

EARTHRIGHTS INTERNATIONAL

Power of Law, Power of People

Training Materials for Advocates

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CASE SELECTION CRITERIA FOR INTERNATIONAL IMPACT LITIGATION

In determining whether to bring a new lawsuit, sign on to an existing lawsuit, or engage in a similar legally-oriented mechanism to address an issue, the basic question is whether the case will advance the cause. In assessing this, a number of different factors should be taken into consideration. The following is non-exclusive list of questions for consideration, not necessarily listed in order of priority, and all should be considered before taking any new case:

- **Do you have a close and long-term relationship with the people affected? Do local communities have a voice in developing the case and shaping the remedies?** These relationships are important for any number of reasons. You want to be sure that the people you are representing are themselves representative of the larger affected community. You need to be able to trust the people and organizations that you work with. You need to have stable partnerships on the ground that are strong enough to carry you through years of litigation or other projects.
- **Can it be linked to national, trans-boundary, regional or global campaigns around a particular issue? Will it strengthen these campaigns?** Litigation or legal advocacy without links to wider campaigns is not likely to be as strong. There should be such links or at least the possibility that such links or a new campaign can be built around the case.
- **Will you be working with good people: lawyers, clients, and other groups?** With a lawsuit, you will likely be working with your clients and co-counsel and other groups for many years, so you should like them, believe in them and have a good relationship with them. You should also be sure to have strong legal partners at a local level wherever necessary.
- **Will it increase accountability of corporations or international financial institutions? Does it establish a new legal theory, tool, or forum? Will more people than the clients be helped by expansion of the law?** Any case or major activity you take should advance the accountability of these bodies, by using existing mechanisms to address the accountability of a particular corporation and/or by establishing new mechanisms to hold these actors accountable in the future.
- **Can the case be adequately litigated by private law firms?** In cases that present a possibility of financial recovery, consider whether the plaintiffs can be adequately represented by private law firms. It may not be the best use of your scarce resources to litigate it yourself, unless the case is too novel or uncertain for private law firms to litigate on their own, or unless you will bring a necessary public interest perspective to the case that private law firms will not.
- **Do you bring necessary experience, perspectives, or resources to the issue?** This is especially important when considering signing on to existing litigation or projects in which other groups are involved. For some particularly important cases, it may be enough that

¹ Information contained in this lesson plan is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

you simply bring additional legal resources. In general, however, you should select cases to which you can bring identifiable skills or resources that would not otherwise be present. This could include, for example, experience with particular legal issues or practical issues that arise in litigation, or a connection and approach to interacting with the affected population.

- **Is it a strong case? Is it winnable?** In general, you should not take a case unless it is, at least theoretically, winnable. You should believe that you can win the case, even if a legal victory is only a remote possibility. The criteria in ERI's [Transnational Litigation Manual](#) can be helpful in determining how strong the case is.
- **If you lose, will it still help the cause, and is it possible to limit the negative consequences of losing?** Regardless of how strong you think the case is, you should always determine what will happen if you lose, and think about whether the case itself will be a useful organizing tool and draw attention to the cause, and what the best ways are to mitigate the loss.
- **Does it address a major problem that needs to be addressed even if it does not set useful precedent?** Even if a case does not set useful precedent or have much impact on future cases that can be brought, if the negative consequences aren't significant and you have the resources it may make sense to bring the case simply because it addresses a major problem that affects many people.

TOP 10 KEY INGREDIENTS FOR SUCCESSFUL IMPACT LITIGATION

Assuming you have considered the questions above and decided to proceed with a case, there are at least 10 key ingredients for advancing successful litigation:

1. **Community Solidarity:** Ensure strong community support, involvement, and unity. Honor local partners and insight, and be sure to give them ownership in the case and all key decisions.
2. **Shared Vision:** Be sure that you and your clients have a clearly defined vision of what success looks like in the case. Public interest attorneys have a primary duty to their client and that can cause tension with other advocates where visions deviate, or where clients are not aligned with broader movement and campaign goals.
3. **Strong Legal Theories:** Develop the strongest possible legal arguments to advance your case, and be sure to identify all venues for redress (including, for example, corporate codes of conduct, multi-stakeholder initiatives, trade agreements, local, regional and international judicial mechanisms and United Nations venues) and determine which venues present the strongest legal and strategic options.
4. **Focus:** Don't try to do too many things well or spread yourself too thin, especially if you are advancing a new legal theory in the case.
5. **Strong Evidence:** Collect excellent evidence through your fact-finding and research docu-

menting human rights and environmental impact, and be sure to complete a thorough legal compliance analysis. Enlist credible third party allies to document human and environmental rights violations to buttress your claims.

6. ***Follow the Money:*** Complete the necessary financial analysis to “Follow the Money”, identifying all actors with leverage over the target of your litigation, including major investors, financial institutions, development agencies, foreign governments, and markets and supply chains.
7. ***Launch a Campaign:*** Engage allies to help you design and implement effective associated campaigns to complement the litigation work, putting pressure on various actors identified through your Follow the Money analysis.
8. ***Deploy a Media Strategy:*** Develop and deploy a strong and strategic media campaign.
9. ***Prepare for a Firewall:*** Ideally, litigating lawyers should not be the primary campaigners, and a judge may insist on a firewall between lawyers and campaign advocates. Make sure that advocates have the information they need for effective campaigns, and distribute public information early and often, so that litigating lawyers are not the only ones with key information.
10. ***Prepare for New Beginnings:*** Don’t forget that once the case is decided, it often leads to a new beginning. For example, are you committing to continue with the case on appeal if you lose? If you win, what role will you have as attorneys in assisting with implementing any settlement and/or in resolving disputes that may arise in the community surrounding the settlement?

INTRODUCTION TO THE POWER OF LAW, POWER OF PEOPLE TRAINING MATERIALS

EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.” We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, EarthRights International seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.

The Power of Law, Power of People Training Materials were prepared by Gillian Caldwell and Louis Spitzer on behalf of EarthRights International for use in building the capacity of advocates, lawyers and campaigners globally to combine litigation with campaigns in order to advance “earth rights”, and guard against human rights and environmental abuse. The materials are based on a series of four distinct lawsuits and associated campaigns, all of which were pursued by EarthRights International and its partners in countries around the world including Peru, Nigeria, Cambodia and Myanmar (Burma). Each case is presented through a combination of three teaching tools: a short (10-20 minute) video, a case study, and a lesson plan including several sample participatory exercises for engaging students in achieving learning objectives. It should be noted that the lesson plan exercises are inter-changeable, so for example the Koh Kong Lesson plan could be adapted for use with the Wiwa v. Shell Case Study and Video if that were preferable. Additionally, there is a brief Impact Litigation Overview that is intended as reference material to accompany learning in any of the cases, and includes case selection criteria as well as EarthRights’ top 10 ingredients for successful impact litigation. We hope these materials are helpful to you, and welcome your feedback at infousa@earthrights.org.

Case Study

Koh Kong Sugar (Cambodia)

BACKGROUND

In Cambodia, forced evictions resulting from large **Economic Land Concessions** (ELCs) granted by the state to business enterprises present a major human rights issue. ELCs are a form of support to private companies for agricultural and industrial development. They are purportedly aimed at increasing employment in rural areas, and at encouraging small and large-scale private investment. But ELCs have regularly led to a wide range of negative impacts on communities, including food insecurity, loss of access to means of livelihood (including smallholder farming, timber and other forest products), environmental destruction, and confiscation of areas of cultural significance for indigenous tribes. Community members who protest their displacement may find themselves facing criminal charges or even violence by government military forces assisting in the evictions.

Under Cambodian law, an ELC is permissible only if: (1) the land has been registered and classified as state private land; (2) a land use plan has been adopted by the relevant committee; (3) environmental and social impact assessments have been completed; (4) there is no involuntary resettlement of lawful landholders; and (5) there has been a public consultation between local authorities and residents of the land. In addition to these restrictions, ELCs should not be more than 10,000 hectares in size. However, ELC grantees often avoid this limit by registering multiple (and/or connecting) concessions on behalf of the same or related parties.

In 2009, the World Bank, representatives of foreign governments, the United Nations, the Asian Development Bank and other international development partners confirmed that the forced evictions caused by ELCs are a significant development issue in Cambodia. In 2011, the World Bank suspended further loans to Cambodia following forced evictions and involuntary resettlement to make way for the Boeung Kak Lake development in Phnom Penh. In response to mounting international pressure, Cambodian Prime Minister Hun Sen imposed a moratorium on granting ELCs and called for the cancellation of ELCs that did not abide by law or contractual agreements. In practice, the issuing of land concessions continued.

THE CASE OF KOH KONG

This Case Study examines an Economic Land Concession granted for a sugar plantation and factory in Koh Kong, the most southwestern province of Cambodia, where a well-documented forced eviction by state actors and business enterprises occurred in 2006. In March of 2006, the Cambodian Council of Ministers agreed to award ELCs to two companies to develop sugar plantations and refinery operations in Koh Kong. The companies received two connected concessions of nearly 10,000 hectares each. These two ELCs were granted in August 2006 on land legally possessed by the communities residing there, without consultation or adherence to other requirements for the granting of ELCs under Cambodian laws.

The villagers whose land was granted to the Koh Kong sugar plantation have well-documented possession rights to the land under the Cambodian Land Law. Although the villagers had not yet obtained definitive title to the land (a common challenge in Cambodia), the law prohibits interference with possession rights pending conversion into legal title. Residence booklets show the villagers inhabited the land for more than five years prior to their forced removal. Moreover, maps in the area clearly show the land was being used as farmland at the time of the forced eviction and therefore not “degraded land” as alleged by Khon Kaen Sugar Industry Public Co. Ltd. (KSL), which is the Thai business enterprise that owns 70% of the Koh Kong sugar business. The remaining 30% is owned by Vewong Corporation, a Taiwanese company.

Further, the law requires a public consultation, an environmental and social impact assessment, and a resettlement plan prior to the granting of an ELC, yet the villagers claim that none of these steps took place at Koh Kong. In fact, the first time the Koh Kong farmers learned about the project was when armed security personnel began clearing their farms. Even before the concession contracts were signed, the companies arrived in Koh Kong and began forcibly evicting villagers, in many cases destroying their rice fields, orchards, and grazing lands. Four hundred fifty-six families from three villages lost approximately 5,000 hectares of land in the clearing operations and forced evictions as part of the Koh Kong sugar plantation development.

The ELCs granted by the Cambodian government in the Koh Kong case are 70% owned and controlled by the Thai business KSL, via two Cambodian subsidiaries: Koh Kong Sugar Industry Co., Ltd. (KKS) and Koh Kong Sugar Plantation Co., Ltd. (KKP). While the Koh Kong concessions were made to two separate companies with different corporate purposes (KKP is a plantation company and KKS processes the sugar), the two pieces of land form a single connected plantation whose combined size is nearly twice the limit allowed for Economic Land Concessions under Cambodia’s 2001 Land Law. The two companies associated with the respective concession contracts occupy the same office and applied for the concession, received approval, and signed the concession contracts on the same days. Further, the communities impacted by these ELCs see the ELCs as evidence of corruption, since they were granted at the request of a Cambodian Senator Ly Yong Phat, who had a 20% ownership interest in the two related companies at the time, but later sold his share to KSL.

The sugar cane harvested in Koh Kong is processed and exported to Thailand, which then exports the sugar to U.K.’s Tate & Lyle Sugars under the European Union’s “**Everything But Arms**” trade and development initiative. In 2010, Tate & Lyle was acquired by the U.S. company American Sugar Refining (ASR), best known for producing Domino Sugar. Thus, the ownership structure and the business operations of the Cambodian companies KKS and KKP involve considerable control and influence by Thai, U.K. and U.S. registered business enterprises.

LEGAL ACTION AND CAMPAIGN

The forcible evictions in Koh Kong flouted Cambodian laws recognizing the villagers' well-documented possession rights, as well as requirements for prior consultation with affected communities, environmental impact assessments, and laws limiting the size of land concessions. Koh Kong villagers who once sustained themselves through raising a variety of crops and cattle now struggle to survive. In addition to the violence and destruction of property that accompanied the forced evictions, the ongoing human rights impacts on the lives of Koh Kong community members include food insecurity, loss of land, loss of housing, health problems, and loss of livelihood and educational opportunities. The poverty and malnutrition that resulted have meant that many of the villagers and their children have been forced to work on the very sugar plantations that now occupy the land stolen from them.

