

MAKING CORPORATIONS RESPOND

to the damage they cause:

Strategic approaches to compensation and corporate
accountability



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INTRODUCTION

Transnational corporate projects often affect the living conditions of hundreds or thousands of people. They can bring positive changes into a region or country, for instance jobs and revenue as well as contributions to the community infrastructure, such as the building of roads, schools or hospitals. Sometimes, working conditions in transnational corporations are better than in small local businesses. Many negative impacts, however, have also come to light. The contamination of water and soil, loss of land, destruction of sacred sites, unemployment, security issues, displacement and the destruction of social and economic networks are some of the consequences which lead to the destruction of livelihoods and constitute grave violations of basic human rights. When communities undertake to organize and defend their rights against the negative impacts of business operations they often experience that there are inherent power imbalances between a community and a transnational corporation. Therefore, it is important to redress this imbalance by designing a strategy from as early a stage of the investment project on as possible, in order to prepare for the possible obstacles the community may face in any of its dealings with the company.

In cooperation with “Brot für die Welt” (Bread for the World) and MISEREOR, the European Center for Constitutional and Human Rights (ECCHR) organizes a series of workshops in Latin America, Africa and Asia with and for human rights organizations and affected communities who work on the impacts of transnational corporations. The idea is to jointly explore further possibilities for human rights action and to strengthen the efficiency of human rights protection. As a result of these workshops, one criminal complaint against the Swiss company Nestlé has been presented in Switzerland, further cases are under preparatory investigation and a number of consultations have been sought to guide future strategic avenues for local organizations.

In June 2011, representatives from 21 non-governmental organizations (NGOs) and communities from 13 African countries met in Douala, Cameroon, to discuss cases of transnational corporate involvement in human rights violations and possibilities for legal accountability. Their joint analysis showed that various attempts are made to mitigate the harm through compensation. Compensation for harm can be one important step on a longer road towards social justice for those affected, given that the destruction of livelihoods often leaves those affected in a situation of increased poverty or even misery which seriously limits their possibilities to act, to mobilize and to articulate themselves in order to defend their rights and interests. However, often the implementation of compensation agreements is unsatisfying, unsustainable, discriminatory or unjust, regardless of whether they are defined by law, by contract, or by individual or collective negotiations. This may be because:

- communities have not been informed fully and in advance of an investment project; women and other vulnerable groups are disadvantaged in their access to opportunities for participation and development or are not included in the consultation and negotiation processes;
- monetary compensation is found to be inadequate in contexts where livelihoods are at risk of being destroyed and where money is not the main means of driving local economies. It can exacerbate existing inequalities in the society if it is not distributed in ways that consider the gender, class, ability, and the likely access to and control over the compensation that vulnerable people will have; corrupt power structures can also divert or diminish the money paid;
- undue pressures exerted against affected people, such as harassment, physical or sexual assault or detention dissuade communities from upholding their claims;
- conflicts are provoked or fuelled within affected groups to damage their cohesion and organizational strength.

There are a number of factors, however, that communities and affected groups can influence and that will improve their chances of achieving better results in their negotiations for compensation.

In this brochure, we will focus on various possible litigation and out-of-court strategies communities could use in the face of human rights violations by transnational corporations. A particular emphasis lies on the objective of compensation. Chapters 3, 4 and 5 will focus on transnational litigation against corporations due to human rights violations, an instrument which is still at the beginning of its development and which compared to other instruments - such as campaigning or advocacy - is also less well known and underused in practice among human rights defenders,

victims' groups and NGOs. There are a few famous examples of successful legal actions, such as the group action in the UK against oil trading company Trafigura for damaging the health of thousands of Ivorian citizens through illegal disposal of hazardous waste¹, which was resolved through out-of-court settlements. However, taking on litigation against multinational companies bears several challenges. It requires a lot of human and financial resources as well as precise strategizing, and it may take several years until any results are achieved. Like any human rights defense strategy it can also lead to counter-actions, such as counter-claims for defamation or libel.

Nevertheless, bringing good cases to court and persevering with them until a final judgment is received helps to develop national and international law and jurisprudence on corporate accountability, as such cases can be used as a model to follow or - where a court rejects a claim - they might show how current law does not provide adequate remedies for victims of human rights violations and that there is a need for legislative action.

What litigation against companies can achieve:

Muriel Mining Colombia: In May 2012, the Constitutional Court of Colombia upheld a suspension order against the Muriel Mining Corporation's open-pit project in territories collectively owned by indigenous and Afro-Colombian communities and protected as Forrestral Reserve in the North of the country.

Uranios del Sur Argentina: In February 2011, the Supreme Court of Jujuy province in the North of Argentina decided to halt an open-pit Uranium mining project of a subsidiary company of Swiss-based Uranio AG until the company could show that there is no possibility that the work carried out in the area will cause contamination or environmental damage.

Chevron Ecuador: An 18 billion dollar judgment against Chevron was upheld in February 2012 by the Intermediate Appellate Court in Ecuador, favoring the plaintiffs from indigenous communities who for decades have suffered the negative health and environmental impacts of massive oil exploitations in the jungles of Eastern Ecuador.

Anglogold Ashanti Ghana: The High Court of Ghana has granted compensation of close to €30,000 to 45 victims of forced displacement at the Iduapriem Mine, owned by Anglogold Ashanti.

Source: information on all cases can be found at: <http://www.business-humanrights.org>

CASE STUDY What litigation against compa- nies can achieve

The best route to pursuing adequate and fair compensation - whether litigation, out-of-court negotiations between the opposed parties or mediation - depends on many factors which apply differently in each case. Whether one particular approach is preferable cannot be answered by a simple 'yes-or-no' answer and none of these approaches are completely separate from each other. **Litigation will often pass through a mediation phase; negotiations can develop into litigation and vice versa. Indeed, using an integral approach that considers the interplay of all these options will considerably strengthen a collective rights defense project.**

>>> *Negotiations can develop into litigation and vice versa.* <<<

It became clear during the workshop in Douala: the basic ingredients that make a positive outcome more likely are similar, independent of the avenue chosen. Be it for litigation or negotiation,

- a strong coherence among those who collectively defend their rights,
- a clear understanding of what they need to achieve and
- a solid basis of detailed and corroborated information

will enhance the chances of achieving a satisfactory and fair outcome. With these elements in mind, this brochure will:

- ✓ analyze common scenarios of human rights violations involving transnational corporations (**Chapter 1**);
- ✓ develop steps to be considered by the communities prior to operations (**Chapter 2**);
- ✓ give an overview of international possibilities for litigation and soft law (**Chapter 3**);
- ✓ explain the basic legal elements that should inform the research and investigation process for a compensation claim (**Chapters 4**);

¹ <http://business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>, last access: 19 June 2012.

- ✓ illustrate how a claim can be converted into a strategic litigation project, which could yield longer-term impacts beyond the individual case (**Chapter 5**);
- ✓ conclude with a set of recommendations
- ✓ and provide an annex with a selection of relevant organizations and online materials.

This brochure cannot offer a comprehensive instruction manual for a transnational litigation case and cannot replace a legal consultation on any specific case.

What this brochure offers and adds to existing tools and materials (see Annex IV for a selection) is that:

- it **condenses the combined experience and knowledge** of communities, activists and legal experts from 22 countries from the global North and South;
- it **increases legal literacy** of human rights defenders and those who support them in that it addresses essential legal technicalities in a non-technical language;
- it **integrates and interconnects legal questions** with the broader context of human rights struggles, adopting thereby an activist perspective and a strategic approach;
- it **enables the reader to identify possible lines of (legal) action** and the prospects and challenges they might offer.

