime under law) if well implemented and applied could

Criminal law is the justice system dealing with what is recognised as crime and the punishment of who committed such crimes

produce preventive effects on criminal conducts and in time, a change towards respectful behaviour of the environment and local communities.

2.2.1 What is international criminal law?

Criminal law is the justice system dealing with what is recognised as crime and the punishment of who committed such crimes (individuals and private legal entities). Criminal law system is mostly regulated at country level and it varies between the different judicial systems and from one country to another. Criminal law system at international level remains very limited, and there is little regional competence.

International criminal law is part of public international law and it looks at individual responsibilities. It is not limited by an inter-state criteria and it can be active against crimes recognised by international laws. The competences of international criminal law are limited and it is not a uniform or universal system as there is no international legislative body to which international criminal law refers to. International criminal law aims to maintain international public order in respect to people's rights.

International criminal law is historically rooted in legal development occurred after World War II with the Tribunals of Nuremberg and Tokyo, which explains today the war orientation in the practice of international justice through the International Court of Justice. International crimes are those crimes that transcend single state interests and they encompass genocide, crimes against humanity, war crimes. As shows in the training material developed by the International Criminal Law Services, the OCSE Office for Democratic Institutions and Human Rights, UNICRI and the International Criminal Tribunal for the former Yugoslavia in the "War Crime justice" project "*international criminal law also includes laws, procedures and principles relating to modes of liability, defences, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance and cooperation issues*."

International and national criminal law shared different connexions (Bianco, 2011):

- some national criminal system can punish crimes committed outside the national territory;
- application of some national penal laws through international conventions;
- application of international conventions through national criminal systems;

Important developments in criminal collaboration among states to tackle trans-national crimes like for example narcotic traffic or organised crime or traffic in endangered species.

2.2.2 What is commonly defined as environment crime in criminal law sphere?

Even though there is no definition agreed internationally, environmental crime in the criminal law sphere is generally intended as a series of offences, whose definitions might differ from one legal body to another, responsible for serious environmental impacts. For UNICRI – United Nations Interregional Crime and Justice Research Institute, as defined in their website, environmental crimes

"*encompass a broad list of illicit activities, including illegal trade in wildlife; smuggling of ozone-depleting substances (ODS); illicit trade of hazardous waste; illegal, unregulated, and unreported fishing; and illegal logging and trade in timber. On one side, environmental crimes are increasingly affecting the quality of air, water and soil, threatening the survival of species and causing uncontrollable disasters. On the other, environmental crimes also impose a security and safety threat to a large number of people and have a significant negative impact on development and rule of law".* The Institute underlines how such crimes are tackled more with administrative and civil sanctions rather than enforced through criminal law.

As the THEMIS Network presents extensively in its Environmental Networking Handbook, environmental crimes are characterised most of the time by few offenders, often invisible, and many victims. The power relation is unbalanced. Generally speaking, there is lack of efficient regulation and a lack of implementation, cooperation among states remaining limited and more expertise are required.

Fig. 10

Waste dumping in Giugliano, Italy

Source: A Sud

Various international conventions on environmental issues, like for example the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes requires parties to enforce appropriate national legislation and refers implicitly to criminal law, but the legal sphere (criminal, administrative, etc), the contents and form of the national implementation depends on the parties, limiting to a minimum the effects of such conventions (Byung-Sun, 2000). Mostly, the instruments available cover trans-boundary or international matters (traffic, etc) and more recently organised crime while it lacks universal instruments to tackle directly the common cases of environmental injustice.

At regional level some advancement have been made in particular on trans-national cooperation and the standardisation of offences, as we will see at the European Union level, even though the experience shows similar limits in term of enforcement and access to justice.

Other Useful links

- Environmental crime: http://www.unicri.it/topics/environmental/
- Training materials on international criminal law and practice: http://wcjp.unicri.it/deliverables/training_icl.php
- United Nations' World Commission on Environment and Human Rights document "Our Common Future": www.un-documents.net/our-common-future.pdf ,
- UNEP views on Transnational environmental crime: http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=95

2.3 International body: The International Criminal Court (ICC)

2.3.1 General concepts for a better understanding the ICC

The International Criminal Court in Brief

The ICC can try individuals for the most serious crimes of international concern. The Prosecutor's investigated cases referred by State Parties, by Security Council or investigated by the Prosecutor on his/her own initiative

The International Criminal Court - ICC is a international criminal tribunal established in 1998 by the Rome Statute entered into force in 2002 to bring to court the most heinous international criminals, i.e. cases of genocide, crimes against humanity, war crimes and since 2010 crime of aggression.

122 countries are States Parties to the Rome Statute of the International Criminal Court: 34 African States, 18 Asia-Pacific States, 18 Eastern European States, 27 Latin American and Caribbean States, and 25 Western European and other States. The Court is based in The Hague, in the Netherlands.

The ICC is a permanent independent Court (not related to the United Nations institutions), the first treaty-based permanent international criminal court established. It is based on the legal principle of complementarity: the ICC complements the criminal justice systems of the State Parties in case of prosecution of individuals only when the State concerned does not, cannot or is unwilling to do so.

The ICC can try individuals for the most serious crimes of international concern. The Prosecutor's investigated cases referred by State Parties, by Security Council or investigated by the Prosecutor on his/her own initiative (Art. 13 and 15 of the Rome Statute).

The ICC is currently conducting preliminary analyses of situations in 8 countries (Afghanistan, Colombia, the Republic of Korea, Georgia, Guinea, Honduras, Nigeria and Palestine) and investigations on crimes committed in 8 African states (Sudan, Democratic Republic of Congo, Uganda, Central African Republic, Kenya, Libya, Côte d'Ivoire and Mali).

The Rome statute of the International Criminal Court

The ICC was created with the adoption of the Rome Statute of the International Criminal Court during the 17th July 1998 international conference in which 160 States took part.