Over the past seven years, the Koh Kong communities have been fighting to have their land returned and to receive compensation for the dispossession, loss of livelihoods and impoverishment they have suffered. They have pursued this fight in the Cambodian courts, where they have faced long delays without resolution and procedural irregularities. The Koh Kong Sugar Industry in Cambodia claims no knowledge of the human rights violations that have been alleged, and insists that it has excellent corporate social responsibility and governance policies. It claims to “understand that a big project, like our project, might have the land conflict with the local people,” and that they “cannot seize the land that belongs to others.” KSL, Tate & Lyle and ASR have replied to some letters from the attorneys representing the Koh Kong community members, but have not taken action to resolve the dispute in accordance with human rights principles or Cambodian law. In a joint statement on the problem of forced evictions in Cambodia, the World Bank and other international development partners noted the widespread use of “policies and practices that do not reflect good international practice in dispute resolution and resettlement and do not make effective use of the procedures and institutions allowed for in Cambodian law.”

The affected communities in Koh Kong have therefore turned to international forums around the world in order to have their voices heard and claims addressed, on the basis that the international companies are directly benefitting from the land confiscation and associated human rights violations taking place in Cambodia. A number of recent developments indicate that the communities' efforts to seek redress have been successful in placing pressure on perpetrators and companies complicit in the abuses. For the first time, for example, representatives of the companies involved have indicated a willingness to enter into dialogue with the villagers, signaling the possibility that justice may yet be possible for the Koh Kong communities.

THAI HUMAN RIGHTS COMMISSION COMPLAINT

In 2012, the communities submitted a complaint to the Thai National Human Rights Commission

(TNHRC) against Khon Khaen Sugar Co. Ltd. (KSL), a Thai company with 70% ownership of the Cambodian companies operating the plantation and factory. The TNHRC accepted Koh Kong as a case designated to the Subcommittee on Civil and Political Rights (SCPR). In a landmark statement of preliminary findings dated 25 July 2012, the SCPR concluded that it has jurisdiction to investigate the case, despite the project's location in Cambodia as it has a "mandate to ensure that the Thai state and private companies comply with human rights principles. The power and duties of the TNHRC do not limit the types of stakeholder involved (whether public or private) or site of violations (whether inside or outside of Thailand)." The SCPR also noted in its statement that the Koh Kong case is one of four trans-border human rights cases currently being investigated by the TNHRC, the others being the Hat Gyi dam in Myanmar (Burma), the Hongsa lignite mine and coal fired power station in Laos, and the Xayabouri dam, also in Laos. The TNHRC continues to investigate the case and issued preliminary findings of breaches of human rights principles and instruments, including rights to life and self-determination, at the plantation. The TNHRC also identified "a failure to uphold the people's right to development, which includes their right to participate in, contribute to and enjoy economic, social, cultural and political development."

In a 2012 report analyzing the human rights impacts of economic land concessions, the U.N. Special Rapporteur on the Situation of Human Rights in Cambodia stated that the investigation by the TNHRC represented "a success in transboundary human rights promotion and protection" and described the case as a "landmark... for international advocacy in Cambodia," noting that the use of national human rights commissions such as the TNHRC could be further explored for seeking redress in land concession cases. In apparent response to increased scrutiny of the human rights issues and legality of the plantations, a representative of KSL visited the communities in March of 2013, reportedly offering to return the land if the villagers could prove legal ownership.

BREACHES OF THE OECD GUIDELINES ON MULTINATIONAL ENTERPRISES

U.K. sugar giant Tate & Lyle, now owned by ASR, has a contract to purchase all of the sugar produced at the Koh Kong sugar plantation. In October 2012, the Koh Kong communities lodged a complaint against ASR with the Organization for Economic Cooperation and Development (OECD) National Contact Point (NCP) in the U.S., which is responsible for overseeing the compliance of U.S. companies with corporate human rights and sustainable development standards under the OECD Guidelines for Multinational Enterprises.

Through a process of dialogue facilitated by the NCP within the OECD, ASR agreed to enter into mediation with the villagers. However, before mediation could commence, ASR withdrew from the process on the grounds that a lawsuit had been filed by the communities against its subsidiary, Tate & Lyle, in the U.K. courts. ASR contended that the matters at issue in the complaint were the same as those being heard in the lawsuit against Tate & Lyle in the UK. However, EarthRights

International and the Community Legal Education Center (CLEC), who are representing the Koh Kong villagers, believe that ASR has its own responsibilities – distinct from those of Tate & Lyle (under both the U.N Guiding Principles on Business and Human Rights and the OECD Guidelines) - to conduct human rights due diligence and address human rights impacts directly related to its business activities through the supply chain. Despite its withdrawal from the mediation process, ASR has stated that it has no plans to purchase sugar from Cambodia in the future.

It is worth noting that the current version of the OECD guidelines incorporate guidance from the United Nations Guiding Principles on Business and Human Rights (the “Guiding Principles”), which are based on the three key tenets:

- *State responsibility to protect human rights*: refers to states’ existing obligations to respect, protect and fulfill human rights and fundamental freedoms, encompassing the responsibility to protect against human rights abuses by third parties, including business enterprises;
- *Business responsibility to respect human rights*: recognizes the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and
- *Access to remedy*: recognizes the need for rights and obligations to be matched to appropriate and effective remedies when breached.

LITIGATION IN UK COMMERCIAL COURT

The Koh Kong communities filed a lawsuit against Tate & Lyle in the U.K. Commercial Court in March 2013. The villagers are claiming damages for the loss of land over which they hold lawful possession rights as well as proceeds from the sugar grown on the land that was wrongfully taken from them. Attempts to mediate the dispute between the parties to the lawsuit have been unsuccessful and the litigation is therefore continuing before the court.

BONSUCRO INDUSTRY ASSOCIATION INVESTIGATION

Tate & Lyle is a member of Bonsucro, a sugar industry association that accredits its members with meeting sustainability standards, including social and environmental benchmarks, in the production of sugarcane. The Koh Kong communities submitted a complaint to Bonsucro, asking the association to investigate whether Tate & Lyle has met the association’s sustainability standards and to review its membership accordingly. The Bonsucro Board suspended Tate and Lyle’s membership on July 8, 2013 for failure to comply with a request for information regarding the complaint within a reasonable timeframe. Tate & Lyle will remain suspended until they either resolve the complaint with the communities, or carry out an independent third party review regarding the allegations and the compliance -- or lack thereof -- of their supplier with Tate & Lyle’s own code of conduct.

CALL FOR SCRUTINY OF THE EUROPEAN UNION'S EVERYTHING BUT ARMS INITIATIVE

All of the sugar from the Koh Kong plantation is imported by Tate & Lyle to the U.K. for sale to local producers under the European Union's Everything But Arms (EBA) Initiative. The EBA Initiative expressly aims to support the economic development of the world's poorest countries by allowing duty-free and quota-free imports to the European Union (EU) of all goods from Least Developed Countries, with the exception of armaments. The Koh Kong communities have repeatedly asked the European Commission to review Tate & Lyle's tax-free importation of sugar from the plantation into the EU. They argue that rather than supporting development in Cambodia, the Koh Kong plantations have impoverished local people and contributed to human rights abuses.

In October 2012, the full European Parliament issued a resolution calling for an investigation and a suspension of the EBA trade preferences for companies implicated in human rights abuses. On 21 March 2013, thirteen Members of the European Parliament wrote to European Commissioner for Trade Karel de Gucht and High Representative Catherine Ashton, calling upon the Commission to launch "an immediate and inclusive investigation into [the] serious human rights abuses related to economic land concessions for agro-industrial development, in connection with goods being exported to the EU." As of February 2014, a meeting was held between representatives from the European Union, Cambodian government ministers, Cambodian Senator Ly Yong Phat and sugar plantation representatives, in which the Cambodian government "agreed to a comprehensive solution for rural families who have lost their land to well-connected agricultural plantations exporting sugar to the European Union (E.U.) duty free," and planned to meet again in March of 2014 to discuss details.

KOH KONG CAMPAIGNS

Villagers from Koh Kong have staged multiple protests against the Koh Kong sugar companies, but their peaceful protests have been met with violence by armed company security guards, resulting in the shooting and injury of a female villager and assault of four other villagers. These human rights violations have contributed to deepening impoverishment amongst villagers, and the physical attacks have made them fear for their personal security in their own communities. In the meantime, the forced evictions have had lasting and severe effects on the livelihoods and economic opportunities of the communities.

The business enterprises involved have faced a slew of complaints, community protests and negative media coverage surrounding the Koh Kong Case. For example, the [UK Guardian published a story](#) in July of 2013 alleging widespread child labor in the Koh Kong sugar plantations. Meanwhile, the [Clean Sugar Campaign](#), a coalition of affected communities and non-governmental

organizations, has been working to stop human rights abuses and environmental damage caused by the Cambodian sugar industry, bring about a just resolution for the individuals and communities who have been harmed by the industry, and ensure that agricultural development and trade policies benefit smallholder farmers and local communities.

Oxfam launched a worldwide campaign targeting the three biggest companies in the sugar industry and calling on them to address land grabbing and other human rights abuses in their supply chains. One of these three companies was Coca Cola, that sources sugar from many countries in where land grabbing is a problem. In response to this campaign, in November 2013 Coca Cola disclosed their major suppliers, **committed to zero tolerance for land grabbing** and 100% sustainable sourcing, and agreed to conduct third party social, environmental and human rights assessments in the countries where they source sugar. Additionally, and importantly for the Koh Kong case, Coca Cola agreed to advocate with governments, companies and suppliers on these issues and to use their leverage to ensure human rights compliance in their supply chains. This includes advocacy on the Koh Kong case specifically, as well as with the Mitr Pohl Sugar Group, which is the largest sugar producer in Asia and has significant operations and investments in Cambodia.

CONCLUSION

Although the Koh Kong communities' lawsuits and associated campaign to have the ELCs cancelled and their land returned has not yet been successful as of February 2014, they have managed to force Senator Ly Yong Phat, one of Cambodia's richest and most powerful men with a prior ownership interest in the ELC, to negotiate with them and eventually to divest his share in the plantation. In the context of Cambodia, where access to justice in cases involving powerful political actors presents significant challenges, this is an important victory. In addition, the global campaign has succeeded in having Tate & Lyle suspended from Bonsucro, in securing new precedent for considering trans-national human rights abuses at the Thai National Human Rights Commission, and in leveraging significant commitments from Coca Cola. However, the relevant business enterprises have yet to comply with the principles of human rights due diligence and there has not yet been an effective remedy to adequately address the human rights violations suffered by the Koh Kong communities. Overall, the Koh Kong case shows how current remedies are still inadequate, especially in bringing actual relief: 200 families in Koh Kong remain landless and uncompensated, although they have been diligently seeking a remedy in numerous Cambodian and international venues since 2007.

- *Follow the Money:* In order to pursue successful corporate litigation and campaigns, follow a given corporation's accountability and financial relationships throughout their supply chain at a local, regional and international level. Be sure to develop relevant global alliances and legal expertise at every key pressure point along the supply chain.

KEY REFLECTIONS AND LESSONS LEARNED

- ***Consider All Available Corporate Accountability Mechanisms:*** Koh Kong demonstrates the use of a wide array of corporate accountability mechanisms in a trans-boundary context, including the exhaustion of local legal remedies, and the pursuit of regional and international mechanisms such as the National Human Rights Commission of Thailand, the Association of Southeast Asian Nations (ASEAN) and the ASEAN Intergovernmental Commission on Human Rights (AICHR), the Organization for Economic Cooperation and Development (OECD), the Bonsucro sugar industry association, the European Union's Everything But Arms trade initiative, the Norwegian Council of Ethics, and even the filing of court case in the UK Commercial Court. Be sure to consider all available national, regional and international remedies for your cases and campaigns.
- ***Integrate Campaign and Legal Strategies:*** The Koh Kong case demonstrates the importance of pursuing a strategy that combines legal and campaign elements at the national, regional and international level. Campaigns in this case included efforts to strengthen AICHR as a mechanism, the collaborative Clean Sugar Campaign in Cambodia, and a range of international groups using Koh Kong in campaigns such as Oxfam's campaign against Coke which is sourcing sugar from the plantations. Campaigns tactics included protests, meetings with relevant stakeholders, community engagement and public advocacy, video public service announcements, and public media regarding legal and campaign activities.
- ***Be Prepared for Competing Priorities Among Advocates:*** Collaborative campaigns and legal strategies can be complicated by competing priorities among the various groups of advocates. For example, improving standards and implementation of regional and international laws is not always completely aligned with benefitting the communities and plaintiffs more directly affected by a specific case. Be sure to keep lines of communication open and to coordinate as much as possible.
- ***Be Mindful of How You Approach Messaging and Tone in Your Campaigns:*** Decisions around messaging and tone are some of the most important ones you will make in campaigns. In the Cambodian context, for example, international advocates tend to bring a more dogmatic, forceful approach to campaigning and some local campaigners tend to think more about engagement and constructive criticism with authorities. When outside campaigners are talking to local communities about messaging, they must take the power imbalance, history, and potential local fear and security risks into account in making their recommendations. They must also guard against the possibility that local communities may sometimes adopt a message based on recommendations or pressure from outsiders without understanding or appreciating the implications for local actors.
- ***Recognize the Power and Challenge of Spectrum in Campaigning:*** Campaigns frequently engage a range of players who may see things differently and decide to use different tactics and tone to get their point across. The Koh Kong case offers a chance to examine how to integrate campaign strategies across a spectrum of tactics and messages, while recognizing

- that as an attorney your core duty is to your client.
- *Grievance Mechanisms Remain Inadequate:* The Koh Kong case illustrates how, despite numerous legal options and venues to pursue a remedy, the grievance mechanisms for cases such as this remain inadequate and justice can remain out of reach for local communities for many years.