CHAPTER 1

Typical human rights violations and companies' responses - An overview

This chapter analyzes from a human rights perspective common scenarios which can arise from the operations of transnational corporations in the Global South, as well as frequent responses by those corporations to the alleged human rights impacts.

1.1. How company projects can clash with communities' rights and interests

Many of the substantive cases that human rights organizations work on concern extractive industries such as mining, gas or oil exploitation, and agribusiness, such as palm oil or other plantations for the production of agrofuels, or the growing of other cash crops for export. All these cases deal with companies' need to access large areas of particular territories that are in demand for the richness of their soil, water or subsoil resources. However, such territories are often inhabited or used for agriculture, fishing or small-scale mining by local people. Further problems frequently arise around a broad range of human rights, including issues of labor rights and collective bargaining.

1.1.1. Rights in relation to land

A company interested in exploiting surface or subsoil resources will seek either property rights or a license to use and exploit large territories. Where individual families or communities have recognized land titles, they might be asked to rent out or sell the land. Yet, often, people are not well informed and so they do not have fair negotiation power. So, the contracts negotiated may be very detrimental to them in the medium or long run, as by losing access to their land and housing, not only will their living costs increase, but their practical possibilities to earn an income will also be reduced if adequate alternative land is not offered. Rent or compensation payments will frequently be insufficient to cover this. Even worse off are traditionally disadvantaged social groups such as indigenous peoples, landless people and women, who often do not have recognized property or ownership.

Case study: ADDAX agrofuel production in Sierra Leone

Addax Bioenergy Sierra Leone and its Dutch mother company Addax & Oryx Holdings BV, leased large parts of land to grow sugar cane for agro fuel export to the EU.

The long-term benefits of the project are very unclear and there are serious risks that it will damage livelihoods. Yet, there is little or no awareness in the communities about the negative implications of the lease. The communities are extremely dependent on natural resources such as water and wood, but according to the land lease agreement the company has the exclusive right over forests, villages and rivers. Addax can limit or deny access to natural resources and can change water courses.

An estimated 13,617 people are affected by this agreement. Compensation payments are insufficient; the contract does not oblige the company to pay for any injurious alterations in land conditions or environmental damage. The lease agreements are negotiated with the chiefs of the village; this does not give individual land-owning families a fair opportunity of equal participation. The majority of people are illiterate and have little awareness of their rights. Furthermore the disputes settlement court is not accessible for them as the agreement stipulates an arbitration tribunal in London.

Source: SilNoRF, Independent Study Report of the Addax Bioenergy Sugarcane-to-Ethanol Project in the Makeni Region in Sierra Leone, 2011, available online at: <https://sites.google.com/site/silnorf/news>, last access: 19 June 2012.

CASE STUDY **ADDAX agrofuel** **production in** **Sierra Leone**

Relevant human rights: right to land, property, decent living, housing, work, non-discrimination (for specific provisions see Annex I)

1.1.2. Forced displacement and resettlement

Through forced displacement people lose their existential basis and find themselves at places of refuge without secure or decent housing, unemployed, without any source of income and often even without access to safe water, food or healthcare. Displacement and eviction often lead to the destruction of social networks that might have provided for emergency assistance in cases of need, and displaced people frequently suffer social isolation and discrimination.

Organized displacement in the form of resettlement is often unsatisfactory, as new living conditions can be significantly inferior to those previous. Social networks and structures are also destroyed if communities are not regrouped in the same units or constellations as before. Further concerns often revolve around access to suitable arable land, transport and infrastructure. Resettlement can also mean loss of personal security for women if, in order to access food, fuel, water, or employment, they have to travel longer distances, at dangerous times of day or night, or along routes that expose them to threats of physical and sexual violence.

Relevant human rights: right to work, water, food, health, security, housing, non-discrimination (for specific provisions see Annex I)

1.1.3. Access to water and food, right to health

Where mining, oil extraction or industrial agriculture projects are implemented they normally show high levels of water consumption as well as waste water production. Water for the industry might be taken from natural sources which used to supply the neighboring communities, and waste waters can pollute the same natural sources of rivers and ground water. Consequently, communities may have to walk long distances to alternative water sources or might depend on costly water supplies through tank systems which are prone to damage and contamination and only offer an instable and limited supply of treated water. Furthermore, the lack of clean water for irrigation will limit food crop production and endanger food security.

Relevant human rights: right to water, food, health and reproductive health (for specific provisions see Annex I)

1.1.4. Right to gain a decent living, right to work

Where people can no longer access the lands they used to cultivate, they are deprived of the basis of their very subsistence. For women, this might mean the loss of an independent source of income and a greater dependence on men, because incoming companies tend to offer very few qualified jobs to women, which leaves them with informal or feminized low-wage jobs.

Rates of prostitution and related health-risks often increase as women turn to sex work to supplement household incomes. The incidence of domestic violence, sexual abuse, and sexually transmitted infections such as AIDS/HIV often also increase, due to the incrementing use of alcohol¹.

It has been identified as a pattern that companies, while promising to create employment, tend to hire migrant workers rather than locals. These migrant workers have to work under precarious health and safety conditions, often in temporary working contracts without proper social security; yet their social isolation and uprooting weakens their capacity to organize in trade unions.

Relevant human rights: right to decent living, work, health and reproductive health, health and safety in the workplace, land, housing, non-discrimination, freedom from sexual exploitation (for specific provisions see Annex I)

¹ Oxfam Australia (2009) 'Women, communities and mining: The gender impacts of mining and the role of gender impact assessment', available online at: www.oxfam.org.au/explore/mining.

1.1.5. Indigenous rights

Where natural resources fall within traditional indigenous territories, the dimensions of human rights violations are multiplied, because indigenous peoples are not only dependant on access to land, water and biodiversity for their material livelihood, but also for their economic, cultural and spiritual survival as an indigenous people. Specific sites, rivers or mountains can have essential significance as sacred sites and their destruction can endanger the very existence of the community affected.

While such resources are not necessarily “untouchable”, their use and exploitation must be discussed with the indigenous people concerned and depend on those people’s Free Prior and Informed Consent (FPIC) to the project. The participation of indigenous women is essential in obtaining FPIC, because of their distinctive role in the preservation of indigenous culture.

Relevant human rights: FPIC, right to land, water, cultural, spiritual and religious rights (for specific provisions see Annex I)

1.1.6. Security: right to life, integrity and security, freedom of expression and association

In all cases studied, communities who organized peaceful protest against negative impacts on their livelihoods of large scale projects have been confronted with security problems of different kinds. Typical problems they encounter are pressures from local authorities who are allied with or have been co-opted by the company. Protesters might face violent assaults, harassment, arrest and abuse by private and public security forces. Women, in particular, often suffer from sexual and gender-based violence. Human rights defenders might suffer public smear campaigns, direct persecution and criminalization which will generate public suspicion, fear, isolation as well as paralysis of the human rights work. Offices of local NGOs are frequently raided and phones intercepted; information is confiscated or stolen. Intimidation and death threats, disappearances and assassinations are used not only in situations of armed conflict.

Human Rights Defenders

According to the **UN Declaration on Human Rights Defenders**¹ adopted in 1998, Art. 1 states “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.” Hence, not only lawyers and journalists but anybody who defends human rights, no matter what their profession or status is, is protected as human rights defender under this declaration and under the **EU Guidelines on Human Rights Defenders**².