The treaty sets out the crimes falling within its jurisdiction (genocide, crimes against humanity and war crimes), the rules of procedure and the mechanisms for States to cooperate with the ICC. Signing countries are known as States Parties and they are part of the Assembly of States Parties. The Assembly decides on the court administration and its activities at least once a year.

What is the ICC pertinence towards environmental justice?

Looking at the characteristics of the ICC, it appears to be an unfit institution to tackle environmental crime cases. Taking a more flexible perspective understanding environmental crime as crime against humanity - i.e. environmental destruction leads to the destruction of the basic means to guarantee fundamental rights like access to clean air, water and food, living in a healthy environment, self-determination, freedom of speech and freedom of organisation, etc. – the ICC could be the theatre for bringing cases of very serious environmental crimes, challenging the so far area "classical area of action" of the Court (often cases related to wars). One wonders why excessive emissions of greenhouse gases should not be seen as an act of aggression.

There are though no direct possibilities for EJOs or communities impacted by environmental crime to access the Court on their own. But this could be a field of collaboration between EJOs, impacted communities and legal experts to work on in order to create precedents both through pressures on the Assembly of State Parties for the recognition of environmental crime as crime against humanity and on the Prosecutor to signal serious cases of environmental crimes to be investigated.

Crime against humanity

The Statutes defines "Crimes against humanity" in article 7 as follows: "[it] *includes any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury*".

The concept of "crime against humanity" is a possible window to bring environmental crime into the international criminal system. A potential application of article 7 to environmental crime presents many and serious difficulties. It would address a new phenomenon with dynamics which differs from heinous crimes so far tried under the ICC. The individual responsibilities are difficult to prove. Environmental crime has become the outcome of a general practice of externalisation of the environmental costs to local communities by polluting industries and services: a widespread and systematic phenomenon that the Court should recognise as an attack on human rights. Such cases should fall under the jurisdiction of the Court.

2.3.2 How to access Justice at the ICC?

Investigations

Usually State Party or the Security Council of the UN – or non-Party State accepting the jurisdiction of the ICC refer situations to the Prosecutor, but the Prosecutor can decide on his/her own initiative to investigate a case on the basis of information usually provided by civil society and intergovernmental organisations or any other reliable sources once the permission of the judges of the Pre-Trial Chamber is obtained.

The Office of the Prosecutor is an independent organ of the Court whose role is to investigate, litigate and assess cases and determine their admissibility. http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf.

Trial

The judiciary body of the Court is composed of 3 levels: the Pre-Trial Division (chamber ensures integrity of investigation proceedings, of the rights of the defence, issues warrants of arrest and summons, confirmation of charges); the Trial Division (chamber conducts the proceedings and determine the innocence or guilt of the accused) and the Appeals Division (the Prosecutor, a convicted person, or other specified persons may apply to appeal).

Who is found guilty risks imprisonment for a maximum of 30 years, in extreme case for life. Convicted persons can be ordered to pay money for compensation, restitution or rehabilitation for victims.

Contact

ICC

Public Information and Documentation Section Registry, International Criminal Court

Maanweg 174
2516 AB, The Hague,
The Netherlands

Telephone: +31 (0) 70 515 9767

Fax: +31 (0) 70 515 8567

Email address: PublicAffairs.Unit@icc-cpi.int

Communications and claims under art.15 of the Rome Statute may be addressed to:

Information and Evidence Unit
Office of the Prosecutor
Post Office Box 19519
2500 CM The Hague
The Netherlands

or sent by email to otp.informationdesk@icc-cpi.int
or sent by facsimile to +31 70 515 8555.

Other useful links

ICC website: http://www.icc-cpi.int

Rome Statute signing countries: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

Rome Statute: http://www.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Compendium.3rd.01.ENG.pdf

Understanding the ICC : http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf

Manual for ICC lawyer: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/office%20of%20public%20counsel%20for%20victims/Documents/26-March-2013-EN-Consolidated-Version-2010-2012-OPCVManual.pdf

2.3.3 Challenging international Criminal Law: the demand against Chevron Texaco CEO for Ecuadorian Amazon forest contamination

On October 23rd, 2014, Pablo Fajardo and his team, lawyers in the Chevron Texaco case in Ecuador together with the Argentinean lawyer Eduardo Bernabé Toledo, presented as representatives of local communities a demand to the ICC prosecutor Fatou Bensouda for investigation against John Watson, Chevron Texaco CEO in relation to the oil contamination disaster in the Ecuadorian Amazon.

It could be seen as an important complaint challenging the ICC to tackle environmental disaster as crime against humanity and pursuing as responsible those individuals directing the decisions and actions of corporations. In the complaint John Watson is held responsible for the company, through its leading role in decision-making, of "widespread and systematic attack" against the local impacted population and those who defend them, while evading the corporation responsibilities in remediating the contamination occurred. He is identified in the complaint as direct author of crime in the grounds of article 25 of the Rome Statute.

Fig. 11

Gas flaring in Nigeria

Source: Lucie Greyl

Pablo Fajardo and his team presented a demand to the ICC prosecutor Fatou Bensouda for investigation against John Watson, Chevron Texaco CEO in relation to the oil contamination disaster in the Ecuadorian Amazon

Even if the crime does not show "classical" characteristic or has not been actuated through "usual" weapons, the demand underlines how the creation of persistent contaminated spaces, the harassment of and the damage to the population, i.e. extinction of ethnic groups, health and death impacts, constitute a violation of fundamental rights and a crime against humanity in the terms of article 7 of the Statute.

This is a case to be followed with attention to see which follow-ups take place on the basis of the preliminary exam the Prosecutor will undertake and of eventual future pre-trial. The demand can we download here: http://chevrontoxico.com/assets/docs/2014-icc-complaint.pdf

2.4 Criminal Justice at EU level

2.4.1 General concepts for a better understanding of environmental crime within the EU framework

The EU, criminal law and environmental crime

The EU faces historical limits in the little power of the Commission and of Parliament and courts in matters of environmental crime, as in the criminal sphere in general, but it has built over the years a process for improving collaboration in investigations and to set common minimum standards.