Lesson Plan

Koh Kong Sugar (Cambodia)

LESSON OVERVIEW

The focus of this lesson plan is on helping advocates get hands-on experience with “following the money” throughout corporate supply chains as a tactic to strengthen accountability campaigns, and on using a role play to give them experience navigating predictable tensions between stakeholders in cases such as these.

This lesson complements the Koh Kong Case Study and Video, which focuses on the displacement of hundreds of families in the Koh Kong province in Cambodia when the government granted an “Economic Land Concession” to allow a sugar company to plant and harvest sugar for global markets.

LEARNING OBJECTIVES

- ***Follow the Money:*** In order to pursue successful corporate litigation and campaigns, it is important to follow a given corporation’s accountability and financial relationships throughout their supply chain at a local, regional and international level. Be sure to develop relevant global alliances and legal expertise at every key pressure point possible along the chain. Once you have completed your “follow the money” analysis (which can require a lot of research), assess all of the corporate accountability mechanisms in your given country or trans-boundary context, including the exhaustion of local legal remedie, and the pursuit of regional and international mechanisms, trade agreements and industry associations.
- ***Be Prepared for Tensions Between Stakeholders:*** In most cases and campaigns, some tensions arise between the various players, including for example between plaintiffs and local, regional and international advocates. Different stakeholders may see things differently, and have legitimate but distinct goals and proposed approaches to advancing their cause. This is natural and occurs in most coalition or collaborative campaigns, but especially so when you have multiple campaigns moving at various points of the “follow the money” chain. Potential tensions should be anticipated and advocates should ensure that dialogue takes place early on and steps are taken to resolve as many outstanding challenges as possible both before campaigns get going, and as they progress.

MATERIALS AND PREPARATION NEEDED

- Students should have read the Koh Kong Case Study before class begins
- Capability to watch the Koh Kong Video with the class
- Space for several small group conversations of approximately 5 people each
- Flip charts for each breakout group

¹ Information contained in this lesson plan is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

- Computers with internet connectivity, where possible

LESSON PLAN RESOURCES

- Koh Kong Video
- Koh Kong Case Study
- Overall Lesson Plan reference material

LESSON PROCEDURES

Exercise 1: Follow the Money

The goal of this group discussion and follow up small group activity is to give learners a chance to engage in a practical, hands-on exercise to “follow the money” in actual or potential cases and campaigns. It requires an estimated 90 minutes to complete.

Steps:

1. Have the class read the Koh Kong Case Study in advance and then screen the Koh Kong Video together.
2. Lead a discussion of 20 minutes with the group to draw a picture on a flip chart of what it looks like to “follow the money” in the case of Koh Kong. Elicit as much information from the group as you can, based on their reading of the Koh Kong Case Study and Video they have seen. Refer to Appendix A for a sample flow chart following the money in the Koh Kong case which you can use as a reference when you are eliciting information from the class.
3. Draw from the group any accountability mechanisms pursued in the Koh Kong case for each point along the supply chain. Refer to Appendix A for the accountability mechanisms pursued in the Koh Kong case which you can use as a reference.
4. Once the flip chart is completed, explain that they will be generating flip charts just like this in their breakout groups on different case scenarios shortly.
5. Ask people in the group to suggest potential or existing cases or campaigns that they would like to discuss in a breakout group for this “Follow the Money” exercise.
6. Work together to select a single case or campaign that each breakout group will discuss separately as part of this exercise and break the class into evenly sized groups of approximately 5 people.
7. Instruct each group to be sure they have a reporter who will capture the group’s thinking on a flip chart.
8. Once the topic and groups have been decided, reiterate the goal of the breakout session: to take your case or campaign and “follow the money” through a visual depiction of all the supply chain and financial relationships on your flip chart, as well as potential venues for

accountability and allies in the campaign. Give them 40 minutes for the breakout sessions, noting that some groups may not have the time to assess all of the potential accountability mechanisms and allies in that time but that they should include whatever ideas they have on the flip chart. Where internet is readily available, allow groups to use the internet to research their “follow the money” chart. Where no internet is available instruct them to include educated guesses and questions to be answered through follow up research.

9. Bring them back together and have the reporter for each group put the flip chart on the wall and take 2 minutes to walk the rest of the groups through what they came up with.
10. Once all groups have presented their flip charts, facilitate a discussion of the various flip charts created addressing key content and variations.

Alternate Version Exercise 1: Follow the Money

Another alternative to the approach above is to have each group work on a different “follow the money” case study. In this scenario, you will need to select enough cases or campaigns to have breakout groups with approximately 5 people in them. Then, have people indicate which group they would like to be in and check to see that the groups are roughly evenly sized. Follow the instructions above for the rest of the exercise, but skip step #10 which entails a comparative discussion of the flip charts generated on the same case or campaign.

Exercise 2: Navigating Tension Between Stakeholders:

The goal of this 60-minute role-play exercise is to give learners a chance to practice navigating tension between stakeholders surrounding a given issue.

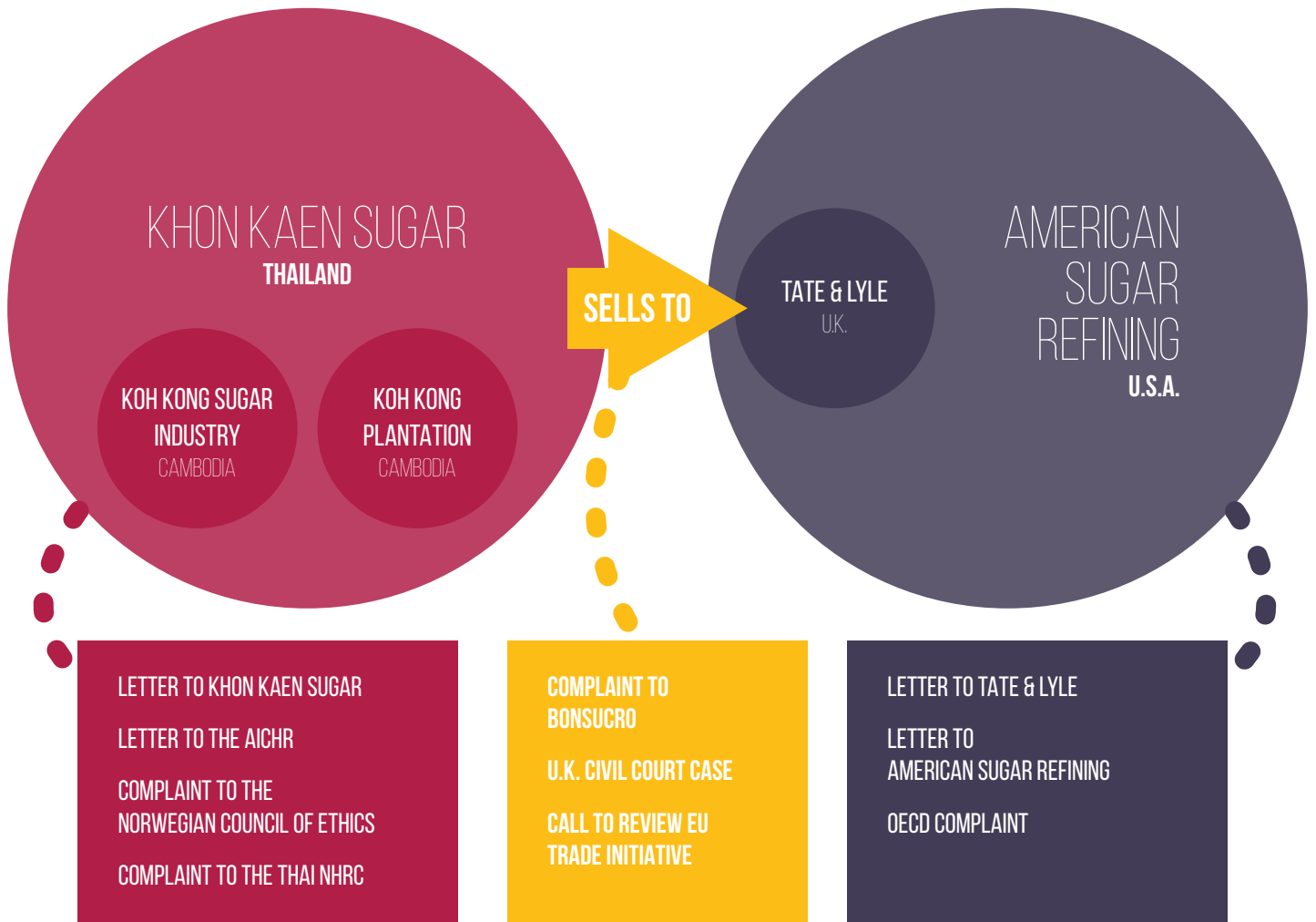
1. Explain that in this hypothetical VeryFine Sugar case, there are three stakeholder groups involved, each of whom has different interests and perspectives on the case. The class will be broken into three groups, with each group charged with representing a different campaign stakeholder in the role play. See Appendix B for the description of the case and each of the stakeholder groups.
2. Tell them the broad title of each of the three groups are and divide the group into 3 stakeholder groups, assigning each group to be a one of the three stakeholders (plaintiffs, Very-Fine Sugar, and Ethical Sugar). Do not publicly discuss the characteristics or interests of each group, but instead privately give each group a piece of paper that includes their characteristics, drawn from Appendix B.
3. Instruct each stakeholder group to meet separately in private for 15 minutes in order to review their characteristics, talk about their goal and planned approach to the role play. Tell them to prepare for a meeting of all of the stakeholders for a discussion about how to resolve the case, which will begin with each stakeholder group making a presentation of a maximum of 3-5 minutes regarding their position and perspectives.

4. Bring the groups together and explain that they are about to enter a meeting of all 3 stakeholder groups in which you are going to serve as the facilitator. Give each group 5 minutes to present their position and then open the floor for dialogue and discussion with the goal being to reach an agreement that all three parties are prepared to accept.
 5. Allow the discussion to continue for 15-20 minutes, with each stakeholder group contributing their perspectives and arguments. Function as a facilitator in supporting them to try and reach a mutually agreeable solution.
 6. At the end of the time period, terminate the role play. Debrief the meeting with all the participants, discussing what worked and what didn't in helping reach a solution in this case. If an agreement was reached, how was that possible and what helped ensure that could be achieved? If no agreement was reached, why not?
-

Alternate Lesson Plan to Either of These Two Exercises:

See the Video Action Plan exercise that is included in the Doe v. Unocal Lesson Plan and can be paired instead with this or any of the other case studies available from [EarthRights International](#).

Appendix A: Follow the Money Diagram, Koh Kong



ACTIONS TAKEN

Appendix B: Stakeholder Role Play

This fictional case involves the VeryFine Sugar Company that has been given a lease on land by the government of “Fiju”.

Stakeholders include:

The Plaintiffs: The Plaintiffs in this case are a group of 3 families whose land was taken by Very-Fine Sugar following the government of Fiju’s grant of a lease to the company. They were relocated against their will to a much smaller plot of land and they can no longer grow crops on the land or support their families. They have sympathy for other landowners around Fiju who are in the same situation, but their primary goal in the case is to get their land back. If they can’t have that, they want compensation for the loss of their land.

The “Ethical Sugar” Campaign: The Ethical Sugar campaign was founded in the country of Pineland, which is an eight hour plane ride away from Fiju. Its goal is to pressure the Fiju government to stop granting leases on land around the country to private sugar companies that are in turn selling their sugar to retailers in Pineland because of the human rights and environmental problems caused by th leases. They also want the VeryFine Sugar company to make a public apology for its practice of accepting leases for land owned by smallholder farmers, to commit to refusing to accept land that is displacing farmers anywhere in their global supply chain, and to urge other sugar manufacturers to take the same principled stand they are taking.

VeryFine Sugar: VeryFine is the sugar company that is being sued by the plaintiffs. Before this case absorbs any more of their resources or generates any further bad publicity, they are prepared to offer to pay the plaintiffs 100% of the value of their confiscated land, provided that the terms of the settlement are kept confidential. They do not want to commit to changing their practices in Fiju or in any other country where they operate.