1) <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>

2) Available in 15 languages: http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/l33601_en.htm

Relevant human rights: right to life, integrity, security, health, freedom of expression, association & assembly, freedom from torture and cruel inhumane and degrading treatment, non-discrimination (for specific provisions see Annex I)



1.2. How companies address these issues: Corporate Social Responsibility (CSR) and compensation schemes

Businesses have reacted to public criticism and have widely adopted Corporate Social Responsibility (CSR) schemes to mitigate their negative impacts. For the purposes of the present publication CSR schemes are defined as unilateral measures of voluntary nature, through which corporations address social and environmental concerns in their corporate policies and stakeholder relationships².

Commonly companies offer CSR measures unilaterally instead of seeking the participation of those affected, and so they might not address the causes of the damage which has occurred or is expected, but will offer other benefits instead, such as construction of school buildings, sports grounds or health centers, provision of motorbikes, training or working tools, etc. As useful and important as they might be, such benefits to certain individuals or communities cannot compensate for the impacts of losing land that was used to secure a livelihood and they often fail to provide sustainable livelihood alternatives. Furthermore, these measures can create or intensify conflicts between different communities, creating 'have' and 'have not' communities.

In practice, CSR commitments tend to be broad in language and voluntary, so it is difficult to extract from them concrete obligations that would be enforceable in a court. And they can be withdrawn at any time, if and when the company changes its economic priorities. The concept of CSR as a voluntary approach does not recognize that the impact of the company's actions may constitute a violation of human rights. Even where a company and a local or national government sign an agreement about CSR measures, these contracts do not constitute individual rights for those affected and are often not even publically disclosed. Of course, in a number of cases, CSR measures have yielded beneficial effects, especially where states are unable or unwilling to fulfill their obligations to provide public services. Yet, CSR treat the affected parties as beneficiaries rather than as aggrieved parties and rights-bearers.

>>> *It is difficult to extract from CSR commitments concrete enforceable obligations.* <<<

According to the "Protect, Respect and Remedy" framework³ that was developed by former UN Special Representative on Business and Human Rights, John Ruggie, companies have a **responsibility to respect human rights** and states have a duty to protect them and to provide efficient remedies in case of violation.

The UN Guiding Principles on business and human rights¹

In June 2011 the UN Human Rights Council adopted Guiding Principles on Business and Human Rights, that were drafted by former UN Special Representative on Business and Human Rights, John Ruggie, on the basis of his "Protect, Respect and Remedy" framework. The Guidelines are not a binding treaty and therefore do not constitute new legal human rights duties for companies, while for states they reiterate what has been recognized as legal duties and apply these in the business and human rights context. Yet these new UN Guidelines are so far the most advanced and internationally supported instrument of guidance for states and companies on business and human rights.

² The Commission of the European Union in October 2011 published a new communication to EU institutions, called "A renewed EU strategy 2011-14 for Corporate Social Responsibility" (COM(2011) 681 final) (available in several languages at: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=200969), in which it transforms its concept of CSR, arguing that while their development should be led by enterprises themselves, "public authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation". CSR should derive and be defined on the basis of the impacts of a company's operations and should be oriented by the authoritative guidance that the OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights offer. However, by no means has this new concept been adopted or implemented by corporations, nor by all EU states; hence for the purposes of this publication we use the term in its more commonly applied meaning as describing voluntary unilateral measures of companies to reflect what they consider their responsibilities towards the society.

³ Available online at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

? INFORMATION The UN Guiding Principles on Business and Human Rights

They also help civil society actors to formulate and support their human rights demands towards states and companies. The Guiding Principles translate the corporate “responsibility to respect human rights”, that is formulated in the “Protect, Respect and Remedy” framework, into a concept of **human rights due diligence** for corporations. This refers to organizational measures or a “human rights due-diligence process” to identify, prevent and mitigate adverse human rights impacts and account for how corporations address these impacts; it further includes the responsibility to remediate such adverse human rights impacts. The Guidelines then go on to explain how a company should proceed in identifying, mitigating and so on. Due diligence responsibilities extend not only to human rights impacts caused by the company, but also to those to which it contributes through its own activities, and further to those which may be directly linked to its operations, products or services by its business relationships.

Although the Guiding Principles are legally non-binding, they can be very useful in strategic litigation: They may help a court in determining whether a company or company director has incurred liability, because a failure to observe due diligence standards will generally give rise to liabilities. In interpreting what such “standards of due diligence” might entail, courts may be encouraged to consult the Guiding Principles.

i) Available online in English, French, Spanish, Chinese, Arabic and Russian at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>.

1.3. Conclusion

Large-scale investment projects of transnational companies can offer much potential for benefits to communities and economic development of poor countries and societies. However, in many cases, they turn out to benefit only a few, and may even lead to the further impoverishment of large parts of the affected population. Large-scale projects often also bring about the violation and abuse of a large range of economic, social and cultural human rights, as well as civil and political rights.

While an increasing number of companies recognize their social responsibility in principle, their understanding of what this means in practice often differs from that of the people affected by their projects.

In our view, corporate responsibility fails to be met where mitigation measures are determined unilaterally, without recognizing and responding to the concrete risks and harms suffered or expected to be suffered, and without a sense of binding force and enforceability.

>>> Corporate responsibility is not met where mitigation measures are determined without recognizing concrete risks and harms and without a sense of binding force and enforceability. <<<

Standards for corporate responsibility and accountability still need to be further developed, on a legal, political and practical level. Each single struggle, each case, each human rights defense project can make an important contribution to that. The following chapters seek to support and facilitate such efforts.

CHAPTER 2

Before damage occurs: what can be done to prevent and limit harm?

This chapter looks at steps that may be taken at a stage where operations have not yet started and damage has not occurred but where there are indications that large-scale projects will be established and will have major consequences for the region and the people living there. These steps will help determine what actions might be useful in preventing harm and in compensation negotiations prior to operations; they can also serve as a basis for compensation claims that might have to be formulated once damage occurs.

Local communities that foresee being affected by an investment project, be it on a large or small scale, should as early as possible

- 1) **gather information**, as much and as concrete as possible,
- 2) **develop ideas for fair, adequate and sustainable compensation**, and
- 3) **build a support network**.

2.1. Gather a solid basis of information

When companies prepare to establish operations in a region, they will be present several months or even years ahead, exploring the terrain, negotiating with the authorities and informing and seeking support among the local population. To that end, they will probably offer a lot of information, in public hearings, leaflets and publications, TV advertisements and so on. But does this information serve primarily the interests of the company or does it also help satisfy the local population's right to information?

The following criteria help the community to evaluate critically the information offered and specify their requests for further information. **Is the information**

- **independent ?**
- **relevant ?**
- **comprehensive ?**
- **accessible ?**

Information should be **independent**; it should be generated by neutral sources, i.e. it should not stem exclusively from the company or from its critics. Access to information should also include access to independent advice. Sometimes companies hire consultants or lawyers to advise the community. While this might be well-intentioned, there is a danger that such advisers will be biased in favor of those who hire and pay them, and will not be entirely and reliably independent.

Information should be **relevant**, i.e. it needs to tell not only of the benefits to be expected from the project, including corporate social responsibility measures, but first and foremost of the actual impacts, including risks that can reasonably be expected of the operations themselves and of how potential damage might be mitigated.

Information must be **comprehensive**. Comprehensiveness means that it should not only include information directly relating to the operations, but also information relating to direct and indirect impacts on the surrounding environment and on all stakeholders, information about the surrounding infrastructure to be built (roads, plants, disposal systems and wastewater management, etc.), the exact territories that will be used or affected directly or indirectly (such as for example communities that settle at great distance from a project site but might be affected when using polluted ground or river waters), applicable legal frameworks and - what is often missing - information on what happens after operations end, whether the area will be rehabilitated, and if so, how that is to

be achieved. Information should be gender-specific and highlight consequences that affect particularly vulnerable groups such as indigenous communities or the landless.