Among the few competences the EU has in terms of criminal law, the Treaty on the Functioning of the EU recognise the competence of the EU over "Criminal law for the enforcement of EU policies" (Article 83(2)), for which the EU can adopt common minimum rules on the definition of offences and sanctions fundamental for a harmonised EU policy framework. Environmental crime has been regulated through Directive 2008/99 on the protection of the environmental through criminal law which sets common grounds for national criminal law in regards with environmental crime.

What Directive 2008/99/EC is about?

The 2008/99/EC Directive, through its adoption in national criminal law systems, aims to enforce criminal penalties in Member States for serious infringements related to environmental crime

Adopted on November 19th, 2008, after a long process of discussion about competences and contents, the Directive set a common basis regarding the identification of offences (which offences fall under the directive) and the responsibility of those who support or incite to such offences. The Directive, through its adoption in national criminal law systems, aims to enforce criminal penalties in Member States for serious infringements related to environmental crime (Gouritin and De Hert, 2009).

Who and what does the directive address?

The directive addresses natural and legal persons, that is to say legal private entities like corporations, who could be prosecuted if proven that individuals with leading positions (representative of the entity, decision maker or control authority) have committed infringements or had failed in their task of supervision or control. The directive addresses not only those directly responsible for a criminal offense but also of those who support or incite to such offence (Gouritin and De Hert, 2009).

The Directive does not target all environmental wrongs but those the European Commission considers as most serious ones and defines 9 offenses:

- The emission of materials and ionising radiation into the environment that could or do endanger human health and life and damage the environment.
- The management (including transport) of waste, its supervision and after-care of disposal sites that could or do endanger human health and life and damage the environment.
- The illegal shipment of waste
- The operation of a plant hosting dangerous activity or dangerous substances that could or do endanger human health and life and damage the environment.
- The production, management and disposal of nuclear materials or other hazardous radioactive substances that could or do endanger human health and life and damage the environment.
- The killing, destruction, possession or taking of specimens of protected wild fauna or flora species
- Trading in specimens of protected wild fauna or flora species, including parts or derivatives
- Any conduct which causes the significant deterioration of a habitat within a protected site;
- The production, importation, exportation, placing on the market or use of ozone-depleting substances

Some concepts …

"Intentionality" and "serious negligence"

"*an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation*". The European Court of Justice, Sentence Case C-308/06

Endangerment crime

The Directive differentiates abstract endangerment crime from concrete endangerment crime defining it as merely unlawful, like violation of administrative regulation that can create danger.

2.4.2 How to access the Justice at UE criminal level

All European Member States shall implement Directive 2008/99. However, if the EU law is not fully implemented in the National Legislation, or if the Member State practically fails to implement it, **citizens can:**

- open a **case at national level** claiming the application of the Directive

- address the **European Commission** through complaint and enquiries and the **European Parliament** through petitions and parliamentary questions to make pressure in order to further actions toward the application of the directive and push for investigations on an specific offence that could lead to a case in the ECJ (as explained in section 1.2.2.2).

Some limits in Directive 2008/99

There is neither mention nor definition of the terminology "environmental crime" and citizens cannot access directly justice at the European Court of Justice against a corporation or other natural and legal person but it can file in cases against EU decisions or actions.

Other useful links

The explanations of the EU Commission: http://ec.europa.eu/environment/legal/crime/

Type and level of criminal sanction for natural and legal persons per country: http://ec.europa.eu/environment/legal/crime/pdf/crime_annex1.pdf

The directive: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF

Directive on ship-source pollution : http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0123&from=EN

Database Eurocrim: http://db.eurocrim.org/db/

European Law database Euro Lex: http://eur-lex.europa.eu/homepage.html?locale=en

Search for a court inEU member states: http://ec.europa.eu/justice_home/judicialatlascivil/html/cc_searchmunicipality_en.jsp#statePage0

E-justice platform: **https://e-justice.europa.eu/home.do?action=home&plang=en**

2.5 National criminal law

2.5.1 Key information to better understand the possibilities to access Justice at national criminal level

As we have seen before, criminal law at national is the main road for civil society and EJOs to access criminal justice. Of course every country, on the basis of its cultural approach to justice and its national history, has different criminal and normative systems and tools to be used to tackle environmental crime directly and indirectly in the attempt to achieve a preventive effect through criminal sentences to leaders of corporations and institutions responsible for contamination and destruction of local communities livelihood and rights.

Generally speaking environmental crime action within justice systems is still weak whereas civil actions have been stronger. Its potential though, i.e. bringing into jail those responsible for contamination, would allow going further than the limited results brought through civil justice in terms of sentences reached (fines, etc.). This means putting more effort in bringing criminal cases by civil society and in pressuring government to take up criminal actions too.

Three possible spheres of criminal law are: environmental crimes, crimes of complicities and concealments and economic crimes.

Criminal procedures regarding environmental protection are not uniform for which we propose to cross three different spheres of criminal law that can be used to tackle: 1) environmental crimes, 2) crimes of complicities and concealments and 3) economic crimes.

1. Typification of environmental crimes has seen some development, different from one country to another, but most of the time they remain under-used. To tackle a given environmental crime, the first step is to check which environmental crime is recognised as such (search your national penal code). Then, proof needs to be gathered in compliance with the law and compared with allowed pollution norms. Difficulties might be found in gathering significant proofs.
2. In a second circle there are the criminal procedures tackling what is commonly called corruption. There are all the crimes that, without referring to environmental pollution, can be used in favour of environmental protection. For example bribery is frequent when search permissions, exploration or exploitation are granted or when there is a breach of the government employees' duties (missing control of pollution and its effects). Same phenomenon of concealment as well as hiding information regarding risk on health can be found in corporations practices.
3. Finally in the third circle are those crimes of economic nature, not directly linked to environmental damage that can be used in order to stop the indiscriminate exploitation of resources like for example: smuggling, tax evasion, money washing and even swindle.