Case Study

Doe v. Unocal (Myanmar)

BACKGROUND

In the early 1990s, two multinational oil companies—Total of France and Unocal of the United States—formed a partnership with the military regime in Myanmar (Burma), known then as the State Law and Order Restoration Council (“SLORC”), to build the [Yadana Gas Pipeline](#) in order to exploit natural gas reserves in the Andaman Sea off Myanmar’s southern coast¹. SLORC had seized power in 1988 and was internationally criticized for widespread human rights abuses against its own people. In particular, the army was notorious for heavy use of forced labor on its projects and for brutal treatment of “porters” -- people forced to carry loads for them. Nonetheless, Unocal’s own documents indicated that, according to their contract, “the government of Myanmar” – SLORC – was “responsible for protecting the pipeline.” The military regime quickly created a highly militarized pipeline corridor in what had been a relatively peaceful area of Myanmar’s southern peninsula.

The influx of soldiers into the area where the Yadana Pipeline was to be built resulted in multiple human rights abuses, including forced labor, torture, rape, extrajudicial killings, and attacks on indigenous and ethnic minority peoples. For example, SLORC began carrying out its obligations under the contract with Total and Unocal by forcing thousands of villagers to build barracks to house the soldiers coming into the region for the project. Villagers were also taken from their homes and forced to build roads and helipads, and to serve as porters carrying arms, ammunition, food and other supplies for soldiers who provided security for survey teams and other project officials. The army relocated entire villages away from the pipeline route and toward roads where they could be more easily conscripted for forced labor, and placed severe restrictions on farmers’ movements, which caused many to lose their livelihoods. Villagers could only endure the abuse or try to escape; many were forced into poverty and exile in refugee camps along the border with Thailand.

Unocal was directly informed by its own consultants before they entered into the contract that Myanmar’s military forces would use forced labor on the pipeline project and would commit widespread human rights abuses. Unocal ignored these warnings -- at times denying that abuses were occurring, and at other times boldly announcing that human rights abuses in Myanmar were simply the cost of doing business there. In 1995, Unocal’s president John Imle admitted that “if forced labor goes hand and glove with the military, yes there will be more forced labor” if the military presence needed to be increased in response to any perceived threats to the pipeline.

Local and international non-governmental organizations providing humanitarian relief and monitoring Myanmar’s human rights situation, as well as representatives from the media, had some access to the border region, but the pipeline corridor itself was completely inaccessible to them.

¹ Information contained in this case study is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

However, refugees who crossed the border into Thailand began to speak about the pipeline, as well as the arrival of the “white people,” the soldiers and the associated human rights abuses. Accounts of human rights abuses began to appear in local newspapers, media reports, and even U.S. Embassy and State Department cables that would later be admitted as evidence in the *Doe v. Unocal* case brought by [EarthRights International](#) and its partners.

The conditions in the pipeline region became both a focus of the worldwide movement for financial divestment from Myanmar and, as one of the world’s most notorious examples of corporate collaboration in human rights abuses, a focal point in a global debate on businesses’ role in human rights. At the center of this debate were eleven villagers from Myanmar who simply wanted to obtain some justice. The villagers had no difficulty linking their suffering to the corporations that profited from it. Although they may not have known the details of the Yadana Pipeline contract or the legal doctrines that govern accountability for human rights violations, they knew that they had experienced devastating abuses. And they knew that the abuses started when the foreigners began arriving on their land.

THE FORMATION OF EARTHRIGHTS INTERNATIONAL

In the summer of 1994, as the militarization process in the Yadana Pipeline region was well underway, Katie Redford traveled to Thailand with Tyler Giannini and Mark Bromley. They were all law students from the United States on a summer internship in South East Asia. Working with local human rights and non-governmental environmental organizations, they were assigned to document the human rights abuses associated with development projects. The students traveled to the Myanmar border to ask about the rapid development plans there. They listened in horror as victims and witnesses described the rape, torture and forced labor they had endured under military rule. While the students were familiar with SLORC’s brutal reputation, they were startled to notice the English word “pipeline” appearing in the accounts of new arrivals to the border. And they were surprised to learn that one of the companies involved in the pipeline was Unocal, a U.S. corporation headquartered in California.

While hearing desperate cries for help and learning of increasing threats of violence, the law students knew that they needed to do something. At the time, sitting in thatched, candlelit huts on the banks of the river, they didn’t know what that “something” was. But as young, idealistic law students, they felt confident that the law could provide an answer. Before they left, they discussed strategy with a small group of grassroots human rights advocates from Myanmar. One of these advocates, [Ka Hsaw Wa](#), was a young man from the Karen ethnic group who had experienced torture at the hands of the SLORC regime. At the age of 18, he was a student leader in the capitol Yangon during the 1988 pro-democracy uprising, which brought hundreds of thousands of peaceful protesters throughout the country to the streets to demand basic human rights, and an

end to authoritarian rule. When the military responded by killing thousands of demonstrators in the streets, Ka Hsaw Wa, and many other students, fled to the jungles near the Thai border, where armed ethnic minority groups controlled territory and could provide a measure of safety. Reasoning that violence was the core problem in his country and, therefore, it could not be his solution, Ka Hsaw Wa chose to pick up a pen rather than a weapon. He began documenting the many human rights violations that had occurred with a goal of exposing them to the international community and seeking accountability and justice.

Katie, Tyler and Mark returned to their third year of law school with the goal of exploring legal options to help the people they had spoken to about their experiences in Myanmar. Their chosen strategy amounted to combining the two necessary aspects of any legal action: getting the facts and figuring out the law. Shortly thereafter, in February 1995, Katie and Tyler joined with Ka Hsaw Wa to establish a new organization called EarthRights International (“ERI”)².

COMPLETING THE INVESTIGATION

Ka Hsaw Wa began training a team of human rights investigators for a secret journey across the border into the pipeline region. By this time, the companies had released the proposed pipeline route naming some of the villages that would be affected by its construction, and had admitted the military’s role in providing security for the project. The effort to document the conditions in the pipeline corridor faced big challenges, beginning with the climate of fear throughout the country that was made stronger by the concentration of soldiers guarding the pipeline. Moreover, with an estimated one out of every ten households reportedly acting as a military informer, villagers were wary of any strangers -- especially those who came asking questions. Nevertheless, Ka Hsaw Wa and his team spent months building relationships with local people and village headmen. They eventually established enough trust to begin their listening project—sitting down with villagers who had experienced or witnessed human rights abuses at the hands of the Myanmar military.

For more than two years, Ka Hsaw Wa and his team interviewed victims and witnesses of pipeline-related human rights violations. Using pencils, small notebooks, tape recorders, and disposable cameras that they could hide and destroy at a moment’s notice, they collected first-hand testimonies from several hundred victims and witnesses who lived in the pipeline corridor, or who had recently fled to the Thai border to escape the abuse. All of this evidence, which was courageously gathered despite the dangers of visiting the region, showed a pattern of human rights abuses that were a direct result of the multinational corporations’ investments. The evidence confirmed what the local villagers had known since the companies first arrived in their lands: the human rights abuses that they were experiencing were directly connected to the pipeline, and to the foreign companies that were building it.

² After Mark Bromley graduated from law school, he worked for the International Human Rights Law Group (now Global Rights) and then went on to found his own successful international human rights organization called the [Council for Global Equality](#).

FILING THE LAWSUIT

While Ka Hsaw Wa's investigators documented human rights violations, Katie and Tyler used their third year of law school in the U.S. to find a legal approach to address the alarming abuses that were occurring in the Yadana pipeline region. They focused their attention on the 1789 [Alien Tort Statute](#) (ATS) in the United States. Under the ATS, foreigners could bring lawsuits in U.S. courts for injuries in violation of well-established principles of international law. Although the ATS was originally passed to address 18th-Century international law violations like piracy, by the 1990s international law also prohibited serious human rights abuses including torture and extrajudicial killings, forced labor and crimes against humanity.

But the ATS had never successfully been used against a corporation. In fact, the ATS was barely used in the United States for almost two centuries. However, in 1980, the Second Circuit Court of Appeals issued a very important decision in the *Filártiga v. Peña-Irala* case. Joelito Filártiga, a seventeen-year-old Paraguayan, had been tortured to death in Paraguay by police inspector Americo Peña-Irala. Joelito's family discovered to their horror that the Peña-Irala was living in New York. Working with lawyers from the [Center for Constitutional Rights](#) (CCR), they sued Peña-Irala under the ATS, arguing that torture had become a violation of international law. The Second Circuit agreed, ruling in favor of the Filártigas in a landmark ruling that paved the way for contemporary human rights litigation by establishing, among other things, that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."

By the time Katie and Tyler graduated from law school in May of 1995 and headed to Thailand to open ERI's first office, Ka Hsaw Wa's team had gathered substantial evidence demonstrating that the Myanmar military had committed extensive human rights violations in the pipeline region with the support of Unocal and Total. Based on their initial research, ERI concluded that a U.S. lawsuit against Unocal might force the corporation to compensate those harmed by the abuses. Local people in Myanmar had long been accustomed to the impunity with which the military ruled. Once they learned from lawyers in the United States that they could file suit under the Alien Tort Statute, they were eager to proceed.

Katie and Tyler contacted lawyers at CCR, recognizing that they needed CCR's expertise, experience, and bold approach to litigation. CCR attorneys had been working for several years with Myanmar activists based in the United States, and they quickly agreed to work with ERI to put together a legal team. By mid-1996, ERI and CCR had assembled a team of ATS litigators to complement the seasoned human rights investigators from Myanmar.

In October 1996, with attorneys Judith Brown Chomsky and Paul Hoffman and the law firm of Hadsell & Stormer, ERI and CCR filed *Doe v. Unocal*, a lawsuit in federal court in Los Angeles

against Unocal, Total, and SLORC itself, for the human rights abuses associated with the Yadana Pipeline project. The plaintiffs alleged that they suffered forced labor, rape, torture, and murder at the hands of the soldiers hired to protect the pipeline by Unocal and its partners. The complaint was filed under the ATS as well as state law tort claims like assault and battery. In addition to seeking damages on behalf of eleven individual plaintiffs, the lawsuit asked the Court to order Unocal to withdraw from the Yadana Pipeline project.

ESTABLISHING NEW LEGAL PRECEDENT AND WINNING THE SETTLEMENT

In 1997, the federal court in Los Angeles agreed to hear *Doe v. Unocal*, which was the first case in which a U.S. federal court allowed an Alien Tort Statute lawsuit against a corporation to proceed. In a 2000 decision, the same court cited evidence that “Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortious acts.” The court also concluded that “the evidence does suggest that Unocal knew that forced labor was being utilized and that [Unocal and Total] benefited from the practice.” Despite this evidence, the judge concluded that the law did not allow Unocal to be held liable, and dismissed the ATS claims. The Ninth Circuit Court of Appeals, however, disagreed, and reversed the dismissal in 2002.

Meanwhile, the lawyers continued to press the case, pursuing the state law claims in California state court. By 2004, they had won the right to proceed to a jury trial against Unocal in state court, while the federal court case was scheduled to be heard before another panel of eleven judges at the Ninth Circuit. In 2005, shortly before the scheduled jury trial, the case ended in a confidential settlement that compensated the plaintiffs in *Doe v. Unocal*. Additionally, the settlement funds enabled the plaintiffs to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.

THE SUPREME COURT SETBACK

The first *Doe v. Unocal* decision in 1997 and the Ninth Circuit ruling in 2002 led to a settlement ensuring compensation for the plaintiffs and their community, and set precedents that instigated the filing of many other U.S. cases against corporations accused of egregious human rights abuses overseas. However, in April of 2013, the U.S. Supreme Court issued a disappointing decision in *Kiobel v. Royal Dutch Petroleum (Shell)*, holding that the Alien Tort Statute (ATS) did not provide an avenue for justice for Nigerian victims of abuse who were allegedly harmed when Shell Oil assisted the Nigerian government in attacking them and their families³. EarthRights, CCR, the

Center for Justice and Accountability (CJA), and many other groups supported the victims' claims at the Supreme Court. In seeking to have the case dismissed, Shell argued that corporations are not bound by human rights law and that U.S. courts are powerless to rule on atrocities committed overseas. Overlooking the clear history and purpose of the ATS, the Supreme Court held that, since Shell was a foreign corporation and the case's only link to the United States was that Shell did business there, the ATS could not be used to hold Shell accountable. The full impact of *Kiobel* is not yet known. Despite the ruling, Chief Justice Roberts's majority opinion and the splintered concurrences by Justices Kennedy, Alito, and Breyer suggest that companies and individuals may still be liable for their abuses in cases with a stronger connection to the United States. For further analysis on the *Kiobel* case, see the EarthRights International report "[Out of Bounds](#)," available at earthrights.org.

