



The European Center for Constitutional and Human Rights (ECCHR)

ECCHR is an independent, non-profit human rights organization that works primarily through legal means to protect and enforce human rights. Together with partners around the world the organization engages in strategic litigation, by which it initiates, develops and supports exemplary cases in order to hold state and non-state actors accountable for human rights violations. ECCHR has recently submitted a criminal complaint (known as a communication) against Colombia to the International Criminal Court in The Hague alleging that the Colombian state is denying women the protection against sexualized crimes and access to justice that it is obliged to guarantee under national and international law. When it comes to multinational companies involved in sexual and gender-based violence ECCHR aims to tackle this issue by using international and national law to hold companies accountable before criminal or civil courts.

Danzer – Criminal Complaint in Germany

May 2011: attack of the village Bongulu in DR Congo by local security forces, hired by Siforco S.A.R.L. – a subsidiary of Danzer Group: arbitrary arrests, physical abuse of several villagers and rape of women and girls following protests by villagers

April 2013: criminal complaint against Danzer CEO in Tübingen, Germany by ECCHR in cooperation with Global Witness: accusation of aiding and abetting crimes against sexual self-determination through omission
ECCHR, Danzer, Criminal Complaint and, ECCHR, Danzer Special Newsletter, April 2013, available under: www.ecchr.de/danzer-en.html

HudBay Minerals – Lawsuit in Canada

January 2007: police, military and security personnel of the Compañía Guatemalteca de Níquel (CGN) forcefully removed Mayan Q'eqchi' families from their homes during land conflicts; CGN is a wholly-controlled subsidiary of Skye Resources, which later amalgamated with HudBay Minerals: shootings, murder and gang-rape of eleven women

2010/2011: three related lawsuits in Ontario courts filed by Q'eqchi' members, represented by Toronto-based law firm Klippensteins Barristers and Solicitors: compensatory damages and punitive damages
July 2013: judgment by Superior Court of Ontario that suit should proceed in Canada; trial expected in 2-5 years

Ontario Superior Court of Justice, Choc vs. HudbBay, 22 July 2013, pp. 8-15 (Ontario Superior Court, Choc vs. HudbBay, 2013), available under: www.chocversushudbay.com/wp-content/uploads/2010/10/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf [last accessed on 8 May 2015].

Monterrico Metals – Lawsuit in UK

August 2005: Peruvian police, assisted by mine employees and mine security guards, detained 33 people during a peaceful

protest of the local community against the Rio Blanco copper mine – a subsidiary of Monterrico Metals Plc.: 5 people shot, torture, sexual abuse of two women

June 2009: Peruvians represented by London-based law firm Leigh Day filed lawsuit in the English High Court: compensation from Monterrico and Rio Blanco Copper SA: the allegation of rape was not made in the litigation.

July 2011: case settled after plaintiffs accepted Monterrico's compensation payment.

Business and Human Rights Resource Center, Monterrico Metals, available under: <http://business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0#c18018>

African Barrick Gold's North Mara Gold Mine, Tanzania

Several incidents in recent years of excessive force against villagers by police and mine security guards: killings, injuries, sexual violence against women

2013/2011 more than 200 people interrogated in an investigation of the sexual assault allegations: women received remedy packages. 2013: villagers represented by Leigh Day filed lawsuit in the English High Court seeking compensation for killings and injuries: case settled in February 2015

Business & Human Rights Resource Center, African Barrick Gold lawsuit (re Tanzania), available under: <http://business-humanrights.org/en/african-barrick-gold-lawsuit-re-tanzania>

Barrick Gold – Porgera Joint Venture, Non-Judicial Proceeding in Papua New Guinea

Since 2006: allegations of environmental damage, killings and gang rapes of hundreds of local women by police and mine security guards

2011/2012: After years of denial, Barrick has acknowledged the allegations of rapes and launched an investigation involving an estimated 200 or more victims: women received remedy packages; legal waiver for the old incidents; Porgera Remedy Framework, a non-judicial process organized by the company to hear claims of sexual violence

April 2015: out-of-court settlement after 11 women prepared to file a lawsuit in the US

Earthrights International, www.earthrights.org/legal/factsheet-abuse-barrick-gold-corporation

In cooperation with the Heinrich-Böll-Stiftung

HEINRICH BÖLL STIFTUNG

30 June 2015

European Center for Constitutional and Human Rights (ECCHR) e.V.

