

A young child, wearing a headscarf and a light-colored shirt, is operating a hand-operated water pump. The child is crouching and holding the handle of the pump. The background shows other people and a rural setting. The image is overlaid with a semi-transparent orange banner containing text.

Holding Companies Accountable

Lessons from transnational human rights litigation



Brot
für die Welt

MISEREOR
IHR HILFSWERK

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● *“Christo Petrolero”, Statue in honor of the oil production in Barrancabermeja, Colombia*

The Project

● Encouraged by prominent human rights organisations in the Global South, MISEREOR, Brot für die Welt (Bread for the World) and the European Center for Constitutional and Human Rights (ECCHR) have joined forces in a project to assist local actors in taking action against transnational companies who are involved in or profit from human rights violations. With funding from MISEREOR and Brot für die Welt, ECCHR organised four workshops on three continents (Colombia in 2010, Cameroon in 2011, India and the Philippines in 2013). These meetings, each held over a number of days, were designed to encourage the formation of international alliances and exchange of strategies for legal action, and to impart basic knowledge to the partner organisations of

MISEREOR and Brot für die Welt on taking transnational cases against European companies. The workshops provided an opportunity to analyse legal case studies prepared by ECCHR as well as general issues such as research, standard of proof in legal proceedings and security issues. Around 150 people participated in the workshops, including representatives of 82 NGOs, 39 local and 14 international lawyers – primarily from continental Europe, Great Britain and the USA – and 11 representatives from affected communities and trade unions. For this project, ECCHR comprehensively analysed close to 50 individual cases of human rights violations committed by companies from all over the world. The findings were discussed and applied to other current cases.

I Transnational human rights complaints – a chance for justice?

● In April 2013 over a thousand workers died in the collapse of the Rana Plaza commercial building in Bangladesh. Most of the European fashion retailers – including several German companies – who had garments manufactured in this building refuse to make any binding acknowledgement of their legal liability. These companies point, among other things, to the complex supply chains with Bangladeshi companies in order to evade direct responsibility, with the result that victims are denied the compensation due to them. Similarly, those affected by South African apartheid crimes wait in vain for compensation from the transnational companies that profited from the apartheid regime. Companies such as Mercedes-Benz maintain that they merely did business in South Africa without any involvement in the grave human rights violations.¹

These drastic examples are in keeping with the experiences of MISEREOR and Brot für die Welt as well as by their partner organisations in Africa, Asia and Latin America. Large-scale agricultural development and the extensive mining of raw materials in countries in the southern hemisphere have led to illegal land grabbing, environmental pollution as well as interference with local communities and the arrest of community members following peaceful protest. The sale of public services to transnational corporations threatens the access of local communities to electricity, water and health services, and the supplier companies to German and European companies often operate in violation of basic labour rights. All too often the victims of human rights violations have no direct or effective access to justice. In fact the (legal) casework of ECCHR and other legal human rights organisations over the last five years shows that German and European companies frequently manage to evade liability due to legal loopholes and evidential difficulties.

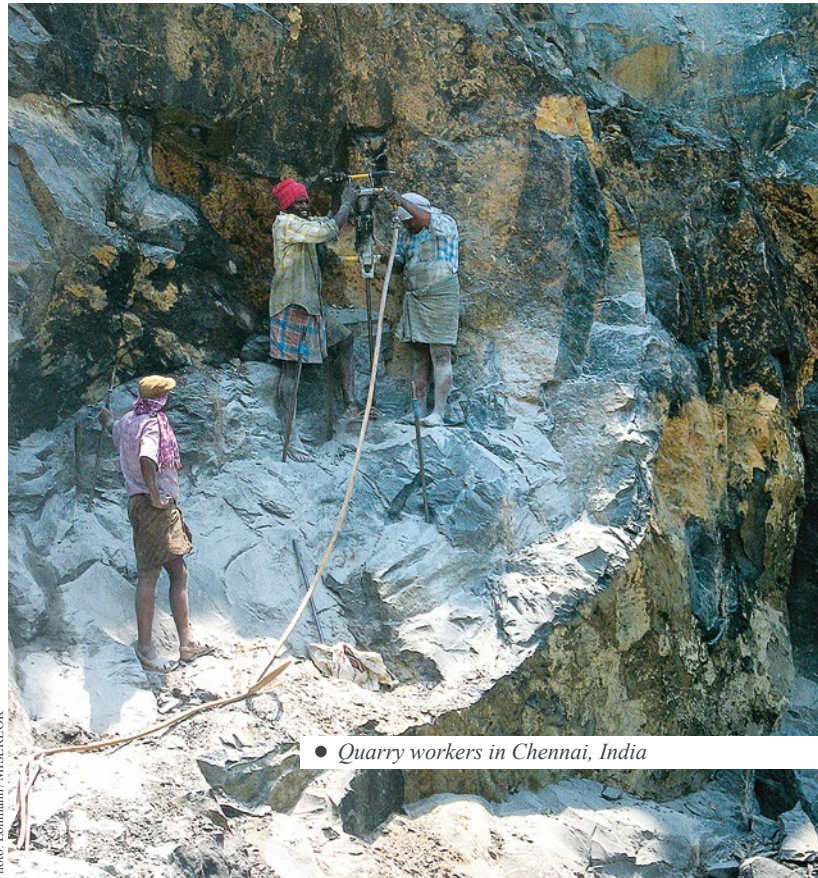
Over the following pages we will set out a number of representative cases in which German and European companies are involved in or linked to human rights violations in the Global South. We use these cases to illustrate the difficulties encountered by affected parties when they attempt to hold those companies accountable in Germany or Europe where their head offices are based. The problems described are based on both ECCHR casework and the experiences gathered over the four workshops. Using this analysis as a starting point, we set out suggestions for German law reforms that should be adopted so that those affected by human rights violations can sue companies in Germany. Cases involving non-German companies will be addressed insofar as they are relevant for the debate on law reform in Germany. They will be detailed to demonstrate the legal problems that would arise in Germany in a similar case involving German companies.

¹ Motion for Certificate of Appealability filed by Daimler AG et. al. in Apartheid Litigation case, MDL No. 1499 (SAS) ECF Case, <http://www.usa-recht.de/wp-content/uploads/2010/05/Motion-of-Daimler-et-al1.pdf>, last accessed: 2/6/2014; Medico International, Questions and Answers on the complaint of the victims of apartheid: <http://www.medico.de/datei/fragen-und-antworten-zur-klage-der-apartheid-opfer.pdf>, last accessed: 2/6/2014.

Current international debate



● Since the foundation of the International Labour Organisation (ILO) in 1919, human rights violations committed by commercial enterprises have led to numerous international debates and various attempts at regulation. So far, however, it has not been possible to create laws that are binding under international law or to determine the exact extent of corporate obligations to protect human rights. The current international consensus is described in the UN Guiding Principles on Business and Human Rights adopted in 2011 by the United Nations Human Rights Council.² According to the Guiding Principles, the primary duty under international law to protect human rights lies with the states, while companies are under a responsibility to respect these rights. But even though these guidelines acknowledge the right of affected persons to bring human rights violations to court, this soft-law standard does not provide any binding legal rights which victims of corporate injustice can rely on to support legal action.



● Quarry workers in Chennai, India

Photo: Lohmann/MISEREOR

² UN Guiding Principles on Business and Human Rights, UNHRC, resolution 17/4 adopted on July 6, 2011, (UN Doc A/HRC/17/4).