KEY REFLECTIONS AND LESSONS LEARNED

- ***Take Precautions to Address Security Risks:*** The Unocal case demonstrates the importance of precautionary measures to protect plaintiffs and others at risk, such as for example by preserving the anonymity of collaborators, and encrypted electronic communications. EarthRights International obtained protective orders regarding all court filings to ensure confidentiality and security precautions. Before taking on a case, it is important to discuss the specific risks with your clients, to evaluate each one individually, and to assess how they feel about it. You should discuss the risks that you can foresee, how you as a lawyer and they as the client will minimize or mitigate those risks, and their feelings about that. You also have an obligation to disclose and discuss the fact that unforeseen risks might emerge during the course of the case, and that some unforeseen risks may be beyond their control⁴.
- ***Define the Most Effective Pressure Points for Your Litigation and Campaign:*** At the time the Unocal litigation was launched, the political space for opposition inside Burma was so small that internationally-focused pressure was identified as the most strategic focal point for the campaign. The case started with a very aggressive litigation strategy that took ten years to come to fruition. It was complemented by a high profile global campaign calling attention to Unocal and its human and environmental abuses in collaboration with the military dictatorship. Over time, the lawsuit and campaign generated change inside Unocal and its partner Total, which have gone from elaborate denials to implementing human rights training and a proactive engagement with the [International Labor Organization](#) and ERItO improve human rights in the pipeline area.
- ***Have a Strong Understanding of the Industry or the Context:*** In the course of discovery, EarthRights International and their co-counsel knew what to ask for because they hired experts who were familiar with oil company operations and could direct them to make

³ For background on the Nigeria case, see the *Wiwa v. Shell* Case Study.

⁴ For more on managing security risks, see the *Doe v. Unocal* lesson plan.

pertinent requests for documents, such as for example risk assessments that were common in the course of operations.

- ***Good Documentation is Critical to Success:*** The Unocal case reinforces the importance of obtaining excellent documentation of rights violations. Their experience litigating *Doe v. Unocal* even inspired the decision for ERI to launch the EarthRights School to train earth rights advocates in how to ensure top notch documentation and establish strong facts to pursue cases.
- ***Do One New Thing at a Time and Do it Well:*** If you want to carve a new path in your lawsuit, be sure to choose the case with the most compelling and egregious facts. It is critical to ensure you have the right facts and the right legal strategy in order to avoid setting bad precedent.
- ***If Are Going to Lose, Lose Carefully:*** In Unocal, the plaintiffs lost summary judgment but secured an excellent opinion on appeal. Their experience demonstrated the importance of being strategic about which arguments you advance, so that if you lose you lose narrowly rather than broadly.
- ***Never Put All Your Eggs in One Basket:*** Following the important precedent that EarthRights International and CCR helped set in *Doe v. Unocal* and *Wiwa v. Shell*⁵ regarding corporate accountability for human rights abuses committed overseas, they faced the challenges of responding to well-financed corporate push-back in the form of cases intended to curtail the wins, as for example in the case of *Kiobel v. Royal Dutch Petroleum (Shell)*. This experience demonstrates the importance of trying to diversify the legal theories and tools on which you rely and to be prepared to defend your wins in future cases.
- ***There is No Substitute for Local Expertise and Knowledge:*** It is very important to know what you don't know when it comes to your case and local context. For example, in the *Doe v. Unocal* case, all the U.S. co-counsel were appropriately deferential to members of the EarthRights International legal team and local Burmese partner organizations regarding the security issues and how to address them.

⁵ See the *Wiwa vs. Shell* Case Study for more information.

Lesson Plan

Doe v. Unocal (Myanmar (Burma))

LESSON OVERVIEW

The goal of this Lesson Plan is to give students hands-on experience in understanding how to develop security protocols surrounding cases and campaigns, and in developing *Video Action Plans* that require clarity regarding campaign goals, message, targets, and strategies. This Lesson Plan should be paired with the accompanying *Doe v. Unocal* Case Study and Video, which focus on a case in Myanmar (Burma) brought by [EarthRights International](#) (ERI), the [Center for Constitutional Rights](#) (CCR) and others in which Unocal, a United States multi-national corporation formed a partnership with the military regime in Myanmar to build the Yadana Gas Pipeline in order to exploit natural gas reserves. The soldiers hired to provide security and other services for the pipeline project committed multiple human rights abuses, including forced labor, torture, rape, extrajudicial killings, and attacks on indigenous and ethnic minority peoples.

LEARNING OBJECTIVES

- ***Take Precautions to Address Security Risks:*** The Unocal case demonstrates the importance of precautionary measures to protect plaintiffs and others at risk, such as for example by preserving the anonymity of collaborators, and encrypted electronic communications. The plaintiffs and others who provided detailed information about their experience of human rights abuses surrounding the Unocal pipeline in Myanmar (Burma) faced grave security risks if their identities were revealed. EarthRights International obtained protective orders regarding all court filings ensuring the necessary confidentiality and security precautions. To the greatest extent possible, individualized security plans should be mapped out in advance of launching a case entailing security concerns. Before taking on a case, it is important to discuss the specific risks with your clients, to evaluate each one individually, and to assess how they feel about it. You should discuss the risks that you can foresee, how you as a lawyer and they as the client will minimize or mitigate those risks, and their feelings about that. For example, you might ask a plaintiff how they feel about their name becoming public if you lose the motion for anonymity. What are the deal breakers for the plaintiff, in terms of their safety and security? As an attorney, you also have an obligation to disclose and discuss the fact that unforeseen risks might emerge during the course of the case, and that some risks may be beyond their control. Additionally, when assessing your risk, it is important to consider the level of partnership and collusion between businesses and government.
- ***Define the Most Effective Pressure Points for Your Litigation and Campaign:*** At the time the Unocal litigation was launched, the political space for opposition inside Myanmar was so small that internationally focused pressure was identified as the most strategic focal point for the campaign. The work began with a very aggressive litigation strategy that took ten

¹ Information contained in this lesson plan is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

years to come to fruition. The litigation was complemented by a high profile global campaign calling attention to Unocal and its human and environmental abuses in collaboration with the military dictatorship. Over time, the lawsuit and campaign generated change inside Unocal, which shifted from elaborate denials to a proactive engagement with the International Labor Organization and EarthRights International to effect better human rights outcomes in the pipeline area.

MATERIALS AND PREPARATION NEEDED

- Students should have read the *Doe v. Unocal* Case Study before class begins
- Capability to watch the Unocal Video with the class
- Print copies of the Video Action Plan from Appendix B
- Space for several small group conversations of approximately 5 people each
- Flip charts for each breakout group
- Computers with internet connectivity, where possible

LESSON PLAN RESOURCES

- Unocal Video
- Unocal Case Study
- Overall Lesson Plan reference material

LESSON PROCEDURES

Security Protocol : This 90 minute Lesson consists of a series of breakouts to discuss real or potential cases and is designed to help students understand how to develop security protocols to advance impact litigation and associated campaigns.

Steps:

1. Have the students read the *Doe v. Unocal* Case Study and watch the *Doe v. Unocal* video.
2. Ask people in the group to suggest potential or existing cases or campaigns that they would like to discuss in a breakout group for this “Security Protocol” exercise. They should be situations that the people suggesting them know fairly well, so that they can help lead a breakout discussion regarding the steps to design a security protocol with the case or campaign in mind.
3. Select enough cases or campaigns to have breakout groups with approximately 5 people in them.
4. Instruct each group to select a reporter who will capture the group’s thinking on a flip chart.
5. Once the topics and groups have been decided reiterate the goal of the breakout session: to

take your case or campaign and come up with a security protocol in the case. Before breaking into groups, lead a discussion to define the key areas for discussion and coverage when it comes to a security protocol. What kinds of security do we need to be thinking about? Examples include digital security, information security, travel security, and crisis protocols. Encourage them to ask and answer these key questions before designing their security protocol :

- A. **What do I want to keep secret?** (Specify all the information that you want to remain secret--including notes, locations, identities, or networks.)
 - B. **Who are your adversaries and what do they want to know?** (Is your adversary interested in your source, your organization, or something else? You should list your potential adversaries and their interests.)
 - C. **What can they do to find out what they want to know?** (Could they use legal means such as a subpoena or technological means like eavesdropping? Or, maybe they could exploit your social networks through social engineering tactics. List every way they could try to find out what you want to keep secret.)
 - D. **What is the risk if they succeed?** (Will it reduce the likelihood of success in your case or campaign? Will your source have legal problems? Or could someone get threatened or killed? Explain what happens if an adversary succeeds in breaking your security. What are the consequences and to whom? Which of these consequences are absolutely necessary to avoid?)²
6. Once they answer these questions, breakout groups are in a position to design a security plan that reduces the risk their individual threat model laid out.

Alternate Exercise, Security Protocol:

An alternative approach to this exercise is to have each breakout group design a security protocol for the *Doe v. Unocal* case, drawing on what they have learned from watching the video and reading the case study. The group discussion would then focus on comparing the security protocols the groups came up with.

Develop a Video Action Plan:

This 90 minute lesson is structured as a series of breakout groups to give students an opportunities to think through the key elements of conceptualizing a campaign, including defining a goal, message, targets, and key strategies to advance the work.

1. Have students read the *Doe v. Unocal* Case Study and watch the *Doe v. Unocal* Video.

² This information is adapted from a blog by Jennifer Henrichson and the Committee to Protect Journalists <http://www.cpj.org/security/2013/12/take-this-survey-on-online-safety-then-take-these.php>

2. Ask people in the group to suggest potential or existing cases or campaigns that they would like to discuss in a breakout group for this “*Develop a Video Action Plan*” exercise. They should be situations that the people suggesting them know fairly well, so that they can help lead a break out discussion regarding the steps to build community solidarity with the case or campaign³.
3. Select enough cases or campaigns to have breakout groups with approximately 5 people in them.
4. Instruct each group to select a reporter who will capture the group’s thinking on a flip chart.
5. Once the topics and groups have been decided reiterate the goal of the breakout session: to take your case or campaign and come up with a Video Action Plan covering all of the questions included in Appendix B. Have each group capture all their answers on a flip chart. Give them 40 minutes for the exercise.
6. Bring them back together and have the reporter in each group put the flip chart with their Video Action Plan on the wall and walk the rest of the groups through what they came up with. Allow time for questions, answers and comments. Get the group to summarize key themes and steps and condense them on a separate flip chart.
7. Break into the assigned groups and give them 45 minutes for the exercise.

Note: This Video Action Plan exercise can be paired instead with any of the other case studies available from EarthRights, including *Maynas v. Occidental*, *Wiwa v. Shell*, and the *Koh Kong Sugar* case.

³ Note: even if groups do not decide to produce a video pertinent to their case or campaign, this exercise is a good one for helping advocates think through campaign strategy and targets.

Appendix A: Resources on Security Protocols

For detail on information security, see <http://www.cpj.org/reports/2012/04/information-security.php>

For sample technology security protocols, see <https://tacticaltech.org/security-box>

For sample filming security protocols, see <http://witness.org/how-to>

For security tips for investigative journalists, see <http://www.cpj.org/security/2013/12/take-this-survey-on-online-safety-then-take-these.php> or <http://nationalsecurityzone.org/site/digital-security-basics-for-journalists/>

For information on encryption tactics and surveillance threats, see <https://pressfreedomfoundation.org/encryption-works> or <https://ssd.eff.org/>

Appendix B: Video Action Plan

Download and print enough copies of this WITNESS Video Action Plan worksheet so that every breakout group in Activity 2 will have one.

http://www.witness.org/sites/default/files/downloads/witness_curriculum-2-worksheet-video_action_plan_development-2011.pdf

Case Study

Wiwa v. Shell (Nigeria)

OVERVIEW

Wiwa v. Shell was a case filed in 1996 charging the Royal Dutch/Shell oil company with complicity in serious human rights abuses against Ogoni people in Nigeria¹. According to the suit, Shell financed, armed, and otherwise cooperated with Nigerian military forces that used deadly force and conducted massive, brutal raids against the Ogoni people in the Niger Delta, with a motive of restarting oil operations in the oil-rich Ogoni territory after opposition had shut them down. Shell was also involved in a strategy that resulted in the executions of the “Ogoni Nine,” a group that included the world-renowned environmental activist *Ken Saro-Wiwa*, the leader of a peaceful movement to protect his people from environmental destruction in the Niger Delta. After a sham military trial based on fabricated charges, Ken Saro-Wiwa was hanged along with eight other Ogoni for his opposition to the military government and Shell’s interests. He was survived by his family who fled the country to escape the Nigerian government. Members of the Wiwa family and surviving relatives of victims of the violence against the Ogoni people joined as plaintiffs in the lawsuit against Royal Dutch/Shell.