Information should be made **accessible** in a way that is adequate for the concerned public. This means that where no access to telecommunication and IT exists, digital documents are unsuitable. Where education levels are low, unadapted scientific reports do not comply with the accessibility criterion. In some communities, illiteracy is widespread, at least in some sectors, for example among women. In these cases, written materials do not offer any utilizable information. Where a community largely works in an indigenous or local language, information presented only in English or French, be it orally or in writing, is inadequate.

Aside from companies, governments must also provide the public with all relevant information so those affected can participate in informed consultations and formulate their questions and objections. Where **Freedom of Information Acts** exist, they can be helpful in extracting the necessary information; so can, for example, meetings with public authorities, parliamentary questions or public awareness campaigns.

2.2. What could be “fair compensation”?

Companies can provoke a wide range of harms through their operations, as we have seen in Chapter 1, ranging from damage to health, loss of income opportunities and access to land, damage to property, destruction of social structures and the social fabric, increased levels of violence, etc. In civil litigation, sums of money are usually the currency into which this harm can be translated, if at all. Negotiations, on the other hand, can open further possibilities for alternative forms of compensation: surrogate land, training, employment, infrastructure, etc. A group of affected people should therefore discuss internally and prior to negotiations what type of compensation or suitable alternatives they need.

Sustainability and adequacy

Compensation with money can be **unsustainable** as a means to provide for maintenance because in contrast to land and seeds, it does not renew itself each year; when it is spent, it is gone. When people are not used to handling money, calculating values in monetary terms, exchanging money for goods and services, or economizing and planning with money and have no access to banking services, it can happen that the compensation is spent unsustainably and, in effect, lost or used in ways that make it valueless.

In a rural community that largely survives on subsistence farming and local economic structures, monetary compensation can generate a number of problems. The sudden influx of large amounts of cash leads to inflation and creates dependencies on cash currency, which artificially impoverishes those who offer different “currencies”, such as goods or services in-kind. Jobs or occupational training that companies offer to increase income-generation may alleviate but may also aggravate the problem as they may contribute to local informal economic structures being replaced by a cash economy that creates new dependencies on cash influx.

Furthermore, monetary compensation may be **inadequate** where money cannot make up for certain losses such as the loss of a spiritual site through construction works or the destruction of a social network through displacement. At the same time, good alternatives to cash compensation are difficult to find where reparation, restitution or replacement of destroyed assets is impossible or undesirable. For example, where alternative land can be found only in very remote areas, those affected might - faced with the prospect of such uprooting - prefer compensation with money, but the inadequacies of this must still be addressed and mitigated.

Case Study: compensation expectations and problems in the Chad-Cameroon Pipeline Project

The Chad-Cameroon Pipeline Project was supported by the World Bank with high expectations that it would prove that oil wealth can be transformed into direct benefits for the poor, the vulnerable and the environment.

In 1998, the consortium leader Esso calculated compensation without participation of the population and fixed rates at US \$0.55 for a banana plant, US \$2.15 for an oil palm tree, and US \$5.96 for orange, mango, and avocado trees. Each transaction was sealed with a receipt and a

! CASE STUDY Compensation expectations and problems in the Chad-Cameroon Pipeline Project

photograph, by which the recipient renounced any future supplementary claim. Only after NGOs in Chad and Cameroon supported 375 villages along the pipeline in their fight for just compensation were these amounts recalculated. Accounting for the productive life-cycle of plants, mango trees, for example, were re-valued at US \$1,635 in Chad (550.000 FCFA = 838 EUR), a price later accepted by Esso. In Cameroon the new compensation amount for a mango tree was fixed at 160.000 FCFA (243 EUR).

Cash compensation, however, was paid in single installments and not accompanied by any assistance programs. So, many of the recipients, who had previously lived on less than one US dollar a day, suddenly received several thousands of US dollars and struggled to cope. Due to misinformation about the total sums to be paid, some spent the money within weeks or shared it with the extended family in the false expectation of recurrent payments. Those trying to save the money for later did not have access to banks or micro credit schemes and thus often buried it, only to find that it was - literally - rotting quickly. Esso later offered lessons on how to manage money to those eligible for cash compensation, but up until today people are compensated without receiving proper training.

Affected communities and individuals also received in-kind compensation, but the equipment delivered was of poor quality or did work not at all. The in-kind compensation did not equal the cost of the damage caused.

Households that were expropriated had to rent land and purchase cereals, which they previously had produced themselves. Meanwhile, an influx of migrant workers with higher purchasing power led to an increased demand for products, and raised the local cost of living. Neither the consortium nor the government has undertaken measures to mitigate the adverse effects of rising food prices on the local population. As a result, many people found themselves in much greater poverty than before.

Source: Claudia Frank and Lena Guesnet, brief 41 "We were promised development and all we got is misery" - The Influence of Petroleum on Conflict Dynamics in Chad, Bonn International Center for Conversion (BICC), December 2009, available online at: <http://www.bicc.de/uploads/pdf/publications/briefs/brief41/brief41.pdf>, last access: 30 May 2012

The example of the Chad-Cameroon Pipeline Project shows how difficult it is to achieve adequate and sustainable compensation and that problems occur not only when payments are too low, but also, when large sums are paid. Opting for collective fund management may be an interesting alternative.

For example: Khulumani vs Daimler and others

Khulumani is a social movement that gathers close to 50,000 members and survivors of apartheid-era gross human rights violations in South Africa. Khulumani filed a compensation claim in the US against Daimler and several other transnational companies arguing that their doing business with the apartheid regime has contributed to systematic human rights violations. The Khulumani claimants have developed proposals which would see any compensation payments that might be awarded or settled being fed into a common fund from which payments for community as well as individual reparations will be made, according to criteria of equal and fair distribution.

Source: Further information on Khulumani Support Group and the case against Daimler and others at: <http://www.khulumani.net/>

A few recommendations for compensation schemes should be taken into consideration:

- ✓ calculate compensation on the basis of the identified **extent and nature of the harm** caused and expected to be caused to a livelihood, including social and cultural assets;
- ✓ undertake this **analysis with an eye to gender** because in many societies, women are responsible for the subsistence of the family and reproduction of labor force and also sustain large parts of the local - and often informal - economy;
- ✓ consider the possibility of a common fund and collective decision-making about its use, **prioritizing communal projects** to improve living conditions of the group as a whole;
- ✓ **seek independent advice and training** about keeping and administering funds, transparency, book-keeping and economic planning.

! CASE STUDY Khulumani vs Daimler and others

Alternatives to monetary compensation

Given the limitations and risks that monetary compensation offers, it might be worth considering alternatives, as the following examples show:

For example: Peace Community San José de Apartadó vs Chiquita

After enduring violence from the armed conflict in their region Urabá in the North of Colombia for many years, a group of farmers of San José de Apartadó decided to organize as a Peace Community and defend their territory as well as their decision to not get involved in the armed conflict. For more than ten years now they have peacefully resisted displacement in spite of high levels of violence and repression by paramilitary and state forces as well as rebel groups, resistance which has cost them numerous lives through violent deaths. After the US-based company Chiquita admitted to having made payments to paramilitary groups in that region, the Peace Community decided to seek justice. But instead of looking for compensation for the lives lost, they explicitly seek a court judgment that should pronounce on whether or not Chiquita bears legal responsibility for the violent deaths the community has suffered as a result of the armed conflict. Such is their understanding of justice: they consider that, as farmers who have managed to maintain access to their land, they are economically self-sustaining and consequently do not request pecuniary reparation from the company. But they do strive for an investigation that reveals the truth, for the public recognition of the injustices suffered and for the determination of those responsible.