Zossener Str. 55-58, Aufgang D

D - 10961 Berlin

www.ecchr.eu



POLICY PAPER

Litigation (im)possible? Holding companies accountable for sexual and gender-based violence in the context of extractive industries

ANNA VON GALL

In mining but also in other extractive industries, companies headquartered in the EU or North America are often implicated in serious human rights violations such as forced evictions or the destruction of livelihoods. Resource extraction by multinational companies disrupts the social structures and norms of local communities.

WHY DISCUSS SEXUAL AND GENDER-BASED VIOLENCE (GBV) IN THE CONTEXT OF RESOURCE EXTRACTION?

The extraction of high-value natural resources are known to trigger, escalate and sustain violent conflicts, as extractive industries are based on a model that is inherently violent – not only towards ecosystems, but also towards workers, communities and women. Conflicts between companies and local communities frequently escalate into violent repression by state or private security forces. Peaceful protesters are seriously injured, illegally detained, tortured and often raped or sexually abused. Although it is known that these conflicts involve gender-specific forms of violence such as sexual harassment¹, sexual abuse and rape, human rights litigators rarely focus on the relationship between extractivism, sexual and gender-based violence and the potential of litigation to end impunity for these crimes.

¹ SEXUAL VIOLENCE COVERS BOTH PHYSICAL AND NON-PHYSICAL ACTS WITH A SEXUAL ELEMENT. THE CEDAW COMMITTEE DEFINES GENDER-BASED VIOLENCE IN ITS GENERAL RECOMMENDATION NO. 19 AS "VIOLENCE THAT IS DIRECTED AGAINST A WOMAN BECAUSE SHE IS A WOMAN OR THAT AFFECTS WOMEN DISPROPORTIONATELY". FURTHER, GENDER-BASED VIOLENCE IS DEFINED AS INCLUDING ACTS THAT INFLECT PHYSICAL, MENTAL OR SEXUAL HARM OR SUFFERING, THREATS OF SUCH ACTS, COERCION AND OTHER DEPRIVATIONS OF LIBERTY. THE SAME RECOMMENDATION SPECIFIES THAT GENDER-BASED VIOLENCE MAY CONSTITUTE A VIOLATION

LITIGATION (IM)POSSIBLE? – COMBATING IMPUNITY FOR SEXUAL AND GENDER-BASED VIOLENCE IN THE CONTEXT OF EXTRACTIVE INDUSTRIES

In general, sexual and gender-based violence is rarely or poorly investigated. Only very few direct perpetrators or responsible managers have therefore been brought to justice for such crimes. This lack of access to justice for women affected by human rights violations has various causes: the lack of a gender perspective in methods of obtaining evidence and in the identification and characterization of the victim, as well as a limited expertise on the part of judicial staff in dealing with and investigating such crimes. This includes the existence of prejudices, gender stereotypes and stigmatization in the judicial process and in the community, as it interferes with the rights of the survivors, in particular the right not to be revictimized. The absence of adequate rules and laws and poor social conditions in the areas of resource extraction render it difficult to provide affected women with adequate legal, physical and social protection.

The persistence of such impunity has a devastating impact. As long as these crimes remain unpunished, women keep silent, and violations will go on as neither the direct perpetrators nor the companies involved have to fear consequences.

OF WOMEN'S HUMAN RIGHTS, SUCH AS THE RIGHT TO LIFE, THE RIGHT TO EQUAL PROTECTION UNDER THE LAW, THE RIGHT TO EQUALITY IN THE FAMILY OR THE RIGHT TO THE HIGHEST STANDARD ATTAINABLE OF PHYSICAL AND MENTAL HEALTH. THIS POLICY PAPER ACKNOWLEDGES THAT SEXUAL VIOLENCE CAN BE A FORM OF GENDER-BASED VIOLENCE, BUT FOCUSES ON THE SPECIFIC CRIMES OF SEXUAL VIOLENCE. SEE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW COMMITTEE), GENERAL RECOMMENDATION NO. 19, VIOLENCE AGAINST WOMEN, PARAS. 1 AND 7.