BACKGROUND

Ogoni is a densely populated rural area in southern Nigeria consisting of approximately 404 square miles. In the mid-1990s when the *Wiwa v. Shell* case was filed, Nigeria as a whole produced over 1.7 million barrels per day of oil. Oil revenues provided 80% of Nigeria’s federal budget, and oil from Nigeria accounted for approximately 14% of Royal Dutch/Shell’s global oil production. An estimated 90% of Nigeria’s yield came from the Niger Delta, which contains the Ogoni region.

Royal Dutch/Shell began oil production in the Ogoni region of Nigeria around 1958, after it had taken land used for oil exploitation through misrepresentation and coercion and without adequate payment to the Nigerian landowners. Approximately 76% of the natural gas produced during the exploration and exploitation of the crude oil in Ogoni was permitted to “flare” which involves burning gases they did not want to keep or transport, causing persistent air and noise pollution which communities say has led to respiratory problems and cancer and reduced agricultural yields in the surrounding area. Ogoni is home to several environmental treasures, including the third-largest mangrove forest in the world and one of the largest surviving rainforests in Nigeria. The oil-related pollution caused by Royal Dutch/Shell’s activities contaminated the local water supply and agricultural land. It killed fish, and destroyed the local economies that were based largely on subsistence farming and fishing. In the mid-1990s when the *Wiwa v. Shell* case was filed, the oil revenues benefited only the wealthiest members of the Nigerian population while more than 70 percent of Nigerians lived on less than US\$1 per day, according to the African Development Bank.

¹ Information contained in this case study is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

Ogoni is the name not only of the oil-rich region in the Niger Delta of southern Nigeria but also of the ethnic group that lives in that region. Beginning in 1990, the **Ogoni people** engaged in peaceful protest against the environmentally devastating operations of Royal Dutch/Shell. The Ogoni officially declared Shell 'persona non grata' on Ogoni Day in January 1993, and by the Spring of 1993 they had forced Shell to leave their territory through their united opposition to its operations. While Shell had withdrawn its personnel, they maintained its flow stations on Ogoni territory. By 1993, at least 300,000 Ogonis -- more than half the Ogoni population -- supported the Movement for the Survival of the Ogoni People (**MOSOP**), a human rights organization aimed at protecting the rights of the Ogoni people and protesting the effects of the oil exploitation on the Ogoni. Ken Saro-Wiwa, a founding member and president of MOSOP, brought worldwide attention to the human rights and environmental violations committed against the Ogoni through international campaigning and his powerful writing and poetry. He was nominated for a **Nobel Prize** and awarded the prestigious **Right Livelihood Award** and the **Goldman Environmental Prize** for his environmental and human rights activism.

But Royal Dutch/Shell has a long history of working closely with the Nigerian government to quell popular opposition to its presence in the region. At the request of Shell, and with Shell's assistance and financing, Nigerian soldiers used deadly force and conducted massive, brutal raids against the Ogoni people beginning to repress the growing movement led by MOSOP against the oil company in 1993. MOSOP's quest for justice had reverberations around the world, spawning global protests against Shell's activities. Eventually, Nigeria was suspended from the British Commonwealth in response.

As the peaceful movement of the Ogoni grew, so did the Nigerian government's and Shell's brutal campaign against the Ogoni and MOSOP. In early 1993, Shell requested military support to build a pipeline through Ogoni. When *Wiwa v. Shell* plaintiff Karalolo Kogbara was sitting in her field crying and watching Shell contractors bulldoze her crops to make way for the pipeline, she was shot by Nigerian troops and lost an arm as a result. In a separate incident later that year, Uebari N-nah, the brother of *Wiwa v. Shell* plaintiff James N-nah, was shot and killed by soldiers near a Shell flow station. The soldiers were requested by and later compensated by Shell, and commended by Shell for their good work.

Plaintiff Owens Wiwa, the brother of Ken Saro-Wiwa, was detained repeatedly under false charges in 1994 to prevent him from protesting. He was beaten and threatened throughout his detentions. Michael Vizer, another plaintiff, was arrested for his political activities and upon his arrest his daughter was raped. When he would not confess to a false charge, he was beaten and tortured. Mr. Vizer's son was also beaten and detained when he attempted to bring his father food.

In April 1994, in response to MOSOP's growing popularity and influence, Nigerian security forces

supported attacks on eight Ogoni villages and burned down several of them.

On May 21, 1994, Ken Saro-Wiwa and other Ogoni leaders were prevented by the military from attending a community gathering at which four Ogoni chiefs were tragically killed. The military governor promptly and falsely announced that Ken Saro-Wiwa caused the deaths. Soon thereafter, Ken Saro-Wiwa was arrested and detained by the Nigerian military. Furthermore, the Rivers State military administrator ordered the arrest of the entire MOSOP leadership because of their non-violent opposition to the activities of Royal Dutch/Shell and the Nigerian military regime. No charges were filed against them until eight months after their arrest and detention began.

The military used the deaths of the four Ogoni chiefs as a justification to conduct raids on scores of towns in Ogoni and to detain and beat several hundred men suspected of involvement with MOSOP. Between May and August 1994, the Rivers State Internal Security Task Force mounted several months of nightly raids through at least sixty towns and villages in Ogoni to punish entire communities for their support for MOSOP. During these raids, the military broke into homes, beating anyone in their path, including the elderly, women and children. They were involved in raping and forcing villagers to pay “settlement fees” and bribes to secure their release, in forcing the Ogonis to flee and abandon their homes, and in burning, destroying and looting property. At least 50 Ogonis were killed and several hundred young Ogoni men were arrested, detained and beaten on a daily basis because of their real or imagined affiliation with MOSOP.

In November 1994, a three-man tribunal known as the Civil Disturbances Special Tribunal was created and specially appointed by the Nigerian military regime to try Ken Saro-Wiwa, John Kpuien, and other Ogoni leaders for the alleged murder of the four Ogoni tribal leaders. The tribunal denied the Ogoni Nine access to counsel, a fair trial, and the opportunity to appeal the decision. During the course of the trial, the defendants were tortured and mistreated, as were their relatives.

In early March of 1995, high-ranking Royal Dutch/Shell executives met in London with the Nigerian High Commissioner and top Nigerian military officers to discuss common strategy regarding Ken Saro-Wiwa and the Ogoni campaign, including a joint media campaign. Shortly thereafter on March 18, 1995, the Civil Disturbances Special Tribunal assumed jurisdiction over the cases of ten additional Ogoni leaders, who were formally charged with murder on April 7, 1995.

Shell held meetings with the Nigerian regime to discuss the tribunal, including meeting with the Nigerian military President Sani Abacha himself. Lawyers attended the trial on behalf of Shell, holding a “watching brief,” which in Nigeria is a privilege afforded only to interested parties, and reportedly sat with the prosecution. Brian Anderson, the Managing Director of Shell’s Nigerian subsidiary, met with Owens Wiwa, Ken Saro-Wiwa’s brother, and offered to trade Ken Saro-Wiwa’s

freedom for an end to the protests against the company. At least two witnesses who testified at trial that Ken Saro-Wiwa was involved in the murders of the Ogoni elders later admitted that they had lied, and said that they had been bribed in the presence of Shell's lawyer with money and offers of jobs at Shell in exchange for giving false testimony.

In late October of 1995, Ken Saro-Wiwa and eight other Ogoni activists were condemned to death by the military-appointed special tribunal, in violation of international law and the laws of Nigeria. Ken Saro-Wiwa and the others scheduled for execution were beaten, and denied food, water or bedding for a period of days prior to their execution by hanging on November 10, 1995. One month after the executions of the Ogoni Nine, Shell signed an agreement to invest \$4 billion in a liquefied natural gas project in Nigeria.

LEGAL ACTION AND CAMPAIGN

The ten plaintiffs in the *Wiwa v. Shell* case include surviving family members of several of the Ogoni Nine: Ken Wiwa Jr. (on behalf of his deceased father Ken Saro-Wiwa), Blessing Kpuinen (on behalf of her deceased husband John Kpuinen), David Kiobel (on behalf of his deceased father Dr. Barinem Kiobel), Lucky Doobee (on behalf of his deceased brother Saturday Doobee), Monday Gbokoo (on behalf of his deceased brother Daniel Gbokoo), and Friday Nuate (on behalf of her deceased husband Felix Nuate). The other plaintiffs were survivors or the surviving family members of other examples of violent attacks and torture by the military government on behalf of Shell: Karalolo Kogbara, James N-nah (on behalf of his deceased brother Uebari N-nah), Michael Vizer, and Owens Wiwa. In addition to [EarthRights International](#) (ERI), counsel for the plaintiffs included Judith Brown Chomsky, the [Center for Constitutional Rights](#), Anthony DiCaprio, Paul Hoffman, and Cohen Milstein Sellers & Toll PLLC.

The *Wiwa v. Shell* lawsuit charged Shell and the Managing Director of Shell's Nigerian subsidiary, Brian Anderson, with complicity in human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhuman treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress. The first claims against Royal Dutch/Shell were filed in November 1996, while a separate suit against Mr. Anderson was filed in 2001 (*Wiwa v. Anderson*). Shell's Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, was added to the case in 2003.

The cases were brought under the [Alien Tort Statute](#), a 1789 statute giving non-U.S. citizens the right to file suits in U.S. courts for international human rights violations, and the [Torture Victim Protection Act](#) of 1991, which allows individuals to seek damages in the U.S. for torture or extrajudicial killing, regardless of where the violations take place. The victims also alleged ordinary counts such as assault and battery under U.S. and Nigerian law. Royal Dutch/Shell made many

attempts to have the cases thrown out of court, but did not succeed.

In addition to pursuing litigation in courts, ERI and the Center for Constitutional Rights (CCR) engaged in a public awareness campaign, producing an 8-minute video and making posters, post-cards and fact sheets available from a case information website at www.wiwavshell.org. At the same time, many NGO partners worldwide engaged in the Shell Guilty advocacy campaign, encouraging screenings of Glen Ellis' video Delta Force about the execution of Ken Saro-Wiwa, organizing protests and rallies, and motivating shareholders to pressure Shell's leadership to redress the damage done in the Niger delta.

On June 8, 2009, on the eve of the trial, Royal Dutch/Shell agreed to a settlement of all three lawsuits filed against it with the plaintiffs. The settlement, whose terms are public, provided a total of \$15.5 million to compensate the plaintiffs, establish a trust for the benefit of the Ogoni people, and cover some of the legal costs and fees associated with the case.

THE SUPREME COURT SETBACK

In April of 2013, the U.S. Supreme Court issued a disappointing decision in *Kiobel v. Royal Dutch Petroleum (Shell)*, holding that the Alien Tort Statute (ATS) did not provide an avenue for justice for one of the so-called "Ogoni nine" - a Nigerian victim of abuse who was harmed when Shell Oil assisted the Nigerian government in attacking him and his family. ERI and CCR did not represent the plaintiffs in *Kiobel* but, along with the Center for Justice and Accountability (CJA) and many others, supported the victims' claims at the Supreme Court. In seeking to have the case dismissed, Shell argued that corporations are not bound by human rights law and that U.S. courts are powerless to rule on atrocities committed overseas. Overlooking the clear history and purpose of the ATS, the Supreme Court held that, since Shell was a foreign corporation and the case's only link to the United States was that Shell did business there, the ATS could not be used to hold Shell accountable. The full impact of *Kiobel* is not yet known. Despite the ruling, Chief Justice Roberts' majority opinion and the splintered concurrences by Justices Kennedy, Alito, and Breyer suggest that companies and individuals may still be liable for their abuses in cases with a stronger connection to the United States. For further analysis on the *Kiobel* case, see the EarthRights International report "[Out of Bounds](#)," available on their website.

KEY REFLECTIONS AND LESSONS LEARNED

- *Sometimes You Need a "Veil" Between Attorneys and Activists:* It is important to prepare for the scenario that the lawyers and the clients in a case can't speak publicly about the case, and to be sure that other people and organizations are able to take the lead in any planned campaigns and discussions with the media. Especially in the context of trial, there are very

different roles for lawyers and campaigners. The *Shell Guilty* campaign in the Wiwa case, for example, was run by other organizations independent of ERI, as attorneys can't be seen as trying the case in the "court of public opinion". And in the course of litigation, defendants may tell the judge that the plaintiffs are making a mockery of the court room -- using it to advance their political goals. Since the judge may in turn respond by prohibiting communications between attorneys and advocates, it is important to do advance work prior to filing a lawsuit both to ensure that advocates are prepared to advance their campaigns and to enable separation between the activities of activists and attorneys should that be required. This is not just a hypothetical concern; in a previous ERI case against Chevron, the court instituted a gag order that applied to attorneys, plaintiffs and anyone on their teams and prevented them communicating with the press or other organizations about the case.