Source: further information on the Peace Community of San José de Apartadó and the case against Chiquita at: <http://www.cdpsanjose.org/>

CASE STUDY Peace Community San José de Apartadó vs Chiquita

2.3. Build a support network

A broad and diverse support network can increase the potential of any human rights campaign significantly, by extending expert knowledge, skills, and the capacity to generate public awareness of the human rights situation, which may be beyond the means of the affected community acting alone.

- **international observers** may bring an element of public scrutiny and can help redress power imbalances.
- **contacts to local, national and international media** should be built carefully, establishing relationships of trust with selected contacts to make sure messages are not distorted or misrepresented.
- **scientific experts** from universities might assign research projects to their students or provide expert opinions as a pro bono service.
- **other communities** who are going through or have gone through similar disputes can be helpful in sharing their experience, offering advice and support.
- **legal consultants** should be involved from an early stage. Their legal analysis will be important for the design of the research process and to assess the viability of litigation options. They can also advise on the formulation of terms of reference and of any agreements.

If the case is brought to court and involves international litigation, it will be necessary to work with international as well as local expert lawyers, because transnational human rights cases against corporations are factually and legally highly complex, and elements of a foreign legal system will apply.

Legal advisers should be chosen with care

In many cases, we have seen an unmerited confidence in lawyers to resolve cases quickly and effectively: subsequently, all questions, initiatives and decisions related to the case are sometimes left to the lawyer. Yet, this overburdens the lawyer and disempowers the clients. Instead, there should be a common understanding that the clients and those affected need to maintain ownership of their case. Hence, they need to ensure fluent communication with the lawyers, adequate information and mutual trust which will enable them to actively participate and give the lawyers informed instructions.

Working with international lawyers may present particular challenges, not only when searching for a suitable person and seeking to establish contact, but also in terms of cultural and geographical distances and language barriers. Arrangements may be necessary to ensure that relevant docu-

INFORMATION Legal advisers should be chosen with care

ments are translated into the languages of all affected individuals, in a way that is understandable for non-lawyers.

Further recommendations on how to formulate ethical agreements with lawyers can be found in the document “Lines of action for lawyers and communities confronting transnational companies acting with impunity” (Annex II).

In Annex III we have included a selection of relevant international organizations.

2.4. Conclusion

A lot can be done before business operations lead to harm. At the early stages of a company’s engagement, it will normally be the company that takes the initiative to present and promote its project to the population. A common reaction is to wait and see what will develop. Yet, it is important to take independent action as early as possible, seek independent information, develop criteria to assess needs and formulate demands, and to reach out and build an independent base of support. The elements highlighted in Chapter 2 will orient you when developing such independent action. They are relevant in your efforts to prevent harm and they are equally relevant in case prevention efforts do not succeed and remedial action becomes necessary, as the following chapters will show.

CHAPTER 3

Claiming compensation: What are the options?

This chapter will look into both legal action and out-of-court avenues against transnational companies and discuss their advantages and disadvantages.

There are hardly any laws that explicitly prohibit corporations from violating human rights, with the exception of anti-discrimination laws. However, a law that prohibits for example, damage to physical integrity, will also protect against conduct that can be qualified as torture or other cruel, inhuman or degrading treatment, i.e. as a human rights violation. A law that prohibits the contamination of natural water sources might help to protect the right to water.

Hence, to hold corporations accountable for human rights violations, one has to find the right avenue. One must also decide whether to bring a case against the subsidiary company, that operates locally, or against the transnational "parent company", that might direct operations from its headquarters in another country. The state itself can even be sued, given its obligations to protect human rights, including against the intervention of third parties such as corporations. (Legal) Actions against transnational companies are the focus in this publication; legal actions against state institutions will require as a first step consultation with local lawyers about the possibilities that national legal orders offer.

3.1. Soft law mechanisms

"Soft law" is a term to describe legal instruments that are considered authoritative rather than optional but that are not enforceable as laws and treaties are. A lot of "soft law" instruments can also be seen as "emerging law", i.e. legal standards in the making, given that soft law often develops into hard law, i.e. binding and enforceable law. For example the Universal Declaration of Human Rights is "soft law", but from it a number of binding human rights treaties were developed such as the International Covenants on Civil and Political as well as Economic, Social and Cultural Rights and others.

>>> *"Soft law" can be seen as "emerging law", i.e. legal standards in the making.* <<<

OECD Guidelines for Multinational Enterprises

The Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD)¹ contain standards of adequate corporate practice in terms of human and labor rights, environment, transparency and anti-corruption, taxation, protection of consumers, sciences and technology and fair competition, which apply in all OECD member and adhering countries. An OECD complaint will normally be brought before the so-called **National Contact Point (NCP)**, a national office designed to receive such complaints. The host country has preferential jurisdiction; if the host state does not have an NCP, jurisdiction goes to the NCP of the home state of the company.

Complaints can be brought by those affected, but also by third parties, for example an NGO.

Complaints under this procedure are not evaluated against national or international laws, but against the OECD Guidelines. International human rights treaties can be used to interpret the terms of the Guidelines, where relevant. A complaint procedure under the Guidelines will not yield a binding and enforceable decision, but aim at mediation and end with an agreement or with a list of recommendations. As a mediation procedure, this mechanism offers lower hurdles to access

¹ Available online for download in English, French and Spanish at: <http://oecdwatch.org>

compared with court litigation and might also allow for more flexibility in negotiating the terms of the agreement, compared to a compensation claim that will only allow for monetary compensation. Their impact will depend largely on the political will of the company to implement agreements or recommendations.

>>> *International human rights treaties can be used to interpret the OECD Guidelines.* <<<

Although the Guidelines are not binding on companies, states that have endorsed the Guidelines have also accepted a duty to give effect to these OECD Guidelines and have committed “to encourage the widest possible observance of the Guidelines”². In this sense, the OECD Guidelines are binding on the signatory states, and they must be given effect to. However, the mechanism has often been criticized for lacking efficiency, particularly as far as implementation is concerned. Indeed, a recent ECCHR study shows that the efficacy of NCP mechanisms varies widely from country to country³.

Case study: Enforcement of agreements following OECD complaints: Oxfam Canada v Mopani Copper mines

The case of the complaint lodged by Oxfam Canada and a Zambian NGO with the Canadian NCP regarding evictions in Zambia by Mopani Copper Mines demonstrates the limitations of the OECD complaints mechanism. Following mediation by the Canadian NCP, an express agreement was made for the evictions to stop, and for continued dialogue between Mopani, local government and the NGO, towards resettlement of farmers on land they could legally own. The Canadian NCP and the OECD Secretary-General and Investment Committee subsequently cited the Mopani case as the paradigmatic example of how the Guidelines are supposed to work and proof that they are having their intended effect. In 2005 then-Secretary General of the OECD, Donald Johnston, even wrote a chapter in a book on Corporate Social Responsibility that notes the successful resolution of the situation in Mufulira, Zambia. However, in reality, the absence of any follow-up to the NCP mediation process meant that Mopani simply disregarded the agreement, restarted forced evictions and instituted a land licensing scheme that served to deny farmers any meaningful rights in the land on which they were resettled.

Source: Can The OECD Guidelines Protect Human Rights On The Ground? A Case Study: The Evictions at Mufulira by First Quantum Minerals / Mopani Copper Mines”, The Umuchinshi Initiative, University of Toronto (2007), available online at: http://oecdwatch.org/publications-es/Publication_2748-es/view?set_language=es

Hence, it is important to stress that any agreement should include viable monitoring and verification mechanisms as well as the option to re-open the proceedings if the agreement is not adhered to.

