Using domestic courts to hold corporations accountable for harm to the environment and human rights

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Domestic courts: an underutilized tool

Natural resource development projects and other activities conducted by domestic and multinational corporations often cause grave harm to the environment and human rights of affected communities in developing countries. This is happening in particular to the lands, health, culture, and way of life of indigenous peoples.

A key tool in preventing and remedying this problem is to pursue domestic legal claims against the corporation causing the harm, whether in the courts of the country where the harm occurs, or in the courts of the country where the parent company (if any) is domiciled. The relative scarcity of domestic law-based challenges to environmental and human rights harms caused by corporations - understandable as it may be - has nonetheless contributed to the legal culture of impunity for such harms.

Legal actions threaten serious financial and reputational consequences for the offending corporation that harms the environment and human rights. They also put the corporate community on notice of the risk of such harms occurring, and the potential for legal liability in the absence of active measures to prevent them. Defendant corporations realize that successful cases will lead to more cases being filed against them for similar harms, and this risk of cascading financial consequences can have a preventive effect on future harms. With each case filed, the law comes a step closer to universal recognition of a duty and a standard of care for corporations to both prevent and remedy these harms.

Legal and practical obstacles to corporate accountability cases

Victims considering bringing cases of this type in domestic courts often face difficult obstacles. If a case is brought in the courts of the country where the harm occurs, these obstacles may include close ties between corporations and host governments; corrupt judiciaries; the limited availability of lawyers willing and able to bring these cases; the nearly unlimited financial resources of many corporate defendants; and the risk of institutional racism and retaliation, especially as to indigenous victims.

If a case is brought in the courts of the country where the parent corporation is domiciled, obstacles may include the difficulty of holding a parent corporation liable for the acts of its foreign subsidiary; the risk of a judge dismissing the case under the "inconvenient forum" rule; the logistical difficulties and expense of bringing a case arising

in one country in the courts of another; and finding lawyers willing to bring the case (such cases are typically too expensive to be brought on a *pro bono* basis).

Solutions

European courts

The Environmental Defender Law Center (EDLC) has worked on nearly a dozen pending and potential cases of this type in Europe, many of which are described on the EDLC website. The single greatest advantage to pursuing these cases in Europe is that judges in European courts cannot dismiss cases brought against corporations domiciled in their country on the basis of the "inconvenient forum" rule. This stands in stark contrast to the situation in North America.

European lawyers are increasingly able to work on a conditional or contingent fee basis ("no win, no fee"), as is customary in North America on cases of this type. In addition, the "loser pays" rule is in place in many European domestic legal systems, unlike in North America. Consequently, for victims of harms caused by European corporations, European courts potentially offer the best of all legal worlds: the victims' lawyers will be paid if they are successful, yet the victims' recovery may be undiminished by legal fees.

A perfect example of the possibilities in European courts is a recent case from Peru against an English mining company. EDLC brought the case to Leigh Day, the English firm that has pioneered international corporate accountability litigation in Europe. Thirty-three Peruvians claimed that following their peaceful protest at the Rio Blanco copper mine site owned by a subsidiary of Monterrico Metals (an English company), Monterrico and its employees were complicit in their torture. Leigh Day immediately succeeded in having the company's assets in England frozen by the London High Court. The High Court later ruled that evidence of additional acts perpetrated by the company against the Peruvian mining opposition would be admissible at trial to support the victims' claim that the company engaged in an overall strategy to suppress opposition to the mine. While denying liability to the very end, Monterrico eventually settled the case in 2011 on the eve of trial on terms favorable to the individual torture victims.

Criminal law may also be used in European courts to hold corporations accountable in ways that would be inconceivable in North America. Victims' lawyers can help develop the necessary facts and legal theories to bring to government prosecutors, who then decide whether investigation and prosecution are warranted. EDLC and the European Center for Constitutional and Human Rights have been collaborating on such a case from the Sudan, and are awaiting a decision from the German authorities on whether they will prosecute executives of a German multinational for their role in the construction and operation of a dam that flooded the land and homes of thousands of people living along the Nile.

Having government prosecutors take on the litigation burden has obvious cost-saving advantages, and brings into play legal tools that only prosecutors have at their disposal to investigate and obtain evidence. Successful criminal prosecutions can also result in damage awards for victims, whether as an additional part of the criminal case (commonly known as an "action civile") or through an entirely separate legal action.

North American courts

Outside of the groundbreaking approach under the U.S. Alien Tort Claims Act pioneered by EarthRights International, Center for Constitutional Rights and others, relatively little litigation of this type has been pursued in the U.S. or Canada. This is largely due to the formidable obstacle imposed by the "inconvenient forum" rule. The application of that rule typically results in the dismissal of a case based on the conclusion that it is more appropriately decided in the courts of the country where the harm occurred.

Nonetheless, at least four such cases have been filed in Canada in the past few years, whereas only one had been filed in the previous dozen years. And in a recent landmark case, the U.S. Court of Appeals for the Ninth Circuit refused to dismiss and send back to Peru a case brought in U.S. courts by EarthRights against Occidental Petroleum over oil pollution in the Amazon.

While large law firms typically do not bring cases of this type, they may be willing to help in other ways. *Pro bono* teams from a number of top firms have worked with EDLC on negotiation and advocacy approaches in cases involving harms caused by major multinational corporations.

Latin American and other courts

While few cases of this type have been brought in the domestic courts of developing countries, this is rapidly changing. Some well-known examples of such cases include the huge ongoing lawsuit against Chevron for pollution of the Ecuadorian Amazon; the Bhopal toxic gas case, which is back before the Indian Supreme Court on a curative petition challenging the adequacy of the original settlement; and the recent litigation against Ramu Nickel for submarine tailings disposal in Papua New Guinea. Claims are typically much less expensive to litigate in developing countries than in Europe or North America.

Local attorneys are increasingly willing to bring the cases, most often on a contingent fee basis, especially in countries with judicial systems where a successful result is not a pipe dream. The Chevron case from Ecuador has given local lawyers confidence that cases of this type can be brought and won. However, local lawyers may not have experience in bringing these cases. Obtaining legal assistance from lawyers who have this experience from bringing cases in other countries can be enormously helpful, whether it takes the form of an advisory role or partnering on the case itself.

For local lawyers to come up with even a relatively small amount of out-of-pocket expenses can make it impossible for them to undertake a case of this type. This and other financial obstacles can be overcome in part through programs such as that created by EDLC in 2011 to advance out-of-pocket litigation expenses to local lawyers. *Pro bono* lawyers and scientists may be willing to assist in these cases as well, allowing a limited budget to go even further.

Conclusion

Lawyers can pursue domestic law remedies in many countries on behalf of victims of environmental and human rights harms. Private attorneys from firms that often litigate

on behalf of plaintiffs can be enlisted to bring cases on a “no win, no fee” basis. Public interest lawyers may bring these cases either on their own or in collaboration with private lawyers. And large firms are sometimes available to advocate for victims as well.

In all these ways, victims of environmental and human rights harms and their lawyers can use underutilized legal tools and resources to “push the envelope” and eradicate the culture of impunity for these abuses.