The UN Guiding Principles on Business and Human Rights

● In 2011 the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights, consisting of three so-called pillars. The first pillar details the states' duty – binding under international law – to protect people against human rights violations committed by companies. The second pillar deals with corporate responsibility to respect human rights. Though not binding under international law, it sets out the International Community's consensus on global standards of corporate responsibility for human rights. Given that

the standards were unanimously endorsed by the UNHCR, they are more binding than, for instance, voluntary corporate codes of conduct. In accordance with these guiding principles, companies are for example obliged to conduct human rights risk assessments on a regular basis and to counteract possible risks and negative effects of their corporate activity. These two pillars are complemented by a third pillar, which establishes the states' responsibility to guarantee effective remedy for the victims of human rights violations.

1. Human rights complaints against companies

Persons affected by corporate abuse cannot and will not wait for international debates or national law reforms to advance. With the assistance of local and international organisations and lawyers, they bring companies to court – both in the country where the human rights violations have been committed (host state) and in the country in which the responsible business is headquartered (home state). During the last decades there has been a series of emblematic cases, such as the lawsuit of Nigerian farmers against Royal Dutch Shell plc filed in Dutch courts relating to oil pollution in Nigeria, the complaint of Ecuadorian citizens against Chevron Corporation re oil contamination in Ecuadorian courts, or the criminal complaint by Colombian trade unionists against Nestlé S.A. in Switzerland concerning the murder of union leader Luciano Romero.³ These complaints show a growing awareness on the part of those affected by human rights violations that they can have recourse to a range of national courts, and in particular in the countries where the liable or partially liable companies are based.

2. Complaints in the home countries of transnational companies

This development goes back to the mid-1990s with law suits brought under the Alien Tort Statute (ATS), a section of the Judiciary Act of 1789 originally providing for US courts to have jurisdiction in tort cases involving breaches of international law. The statute was revived and used by progressive human rights lawyers to bring litigation against corporations, including in a case against Shell for their complicity in the execution of the Nigerian environmental activist Ken Saro Wiwa, and against Mercedes-Benz and Rheinmetall for their involvement in crimes of the apartheid regime in South Africa.⁴ This trend continues. In Great Britain claimant groups have sued the parent companies of transnational corporations for human rights violations such as health damages resulting from toxic waste dumping in Côte d'Ivoire and asbestos mining in South Africa.⁵

In addition to civil complaints, there have been several criminal investigation proceedings into and some sentences handed down to individual employees of companies for their complicity in human rights violations. In 2007 Dutch businessman Frans van Anraat was sentenced by an appeal court for his complicity in war crimes by providing Saddam Hussein with chemical weapons in

the 1980s.⁶ In Germany proceedings are ongoing against three executive employees of the engineering company Lahmeyer International GmbH for their alleged involvement in the displacement of at least 4,700 families to make way for the Merowe dam construction project in northern Sudan.⁷ Prosecution authorities in France opened an investigation into employees of technology companies that sold surveillance equipment to repressive states including the Gaddafi regime in Libya.⁸ Prosecutors in Switzerland are currently investigating a criminal complaint lodged against five top managers of Nestlé that accuses them of complicity in the assassination of a Colombian trade unionist in 2005.⁹

3. Complaints in the host countries

Many compensation law suits and criminal proceedings are lodged in the countries where the human rights violations were committed. To mention just a few examples: an Ecuadorian court ordered Chevron to pay \$18 billion in compensation for the environmental and health damage caused by the company's oil operations.¹⁰

3 For further information on the Nestlé case see: ECCHR, Criminal Complaint against Nestlé Switzerland concerning murder of Colombian trade unionist Luciano Romero, <http://www.ecchr.de/index.php/nestle.html>, last accessed: 11/5/2014; regarding the complaint against Chevron in Ecuador: Business & Human Rights Resource Centre, Case profile: Texaco/Chevron lawsuits (re Ecuador), <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador>, last accessed: 11/5/2014; regarding the complaint against Shell in the Netherlands: Business & Human Rights Resource Centre, Case profile: Shell lawsuit (re oil pollution in Nigeria), <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreoilpollutioninNigeria>, last accessed: 11/5/2014.

4 Business & Human Rights Resource Centre, case profile: apartheid reparations lawsuits (re S. Africa), <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ApartheidreparationslawsuitsreSoAfrica>, last accessed: 11/5/2014.

5 Richard Meeran provides an overview in "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States", in: City University of Hong Kong Law Review, Vol 3:1, 2011, pp. 1-41.

6 Public Prosecutor v Van Anraat, 22-000509-06, judgment from: 9 May 2007, <http://www.haguejusticeportal.net/index.php?id=7548>, last accessed: 11/5/2014.

7 ECCHR, The Case Lahmeyer: German engineering – regardless of the consequences? <http://www.ecchr.de/lahmeyer-case.html>, last accessed: 11/5/2014.

8 Business & Human Rights Resource Centre, case profile: Amesys lawsuit (re Libya), <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/AmesyslawsuitreLibya>, last accessed: 11/5/2014.

9 See fn. 3, with further references; the case was closed in August 2014 by the Swiss supreme court due to statutes of limitation.

10 See fn. 3, with further references.

In Argentina the federal prosecution is currently re-examining the role of major companies such as the Ford Motor Company and Mercedes-Benz in the crimes of the military dictatorship (1976 - 1983).¹¹ The Indian Supreme Court is addressing human rights violations in clinical drug trials conducted by the pharmaceutical companies Merck (USA) and GlaxoSmithKline plc (UK).¹² These and other proceedings show that the legal assessment of human rights violations committed by companies need not take place, or take place exclusively, in the country where the company in question is headquartered. The host countries in particular play an important role and legal systems in the so-called developing and newly industrialised countries may sometimes be more suitable than expected for the purposes of legal proceedings.

4. Lack of effective legal protection for victims of corporate injustice

These cases show that, besides social and political forms of protest, the affected persons can also seek redress, truth and justice in domestic and European courts. Yet compared to the number of infringements committed

by companies, especially in developing and newly industrialised countries, the number of legal proceedings remains extremely low.

The case studies also illustrate that complaints are often obstructed due to practical concerns such as limited capacities or the dangers facing affected persons. Victims face a variety of legal obstacles in the home countries of the companies, denying them effective legal protection. With this publication we aim to respond to claims by the German government and business associations that Germany provides sufficient legal scope to hold companies accountable for their involvement in human rights violations. In fact the case studies show that under current law, German and European countries can only very rarely, and with great difficulty, be held accountable for the social and environmental harm that they cause.

11 Business & Human Rights Resource Centre, Case profile: Ford lawsuit (re Argentina), <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ford-lawsuitreargentina>, last accessed: 11/5/2014.

12 ECCHR, case summary HPV case, <http://www.ecchr.de/clinical-trials.html>, last accessed: 11/5/2014.

Typical case scenarios: denial of victims' rights

● In Latin America, Africa and Asia, there are a number of situations that have proven to be particularly prone to human rights problems in the context of transnational corporate activity. These include in particular land grabbing and displacement in the context of raw material extraction or agro-industrial development (1). In many cases, such projects also cause health problems and environmental damage that destroys the livelihoods of the local population (2). German companies are often involved in such human rights issues, not directly, but via global supply chains. The supplier companies of German firms all too often produce goods under inhumane labour conditions (3). In addition, social movements protesting against the negative impacts of corporate activities are frequently subjected to violent persecution by public and private security forces (4).