This paper shall highlight the possibilities for holding companies accountable before criminal or civil courts for sexual violence committed in the context of their activities in the extractive industries. In fact, there are a few examples of companies that have been party to such violence and that have been sued by the survivors in the courts of the company's legal venue. For example, Guatemalan women are suing the HudBay Mineral Inc. mining company in Canada², while women from the Democratic Republic of Congo are witnesses and represented as *partie civile* in criminal proceedings against the Swiss-German logging company Danzer AG and its Congolese subsidiary.³

Testifying in front of a judge or another judicial authority can be an empowering process for female survivors of sexualized violence. As long as they are questioned in an appropriate way, this can be a space for the women's voices and their specific experience of violence and injustice. Some female survivors also see this as an opportunity to organize their own resistance against patriarchal structures within their own community and against the companies from the global North – they are thus no longer objects of a conflict between the communities and the companies, but become subjects of their own fight for justice.

WHAT ARE THE CHALLENGES OF LITIGATION?

Criminal or civil proceedings can take place either in the country in which the crimes occurred or the country in which the involved company is headquartered. While host-state litigation is of major importance, home-state litigation also has its role: EU parent companies whose subsidiaries or suppliers are involved in crimes should also be held to account before courts in Europe, i.e. in the same place the relevant decision-makers within the companies as well as their shareholders and consumers are based. Beside the practical challenges mentioned above, the analysis of the four cases indicates two specific challenges in the context of sexual crimes:

(1) the objective criteria of legal liability – the question of duty of care of the headquarters' management (in civil and criminal law) and (2) the mental element in criminal law: apart from the fact that it is difficult to prove that the commission of crimes was foreseeable for the company staff, in the context of sexual violence there are additional challenges when it comes to the question of strict liability or negligence.

1 Duties of care of headquarters' management

One of the challenges of litigation against the companies involved in crimes of GBV is that there is currently no clear international consensus on whether transnational corporations have a duty to ensure that third parties are not negatively affected by their activities, which would create legal liability for damages suffered as a consequence of human rights violations. Often it will not be possible to prove that the headquarters' management was actively involved in the crimes in question or that it actually commissioned the crimes. Therefore legal theories need to be relied on in both criminal and civil proceedings against the parent company which establish an obligation on the headquarters' management to take reasonable measures to prevent any involvement in sexualized violence on the part of its subsidiary.

Such legal theories are developing, but they are not yet fully established, apart from UK civil jurisprudence. On the basis of one of these cases (*Caparo v. Dickmann and Chandler v. Cape Plc.*) it can be alleged that the defendant corporation assumed a responsibility to protect third persons from harm caused by its subsidiary. This omission to act is unlawful if it satisfies three requirements to justify the attachment of a duty of care: the harm must have been reasonably foreseeable, a close and direct relationship of proximity must have existed between the parties, and it must be »fair, just and reasonable to impose liability.«⁴ However, too often, sexual violence is not to be seen as a

² ONTARIO SUPERIOR COURT OF JUSTICE, *CHOC VS. HUDBAY*, 22 JULY 2013, PP. 8-15 (ONTARIO SUPERIOR COURT, *CHOC VS. HUDBAY*, 2013), AVAILABLE UNDER: WWW.CHOCVERSUSHUBBAY.COM/WP-CONTENT/UPLOADS/2010/10/JUDGMENT-JULY-22-2013-HUDBAYS-MOTION-TO-STRIKE.PDF [LAST ACCESSED ON 08 MAY 2015]. FOR FURTHER COMPREHENSIVE INFORMATION SEE: KLIPPENSTEINS, BARRISTERS AND SOLICITORS, *LAWSUITS AGAINST CANADIAN COMPANY HUDBAY MINERALS INC. OVER HUMAN RIGHTS ABUSE IN GUATEMALA*, AVAILABLE UNDER: WWW.CHOCVERSUSHUBBAY.COM.

³ ECCHR, DANZER, CRIMINAL COMPLAINT AND ECCHR, DANZER SPECIAL NEWSLETTER, APRIL 2013, AVAILABLE UNDER: WWW.ECCHR.DE/DANZER-EN.HTML.

⁴ HOUSE OF LORDS, *CAPARO INDUS. PLC. V. DICKMAN*, [1990] 2 A.C. 605; [1990] 2 W.L.R. 35 (H.L.).



risk that could have been foreseen by the headquarters' management as they consciously disregard information regarding the commission of such crimes. However, in one of the cases (*Hudbay*), it has been acknowledged that if facts are presented that show that such violence was frequently used in the past and that there was a general risk that violence could occur, it would be also reasonably foreseeable to the parent company. Sexual violence is not a private issue anymore and parent companies must have a duty to prevent or repress the commission of such crimes.