- ***High Profile Campaigns Are a Strong Complement to Litigation:*** As the *Wiwa v. Shell* case demonstrates, litigation and campaigns can work hand in hand to advance justice. In this case, there was a sustained international campaign around the Ogoni issue for a number of years and the campaign became a significant reputational problem for Shell which helped bring them to the bargaining table. The lawsuit and the campaign sustained each other's momentum. Both extended over a number of years, including a lot of media and advocacy work around the Ogoni issue, documentary films, human rights reports, demonstrations at Shell stations around the world, and actions at Shell annual meetings. When Ken Saro-Wiwa was executed, there was tremendous international attention to the event and it led to Nigeria being suspended from the British Commonwealth, and condemnations from a variety of world leaders. All of the campaigns undertaken by partners and allies of EarthRights International set the stage for an effective settlement of the case.
- ***Be Persistent and Patient:*** This case demonstrates the patience and persistence required to prevail in difficult cases such as these against well-financed opponents. It was over 13 years from the time Ken Saro-Wiwa was executed and approximately 12 years from the time the lawsuit was filed until the *Wiwa v. Shell* case was concluded.
- ***Recruit Idealistic and Committed Allies:*** In the *Wiwa v. Shell* case, ERI needed to be proactive about recruiting idealistic and committed allies as co-counsel and supporters of the case in order to have the resources to engage in litigation against wealthy companies that have huge legal budgets and a lot at stake. Be sure that you do the leg work to recruit pro bono or affordable legal support to advance your cause.
- ***Lawsuits Don't Solve Underlying Problems Overnight:*** Lawsuits don't happen in isolation, and they don't solve the underlying problems overnight. Advocates need to be working to solve underlying problems even as litigation and associated campaigns are pursued. The events on the ground in Nigeria played a role in securing justice in the case, because during the 13 years the case was underway, Nigeria went from a brutal military dictatorship to a flawed democracy, which changed Shell's calculation of the relative costs and benefits of continuing with the litigation and helped lay the groundwork for the settlement.

Lesson Plan

Wiwa v. Shell (Nigeria)

LESSON OVERVIEW

This two-part lesson plan uses group discussion and breakouts to explore how to conceptualize campaigns as a complement to litigation, and how to prepare allied advocates to advance campaigns before and during a trial. *Wiwa v. Shell* was a case filed by [EarthRights International](#), the [Center for Constitutional Rights](#) and others in 1996 charging the Royal Dutch/Shell oil company with complicity in serious human rights abuses against Ogoni people in Nigeria¹. According to the suit, Shell financed, armed, and otherwise cooperated with Nigerian military forces that used deadly force and conducted massive, brutal raids against the Ogoni people in the Niger Delta, with a motive of restarting oil operations in the oil-rich Ogoni territory after opposition had shut them down. Shell was also allegedly involved in a strategy that resulted in the executions of the “Ogoni Nine,” a group that included the world-renowned environmental activist [Ken Saro-Wiwa](#), the leader of a peaceful movement to protect his people from environmental destruction in the Niger Delta.

LEARNING OBJECTIVES

- ***High Profile Campaigns Are a Strong Complement to Litigation:*** As the *Wiwa v. Shell* case demonstrates, litigation and campaigns can work hand in hand to advance justice. In this case, there was a sustained international campaign around the Ogoni issue for a number of years and it became a significant reputational problem for Shell that helped bring them to the bargaining table. The lawsuit and the campaign sustained each other’s momentum. Both extended over a number of years, involving a lot of media and advocacy work around the Ogoni issue, documentary films, human rights reports, demonstrations at Shell stations around the world, and actions at Shell annual shareholder meetings. When Ken Saro-Wiwa was executed, there was tremendous international attention to the event and it led to Nigeria being suspended from the Commonwealth of Nations, and condemnations from a variety of world leaders. All of the campaigns undertaken by partners and allies of EarthRights International helped set the stage for an effective settlement of the case.
- ***Sometimes You Need a “Veil” Between Attorneys and Activists:*** It is important to prepare for a scenario in which the lawyers and the clients in a case can’t speak publicly about the case, and to be sure that other people and organizations are able to take the lead in any planned campaigns and discussions with the media. Especially in the context of trial, there are very different roles for lawyers and campaigners. The *Shell Guilty* campaign accompanying the *Wiwa v. Shell* case, for example, was run by other organizations independent of EarthRights, as attorneys can’t be seen as trying the case in the “court of public opinion”. And in the course of litigation, defendants may tell the judge that the plaintiffs are making a mockery of the court room -- using it to advance their political goals. Since the judge

¹ Information contained in this lesson plan is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

may in turn respond by prohibiting communications between attorneys and advocates, it is important to do advance work prior to filing a lawsuit both to ensure that advocates are prepared to advance their campaigns and to enable separation between the activities of activists and attorneys should that be required. This is not just a hypothetical concern; in a previous ERI case against Chevron, the court instituted a gag order that applied to attorneys, plaintiffs and anyone on their teams. The gag order prevented the attorneys from communicating with the press or other organizations about the case.

MATERIALS AND PREPARATION NEEDED

- Students should have read the *Wiwa v. Shell* Case Study before class begins
- Capability to watch the *Wiwa v. Shell* Video as a group
- Space for several small group conversations of approximately 5 people each
- Flip charts and markers for each breakout group
- Computers with internet connectivity, where possible

LESSON PLAN RESOURCES

- *Wiwa v. Shell* Video
- *Wiwa v. Shell* Case Study
- Overall Lesson Plan reference material

LESSON PROCEDURES

Erecting a Firewall: This 60 minute group discussion is designed to help students conceptualize the steps they might take before filing a case to ensure that their campaign partners have all the information they need to advance their work without ongoing communications during trial, as such communication may be prohibited by the judge in the case.

Steps:

1. Have students read the *Wiwa v. Shell* Case Study and then watch the *Wiwa v. Shell* Video.
2. Following the screening of the video, ask the students to imagine themselves as attorneys in the *Wiwa v. Shell* case. How would they go about ensuring as lawyers in the case that they have the necessary allies for the campaign, and that those allies have all of the information they need to advance their campaigns before trial begins? Capture their thinking on flip charts and see Appendix A for sample steps to take.

Combining Litigation and Campaigns: This 90-minute breakout group exercise is designed to help learners think through approaches to conceptualizing campaigns that accompany and strengthen litigation as an avenue for delivering justice.

Steps:

1. Have students read the *Wiwa v. Shell* Case Study and then watch the *Wiwa v. Shell* Video.
2. If you have Internet access, bring up the website www.wiwavshell.org. Spend 30 minutes walking the class through the website. Talk about the different sections that the website featured, and the content in each. What was the goal of the campaign and who do they think the targets were for the campaign? What were the campaigners trying to do, and why? What else might they have included to make the website more powerful?
3. Ask people in the group to suggest potential or existing cases or campaigns that they would like to discuss in a breakout group for this “*Combining Litigation and Campaigns*” exercise. They should be situations that the people suggesting them know fairly well, so that they can help lead a break out discussion regarding the steps to build community solidarity with the case or campaign.
4. Select enough cases or campaigns to have breakout groups with approximately 5 people in them.
5. Have people indicate which group they would like to be in and check to see that the groups are roughly evenly sized.
6. Instruct the group to select a reporter who will capture the group’s thinking on a flip chart.
7. Once the topics and groups have been decided reiterate the goal of the breakout session: to come up with the outline for a website for the litigation/campaign they have chosen. Their ideas should be captured on a flip chart and should include the proposed URL/web address, the campaign tagline or slogan, the proposed menu items on the website, and if time permits, a summary of the proposed content in each section. Be sure that one section of the website gives viewers a chance to take action, and that the proposed actions are specified on their flip charts. Instruct the groups to be sure also to capture the names of potential ally organizations who could provide content and help collaborate on the campaign or raising visibility for the website.
8. Allow each group to meet for 45 minutes.
9. Bring them back together and have the reporter on each group put the flip chart with their web development plan on the wall and take 2-3 minutes to walk the rest of the groups through what they came up with. Allow a few minutes for questions, answers and comments on each web concept.

Appendix A

Sample Steps to Take in Preparing Allies for Campaigns Before Trial

1. Make sure that you are working with advocates, NGOs or other partners along the way who know the story of the case and what is at stake so that they are committed and ready to spring into action.
2. Be sure to brief your allies on where they can find all publicly available documents about the case, such as for example websites and transcripts and pleadings where the case hasn't been sealed etc.
3. Make all the information that you can publicly available before any restrictions are placed on your communications; share key information with advocates and make it available on your website. In the United States for example, be sure to make your Opposition to Summary Judgment motion available since that is where you will articulate your strongest arguments on behalf of the plaintiffs.
4. Be sure to spend time briefing advocates and allies on the likely timeline of the litigation, from filing a complaint to opening arguments, calling witnesses etc.
5. Organize a campaign strategy meeting with your allies early on assuming you wont be gagged by the judge, thereby ensuring that you are prepared if you are. Agree upon talking points and useful messaging, strategies and tactics for the campaign, keeping the judge and the case in mind.
6. Consider encouraging donors to support the campaign work planned by advocates and allies.
7. In instances where a gag order doesn't apply to witnesses or plaintiffs, introduce your witnesses and plaintiffs to advocates as trusted allies so that they can work together even in the instance that the legal team is prohibited from communicating with allies and campaigners.
8. Remember that anything put you put in writing, such as text messages, email, faxes or letters, could need to be turned over to the defendant in the course of the legal proceedings. Because discussions of advocacy work can easily be taken out of context, bear in mind how any communications or documents might be interpreted by an outsider. In-person or telephone conversations, of course, cannot be directly turned over unless they are recorded, but a defendant could subpoena the participants in such conversations as witnesses to testify about what they remember. Legal advocates and activists should always conduct themselves with the highest ethical standards.

Case Study

Maynas Carijano v. Occidental (Peru)

OVERVIEW

The 2007 *Maynas Carijano v. Occidental* case resulted from the irresponsible and illegal practices of Occidental Petroleum Corporation and Occidental Peruana, Inc. (“Oxy) in the Peruvian Amazon over the course of thirty years¹. In its unchecked effort to profit from Amazonian oil, Oxy engaged in irresponsible, reckless, immoral and illegal practices in the ancestral and current territory of the Achuar indigenous people. These practices were below accepted industry standards, prohibited by law, and Oxy knew they would result in the severe contamination to the water and land. The case further claims that Oxy knew their practices would cause severe health problems and other injuries to the Achuar indigenous communities such as death, epidemic lead and cadmium poisoning, exposure to carcinogens and mutagens, substantial harm to their livelihoods, severe emotional distress, and continuing trespass on their lands.

BACKGROUND

The Achuar indigenous people have resided along river systems in the Amazon basin in what is now northern Peru for centuries, if not millenia. One group of Achuar has traditionally resided in communities along the Corrientes River and its tributary the Macusari River, in the Upper Corrientes Basin. The region is remote, with access typically limited to small planes, helicopters, small boats, and canoes. Prior to Oxy’s involvement in the area, the Upper Corrientes Basin was largely pristine rainforest with no industrial activities. As of 2014, the oil production facilities built by Oxy remain the only industrial facilities in the area.

Oxy is one of the largest oil and gas companies in the United States. The Peruvian government signed its first operating contract with Oxy in June of 1971, which granted Oxy a concession known as Lot 1A. Oil was first discovered in the area in 1972, and the discovery sparked intense oil exploration and extraction activities. Oxy was later granted an additional concession known as Lot 1B, and Lots 1A and 1B were later combined into a concession now known as Lot 1AB. Lot 1AB includes the upper portion of the Corrientes River and almost the entire Macusari River where the indigenous Achuar people have lived for centuries.

Oxy developed Lot 1AB into the largest oil operation in Peru – at one time producing up to 42% of Peru’s oil. The company built dozens of wells, a 530-kilometer network of pipelines, refineries, and separation batteries for processing crude oil, as well as roads, heliports and camps to support the operation at Lot 1AB. Oxy’s accumulated production in Lot 1AB from 1972 to 2000 totaled 68% of total historical oil production in the Peruvian Amazon and 26% of total historical oil production in Peru as a whole. By 2000, Lot 1AB was still producing 17% of Peru’s total oil.

¹ Information contained in this Case Study is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

Peru's Ministry of Energy and Mines' Bureau of Environmental Affairs called the area one of Peru's most environmentally critical. The Peruvian government's National Office of Evaluation of Natural Resources has classified Lot IAB as "one of the most critical environmental zones most damaged in the country." The Achuar people depend on the Corrientes and Macusari Rivers and their tributaries for drinking, bathing, and washing. But Oxy's oil operations in Lot IAB contaminated Achuar land and the waterways on which the Achuar people depend with pollutants such as heavy metals, hydrocarbons, and other products of the oil industry.