1. Land grabbing and the extraction of raw materials

When new territories are explored for the mining of extractive resources such as coal or gold, there often follows an immediate or creeping displacement of the local population. The same phenomenon can be observed in agro-industry, especially where the large-scale cultivation of renewable raw materials for the production of biofuels is concerned.¹³

Countries of high growth such as China, South Korea and Japan, the food import-dependent Gulf States and

13 The appropriation of large areas of land in terms of so-called foreign direct investments or by means of long-term tenancy agreements is often described as land grabbing.

major Western transnational corporations often invest in land for agricultural use.¹⁴ European and North American agricultural corporations secure land predominantly to grow crops such as corn, sugar cane and oleiferous plants for energy production.¹⁵ There are countless globally active companies operating in the field of extractive production of raw materials like coal or precious metal mining.¹⁶ These companies develop and operate mines



● Expropriated peasant in Paraguay

and other developments through subsidiary companies. But such projects often fall under free trade agreements and bilateral agreements on the protection of investment, making it difficult if not impossible for the host countries to restrict entrepreneurial activities for the protection of human rights.¹⁷

Land grabbing and the displacement of local populations can occur in very different ways. Some are effected violently and without any legal basis. But often the land grabbing leading to the displacement of populations is formally legalised. There are two typical land grabbing scenarios, each displaying their own distinct difficulties when it comes to the judicial enforcement of compensation or reparation claims.

a) Expropriation of property by a government without adequate compensation

Governments often expropriate the land of local populations in order to sell or lease it to a corresponding company for cultivation or the exploitation of its natural resources.

This is shown by the example of two gold mining projects in Ghana. The Ghanaian company Bogoso Gold Ltd., a subsidiary of the Canadian mining company Golden Star Resources, operates two mines in Bogoso/Prestea and Wassa. Both projects are operated as open pit mines. The population that originally inhabited the territory of the Ashanti Gold Belt did not possess any legal titles but used the land collectively for subsistence farming according to traditional law originating from pre-colonial times, which is usually not written down.¹⁸ The Ghanaian state appropriated the land under existing mining laws and, as the new landowner, assigned mining licenses to the corporation.¹⁹ In the case of expropriation in the context of mining projects, the state is technically obliged under existing laws to pay compensation to the original inhabitants of the land. But often, as in the case of the Golden Star mining company in Bogoso/Prestea and Wassa, this compensation is insufficient.²⁰ One problem is that only those who can formally prove their property rights, traditional usage or customary

14 FIAN Factsheet 2010/1, Landgrabbing – Moderne Landnahme und das Recht auf Nahrung. [2 FIAN (2010). Land Grabbing in Kenya and Mozambique].

15 Hobbeling, Henk, Die neuen Großgrundbesitzer, in: Brot für die Welt / EED / FDCL, Land ist Leben – Der Griff von Investoren nach Ackerland, Dossier 5-2011, pp. 3-5.

16 The majority of mining companies are from the Anglo-American sphere. One exception is the Anglo-Swiss company Glencore/Xstrata, which, on merging, became one of the biggest players in the commodity market and is headquartered in Switzerland. Cf. Silverstein, Ken, A Giant among Giants, in: Foreign Policy, May/June 2012.

17 German Watch/Misereor, Globales Wirtschaften und Menschenrechte, Deutschland auf dem Prüfstand, Berlin/Aachen, 2014, pp. 63, 64.; Burkard, Eva-Maria, Zum Spannungsverhältnis von Investitions- und Menschenrechtsschutz, Baden-Baden, 2013

18 Sarpong, George A., Improving Tenure Security For The Rural Poor. Ghana – Country Case Study, Rome, 2006, pp. 2-6.

19 FIAN, Ghana im Goldrausch. Menschenrechte, Landwirtschaft und Wälder in Gefahr, Cologne, 2008, pp. 15 et seq. [FIAN Report | 19-02-2008, Mining related human rights violations Ghana]; Botchway, F. Nii, Land Ownership and Responsibility for the Mining Environment in Ghana, in: Natural Resources Journal, 1998, Vol 38, pp. 509-536.

20 Koomson, Frederick/Akonor, Edgar, Report. Life is more Precious than Gold. Effects of Goldmining on Livelihoods: The Gender Component; FIAN, Ghana im Goldrausch. Menschenrechte, Landwirtschaft und Wälder in Gefahr, Cologne, 2008

The Addax Case:

Agreements between the company and village chiefs to the detriment of the population?

● The Swiss company Addax Bioenergy has declared that it has invested 220 million euro in the cultivation of sugarcane for agro-fuel in Sierra Leone. Since 2008 Addax, through its subsidiary company Addax Bioenergy Sierra Leone (ABSL), has leased 58,000 hectares of land in the north of Sierra Leone from the local population.²¹ Lease contracts were negotiated between ABSL representatives and the traditional chiefs of the village communities, with the actual land titles being held by the individual villagers. The lease contracts are scheduled to run for fifty years with the possibility of renewal for an additional twenty years.²² They do not include any obligation for the company to cultivate the leased land sustainably. Civil society organisations – such as the Sierra Leone Network on the Right to Food (SiLNoRF) – have thus feared since the beginning of the investment that the land will be used intensively and will be returned leached and infertile to the owners on termination of the lease.²³ Furthermore, SiLNoRF stated that the quality of alternative acreage provided by the company was not as good as claimed by the company and sufficient irrigation of the alternative areas was not guaranteed. In addition, the rent paid did not reflect the projected profits.

It is conceivable that individual villagers could contest the lease agreements made between the village chiefs and Sierra Leonean Addax subsidiary ABSL in court and demand adequate rent or the restitution of their land. Jurisdiction would lie either in Sierra Leonean courts or, in the case of divergent stipulations, a European court. But this would only be possible if the potential plaintiffs could formally prove their property rights or rights of use. Given the social structure of traditional village communities, in most cases it would not be possible for individual villagers to assert their claims against

the will of the traditional leader. Moreover, it would be impracticable to demand access to a particular individual plot if the rest of the land remains leased to the plantation managers.

A compensation claim for infringement of the right to property or other rights could be asserted against the Addax parent company in a Swiss court. However, to do this it would have to be proven that the lease contracts between the subsidiary company ABSL and the village chiefs are unlawful, invalid and in violation of the rights of the landowners. Furthermore, it would have to be proven that the parent company is legally liable for the conditions under which the subsidiary ABSL enters into lease contracts. This means that it would have to be established that the parent company could have influenced the lease agreements and was under a legal obligation to make sure that only lawful lease agreements were concluded. This kind of liability of parent companies for the legal transactions of their subsidiary companies in transnational cases is neither regulated by statute nor recognised by courts in Switzerland. Even where the affected parties were able to afford the procedural costs, the legal uncertainty surrounding the case means that taking such a complaint would involve a high degree of risk.

21 See the company website: <http://www.addaxbioenergy.com/en/about-us.php>.

22 Anane, Mike / Abiwu, Cosmos Yao, Independent Study Report of the Addax Bioenergy Sugarcane-to-Ethanol Project in the Makeni Region in Sierra Leone, June 2011, pp. 25 et seq.