Advice from the field from Prosecutor Antonio Gustavo Gomez on the gathering of proof

On the one hand, a main error in gathering proof for a criminal case could be to concentrate effort only in chemical proofs and on contamination's impact on persons and the environment, as it might become difficult to prove.

On the other hand, the concept of “crime of danger” allows facing less legal difficulties. If there is the emission in the air, water or soil of a contaminating agent that is superior to the limits or norms set by law, proof collection should concentrate on what is emitted, where, how and how much and by who, and should rely in particular in the gathering of existing documents to be found within the contaminating company and related institutions. Environmental Impact Assessments (EIA)- are used in almost all countries and they can be used in proof gathering as many times they do omit important information or do not include proven data. Photographs and film proofs might be relevant too, provided that they are not edited and that the name of the author, the time, date and place can supplied.

But a fundamental proof is testimonial. Testimony providing narration of real fact occurred can offer the trial the necessary realism. If you are using a chemical proof to prove contamination it could be reinforced by an expert testimony, for example a chemist, who can explain the effects or the risks related to the use of one chemical in a given situation.

Some concepts …

Conduct crime is a crime whose nature is borne in a behaviour recognised as a crime, like blackmail;

Result crime is a crime whose nature is borne in the consequence of an act, like a murder;

Crime of danger is a crime whose nature is borne in a conduct creating danger, like an omission of information on risk.

2.5.2 How to access justice at national criminal level

We propose here a basic model used in EJO's training by Prosecutor Gomez in Latin America and Europe that could be used by EJOs and citizens to make contact with any prosecutor to request the opening of a criminal investigation. Of course procedures, requirements and information to be provided vary from one country to another but this can give an insight of the information to be provided when making contact with criminal institutions.

Box 6 Model for criminal complaint to ask investigation to national court

Source: Antonio Gustavo Gomez

1. PRESENTATION

- Who you address: " To Prosecutor XX (Name of the prosecutor) of the XX Court (name of the Court)"
- Personal data of who presents the complaint: your name, ID number, address, e-mail address, telephone number

2. OBJECT AND REASON OF THE COMPLAINT

Object: Summarize criminal facts in 5/6 sentences, including: where, when, who could be part of the crime, present people at the time

3. PROOFS

a. videos and pictures
b. witnesses: who and who they are
c. documents
d. others

4. LAW AT STAKE

Research criminal laws pertinent to the case using online resources (penal code of your country)

5. THE DEFENDANTS – charge/accusation

Who they are and why they are potential authors of a crime

6. THE REQUEST

" For all this,
I REQUEST
- the ordering of all proofs and evidences
- ask to be considered (you individually or your organisation) as victim of the crime or to be the victim' spokesperson
- request to summon charged persons in order to present the proofs and evidences"

7. SIGNATURE

Box 7 Example letter to request criminal investigation at national level [7]

Source: Antonio Gustavo Gomez

To Prosecutor Antonio Gustavo Gomez, Camara Federal de Tucuman

Complaint submitted by:

Carlos Gonzales, ID 21537692, domiciled in Los Rios 4, Concepcion, phone number 456789, e-mail contact: carlosgonzales@yahoo.cr ,

Prosecutor Gomez,

I, Carlos Gonzales, inform you officially with the present letter of the following criminal situation

Object:

In the city of Conception, in the province of Tucuman, a municipal truck collects the garbage daily. In this process there is no separation between domestic rubbish and toxic waste produced in the hospital, medical and veterinary centres. Waste is then dumped nearby the local river, which is the main source of water for communities and villages of the area.

Proof:

I attach, as proof, pictures of the moment in which waste is collected in different places and of the dumping. Please note bags floating and the contents of one opened bag: bloody syringes and cotton, and so on.

Pictures have been taken by Juan Peres

As witnesses, I propose:

Mr Juan Peres, domiciled in xx who is the person who took pictures

Mr Ceferino Gomes, domiciled in xxx, the truck driver

I attach, as proof, the written order of the municipality establishing the place of destination of the waste.

Law at stake

Art. 55 of the 24.051 law punishes air, land, water contamination by waste dumping (and by other methodologies included in its Annex) with imprisonment.

Art. 56 broadens the charge towards individual acting with negligence.

At least one of the two articles mentioned above seems to apply to the offences described in the complaint.

The defendants

We identified doctors and veterinaries (listed in Annex) as potential authors of the crime.

We also require initiating formal investigation of the hospital General Director and of the Mayor Dr. Juan Cherques as not following the garbage collection law n.24.051 according to which hazardous waste should be separated.

For all this,

I REQUEST :

that the present complaint be accepted and its presentation to the Federal judge

to be considered as victim of the contamination crime – because of living near the dumpsite and for that I request to be kept informed on the judicial procedure progress

the ordering of all proofs and evidences

to receive statement of the investigative measures requested

Signature

[7] All information in the example letter are fiction and the model is based on Argentinian legal system.

3 Building strategies and defending defenders

3.1 Environment defenders' defence to build environmental justice

3.1.1 Key information to better understand the possibilities to access Justice

3.1.1.1 What is the situation of environmental justice defenders?

In the context of legal strategies to seek environmental justice, the defence of environmental justice defenders, criminalised and persecuted in many different ways, is a hot topic. Recent years have seen a sharp increase in both the development of environmental conflicts and the tendency to kill, injure, persecute, punish and criminalize social protest activities and the legitimate claims of those who promote environmental justice and defend connected human rights, especially in cases related to large-scale economic investments.

Among EJOLT EJOs' common priorities lies the issue of environmental defenders: the promotion of the recognition of our situation and the implementation of concrete actions to reverse the trend. A field which remains little explored and for which few and unbalanced data is available. Environmental justice defenders from all over the world are exposed at different intensity, often with impunity, to the violation of the most basic civil and political rights (freedom of expression, freedom of association, right to life) and to threats and attacks to their persons, to their relatives , like torture and murder, harassment, criminalisation, intelligence and other interference activities, as well as criminal and civil charges, perpetrated by various actors: states, companies, media, military and non-organised groups, etc..