>>> *Any agreement should include viable monitoring and verification mechanisms.* <<<

Complaint mechanisms of financing institutions

Financial institutions, such as the World Bank Group, the European Investment Bank (EIB) or the African and Asian Development Banks have internal mechanisms that can also be used to investigate further into corporate behavior and assess corporate human rights impacts. Procedures are rather simple and the outcomes can be varied. The complaints and resulting decisions are not directed against a company but address the financial institution concerned. The outcome can take the form of recommendations for changes of behavior or procedures of the bank. Over and above the outcome, however, such proceedings have been considered relevant for the fact-finding process, given that the mechanisms have some funding to conduct their own investigations, including field trips and expert consultations. This can support investigations of victims’ groups or NGOs.

As to the applicable soft law, each institution manages their own applicable standards; the EIB

² OECD Guidelines, Ch. I (Concept and Principles); para. 6

³ ECCHR Policy Paper: A Comparison of National Contact Points - Best Practices in OECD Complaints Procedures, Berlin, November 2011, available online at: <http://www.ecchr.de/index.php/ecchr-publications/articles/a-comparison-of-national-contact-points-best-practices-in-oecd-complaints-procedures-1333.html>.

relies for example on its Statement of Environmental and Social Principles and Standards 2009)⁴, the World Bank uses a series of Safeguard Policies⁵ on different topics such as indigenous peoples, environment, transparency, and so on, whereas the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), bodies that assume private financing projects within the World Bank Group, work with different standards, the so-called Performance Standards⁶.

Voluntary codes of conduct and other good practice frameworks/policy initiatives

Voluntary codes of conduct may offer more or less formalized review procedures. Some of them, such as the International Council on Mining & Metals, are industry-led initiatives and for that very reason have inherent limitations. Others are multi-stakeholder initiatives that include for example trade unions, NGOs and universities, as well as government actors. Examples are the Fair Labour Association or the Common Code for the Coffee Community. The impact of voluntary initiatives is necessarily limited. This is why ECCHR in 2010 made a first advance through litigation to argue that voluntary codes can also have binding effects, by using European fair competition laws against the international supermarket chain LIDL.

Case Study: The case against LIDL

This case was motivated by the investigations of the Clean Clothes Campaign, which showed that LIDL's textile suppliers in Bangladesh exposed their workers - mainly women - to exploitative and discriminatory labor conditions. Investigations showed that a number of ILO convention rights, applicable in Bangladesh, were violated. ECCHR together with the customer protection agency of Hamburg, Germany, filed a court case arguing that it amounted to unfair and prohibited competition methods if LIDL falsely advertised to its potential customers that it guaranteed fair labor relations in supplier companies when those labor relations were in fact unfair.

LIDL hence had to abstain from competing for customers through false or misleading statements. However it seems a cynical response if LIDL, instead of correcting labor relations so they live up to its promises, would simply abandon its declared ethical standards to adjust to the status quo of exploitation and injustice in the sweat shops of Bangladesh.

Source: ECCHR, the LIDL case, <http://www.ecchr.de/index.php/lidl-case.html>, last access: 19 June 2012

Furthermore, there are a number of policy initiatives developing good practice frameworks, such as the UN Global Compact or the Extractive Industries Transparency Initiative (EITI) and certification schemes, such as the Kimberley Process, the Forest Stewardship Council (FSC) or the Roundtable on Sustainable Palm Oil (RSPO). Private initiatives that set and review their own standards might be far from a litigation approach, but in specific cases they can have practical value and should not be excluded as an option from strategic considerations, for example as a basis for advocacy or “naming & shaming” campaigns, where no convincing complaint or compliance mechanisms are available. However, they might not fulfill the expectations they raise. For instance, in 2003 the organization Global Witness helped to establish the Kimberley Process, an international certification scheme established to stop the trade in blood diamonds. Yet, Global Witness recently withdrew from the scheme, citing that the process had become “an accomplice to diamond laundering”⁷.

4 Available online at: www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf.

5 Available online at: <http://go.worldbank.org/WTA1ODE7T0>.

6 Available online at: <http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>.

7 Press release: Global Witness leaves Kimberley Process, calls for diamond trade to be held accountable, 5 December 2011, available online at: www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable, last access: 16 January 2012.

CASE STUDY The case against LIDL

3.2. Civil actions

Civil actions are the appropriate legal action when compensation is sought. Compensation can be individual or collective, depending on whether the applicable law allows group and class actions or only individual actions.

>>> *Civil actions are the appropriate legal action when compensation is sought.* <<<

Some jurisdictions that allow for class or group actions:

Canada
Italy
Portugal
Spain
Sweden
The Netherlands
USA
United Kingdom

? **INFORMATION**
Some jurisdictions that allow for class or group actions

In large group actions it will be difficult for each one of the hundreds or thousands of plaintiffs to actively participate and feel adequately represented; client-lawyer communication is much easier when only a few selected plaintiffs put forward their demands. Yet, this also bears obvious risks, as their individual interests could enter into conflict with collective interests. This might provoke envy, conflicts and distrust within the community and weaken its social and political cohesion.

Yet, if the individual case is used as an example or precedent, is integrated into a broader strategy and is understood by both the individual and the collective as a shared concern, this will strengthen the individual case which in turn can help the collective human rights struggle.

>>> *If the individual case is understood as a shared concern and integrated into a broader strategy, this will strengthen both the individual case and the collective human rights struggle.* <<<

Jurisdiction and applicable law

Civil actions can be brought against the local subsidiary or against the parent company. One of the most important differences between the two approaches is the issue of jurisdiction.

Each company must be sued in the country where it is registered or maintains its main activities. That means that subsidiaries must normally be sued locally, that is, in the “**host country**”, where the company’s operations are hosted; the parent company will have to be sued in its “**home country**”, where it is domiciled.

In common law countries, such as the USA, Canada or Australia⁸ the doctrine of *forum non conveniens* provides for exceptions to this rule. Under this doctrine, jurisdiction shall be established in the country that seems more convenient for a number of factors such as the residence of the parties, the location of evidence and witnesses, public policy, the relative burdens on the court systems, the plaintiff’s choice of forum or how changing the forum would affect each party’s case⁹. Very often, however, this rule is used to refer cases back to the host country.

Which laws a court must apply differs from country to country. In actions against the local subsidiary, local laws will usually apply. In a case against a parent company in the home country rules can be different. Courts in the European Union, for example, will largely apply the law of the country

⁸ In the UK, although also a common law jurisdiction, this rule does not apply, following EU Regulation 44/2001, which harmonizes procedural rules all over the European Union.

⁹ Cornell University School of Law, Legal information Institute, Forum non conveniens, at: http://topics.law.cornell.edu/wex/forum_non_conveniens.

where the damage occurred¹⁰. Sometimes, local laws are better adapted to the local situations, so on occasion, this rule can turn out to be an advantage for the case.

Costs

Costs can vary depending on the procedure chosen and on the country of jurisdiction. There is a rule that **the party who loses a claim must pay the costs** of the winning party. This is a financial risk for the plaintiffs. Yet, it applies only in some, not in all jurisdictions, and it applies only in civil, not in criminal cases.

The investigation and documentation of evidence will require funding for expenses, such as site visits, travel costs of witnesses and lawyers, translations, expert opinions and scientific analyses, technical equipment, etc. Even where the public prosecutor is obliged to investigate a case, a community is well advised to collect evidence on its own initiative to ensure that the prosecutor does not miss any relevant facts and close the case for lack of evidence.