23 Anane, Mike / Abiwu, Cosmos Yao, fn. 25, pp. 38 et seq.; Conteh, Mohamed Sorie, Economic Impacts of Large Scale Leases of Farmland on Smallholder Farmers. A Case Study of Leased Farmlands for the Addax Sugarcane Ethanol Project in Sierra Leone, Bochum 2014; Sierra Leone Network on the Right to Food, Annual Monitoring Report on the Operations of Addax Bioenergy by Sierra Leone Network on the Right to Food (SiLNoRF). For the period July 2012 - July 2013.

land tenure are entitled to compensation, which is often problematic in the case of traditional, collective rights because these rights are not formally documented. Women are at a particular disadvantage in the process because in Ghana they have only limited land rights (property as well as traditional customary usage rights) and can thus only receive limited compensation.²⁴ At the same time, providing monetary compensation to a population that lives predominantly from subsistence farming often proves to be less than useful. To use such payments sustainably, the population must also be provided with sufficient replacement land as well as sensible advice regarding the – hitherto unfamiliar – use of money. The overall result is that there is less land available for sustaining the livelihood of the local population and this results in the inability to maintain living standards and ultimately in poverty. In many cases the local populations are forced to leave their traditional home regions.

In such cases claims can only be asserted against the state that has conducted the expropriation. The success of such claims against governments for compensation or for the provision of replacement farmland depends on the willingness of the courts to find against the government in question. Furthermore, both property rights and traditional customary usage rights must be actionable in court. In most cases, the companies benefitting from land grabbing cannot be prosecuted because the corporate use of the land has been formally legalised with the government in question, while the traditional customary rights of use of the original landowners are often unenforceable.²⁵

b) Land grabbing through agreements between companies and local populations

The other common scenario is one in which the company negotiates the lease or purchase agreement directly with the traditional chiefs of the villages in question. These lease contracts are often very unfavourable to the landowners, as the company representatives and traditional chiefs are on unequal footing. Many local chiefs are not familiar with national legislation. Moreover, they are inadequately informed about the venture and the impacts of the lease. The contracts and other information are seldom written in the local language, with the result that many

village chiefs have little or no understanding of these documents. Still, they enter into such contracts in the hope of jobs at the new plantations or in the mines and on the assurance that the company will develop the infrastructure in the region. In many cases they also come under pressure from the government to agree to the lease contracts. The situation is further exacerbated by traditional village structures that allow the chiefs to dispose of land titles on behalf of the villagers. Time and again we receive reports of chiefs not acting in the interest of the whole village community or being bribed by companies or authorities.

2. Environmental and health damage caused by extractive and agro-based industries

Besides the above-mentioned land grabbing, major agro-based companies and oil or mining projects frequently cause serious environmental and health damage.²⁶ Once the local population has been deprived of the farmland and in some cases resettled, the irrigation of agricultural land and water-intensive extraction often cause drought in surrounding areas. The problem is further aggravated by the pollution of groundwater and soil. Pesticides and inappropriately disposed agricultural waste affects the water quality while crude oil production often causes leaks and environmental pollution. The burning of carrier-gas also has serious consequences for microclimates and human health. In the mining industry, outdated or negligent extraction methods severely contaminate the region's drinking water and soil with heavy metals and toxins such as arsenic, cadmium and mercury. In the context of the Ghanaian goldmine projects, organisations like WACAM (Wassa Association of Communities Affected by Mining) reported that the residents of the region increasingly suffered from gastro-intestinal and respiratory diseases, which are attributed to the effects of mining on drinking water and air quality.²⁷

24 Sarpong 2006, pp.6-9

25 On the problems and limited opportunities to take compensation claims in Ghana: Sarpong, George A., fn. 18.

26 On the impacts of mining in Peru: Misereor, *Menschenrechtliche Probleme im peruanischen Rohstoffsektor und die deutsche Mitverantwortung*, Aachen 2013.

27 Koomson, Frederick /Akonor, Edgar, fn. 20.



Photo: Fricss / MISEREOR

● Mining company Doe Run Perú, La Oroya, Peru

Additionally, increased heavy metal pollution in drinking water and soil cause damage to agriculture and livestock farming. Once mines are in operation, farmers consistently report declining crops as well as an increase in animal deformities and livestock deaths. These losses in agricultural production have forced many residents to leave their original settlements; the new settlements provided for resettlement, however, often prove to be insufficient.²⁸

If damage claims are asserted in court against the companies in question, two specific problems arise. First, a causal link between corporate activities and the asserted damages must be proven. Should they want to claim damages, plaintiffs must always substantiate their claims of individual harm, tracing it back directly to the company's actions. Second, certain forms of harm are not fully protected as in-

dividual legal interests and thus cannot be asserted through formal legal proceedings. The right to use pastures, for example, is afforded almost no protection by civil rights legislation in cases where no title exists.

3. Irresponsibility along the global supply chains

The involvement of German and European companies in grave human rights violations often occurs indirectly through their global supply chains. For instance, German energy companies such as E.ON or EnBW purchase large amounts of the coal used in Germany from Colombian supplier companies

²⁸ Misereor, fn. 26, pp. 22, 23.

The Bayer and Syngenta cases:

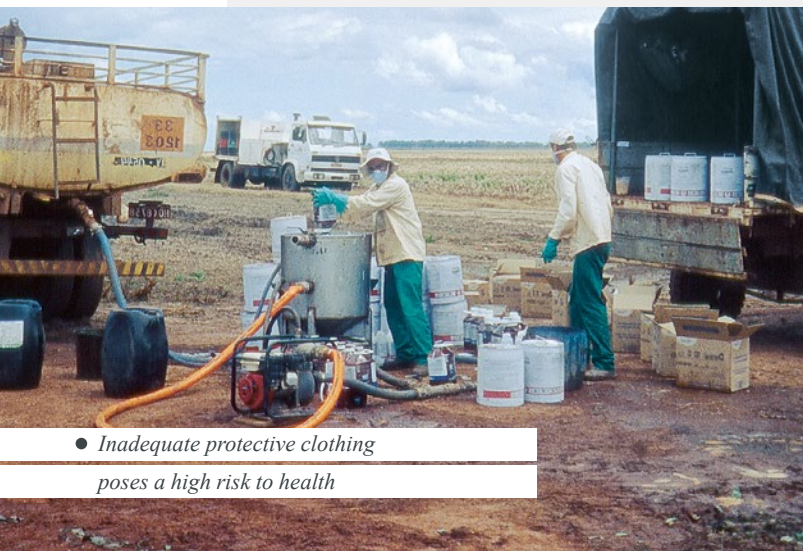
Pesticide poisoning and the difficulties in attributing causation

● Evidential difficulties also arise in the case of health problems suffered by plantation workers due to the use of pesticides that are extremely harmful, especially to women.²⁹ European corporations such as Syngenta or Bayer AG produce highly toxic pesticides, which have already been banned in Europe and North America on account of the significant dangers they pose, and sell them in countries such as Malaysia, the Philippines or India.³⁰ Distribution structures in these countries are often quite complex: the manufacturing plant sells the pesticide to wholesalers, who may resell them to other retailers, who

the health of individual workers, which only emerges after several months or years of use.