The second most vulnerable group of human rights' defenders involves those working on land, natural resources and environmental issues

One of the legal issues related to environment defenders' defence is the specific legal recognition of such category. This juridical gap is evident and results in major precariousness for the protection of the environment and the connected human

rights. According to the UN report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya in 2011 (Sekaggya, 2011), the second most vulnerable group of human rights' defenders involves those working on land, natural resources and environmental issues. Between December 2005 and May 2011, the Rapporteur reviewed the 1500 communications of rights' abuses sent to governments, among which 106 were directly related to defenders working on land and environmental issues showing a heterogeneous group of cases from which are built 4 main categories of sectors in which violations occurred.

Box 8 Four sectors in which violations of environment defenders' rights occurred

Source : Sekaggya, 2011

Extractive industries, construction and development projects

- Victim defenders working on extractive industries and construction and development projects represent 34 of the 106 communications, 21 from the Americas (of which 7 killings) and 9 from the Asia Pacific region, most cases are related to land disputes.
- Both State, including police, local authorities and public officials, and non-State actors (companies, media, paramilitary and private security) are responsible for those violations.

Defenders working for the rights of indigenous peoples and minorities

- Victim defenders working on the rights of indigenous peoples and minorities represent 29 of the 106 communications, 18 from the Americas region, 9 from the Asia Pacific region, 2 from African region.
- In total 10 killings: 4 committed by State actors, 1 by non-State actors, 5 by unknown groups or individuals.

Women defenders working on land and environmental issues

- Victim women defenders working on land and environmental issues represent 25 of the 106 communications, 17 from the Americas, 6 from the Asia Pacific region and 2 from Africa.
- Women defenders have suffered threats against their physical integrity: killings (Americas); excessive use of force; and armed attacks, threats and death threats, harassment and intimidation.

Journalists working on land and environmental issues

- Victim journalists represents 9 of the 106 communications: 4 from the Americas, 2 from Africa, 1 from Europe and Central Asia and 1 from the Asia Pacific region.
- They suffered killing, physical attacks, death threats and intimidation, charged of espionage, arrest and detained.

Important input in this field is given by environmental justice organisations by providing information on the situation of environment defenders, from grassroots information on single cases to the systematisation of information worldwide. The EJOLT Atlas of environmental conflicts (www.ejatlas.org) contains many cases of criminalization and violence against environmental defenders. The organisation Global Witness published in 2014 the result of their research in a report "the Deadly Environment" (A.A., 2014) on the killing of activists working on environment and land issues. They manage to report on 908 known cases of environmental justice defenders killings and provide key information on the issue.

Between 2008 and 2012, two environmental justice defenders have been killed every week

Box 9 Key findings on environment defenders killings by Global witness report "the Deadly Environment"

Source: Global witness

- 2012 recorded the highest number of deaths (147), 3 times more than in the previous 10 years
- In last the last 4 years, 2 environmental justice defenders have been killed every week
- 3 main drivers: extractive industries and mining, land grabbing and land distribution, illegal logging and deforestation
- At international level most cases as reported from Central and South America.
- At regional level most cases are reported from the Philippines (67 cases) in Asia and Brazil (448 cases) in the Americas, while Africa shows limitation in term of access to information
- Perpetrators: only 10 have been punished, most of them remain unknown, in 52 killings military or police have been identified and small groups of 1 to 6 people in other 171 cases

3.1.1.2 Legal concepts pertinent to the defence of defenders in the international legal framework

Economic, social and cultural determination

Two International Covenants from 1966 on "Economic, Social and Cultural Rights" (resolution 2200 (XXI)) and on "Civil and Political Rights" (resolution 2200A (XXI)), basic documents contained in the International Bill of Human Rights, state in their art.1 that "*all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence*". RAPPORT UN 2011

Human rights defenders

The "Declaration on Human Rights Defenders" (resolution 53/144) adopted by the UN General Assembly on the 9th December 1998 states in art. 1: "*Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels*." It underlines moreover the duty of governments to protect, promote and implement all human rights and fundamental freedoms.

As the report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya in 2011 underlines, the declaration recognizes in its preamble the legitimacy and importance of activities for the promotion of economic, social and cultural rights and the "v*aluable work of individuals, groups and associations*" in fighting violations including those related to "t*he refusal to recognize the right of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources*".

Responsibility to protect human rights

The "Declaration on the Right and Responsibility of Individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms" adopted by the UN general assembly in December 1998 (GA Res. 53/144) embodies the right to defend human rights as a right in itself. It states that "[e]*veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels*" (art. 1), in particular to "*meet or assemble peacefully; to form, join and participate in NGOs, associations or groups*" (art. 5), "*to participate in peaceful activities against violations of human rights and fundamental freedoms*" (art. 12).

Moreover, the declaration underlines the right to be protected from violations and "*to complaint about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms*"(art. 9), as well as the duty of State to "t*ake all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence (...) any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration"* (art. 12).

Arrest and prosecution

Regarding the specific issue of arrest and prosecution of defenders, the United Nations' "Universal Declaration on Human Rights" of 1948 states that "*everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law*" (art. 8), "*no one shall be subjected to arbitrary arrest, detention or exile*" (art. 9), *"everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her", "everyone charged with a penal offence has the right to be presumed innocent until proved guilty (...) With all guarantees necessary for his/her defence*" (art. 11).

Victim of crime

The "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", adopted by the UN General Assembly in 1985 (resolution 40/34) states that: "*Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered*" (art. 4). It underlines that "*Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilised where appropriate to facilitate conciliation and redress for victims*" (art. 7) and that "*States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support*" (art. 19).

Information on cases of violation of defenders' human rights are sent to the special rapporteur on Human rights defenders by various actors

3.1.2 How to access justice for the defense of environmental defenders?

We present here only some specific *international and regional legal tools and some main trends for national levels*, well aware that those are very partial information and that legal defence strategies for environment defenders would need a specific manual and an deep vision into regional and national instruments.