2 In cases of crimes committed by local staff of a subsidiary it is challenging to establish the liability of a manager of the parent company, because it is difficult to prove a direct intent or conditional intent in the sense that the defendant at least consciously accepted the risk of crimes being committed. It is much more likely that it will be established that the corporate defendant acted negligently. Many jurisdictions, however, do not legally recognize negligence in the context of sexual coercion and rape. Consequently, managers of parent companies cannot be held liable for rape if it is not possible to prove actual knowledge and would thus only face charges of negligently causing bodily harm.

SOFT LAW MECHANISMS AND INTERNAL GRIEVANCE MECHANISMS (IGM) AS AN ALTERNATIVE?

Apart from legal proceedings, survivors of SGBV can use international Soft Law Mechanisms provided by the OECD Guidelines on Multinational Corporations or company-based Internal Grievance Mechanisms (IGM). Both mechanisms have some advantages: lower thresholds of evidence need to be provided to »prove« the case; the cultural circumstances of the community can be reflected in the negotiations and outcome (reparations). The OECD Guidelines' complaint procedure is aimed at mediation between the parties with the goal of finding a common agreement but

doesn't provide any robust sanctioning mechanism, nor are agreements reached in mediation enforceable. In reality, unfortunately, it seems that IGM and OECD complaint procedures usually handle complaints in the best interests of the company without really addressing the sufferings of survivors of sexual violence adequately. Furthermore, the provision of legal advice to the survivors must be guaranteed before they sign IGM or OCED settlements.

WHAT NEEDS TO BE DONE?

Many international treaties, courts and UN institutions have acknowledged the existence of GBV committed by state and private actors. However, the extent of such violence is still not adequately reflected in the number of court convictions. Neither national legal systems nor their enforcement authorities take this international debate into account. Judicial staff is often inadequately informed about a certain conflict or unwilling to explicitly investigate sexual violence. In addition the legal standards of a corporations' liability regarding human rights risks are not entirely clear. It still remains unclear to what extent companies are legally obliged to exercise due diligence related to the observance of human rights by their subsidiaries and suppliers. 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 the ones presented in this paper would in turn have more legal certainty regarding how to conduct their corporate affairs. It is important to note that the CEDAW Committee in its Recommendation No. 28⁵ and No. 30⁶ highlighted the responsibility of states to adopt any measures necessary for the prevention of violence against women. This relates to state acts as well as activities of non-state actors and explicitly includes the activities of companies that operate extraterritorially. It is now up to the state to take appropriate measures to eliminate discrimination by national enterprises operating extraterritorially.

⁵ CEDAW COMMITTEE, GENERAL RECOMMENDATION NO. 28 ON THE CORE OBLIGATIONS OF STATES PARTIES UNDER ARTICLE 2 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, CEDAW/C/GC/28, 16 DECEMBER 2010, AVAILABLE UNDER: [HTTP://DACCESS-DDS-NY.UN.ORG/DOC/UNDOC/GEN/G10/472/60/PDF/G1047260.PDF?OPENELEMENT](http://DACCESS-DDS-NY.UN.ORG/DOC/UNDOC/GEN/G10/472/60/PDF/G1047260.PDF?OPENELEMENT) [LAST ACCESSED ON 18 JUNE 2015].

⁶ CEDAW COMMITTEE, GENERAL RECOMMENDATION NO. 30 ON WOMEN IN CONFLICT PREVENTION, CONFLICT AND POST-CONFLICT SITUATIONS, CEDAW/C/GC/30, 1 NOVEMBER 2013, AVAILABLE UNDER: [HTTP://TBINTERNET.OHCHR.ORG/LAYOUTS/TREATYBODYEXTERNAL/DOWNLOAD.ASPX?SYMBOLNO=CEDAW/C/GC/30&LANG=EN](http://TBINTERNET.OHCHR.ORG/LAYOUTS/TREATYBODYEXTERNAL/DOWNLOAD.ASPX?SYMBOLNO=CEDAW/C/GC/30&LANG=EN) [LAST ACCESSED ON 18 JUNE 2015].