The question arises, moreover, of why producers of a highly toxic pesticide should be made liable for harm if a number of other factors are also involved in the process.³² Intermediaries may, for instance, transfer pesticides from the original packaging with warning labels into inconspicuous containers whose contents are no longer clearly hazardous. The plantation owners and direct employers often fail to adequately inform the workers about potential health hazards or to provide appropriate and functional protective clothing. Where protective clothing is provided, it is often unsuitable for work in tropical climates.³³ The affected persons often remain unaware of the health hazards involved in their work as pesticide sprayers. Furthermore, pesticides from different producers are frequently mixed before their application, thus making it difficult to ascertain which pesticide from which producer has caused the harm in question.

Under the present rules of evidence, it is thus difficult to prove that health damage caused by pesticide poisoning under such conditions can be attributed to a specific pesticide producer. It also remains legally unclear if corporations like Bayer or Syngenta can actually claim to have provided adequate information about the health hazards involved when it is obvious that neither the warning labels on the pesticide packaging nor the occasional training courses for retailers and plantation owners can prevent severe poisoning from occurring amongst the many thousands of plantation workers.



● *Inadequate protective clothing poses a high risk to health*

Photo: Bickel/MISEREOR

then sell to the plantation owners. On the plantation, the storage and use of the pesticides is overseen by local supervisors.

Despite the scientific evidence of the kinds of health damage commonly caused by their products, companies who produce these pesticides have almost never been held accountable for this damage.³¹ This is because, in the framework of civil compensation claims, it is extremely difficult to prove that the corporations producing the pesticides are legally responsible for the harm in question. In particular, it can be difficult to determine the causal link between the production of pesticides and chronic damage to

29 The Permanent People's Tribunal. Session on Agrochemical Transnational Corporations, 2011, pp. 60 et seq.

30 Neumeister, Lars/Isenring, Richard, *Paraquat. Unacceptable Health Risks for Users*. 3rd ed. 2011.

31 Grabosch, Robert, *The Distribution of Paraquat: Does Syngenta Respect Human Rights? Legal Opinion*, Bern, 2011.

32 Neumeister, Lars/Isenring, Richard, fn. 30, pp. 7-13.

33 Neumeister, Lars/Isenring, Richard, fn. 30, pp. 14, 15.



● Quarry workers
in Chennai, India

Photo: Lohmann/MISEREOR

such as Cerrejón or Drummond. Serious human rights violations have occurred within the scope of resettlement measures undertaken for the exploitation of the coalmines of these supplier companies in Colombia, and miners frequently report threats and assaults resulting from trade union activities.³⁴

In cases of sub-contracting, the more complicated the supply chain is, the more difficult it is to establish legal responsibility for labour conditions in supplier companies.

These supply chains, which ultimately end with German companies such as Daimler AG, Volkswagen AG and E.ON, are kept complex in part to shield these firms from liability for economic risks and labour obligations.³⁵ Thus it is unsatisfactory, but not surprising, that these companies are difficult to hold legally accountable for human rights violations committed by their supplier companies. It would have to be proven that the companies

Complex supply chains: Natural stone from India for the German market

● In India, natural stone is often mined under inhumane labour conditions. Child and forced labour are common. Outdated mining methods and a lack of appropriate protective measures mean that serious work accidents and occupational diseases such as silicosis (miner's phthisis) occur frequently.³⁶ When European companies import natural stone from India to Europe, the complex supply chains involve numerous intermediaries from the natural stone mining unit to the European importer. In the Indian state Rajasthan, for instance, the mining of stone is mainly carried out by small and medium-sized businesses. These stones are then sold through various intermediaries to larger export companies who trade with the European companies. As a result, it cannot be established with certainty whether a specific natural stone comes from a mine using child labour. Though human rights violations are widespread in Indian natural stone mines, there is limited concrete evidence of links between European companies who import natural stone from India and the human rights problems that are rife in this industry.

34 German Watch / Misereor, fn. 17, p. 80 with further references.

35 MISEREOR, Global Policy Forum und Brot für die Welt, *Vom Erz zum Auto. Abbaubedingungen und Lieferketten im Rohstoffsektor und die Verantwortung der deutschen Automobilindustrie*, Aachen/Stuttgart/Bonn 2012.

36 Hütz-Adams, Friedel, *Steine des Anstoßes. Arbeitsbedingungen bei Natursteinlieferanten für Baumärkte und Küchenhersteller*, 2008; Madhavan, P. / Raj, Sanjay, *Budhpura 'Ground Zero' Sandstone Quarrying in India*, 2005; India Committee of the Netherlands, *From Quarry to Graveyard. Corporate social responsibility in the natural stone sector. Labour, social, environmental and economic issues in the quarrying, processing and trade of natural stone from developing countries. Focus on India and the Netherlands*, 2006.

were aware of the specific human rights violations and made no attempt to intervene. However, it has still not been established if or how a German corporation should properly react to human rights violations committed by one of its many hundreds or thousands of supplier companies. There are no statutory provisions regarding a company's due diligence obligations for human rights conditions in supplier companies; it remains uncertain

what preventive procedures and responsive measures should be taken in the event that grievances are reported.

4. Criminalisation and persecution of protest movements

Affected persons in many regions of Africa, Latin America and Asia regard protest movements as the only way to defend their rights. Protests by the population or work-

The Danzer Case:

When companies encourage brutal police operations

● The products traded by the Swiss-German corporation Danzer include tropical timber from Central Africa. Danzer had been active in the northern Equateur province of the Democratic Republic of Congo (DR Congo) for many years through the Société Industrielle et Forestière du Congo (Siforco), a one hundred per cent subsidiary company. Residents of the village of Bongulu accused Siforco of failing to meet its contractual obligations to provide for social projects in the region. In protest, and to improve their own negotiating position, on 20 April 2011 some villagers stole a number of items, namely five batteries, a cable, a solar cell and a radio.

In late April and early May 2011, Siforco negotiated the return of the stolen items with a representative of the residents.³⁷ Despite the fact that these negotiations were still ongoing, managers of the Danzer subsidiary engaged the services of local security forces. Siforco employees used company vehicles to transport the members of this task force in the early hours of 2 May 2011 to Bongulu. There they raped several women and girls, abused dozens of men and made arbitrary arrests. Following the "operation", employees of the Danzer subsidiary paid the security forces.³⁸ The Danzer management maintained that it had only been informed about the event after it had taken place. Furthermore they stated that it was common practice in the DR Congo to pay public security forces for their services.³⁹

This statement from the company completely disregards the specific human rights risks in the region where the company operates. Managers of

companies operating in regions such as the DR Congo are well aware of the state security forces' propensity for violence. Organisations including ECCHR accuse Danzer management of failing to meet its legal obligation to prevent the business-related crimes committed by its employees.⁴⁰

Under the existing concept of the liability of principals in criminal law and international standards such as the OECD Risk Awareness Tool for Multinational Enterprises, Danzer managers acting unlawfully in failing to give Siforco employees clear instructions stipulating that security forces must as a rule not be called in to deal with conflicts with the local population. Had the intervention of security forces been unavoidable, the local management should have insisted as a precondition on the exclusion of any kind of violence and in particular sexualised violence. They were under an obligation to control the course of any operation, and only make payment – where applicable – subject to the condition that no human rights violations are committed.

37 Resource Extraction Monitoring, Rapport de Mission 1B. Affaire Yalisika. Observation Indépendante de la mise en application de la loi forestière et la gouvernance en RDC (OIFLEG - RDC), Kinshasa, 2011.