3.1.2.1 International level: Presenting an allegation to the UN Special rapporteur on Human Rights Defenders

Who usually can send allegation?

Information on cases of violation of defenders' human rights are sent to the special rapporteur on Human rights defenders by various actors, in particular by States, EJOs, indigenous groups, United Nations agencies, the media and individual defenders. The identity of those sending information will remain confidential.

Why sending an allegation letter?

Thanks to the allegation letter, the special rapporteur can ensure States are duly informed on the case(s) and start investigate and conduct criminal prosecutions on those cases with the objective of ending and/or preventing such violations. States are expected to report the results of their actions to the Special Rapporteur. Under the Human Rights Council resolution renewing the Special Rapporteur's mandate, governments have to respond to the letters sent.

The letters by the Special Rapporteur to Governments, once answered by Governments' are published in the annual communications report presented at the Human Rights Council.

Box 10 Key information regarding allegation letters to special rapporteur on Human Rights' defenders

Source: own elaboration

- An allegation letter can cover several human rights issues
- Ensure that all information listed in points 1 to 7 of column A (Essential information) are described.
- Provide additional information in column B (Useful information). These details can be important in some cases.
- Information may be sent in list form (columns A and B) or in form of a letter. Column C shows how case information can be included in a letter.
- Victim(s) identity shall be stated, if not the Special Rapporteur cannot intervene. It is possible to request that victim's name are not included in public reports or that other details remain confidential.
- Correct details expressed clearly ensure quicker response.

What happens once the allegation letter has been received?

- Verification if violations fall into the Rapporteur mandate
- Verification of the probable validity of allegations and reliability of the source of information, collection of additional information

- Government is contacted by the Rapporteur through an “urgent appeal letter” (for ongoing or cases about to happen) or a “allegation letter” (for cases that happened) directed at the country's diplomatic mission in the United Nations, Geneva for transmission.
- Consultation with other special Rapporteurs which mandates might be related to the cases tackled

The Special Rapporteur will tackle the violations very quickly, within few hours for those most serious and urgent cases that are well documented. When insufficient information is available the process to contact governments may take some days, depending on the priority of cases.

What happens if a Government does not reply to the special Rapporteur?

In many cases governments tend not to respond or to respond after months. In particular for very serious and urgent cases more efforts are put in following up with the state representation at the United Nations in Geneva. UN reports that resource limitations make it impossible for the Special Rapporteur to follow-up on every case.

How to submit an allegation?

To ease the presentation of allegation letters, the OHCHR developed a guideline on the information to be provided in the letter and on how to submit it so that the Special Rapporteur can take action on a case (**Box 11**).

Contacts

- E-mail: urgent-action@ohchr.org . Refer in the text and title of the e-mail to human rights defenders mandate.
- Fax: +4112 22 917 933006
- Telephone: +4112 22 917 129934. Ask to speak with staff supporting the mandate of the Special Rapporteur on human rights defenders at the Office of the United Nations High Commissioner for Human Rights dealing with the special procedures of the Human Rights
- It is possible to request the acknowledgement of the receipt of a submission.

Box 11 Guidelines for submission to the Special Rapporteur of allegations of violations of the Declaration on human rights defenders

Source: http://www2.ohchr.org/english/issues/defenders/complaints.htm

A **Essential information**	B **Useful information**	C **Sample letter to the Special Rapporteur**
1. Name of alleged victim/s Take care to give first and family names and to spell names correctly. Victims can be individuals, groups or organizations.	If the victim is an individual, please provide information on gender, age, nationality and profession. If the victim is an individual or an organization, please provide contact details. Contact details are treated as confidential.	Ms. [Name and Surnam, i.e. Aabb Ddee], a lawyer, lives in [name of city/town and country].
2. Status of the victim as a human rights defender In what human rights activity is the victim (person/s, organization) engaged?	Where relevant, please also indicate the city and country in which the victim (person/s, organization) conducts this human rights work.	Aabb Ddee takes up legal cases supporting the right to adequate housing on behalf of ethnic minorities. She is also a member of the National Commission for Human Rights.
3. Alleged violation/s committed against the victim What happened? Where? When? What is the current situation?	If an initial violation leads to other events, please describe them chronologically. E.g. if the initial concern is that a human rights defender has been arrested, details should be provided. But if he or she is later detained, other useful information would include: the place of detention; the person's access to a lawyer; conditions of detention; the charges; etc.	Aabb Ddee received an anonymous threat to her safety. On [day/month/year] Ms. Ddee received a letter at her office in [name of town]. The letter was addressed to her and contained only the words "Be careful". In addition, the following day Ms. Ddee was followed closely while driving from her office by two men in a white car.
4. Perpetrators Give available information on who allegedly committed the violation: e.g. two men (in uniform?); rank, unit or other identification or title.	Witnesses Were there any witnesses to the alleged violation? Were there any other victims?	Aabb Ddee was unable to identify the two men following her or their vehicle. A friend accompanying Ms. Ddee in her car also saw the vehicle following them.
5. Action by authorities Has the matter been reported to the relevant authorities? What action has been taken?	Action taken by the victim or by human rights organizations Has the alleged violation been made public? Has this information been sent to others?	Aabb Ddee reported both incidents to the police [name/address of police office] the same days they occurred. The police have opened an investigation. She also reported the incidents to a local newspaper [name].
6. Link between the violation and human rights work Why do you think the alleged violation is a response to the human rights work of the victim?	Previous incidents If there have been previous incidents which are relevant, please give details.	A year ago [date], another lawyer representing the same ethnic group as Aabb Ddee received a threatening letter similar to Ms. Ddee's and was later [date] killed by unknown persons.
7. Who is submitting this information?(Confidential) Give name, contact details and professional role (if relevant).	Submissions may be made by organizations or individuals.	This letter is submitted by the National Commission for Human Rights, with which Aabb Ddee works.
Updates Please send any updated information you have as soon as possible. It is especially important to know if there has been any change in the situation of the victim. Updates might be given where: 1) additional information becomes known (e.g. the identity of the perpetrator of the violation); or 2) new events occur (e.g. the victim's release from detention).		[two months later] We learned today [date] that the police investigation was closed yesterday. Two men have been arrested and detained on charges of sending a threatening letter to Aabb Ddee on [date] and of following her in their car when she left work the next day. The men are due to appear in court in two weeks. While pleased with the arrests, Ms. Ddee believes that the person who ordered these acts to be committed remains at liberty. She has asked that the police investigation be continued.