Oxy's contaminating practices have caused and contributed to a range of problems. Direct and indirect contact with these compounds has led to health problems among the Achuar people, including skin rashes, aches and pains, gastrointestinal problems including vomiting blood, harm to the kidneys, and deaths. The exposure to contaminants has also caused cancer and increased the risk of cancer. Tests have shown potentially dangerous levels of lead and cadmium in the blood of many members of the Achuar community. Lead poisoning, which is known to cause harmful developmental effects, is widespread among the Achuar children, and cadmium poisoning, which can cause a range of negative health impacts, is widespread among the entire population. The Achuar have observed that the pollution led to decreasing yields of edible fish, and that the animals hunted by the Achuar have been turning up dead or diseased after drinking river water. The pollution has also damaged agricultural productivity and decreased land values.

LEGAL CASE AND CAMPAIGN

In 2007, [Earth Rights International](#) (ERI) and its co-counsel brought suit on behalf of twenty-five indigenous Achuar plaintiffs from the Upper Corrientes Basin against Los Angeles-based Oxy, detailing serious harm caused by Oxy over a thirty-year period.

Oxy contaminated the rivers and lands of the indigenous Achuar communities, causing death, widespread poisoning and destruction of their way of life. During its thirty years in the Achuar territories, Oxy knowingly utilized out-of-date methods for separating crude oil that contravened United States and Peruvian law, resulting in the discharge of millions of gallons of toxic oil by-products into the area's waterways. ERI and its co-counsel also represent the California-based NGO [Amazon Watch](#), which sued Oxy for unfair business practices in covering up the contamination. Amazon Watch works to defend the environment and rights of the indigenous peoples of the Amazon basin. As part of this mission, Amazon Watch has been working on behalf of the Achuar people to monitor the actions of Oxy, to try to prevent Oxy from further contaminating the Achuar lands, and to expose misinformation that Oxy has spread about the contamination. Amazon Watch organized multiple actions and events at Oxy shareholder meetings, and brought members of the Achuar community to provide testimony and remarks at US press conferences and Oxy board meetings over many years.

The Oxy lawsuit filed by ERI in 2007 was dismissed by the federal District Court in Los Angeles in 2008 because the judge ruled that the case should be litigated in Peru instead of the United States. The plaintiffs appealed to the Ninth Circuit Court of Appeals, arguing that the case should stay in the United States, and that the district court should have required Oxy to hand over relevant documents before dismissing the case. Oxy also appealed, arguing that Amazon Watch should be dismissed from the case. After many attempts by Oxy to have the case dismissed or argued in Peru instead of the United States, including an unsuccessful petition to the US Supreme Court, ERI and the plaintiffs succeeded in keeping the case in US courts. In 2013, the case returned to the district court for further proceedings.

KEY REFLECTIONS AND LESSONS LEARNED

- *Follow Them Home:* This case demonstrates the importance of being willing to represent remote clients notwithstanding the logistical challenges of doing so. Occidental Petroleum was ignoring best practices in terms of environmental contamination and they thought no one would pay attention to the indigenous communities in the Amazon that were affected. EarthRights International wanted to establish that there was no place in the world that corporations were beyond justice and accountability. The case also highlighted the importance of assessing all possible locations for filing suit in advance to determine which place or places make the most sense, as well as the potential for filing a lawsuit in your home country if you can establish the connection.
- *Focus on Supporting Community Solidarity:* The Oxy case demonstrates the importance of community solidarity and organization. Lawsuits need to be driven by community needs and perspectives. The Achuar communities had extensive internal discussions, and some disagreements about the case, before deciding to move forward with litigation, but once they did they were united in support². Lawyers can play a constructive role in organizing a community and helping them to achieve unity. It requires extra time and resources, but it can really strengthen the litigation and set the stage for the settlement if that time comes.
- *Don't Assume It's Too Late to Push a Company to Clean Up its Act:* When it comes to environmental contamination, the statute of limitations may extend liability for several decades to help you ensure accountability or a remedy provided the pollution is still present. Oxy started operations in the 1970s and EarthRights International didn't bring a lawsuit until 2007, but Oxy still had a responsibility under law to clean it up.
- *Combine Litigation with Campaigns:* There were a variety of campaign activities to the Oxy case that were implemented by Amazon Watch and others alongside the litigation to keep the pressure on the company. Along with Amazon Watch and [Racimos de Ungurahui](#), ERI created and publicized a report on Oxy's activities in the Corrientes River basin. Amazon

² For more detail on the debates the Achuar community had, see the Oxy Lesson Plan.

Watch also organized demonstrations and actions at Oxy shareholder meetings over several years, and Achuar representatives from affected communities came to the meetings many times and spoke directly to Oxy shareholders and the Board. Amazon Watch also brought media attention to the case and the underlying issues at hand.

- *Engage the Communities in Participatory Decision-Making on How Settlement Funds Will be Deployed:* One of the activities that was integral throughout the process of preparing and litigating the case was thinking about how any funds received from the defendants as a result of the lawsuit would be managed and spent. EarthRights International and the communities have a very detailed plan in place for how any funds received will be directed to support local needs. That was made easier in the Oxy case than it may be in others because it involves a relatively discrete population of about 1000 adults and they could readily organize a structure to make decisions about projects and fund deployment.
- *Indigenous community values don't always align with Western legal strategy:* It was a challenge to engage the Achuar in the Western legal system and process because of how different their cultural values are. For example, they think of rights in collective terms, not individually, so the notion of individual plaintiffs in the case was very foreign to them.
- *Interconnectedness of Environmental and Human Rights Issues:* When dealing with the Achuar communities and the harms they had suffered in this case, it became clear that of all the impacts they suffered, the most damaging in their view was the appropriation of their lands and the destruction of the earth and waters on which they depended. It wasn't just that it made them sick or took away their food -- it was that it destroyed a core part of their identity. In the end, they felt that legal claims available to them were not necessarily adequate to address the core wrongs as they perceived them.
- *Lawyers Can Help Communities Understand Why They Have Suffered:* While in straightforward human rights cases, fact gathering is largely reliant on interviews, in environmental cases scientific tests may also be necessary, such as for example blood, water, soil and urine tests, all of which require more time and more expense. However, the testing meant that the attorneys were able to help the local community make sense of the harms they had suffered, to understand the origins of their problems, and to understand the impact it was having on their health and ecosystem.

Lesson Plan

Maynas Carijano v. Occidental (Peru)

LESSON OVERVIEW

Learners will engage in group discussion and breakout exercises to explore what it means to build cases and campaigns against corporations operating in remote parts of the world with corporate headquarters elsewhere. They will also define the top 10 steps they would use to build community solidarity to advance actual or potential cases and campaigns that members of the group are working on.

This lesson complements the accompanying case study and video which is about the 2007 [Maynas Carijano v. Occidental](#) (“Oxy”) case and campaign brought by [EarthRights International](#), [Amazon Watch](#) and others, claiming that Oxy contaminated the rivers and lands of the indigenous Achuar communities in Peru, causing death, widespread poisoning and destruction of their environment and way of life¹.

LEARNING OBJECTIVES

Follow Them Home: Occidental Petroleum was a multi-national corporation ignoring best practices in terms of environmental contamination. They thought no one would ever pay attention to the distant communities in the Amazon that were affected. EarthRights International wanted to establish that corporations could not assume that their remote operations were beyond justice and accountability. But what does it really mean to “Follow them Home” and how does that work in practice? For example, advocates will need to support and work with the community to engage with the case, which may lead to unexpected challenges and learning. They will also need to assess all available venues for filing a lawsuit in advance, and be prepared to sue defendants in their home country if it is possible to establish the connection necessary for jurisdiction.

Focus on Supporting Community Solidarity: The Oxy case demonstrates the importance of community solidarity and organization. Lawsuits need to be driven by community needs and perspectives. It makes a big difference to have community solidarity because it can be very damaging if there are substantial divisions within a community; it threatens not just the litigation but also the community, and so much more. Lawyers can play a constructive role in organizing a community and helping them achieve unity. It requires extra time and resources, but it can really strengthen the litigation and set the stage for the settlement if that time comes. In this case, the Achuar communities had extensive internal discussions and some disagreements about the case before deciding to move forward with litigation, but once they did they were united in support of proceeding. In terms of disagreements, EarthRights faced a unique problem that can arise when working with indigenous communities, or any community that tends to value the group over the individual. In the Oxy case, for example, the communities almost didn’t bring the suit because of the need under United States law to name individual plaintiffs who were harmed. The communities felt strongly

¹ Information contained in this lesson plan is taken from allegations made by plaintiffs in the cases, and from media and other public documents.

that an abuse of one person was an abuse on the entire community and they didn't understand that in the Western legal context, one person could have a "claim" where others in the community didn't qualify to advance the same claim. In other words, legally "justiciable" harms are one thing, but experienced, cultural, other harms are another—and not all harms can be asserted as claims under law. Fortunately, EarthRights International had a lawyer from Peru who understood both indigenous law and culture and US law and could help the legal team support the communities in their deliberations.

MATERIALS AND PREPARATION NEEDED

- Students should have read the *Wiwa v. Shell* Case Study before class begins
- Capability to watch the Oxy Video with the class
- Space for small group conversations (5 people suggested per breakout group)
- Flip charts for each breakout group

LESSON PLAN RESOURCES

Maynas v. Occidental Video
Maynas v. Occidental Case Study
Overall Lesson Plan reference material

LESSON PROCEDURES

Exercise 1: Follow Them Home

The goal of this 60-Minute group discussion is to give learners a chance to discuss and expand their thinking on what it takes to advance a case and campaign in a remote area against a corporation with head offices elsewhere.

Steps:

1. Following a screening of the Oxy Video, lead a group discussion on what the group identified as aspects of the "Follow Them Home" strategy in the Oxy Case Study and Video. Sample questions might include: What do you think the attorneys and advocates needed to do in order to advance the case with the plaintiffs? How can you imagine them responding to the indigenous Achuar perspective that the whole community is harmed by what the West defines as an individual plaintiff's "justiciable claim"? What efforts did the attorneys make to address Oxy on its home turf in the United States?
2. Following this broader discussion, have the group imagine that they were campaigners in the case, planning to bring two Achuar representatives to a press conference and shareholder meeting of Occidental Petroleum in the US. Sample questions might include: How would

you go about deciding which two representatives would speak on behalf of the Achuar? What preparations would be necessary before leaving with the Achuar representatives for the US? What would the three key talking points for the Achuar representatives be in the press conference? What would the three key talking points be for Achuar representatives at the shareholder meeting – would they be the same or different?

Exercise 2: Build Community Solidarity

The goal of this 60-minute breakout session is to give learners a chance to think through the top 10 steps they would take to build community solidarity for a case and campaign. This lesson should be preceded by a review of the Oxy Video and Case Study.

Steps:

1. Explain the purpose of the exercise which is to have break-out groups generate the top 10 steps they would take to build community solidarity in the Oxy case based on what they know and have learned.
2. Organize the group into breakouts and ensure they are roughly evenly sized with approximately 5 people per group.
3. Make sure each group has a reporter who will capture the group's thinking on a flip chart.
4. Once the groups have been decided, explain the goal of the breakout session: to come up with approximately 10 key steps required to build community solidarity in the Oxy case, in chronological order starting from first to last.
5. Give the breakout groups 35 minutes to create their 10 step plan.
6. Bring the groups back together and have the reporter for each group put the flip chart on the wall and take 2 minutes to walk the rest of the groups through what they came up with. Allow time for questions, answers and comments.
7. Get the group to summarize key themes and steps and condense them on a separate flip chart.

Alternate Version, Exercise 2: Building Community Solidarity

Steps:

1. Explain that the purpose of this breakout group exercise is to give learners a chance to brainstorm approaches to building community solidarity in real life cases and campaigns. Each breakout group will discuss and select a current or potential case or campaign that some people in the group are familiar with, and come up with approximately 10 key steps required to build community solidarity, in chronological order starting from first to last.
2. Ensure that the breakout groups are evenly sized, with approximately 5 people in each of them. Make sure each group has a reporter who will capture the group's thinking on a flip chart.

3. Give them 40 minutes for the exercise.
 4. Bring them back together and have the reporter in each group briefly explain the case or campaign they discussed, and put the flip chart with their 10 next steps on the wall and walk the rest of the groups through what they came up with. Allow time for questions, answers and comments.
 5. Time permitting, get the group to summarize key themes and steps and condense them on a separate flip chart.
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Alternate Lesson Plan to Either of These Two Exercises:

See the Video Action Plan exercise that is included in the Doe v. Unocal Lesson Plan and can be paired instead with this or any of the other Case Studies available from EarthRights International.