38 Greenpeace, Stolen future. Conflicts and logging in Congo's rainforests – the case of Danzer, 2011, <https://ic.fsc.org/siforco-drc>, last accessed: 15/5/2014.

39 Swiss Television, Tagesschau/News: Christa Ulli, Schweizer Holzfirma in gewalttätige Übergriffe in Afrika verwickelt, first broadcast on Wednesday, 16 November 2011 at 7:07 p.m.

40 ECCHR, Special Newsletter. Criminal Complaint Against Senior Managers of the Danzer Group, Berlin, 2013.

ers affected by a corporate project are frequently met with public or private repression. The forms of repression vary greatly. They range from more stringent national legislation – impeding the work of civil society organisations, the criminalisation of civil society work, political intimidation, to violent attacks on the part of governmental, paramilitary or private security forces.⁴¹ In many of the cases investigated, the partner organisations or persons immediately affected were not willing or able to challenge human rights infringements by transnational companies because they were and remain subjected to severe state repression as well as threats by non-state actors. Intimidation and threatening of witnesses is another common problem. These dangers mean that those affected often refrain from taking legal action against the companies involved.

More often than not, companies revert to local security forces when protest movements target the

company. A shocking example of this is the case of the Swiss-German timber firm Danzer Group. The case illustrates how easily a corporation can facilitate serious crimes.

While German criminal law obliges top level managers to prevent business-related crimes committed by subordinate employees, and similar obligations can be found in civil law, the legal situation of the cases discussed here has not yet been conclusively clarified. In particular, it is unclear – and thus in need of regulation – whether such obligations also apply in cases of transnational crimes and to the employees of subsidiary companies. The lack of clarity in the scope of the due diligence obligations of a parent company toward human rights violations of its subsidiary companies means that even in the most extreme cases, victims of violent repression have no legal entitlement to justice and reparation from the parent company.

Obstacles to court enforcement

IV

● The following paragraphs categorise the various kinds of legal and practical obstacles that arise when pursuing legal action on human rights violations of German companies.

1. Practical and political obstacles

The experiences of organisations like ECCHR, Brot für die Welt and MISEREOR have shown that many of the substantial practical obstacles to enforcing legal claims against companies for complicity in human rights violations can be organised into three main categories: weak civil society and governance structures (a), precarious security situation of the affected person and their organisations (b), limited capacities of the affected person and their organisations (c). These issues are interconnected and interdependent. For the purposes of clarity, however, we will treat them as separate issues.

a) Weak civil society and governance structures

A prerequisite for legal action is that the state in which the infringement has occurred has a minimum level of structure and a basic structure also exists for civil society actions and debates. Working with transnational human rights also requires that civil societies in affected countries are willing and able to work according to strategies autonomously developed based on the results of legal processes in Europe, thus triggering social and political discourse in their own countries.

In logistical terms this simply requires the possibility of putting victim groups in contact with one another, transporting evidence safely and conducting

⁴¹ Cf. Forum Menschenrechte (eds.): *Schützen statt verfolgen*, Berlin, September 2012.

investigations. Government investigations and prosecutions relating to events in situ are often essential in order to facilitate the companies involved being held accountable at their headquarters. Hence, a number of the proceedings conducted in Europe – such as the criminal complaints against Danzer management in Germany and Nestlé management in Switzerland – are based on local investigations. But if public institutions are not even rudimentarily willing or able to conduct such investigations, it is difficult for the affected persons and local organisations to develop a legal strategy.

b) Precarious security situation of the affected person and their organisations

The Danzer case illustrates that the safety of human rights defenders is closely linked to the political stability of a country. And, as mentioned, protest movements against economic projects that are problematic in terms of human rights is often criminalised and met with violence. Thus, in preparing a complaint, it must also always be determined whether the local actors involved are capable of adequately assisting plaintiffs and witnesses and of offering advice and hands-on support in matters of safety.

c) Limited resources

The aforementioned topics substantially influence the ability of victims of corporate injustice to conduct transnational legal procedures. But determining whether a lawsuit may be adequately prepared also depends on the logistic, expert and long-term financial capacities of those affected and of their local organisations. Rural communities are often unable to meet the demands of collecting evidence, researching the structure and management of the company in question and finding lawyers who can conduct transnational lawsuits. Local organisations therefore play a crucial role. They must be capable to a certain extent of taking care of the affected persons and guaranteeing them frequent updates on the progress of the proceedings. This can be difficult, especially for large victims' groups and for those who live scattered over a wide area. Such tasks require extensive personnel and logistical resources. Local organisations must also have sufficient human resources and expert qualifications to carry out the investigations necessary for a lawsuit. Local researchers need a good understanding of legal procedures and professional research standards to meet the legal standard of proof. Proof of

causation between environmental pollution and health damage from a company's emissions often requires expert opinions, which can be arduous to obtain. The opposing party will usually also call on its own experts. As a result, such cases can often descend into battles of expert opinion, which can quickly turn into a considerable drain on capacities and resources for the plaintiffs and their organisations.

Some of these problems occurred for instance in the work on a case against the Spanish energy company Gas Natural Fenosa in Guatemala, Nicaragua and in Colombia.

2. Legal obstacles in Germany

Once all practical obstacles for legal proceedings have been surmounted, the victims of corporate injustice must overcome various legal obstacles. The following issues focus on the German legal position.

a) Lack of preventive, transnational remedies

In a number of investigated cases, the health detriments feared due to mining projects had not yet occurred because the project was still at an exploratory stage. In the Addax case, it would have been in the interest of the local population to put the corporate project on hold and renegotiate the conditions of the lease contract before the continuation of the project led to the occurrence of actual damage.

It is, however, impossible to engage in preventive legal activity at a transnational level. The issuing of injunctions by European courts to stop corporate projects would represent an infringement of sovereignty of the other state and would not be permitted.

As a result, those affected rely on the national judicial system for preventative remedies. Where this does not provide appropriate legal recourse for interim relief, or rather, if the legal systems fail due to lack of resources or corruption, those affected are deprived of any right of action until the onset of the expected harm.

b) Lack of clear arrangements concerning the liability of subsidiaries and supplier companies

One of the basic legal standards of German corporate law is the corporate veil doctrine, according to which separate legal entities such as parent and subsidiary companies are liable only for their own infringements. Thus a parent company is, in principle, not liable for the obligations



● Power lines in Barranquilla, Atlantico, Colombia

Photo: Müller-Hoff/ECCHR

The Gas Natural Fenosa Case

● The Spanish energy group Gas Natural Fenosa produces electricity worldwide, operates power grids and distributes electricity to end consumers. The corporation is active through subsidiary companies, with various associations in nine Latin and Central American states. In countries such as Nicaragua, Guatemala and Colombia, Gas Natural Fenosa has largely monopolised the energy supply.⁴² Power grids in structurally disadvantaged regions are in

a particularly bad condition: lack of maintenance, voltage fluctuations and recurrent power failures frequently cause short circuiting, which in turn lead to fires. Furthermore, the poorly maintained power

will be continued on page 18

⁴² Jesús Carrión Rabasco, Nicaragua, Colombia y Guatemala. La Ir-Responsabilidad Social de Unión Fenosa, 2010.