3.1.2.2 Inputs on Regional and trans-national levels

Africa

You could handle the African Commission on Human and Peoples' Rights' regarding environment defenders referring to various resolutions, among which:

- Resolution on the Protection of Human Rights Defenders in Africa (ACHPR/Res. 69 (XXXV) June 4, 2004). Among other resolutions to be reviewed:
- Resolution on Human Rights Defenders in Africa (ACHPR/Res. 196 (L), 05 November 2011)

To review procedure for complaint to the African Commission on Human and Peoples' Rights (see page 55).

Fig. 12

Environmental Rights Action (ERA) team

Source: Lucie Greyl

Latin America

The IACHR created in 2011 a specific Office of Rapporteur on the Situation of Human Rights Defenders. The office is in charge to follow closely situation of defenders, including justice workers, under threats. The office can be directly contacted at cidhdefensores@oas.org. To submit a case for attention to the Office, you should follow the overall procedure of Petition to the IACHR.

Europe

In December 2008, the *EU guidelines on human rights defenders* was presented by the European Union Council. The Guidelines, addressing EU's concerns on human rights defenders can be downloaded here: http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/l33601_en.htm.

For UE and CoE tools accessible to EJOs and citizens see here and here.

3.1.2.3 National Mechanisms for the protection of human rights defenders

United Nations member countries have the duty to protect human rights defenders and prevent attacks to their lives and personal integrity

Countries have different forms and level of effectiveness of their mechanism for the protection of human rights defenders that could be applied for environmental justice defenders. We present here some general inputs and trends, but each country would need a specific study to provide more concrete information.

- International tools as pressure instruments at national level.
- Tools from international and regional levels like the allegation letter to the UN special Rapporteur on human rights defenders can be used as a pressure tool for the national level to actuate measures of prevention, action and reparation.

United Nations member countries have the duty to protect human rights defenders and prevent attacks to their lives and personal integrity, we advise though to search and check in national legislations the following elements:

- The political commitment of the State to eventual national Human Rights protection programs or similar.
- The categories of protected subjects (who has specific rights to be protected, i.e. human right defenders, environment defenders, indigenous rights' defenders, etc.).
- The grounds for requesting special protection (i.e. what violation or crime against an individual or a group from which stakeholders can be prosecuted).
- The procedure for risk assessment.
- The suitability and effectiveness of the existing protection measures.
- The role of figures like the **Ombudsperso**n or the **peoples' defender**.

Box 12 National Ombudsperson or the peoples' defender

Source: http://en.wikipedia.org/wiki/Ombudsman

In the countries where it exists, it does not constitute an effective judicial remedy but the ombudsman's advisory role, the assistance provided to victims as well as the recommendations issued regarding environmental degradation are important in urging the State's compliance with its obligations under international human rights instruments and the protection of the environment.

Find the list of countries where the Ombudsperson exists on wikipedia: http://en.wikipedia.org/wiki/Ombudsman.

3.1.2.4 Where to find defenders of environment defenders?

- Environmental Law Alliance Worldwide: http://www.elaw.org.
- Environmental Defender Law Center: http://www.edlc.org/.
- Centre for International Environmental Law: http://www.ciel.org/.

Other useful links

- Friends of the Earth International, “We-defend the environment, we defend human rights. Denouncing violence against environmental defenders from the experience of Friends of the Earth International”, June 2014. Report; available at http://www.foei.org/wp-content/uploads/2014/06/We-defend-the-environment-we-defend-human-rights.pdf.
- UN Human Rights Defenders FactSheet: http://olddoc.ishr.ch/hrdo/documents/FactSheet29.pdf.
- UN report on the situation of human rights defenders 2007: situation of human rights defenders 2007: http://www2.ohchr.org/english/bodies/hrcouncil/docs/4session/A-HRC-4-37-Add-1.pdf.
- Situation of the Human Rights Defenders in the Americas: https://www.cidh.oas.org/countryrep/Defenders/DEFENDERS.ENGLISH.pdf.
- A Practical Security Handbook for Activists and Campaigns :http://www.anti-politics.org/distro/2009/practicalsecurity-read.pdf.
- Security Culture for activists: http://www.ruckus.org/downloads/RuckusSecurityCultureForActivists.pdf.
- New protection manual for Human Rights defenders: http://protectioninternational.org/wp-content/uploads/2012/04/Protection-Manual-3rd-Edition.pdf.
- Integrated security: the manual : http://www.integratedsecuritymanual.org/sites/default/files/integratedsecurity_themanual.pdf.
- On infiltrators and informers: http://www.activistsecurity.org/Infiltrators0.3.pdf.
- Frontline Defenders: http://www.frontlinedefenders.org/emergency.

3.2 Broader views on environmental justice defence strategies

Stronger together, EJOs address the media and challenge in the best case the lack of interest of mass media and in the worst case the criminalisation of protest actuated through media

If there is one recommendation this manual would give is the one to include legal strategy as one of the element of a broader and plural dimensional action towards environmental justice and try to put in place as much as possible a legal action combining the different branches of law, administrative, civil, constitutional, criminal, and to target from the local judicial bodies up to the international instruments.

A first step in facing environmental crime, in particular where high economic and political power lies, requires an important effort of collaboration among EJOs of all sorts, national organisations, associations, local committees from local to international level in sharing common strategic actions to address environmental justice. This allows bringing together competences and energy in basic activities like communication, awareness raising, campaign, promotion of active citizenship, research.