Lawyers also have to cover their costs and expenses and might not be able or prepared to wait several years until receiving a court sentence of uncertain outcome. So, a lawyer might have a pecuniary self-interest in reaching an early settlement of the case, and this might enter into conflict with the interest of the clients, who might seek to advance in investigations or to reach a court judgment. Hence, the financial needs and expectations of the representing lawyers should be addressed and clarified at the very outset and it is recommended to search for alternative funding for the case.

3.3. Criminal complaints

The objective of a criminal complaint, by contrast, is not compensation but the penalization of illegal behavior. For a company or its directors, to “lose” such a case, i.e. to be sentenced, can have a very grave impact on their public image, reputation and future economic opportunities.

>>> A criminal sentence will have a very grave impact on the company's reputation and future economic opportunities. <<<

There are no “plaintiffs” in a criminal case. Those who are victims of the denounced crime may participate in the proceeding in different ways:

- as **witnesses**, s/he can make important contributions to the investigation, but cannot directly influence the course of the proceedings;
- by pursuing **accessory prosecution**, s/he becomes party to the proceedings. S/he may then have the right to question the accused, to provide evidence materials, to access to the court files, or to appeal against the authorities' decision to close investigations or to appeal the judgment and/or any other court decision during the course of the proceedings;
- by **annexing a compensation claim** within the criminal proceeding, the advantage being that the facts are already being investigated by the authorities and do not have to be presented entirely by the plaintiff, who can await the outcome of the criminal case and use its outcomes to substantiate their claim.

The proceedings go through various stages. First the prosecutor or investigation judge will decide whether an investigation into the case will be opened or denied. After investigations, s/he decides whether to formulate an indictment. The next step is for the court to decide whether to open the trial. In the court proceedings the public prosecutor and the defendant will both have to argue with the objective of convincing the court in his/her favor. The court makes its decision, after which point the way is normally open for either side to appeal.

Even if a case does not reach the stage of a conviction, the investigation process in itself can contribute in important ways to revealing the truth. And this can be a very important component not only for the court case but far beyond for the entire process of human rights defense that the victims are engaged in.

¹⁰ EU Regulation 864/2007 (the 'Rome II' Regulation, available online in several languages at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007R0864:en:NOT>); this applies for all claims based on tort law, and in fact any, claims that are not based on contract. Claims based on breach of contract are dealt with under Regulation EU No 593/2008 (ROME I).

Jurisdiction

Courts in both the home and host country may have jurisdiction to hear a case, depending on the criteria that local law determines, such as can be determined by a number of criteria, such as: where the crime was committed; the nationality or the residence of the accused or of the victim. This might, again, mean that a court in the host country as well as the home country may in a certain case have jurisdiction over a case and one can choose where to present the case. This might depend on availability of evidence, security, efficiency of the law enforcement and judicial authorities, for example.

Corporate vs Individual Liability

Many legal systems do not accept corporate criminal liability of companies, and require the identification of an individual culprit. Yet, the number of countries that allow for the criminal prosecution of companies is rising.

For example, these countries provide for corporate criminal liability:

<i>Austria</i>	<i>Netherlands</i>
<i>Belgium</i>	<i>Philippines</i>
<i>Canada</i>	<i>Slovenia</i>
<i>Denmark</i>	<i>South Africa</i>
<i>Finland</i>	<i>Spain</i>
<i>France</i>	<i>Switzerland</i>
<i>India</i>	<i>Thailand</i>
<i>Ireland</i>	<i>United Kingdom</i>
<i>Israel</i>	<i>USA</i>
<i>Italy</i>	

? **INFORMATION**
For example, these countries provide for corporate criminal liability

3.4. Other claims based on national legislation

Workers can file claims based on national labor legislation. Such claims will be under the jurisdiction of the country where the working relationship is put into practice. No legal avenues exist generally against the parent company, because it is not the parent company but the local subsidiary that acts as employer and that assumes duties towards the employee under the employment contract and under local labor laws. Other avenues, such as tort law, may be available in labor relations in very limited circumstances. However, a recently published Friedrich-Ebert-Foundation/ECCHR study on the topic shows that whether and to what extent they can be applied in practice has so far hardly been tested and remains a challenge for future strategic litigation projects¹¹.

Furthermore, host countries might offer a wide range of claims based on national **laws protecting public interests such as the environment or public health**. Most of these actions will not be similarly available in home countries of the parent companies. It is a question of national sovereignty that these laws are enforced by the national executive and judicial authorities and not by those of other states. For example, if a Ghanaian environmental law regulates levels of SO₂-emissions or on lead-concentrations in drinking water, the Ghanaian court will have to apply this law, whereas a French court may not be allowed to apply it. The French court may apply the respective French law, but this law will apply only to drinking water sources in French territory, because France has no right to make laws about Ghanaian water sources, as this falls under the sovereignty of the Ghanaian state. There is no “extraterritorial” legislation or jurisdiction in such a case. A company that operates in Ghana, will hence have to observe the Ghanaian regulations and will be judged by Ghanaian courts.

¹¹ Miriam Saage-Maaß, Labour Conditions in the Global Supply Chain - What Is the Extent and Implications of German Corporate Responsibility?, in: Friedrich-Ebert-Foundation, International Policy Analysis Berlin, December 2011, available online at: <http://www.ecchr.de/index.php/studies/articles/labour-conditions-in-the-global-supply-chain.html>, last access: 30 May 2012.

3.5. International courts

International courts such as the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, the African Commission and new Court of Human Rights as well as further regional courts¹² will only accept jurisdiction for claims against member states, not for claims directed against a private company.

>>> *International courts will only accept jurisdiction for claims against member states, not for claims directed against a private company.* <<<

So, in cases against transnational companies, there might be two possible ways of presenting such a case before an international court: (1) if the action is directed against a state agency for example for failing to guarantee environmental, public health, consumer protection, labor or other legal obligations and national courts deny justice or (2) where plaintiffs seek justice at national courts against a company but the state fails in providing effective access to justice, for access to justice is in itself a human right which states are obliged to guarantee.

There is, however, one international court that accepts human rights claims against a private person: the International Criminal Court, which has jurisdiction over international crimes such as war crimes, genocide or crimes against humanity. Claims can be brought only against individuals, for example a company director, and not against the company itself. Given that this one court has worldwide jurisdiction, it will be reluctant to accept cases, and plaintiffs are in any case required to exhaust local remedies, which means they must first seek remedies through national courts up to the highest possible level.

>>> *There is one international court that accepts human rights claims against private individuals on a limited range of crimes: the International Criminal Court.* <<<

The decisions of international courts are binding on the defendant state. But the courts will not be able to enforce the decisions - they have no international police, no international prisons - so their implementation will depend largely on the political will of the sentenced state party and on the political will of the international community to exert political pressure on it.

¹² Such as, for example, Courts of the Southern African Development Community SADC (this court is currently inactive), of the Central African Economic and Monetary Community CEMAC or of the the Economic Community of West African States, ECOWAS. In contrast, the ASEAN Intergovernmental Commission on Human Rights is a consultative body that does not fulfill functions of a court.

CHAPTER 4

Building your compensation case

As described in Chapter 3, there are a number of legal and non-legal avenues that may be explored to hold a company to account for human rights violations. This chapter will discuss some aspects of how plaintiffs should build their case, applying principles of gathering evidence and investigating the chain of corporate responsibility.

Factual research should always aspire to the standards of proof that apply in courts, whether the case strategy involves litigation, negotiation or mediation processes. It would be incorrect to assume that lower standards of proof are generally sufficient to succeed in out-of-court processes. The success of any corporate accountability strategy will depend to a large extent on the solidity of its factual argument.