continued from page 17

The Gas Natural Fenosa Case

lines also lead to electric shocks that can result in the deaths of local residents.⁴³ The victims accuse the Spanish energy group of neglecting the power grids in poorer neighbourhoods because the residents there are in a financially weak position.⁴⁴

Local organisations have considered suing the parent company in Spain through Spanish lawyers. So far, however, attempts to pursue these cases have failed. This was due to the perilous safety situation of the affected persons and their local lawyers, the local legal system not properly prosecuting the earlier cases and also the challenges in undertaking the evidential research required. In Nicaragua and Guatemala in particular, organising and taking action against human rights violations puts the lives of affected persons, local lawyers and the staff of local organisations at risk. In Guatemala, eight spokespersons of anti-globalization movements were killed in 2010 within six months of publicly speaking out against the corporate policy of Gas Natural Fenosa.⁴⁵

In investigating the legal responsibility of the Spanish energy corporation regarding deaths due to neglected power lines, it has proven difficult to determine individual justiciable cases. Deaths due to insufficiently maintained power lines occur randomly and forensic evidence showing a causal link between the company's negligence and the electro-

cution is difficult to obtain and requires technical evidence that can take a long time to compile.

Given that national law enforcement agencies do not work effectively, the methods and knowledge needed to guarantee legal documentation must be imparted to the affected local population. Attributing legal responsibility is problematic because different actors are in charge of different sections of the power grid and the lack of independent experts makes it difficult to clearly determine the technical causes of accidents. Moreover, Gas Natural Fenosa, like many transnational corporations, operates through a variety of subsidiary companies and subcontractors. Liability for the parent company in Spain is difficult to determine, even when an individual case can be established.

43 La Costa Caribe registra 529 electrocutados, 15 November 2013, accessible at: <http://www.elheraldo.co/region/la-costa-caribe-registra-529-electrocutados-132302>, last accessed: 13/5/2014.

44 Tribunal Permanente de los Pueblos, Sesión Madrid 2010, Caso contra la Unión Fenosa / Gas Natural a nivel Americano, elaborado por CEIBA Amigos de la Tierra Guatemala y Associació d'Amistat amb el Poble de Guatemala (Guatemala), Red Nacional de Usuarios de Servicios Públicos y el Centro de Estudios para la Justicia Social "Tierra Digna" (Colombia), Sindicato Mexicano de Electricistas (SME) (México), Centro de Derechos Humanos Tepeyac (Nicaragua), pp. 8, 9, pp. 25, 26.

45 Cúneo, Martín, Ocho activistas opuestos a Unión Fenosa asesinados en seis meses en Guatemala, 15 April 2010.

of a subsidiary – even if it holds 100 per cent of the subsidiary's shares – and even less so for breaches of the law by supplier companies. To ensure that European parent companies can be held accountable for human rights violations committed abroad by subsidiaries or suppliers, clear attribution regulations are required and companies should ideally have their own clearly defined due diligence obligations.

c) Unclear due diligence obligations of parent companies regarding subsidiaries and supplier companies

As illustrated in the Danzer case, there are certain provisions under existing laws which could be used to derive

due diligence obligations for parent companies to prevent human rights violations in subsidiary companies. Both criminal and civil law provides for due diligence obligations such as the duty to implement safety measures and organisational obligations. These can be interpreted to mean that companies must control and direct foreign subsidiaries in their management of human rights risks.⁴⁶

46 Saage-Maaß, Miriam, Arbeitsbedingungen in der globalen Zulieferkette. Wie weit reicht die Verantwortung deutscher Unternehmen?, in: Friedrich Ebert Stiftung, Internationale Politikanalysen, Berlin 2011, pp. 13-19; Grabosch, Robert, Rechtsschutz vor deutschen Zivilgerichten gegen Beeinträchtigungen von Menschenrechten durch transnationale Unternehmen, in: Ralph Nikol, Thomas Bernhard, Nina Schniederjahn (eds.), Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerecht, Baden-Baden, 2013, pp. 69 et seq.



Photo: Clean Cloth Campaign

• Textile factory in Dhaka, Bangladesh

The criminal complaints against the Nestlé managers and those in the Danzer case are thus based on the argument that the managers of the company in question were in breach of their duties and thus failed to exercise the due diligence expected of them.⁴⁷ In Britain, several claims for compensation have also been based on this legal argument.⁴⁸ British appeal courts held that parent companies, which crucially influence fundamental corporate policies, could also be held responsible for damages to health caused by the mistakes of subsidiary companies. However, the applicability of due diligence obligations existing in German law is presently not legally secured in cases of transnational activity. Part

of the problem is the lack of legal provisions concerning the implementation of the standards of the UN Guiding Principles on human rights risk assessment and adequate measures to prevent or reduce human rights violations.

47 ECCHR / Misereor, Special Newsletter On The Criminal Complaint Against Nestlé In The Case Of The Murdered Colombian Trade Unionist Luciano Romero, Berlin 2012, pp. 12-14; Saage-Maaß, Miriam, Die Menschenrechte: Postkoloniale Agenda oder Mittel der Emanzipation? Soziale Bewegungen und der Gebrauch strategischer Menschenrechtsverletzungen, in: Perspektiven des demokratischen Sozialismus. Zeitschrift für Gesellschaftsanalyse and Reformpolitik, Issue 2, 2013, pp. 70-79.

48 Policy is informed by the decision of the England and Wales Court of Appeal *Chandler v Cape plc*.



● *The Kabra village in Sudan, flooded by the Merowe Dam*

Photo: Askouri/ECCHR

The Lahmeyer case: Development at any human cost

● The German company Lahmeyer International was responsible for planning and supervising the construction of the Merowe dam in North Sudan and for managing its operations.⁴⁹ Lahmeyer commenced construction of the dam despite the fact that resettlement plans for the affected population – as laid down by international World Bank standards – had not yet been fully negotiated. By the time the hydropower plant’s first turbines at the dam went into operation, the Sudanese government had still not reached an agreement with the affected population groups. The construction project progressed under the direction of Lahmeyer, and in 2008, flooding forced the residents to flee their villages.

Between 4,700 and 10,000 families have been affected by the flooding, houses and crops were destroyed, as were livestock and other possessions.⁵⁰ In May 2010 several affected persons and their representatives, together with ECCHR, filed a complaint against two company managers at the department of public prosecution in Frankfurt am

Main.⁵¹ The resultant preliminary proceedings are currently ongoing. The representatives of the northern Sudanese families declined, however, to lodge civil claims for compensation against the German company though this would legally have been an option. The representatives said they were unable to make a selection of plaintiffs without threatening the social cohesion of the affected community. A further blow was dealt when the affected persons and the organisations involved considered it practically impossible to cover the financial risk of a compensation claim for 4,700 families.

49 Lahmeyer International, Operation and Maintenance of Merowe Hydropower Plant, Sudan, <http://www.lahmeyer.de/en/projects/detail/article/operation-and-maintenance-of-merowe-hydropower-plant-sudan.html>, last accessed: 16/5/2014.

50 Report of the Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar, UN Doc. A/HRC/11/14, June 2009 marginal nos. 43, 43.