Stronger together, EJOs address the media and challenge in the best case the lack of interest of mass media and in the worst case the criminalisation of protest actuated through media. They can also better try to dialogue and cooperate with authorities starting from local and national authorities to denounce a given situation and underline the disrespect of legal obligations behind it. Most of the time, such relations might be difficult but the initial attempt is to create an exchange of information and expertise that both parts hold and could need in a path towards justice.

Fig. 13

March in Naples, Fiume In Piena 2013

Source: A Sud

When no concrete response is given and injustice carries on, defence strategies tend to strengthen their intensity and pressure action on authorities and corporations, through marches, occupation of land and buildings, civil disobedience, development of local grassroots alternatives, organisation of legal pursuits, blockade and strikes, financial activism, etc.

Box 13 Eight basic tips for environmental justice defence
Source: own elaboration

- Continuously reinforce network among EJOs
- Build relation with political and judicial authorities
- Challenge the media to channel information to broad audience
- Develop different adequate communication plans for different stakeholders
- Mix legal actions and judicial levels, start criminal court cases
- Personally pressure political and judicial leaders to tackle your case
- Never forget community grassroots work
- Mobilise all democratic tools available
- Bring together multiple expert competences for support

In this framework, institutional tools like semi direct democracy and soft law tools at disposition should not be rejected because of political or institutional distrust, but their use should be claimed as an exercise of our rights even when their impacts remains very limited. We refer here to popular initiatives, referendums, and other international instruments like communication to special rapporteurs on special issues within regional and international bodies. The more institutional actions are brought together, the stronger will be their potential impact.

3.2.1 Where to start with when thinking a legal strategy? Basic questions and inputs to approach legal strategy

When first thinking to approach a legal action, EJOs can start mapping basic but fundamental information:

> *Where is the area of interest? Which Natural resources are at stake, both exploited and contaminated? Who are the stakeholders in the case? Civil society, private companies, authorities, other actors? Who suffers from the situation? Who holds liabilities?*

It is useful to identify better which are the specificities of a given case to better understand where to find appropriate institutional and legal tools:

> *Which elements characterised especially the facts at stake? For example, do they involve indigenous people? protected area? waste issues? Traffic? Health issues? Basic rights violations? Exposure to risk? Their dimension is local or international?, etc., more details the better*

Then, try to list other known or potential damages or crimes related to the case but not directly related to its environmental aspects:

> *Omissions or errors in EIA, corruption, falsification of documents and procedures, lack of compliance of duty of corporations and authorities workers, in particular individuals with leading role, etc.*

Which tools can be find in your local, national, regional and international, public, civil and criminal justice systems?

Once, the assets of case are more clearly articulated, search and list tools into law systems that could be addressed directly or indirectly by EJOs:

> *Which tools can be find in your local, national, regional and international, public, civil and criminal justice systems?*

Finally you can map useful contacts:

> *Who are relevant Lawyers, Procurators, Judges to contact?*

3.2.2 Learning from good practice: an insight into the methodological approach of community involvement in Chevron Texaco Case

The Chevron-Texaco is one of the best known environmental justice cases brought to Court with such an International echo. Notwithstanding, the difficulties faced for the enforcement of the Ecuadorian court decisions and after long years of legal battle to bring the case to a close, the experience developed is one of the most remarkable for the central role of impacted communities involvement. We could not finish this manual without sharing some fundamental inputs to build motivation and inspiration for future legal pursuits.

The objective of the work with impacted communities includes developing standards of adequate community control over the judicial process and its results

EJOLT project had the honour to host Pablo Fajardo, one of the main lawyers of the Chevron-Texaco case, during the Rome Workshop in 2013. According to him, the objective of the work with impacted communities was to guarantee the highest possible degree of decision-making to communities and to develop standards of adequate community control over the judicial process and its results.

From the wording of the court decision itself, we can sense there has been an enormous collaboration between the legal team and the affected communities which has led to the proposal of measures restoration, compensation and mitigation that could respond to community expectations and to and their economic implication in respects with concrete actions. A collaboration without precedent, as the class action represented over 30,000 local inhabitants.

Fig. 14

Community members involved in the Chevron Texaco lawsuit

Source: Kevin Koenig in www.chevroninecuador.com

By restoration are intended actions of soil clean-ups, recuperation of fauna and flora (including aquatic life), groundwater clean-ups; by compensation the creation of a Trust for the Amazon Defense Coalition, the coalition of communities and local EJOs involved, to promote indigenous culture and the doubling of the economic fine if the company did not apologize (a clause latter withdrawn on appeal); and by mitigation the installation of drinkable water and health systems, as well as a centre for reconstruction and ethnic reaffirmation.

Since the beginning of the legal action in the 1990's, it was decided to go for a class action, a very interesting form of collective action existing in various countries, like in Ecuador and the USA, in order to avoid issues related to the potential division of compensation among some members of the community. This helped to have a sentence that could be implemented also in a collective way, so to better answer to the requirement and needs of the local communities. All personal legal cases have been rejected by the legal team.

Once the case was advancing and looking towards the implementation of the sentence, a special commission has been created among the community to manage the reparation/compensation/ mitigation money. This way, not only the community is part of the trial but also of the management of its results to come. More specifically, on every item of the sentence, shared rules are developed by the community to guarantee their best management and implementation for the benefit of the all community. However, Chevron has not yet agreed to pay the money it owes.

A special commission has been created among the community to manage the reparation / compensation/ mitigation money in the Chevron-Texaco case.
This way, not only the community is part of the trial but also of the management of its results to come

Box 14 Basic steps for participative decision over collective application of a sentence, example of clean ups in the Chevron Texaco Case

Source: own elaboration

1st step: gather information on what community wants to address contamination during community meetings and assemblies

2nd step: technical capacity building of community to allow community to understand the dimension of the problem and the potential remediation measure, to better evaluate to which company to grant clean-ups and decide together rules for the realisation of clean-ups and the forms of control the community will exercise over clean-ups.

3rd step: collective decision over the process of control over the rightful use of resources planned for cleans-up.

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