51 ECCHR, Case Report; The Lahmeyer Case – Construction regardless of the consequences, as of: 21/10/2013.

Whether and to what extent legally binding due diligence obligations exist for the control of human rights in the supplier companies of German and European companies such as E.ON remains entirely unclear. If the due diligence obligations for supplier companies were clearly regulated by law, victims would be in a position to put forward clear demands on the companies in question. Companies like E.ON would in turn have more legal certainty regarding how to conduct their corporate affairs.

d) Insufficiently protected legal interests under civil law

Under the existing civil law system, health, life and property are valued above all other legal interests. Unless the destruction of livelihoods and subsequent displacement or inhumane labour conditions can be subsumed under one of these three legally protected goods, it won't be possible to launch action under civil law. It is almost impossible to address the destruction of traditional territories or water shortages and pollution caused by plantations under the current system. In legal terms, these problems often do not represent injuries to property or damage to health, despite their grave and real impact on the lives of the affected population. Similarly, employees who work extreme overtime hours without adequate remuneration and leave entitlements cannot invoke the violation of a statutory rule unless they can prove direct damage to health.

e) No complaint mechanism for large victims' groups and high financial risk

Existing laws do not currently provide for group action. This means that every affected person must take individual legal action against any infringement of their rights, even if many hundreds of people have suffered similar harm in the same case. If the plaintiffs cannot form a group, individual legal expenses will incur for each and every plaintiff. Logistically and financially, law firms are only capable of representing a handful of plaintiffs. For some victims' groups, it may be difficult to understand why from the thousands of affected families only some are selected to act as claimants. Affected persons thus sometimes refrain from filing civil complaints in order to prevent internal conflicts within the community, as occurred for instance in the Lahmeyer case.

Compensation claims under civil law involve substantial costs. Non-European plaintiffs must deposit the

full legal and procedural costs as soon as they file a civil lawsuit. While legal aid does not, in principle, preclude foreign plaintiffs, the risk remains that in the case of a negative outcome they must pay the costs of the winning party. Hence, the risk of litigation costs for compensation complaints amounting to €10,000 would mean payments of approximately €4,000 in the first instance and about €5,000 in the second.⁵² While this may be an affordable risk for two to five plaintiffs and the organisations and lawyers supporting them, for several hundred or thousands of affected people – as in the Lahmeyer case – it is almost impossible to fund such proceedings unless the individual actions can be pooled in a collective action to reduce the costs.⁵³

f) No criminal law for corporations

In Germany, companies are not liable for prosecution as such and can at most be issued with a monetary fine for breach of administrative rules. The Danzer case has shown how unsatisfactory this is. Even when individual responsibility in criminal law can be attributed to individual company managers who were specifically responsible for the company's business affairs in the Congo, the individual transgressions can still be traced back to corporate policy and show that the company organisation as such has failed. That internal corporate structures have contributed to the complicity of an employee in human rights violations is a grievance that cannot be appropriately prosecuted if the company itself cannot be held accountable.

In terms of its corporate criminal legal system and academic debate on the subject, Germany is currently in a rather isolated position. The concept of corporate criminal liability has been advocated by the European Council and jurisprudential studies, and in recent years the concept has been incorporated into the legal systems of several European countries. These include Spain (2010), Austria (2005) and Switzerland (2003).⁵⁴

52 Cf. Court Fees Law (Gerichtskostengesetz, GKG) and Law on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz, RVG)

53 Consequently, if 500 individual plaintiffs each lodged a compensation claim of € 10,000, it would incur risk of litigation costs amounting to approx. € 2 million. If, however, the same 500 individual plaintiffs filed a complaint for total of € 5 million in compensation, the risk of litigation costs would amount to just ca. € 160,000.

54 Corporate criminal liability exists in the following European countries: Belgium (1999), Denmark (1996), England (common law), Finland (1995), France (1992), The Netherlands (1976), Norway, Austria (2005), Poland (2003), Switzerland (2003) and Spain (2010).

Law Reforms: Political recommendations

● The current difficulties and issues outlined above – in particular the political parameters, local safety situation for human rights defenders and the limited capacities of victims’ organisations – cannot be resolved through law reform in Germany. Nevertheless, the German government can attend to its extraterritorial state obligations and, in accordance with the UN Guiding Principles, provide effective legal means in transnational cases for those whose human rights have been violated by German companies.⁵⁵

1. Legal provisions on the extent and content of corporate due diligence obligations for subsidiary and supplier companies

German legislation should explicitly extend the existing due diligence obligations and the duty to implement the safety precautions of parent companies to avoid human rights risks. The content and extent of the obligation to monitor foreign subsidiary and supplier companies regarding their human rights risk management should be clearly defined.

2. Compatibility with the Rome II Regulation

Attention must be paid to ensuring that any reform of German law is also applicable in transnational cases. The Rome II Regulation (EC) No. 864/2007 came into effect in early 2009, establishing that for transnational civil damage claims under tort law, the applicable law shall be the law of the country in which the violation/damage occurred. For the cases discussed here, this implies that as a rule foreign and not German law would be applicable to compensation claims brought against

German companies for their overseas human rights violations. The legal provisions of corporate due diligence obligations regarding human rights should be set out so as to be applicable to the exceptions in the Rome II Regulation.⁵⁶

3. Extended catalogue of legal interests for compensation laws

The catalogue of legal interests in civil law countries should be extended to include the conservation of fundamental natural resources such as drinking water as well as protection against inhumane labour conditions. This would provide plaintiffs with a basis for claims where environmental damage, for instance the contamination of water and soil, makes survival in their traditional environment difficult, but they have not suffered demonstrable injuries to property or damage to health. It would also enable those working under inhumane labour conditions, but not yet suffering bodily harm, to sue for damages. Here, too, it must be ensured that corresponding regulations in transnational cases can be applied as exceptions to the rule of the Rome II Regulation.

4. Easing the burden of proof

For those affected by corporate injustice, the complex organisational and technical procedures and decision-making processes within a company are difficult to determine and prove. As under the US and some European legal systems, German law should allow affected parties to secure the disclosure of relevant information from the opposing party through preliminary proceedings or another form of discovery.

5. Introduction of group actions

In cases where large groups of people have suffered the same injustice, it should be possible to group individual complaints together. These should not be confused with class actions under US law. In group actions, each plaintiff would still be represented as an individual party in the proceedings, but the complaint would be pursued jointly, thus reducing costs and risks.

55 For extraterritorial obligations cf.: Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights; Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation*, 2006; Bernstorff, *Extraterritoriale menschenrechtliche Staatenpflichten and Corporate Social Responsibility: Wie weit geht die menschenrechtliche Verantwortung des Staates für das Verhalten eigener Unternehmen im Ausland?* 49 *Archiv des Völkerrechts* 2011, pp. 34-63.

56 For instance, Article 16 or 17 of the Rome II Regulation.

6. Corporate criminal law

Corporate criminal liability should be introduced. Alternatively, the possibilities for sanctions within the scope of the Act on Regulatory Offences (Ordnungswidrigkeitengesetzes, OWiG) should be extended to companies whose employees commit crimes for the benefit of the company. The catalogue of sanctions could include reprimands and cautions, exclusion from public funding, compensation/indemnification, publication of the decision on violations of the OWiG as well as business restrictions and, as ultima ratio, the dissolution of legal persons. The affected persons should also be given the possibility to set such regulatory proceedings in motion. Furthermore, it might be possible to extend the public aspect of proceedings prior to the imposition of a fine, for instance by subjecting the company to public hearings (currently the company must merely be given the opportunity to comment; § 55 OWiG).

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