4.1. Basic rules for civil claims

To seek compensation, the appropriate legal action is the civil claim. And although the national law of each country determines what is needed to bring a successful claim, we can derive some general principles that apply similarly in most countries.

Burden of proof

In civil claims, i.e. claims for compensation, the plaintiff will bear the burden of proof for their claims. That means that plaintiffs will have to present the concrete facts of the case as well as convincing evidence to show that the facts are indeed true.

Evidence is material presented to convince the court of the alleged facts. A wide variety of material can be produced as possible evidence, such as:

- the court hearing of the parties
- witness testimonies
- expert opinions
- site visits and presentation of physical objects
- data gathered by third parties, particularly by state authorities, national or international independent bodies with good credentials
- historical or other data available in public archives, such as company registers, cadastral land registers, statistical surveys, etc.
- logs or journals prepared by the community members themselves or by those who accompany them on a daily basis, in order to show the changes over time in living conditions. Such long-term records are of particular importance, because experts or judiciary personnel who visit the site, no matter how great their scientific expertise, will normally visit just once or for a short period of time, as they lack the time and resources for longer or more frequent visits, and will not be able to gather such data.
- videos and photographs that can show the harm suffered but also show the situation prior to the harm caused, in order to establish a comparative base line

Defamation/ libel claims:

*Evidence is vital not only to build a strong claim, but also to prevent and refute **defamation or libel claims** or even **criminal prosecution**. Increasingly, such actions seem to be a preferred counter-strategy of companies to dissuade plaintiffs or shed public doubt on their credibility. Where a fact can be corroborated with evidence, this diminishes the risk of liability for defamation or libel. Yet, **even the expression of true facts or of opinions about a company or a com-***



pany member may in some cases give rise to legal actions, hence it is advisable to consult an expert lawyer before publishing accusations against a company.

One effective strategy for building a solid evidence-base is the use of **base-line studies**. Some communities start to produce these about their environment and living conditions, traditions and cultural practices, when the arrival of a company becomes foreseeable through media reports, visits of company representatives, or through militarization of a region. Base-line studies can be extremely valuable in both proving harm and determining the extent of the harm caused, as they provide the comparative basis of how conditions were before the damage occurred and how, if possible, they should be restored.

>>> *Base-line studies prior to damage are extremely helpful in comparing subsequent damage with previous conditions and determining how these should be restored.* <<<

Difficulties appear when it seems that gathering scientific evidence is too costly, or certain facts remain within the realm of the company and the plaintiff cannot access or document them. For example, a community might source its drinking water from a river and that river is now contaminated by the agroindustrial operations of a company. Soon an increase in skin diseases is reported. However, where the community has no technical knowledge and no money to pay for experts, they will not be able to show a causal link between these problems and the contamination of the river. But there may be ways to get around this problem. Some communities have, for example, managed to establish relationships with universities who investigate the issue.

Creative thinking might also produce alternative means of evidence that might not be scientific but have the capacity to convince the court, such as video material, story-telling etc.

Case study: Community of Tarkwa vs Anglogeld Ashanti, Ghana

For example, in 2008 the High Court of Ghana sentenced the management of AngloGold Ashanti Iduapriem mine to pay an amount of 690,295 Ghanaian New Cedis in compensation to 45 plaintiffs whose properties had been demolished to establish a mining project on the territories of the village Nkwantakrom, near Tarkwa. While the defendants claimed that the demolished village had never existed and the plaintiffs could not present legal titles on land, the court based its judgment, among others, on credible witness statements about the village history and on photographic evidence showing that the devastated village showed very tall coconut trees some appearing to have passed their fertile years, which the judges took as an obvious indication that this was an old and established village.

Source: Ghana: Anglogold Ashanti to Pay Gh¢ 690,295 to 45 Victims

http://investorshub.advfn.com/boards/read_msg.aspx?message_id=27518409#, last access: 30 May 2012

In exceptional cases, the court might consider a reversal of the burden of proof, i.e. shift the burden from the plaintiff to the defendant, when this seems more fair and reasonable, for example. So, if the plaintiff can convincingly show that a certain question of fact may be proven only with technical expertise which lies far beyond the plaintiff's capacities, but which lies within the capacities of the defendant company, the court may decide that it would be unreasonable to expect the plaintiff to produce evidence, and so might exceptionally reverse the burden of proof. As a result, it will be no longer the plaintiff who has to prove the fact in question, for example that the company's operation caused the contamination of a river, but instead, the company would have to demonstrate and prove the contrary, that its conduct has not been the cause of the contamination. Note that the contamination as such will still have to be proven by the plaintiff(s).

CASE STUDY Community of Tarkwa vs Ang- logeld Ashanti, Ghana

CASE STUDY
Inhabitants of
Tilcara vs Uranios del Sur, in
Jujuy, Northern
Argentina

Case study: Inhabitants of Tilcara vs Uranios del Sur, in Jujuy, Northern Argentina

The Supreme Court of Jujuy in Argentina halted the project of Uranios del Sur, a subsidiary of Switzerland based Uranio AG. The company intended to mine uranium in an open-pit mine in Quebrada de Humahuaca. Yet, the court halted the mining project until the company could show that there is “no possibility or certain danger” that the project would contaminate the environment or would otherwise threaten the fundamental human right to a healthy and uncontaminated environment.

The court here reverses the burden of proof, based on the **precautionary principle** drawn from international environmental law. This rule provides that when a project or product may potentially have very serious dangerous effects, then as a matter of public interest the project or production may be stopped or prohibited even without scientific proof of the expected harms.

Source: Latin American Herald Tribune (2010) Available at: <http://www.laht.com/article.asp?ArticleId=355944&CategoryId=14093>, last access: 4 June 2012

Which facts need to be proven?

Compensation claims are construed in similar ways in most legal systems, the basic argument of such a claim being that:

- a) the plaintiff(s) have suffered a **concrete harm**, which
- b) has been **caused by a specific conduct** of the defendant;
- c) this conduct has been in **breach of a duty of care** that the defendant owed to the plaintiff(s) and
- d) the defendant could have **foreseen and prevented** the harm;
- e) the compensation claim is **quantified**.

This will be shown with the example of a fictional case.

The fictional case of SBD and TNC:

A UK-registered company, ‘TNC’, has been exploiting large oil fields through its locally-registered subsidiary, ‘SBD’, for the last five years.

Soon after operations started, ground water in the surrounding areas started to change its taste and smell. At the same time, an increasing number of people in the local communities have started to display health problems, such as severe skin and eye diseases and digestive problems as well as above-average incidents of miscarriages. Yields from harvests in the local area have decreased by at least 30% over the last five years. Cattle owned by members of the community have also died prematurely.

FICTIONAL
CASE

a) Plaintiff suffered harm

The plaintiff must show through facts and evidence that s/he her/himself has suffered harm.

eg. The case against SBD and TNC:

The plaintiffs explain their health problems. This is corroborated by medical records for each plaintiff, and by a medical expert testimony, explaining their medical conditions prior to the company’s operations. They also produce logs and journals regarding the declining harvest yields. Veterinary reports are compiled, which also link the dead cattle to their ingestion of contaminated water.

FICTIONAL
CASE

b) Defendant’s conduct caused the harm

The plaintiff needs to identify a specific conduct of the defendant that caused the harm complained of.

eg. The case against SBD and TNC:

Expert medical evidence is put together to show that the health problems are caused by contaminating substances and concentrations that have been found in the ground waters. Furthermore, plaintiffs can show that such contamination is likely to occur as a result of the type of oil extraction operations the company undertakes, as comparable cases show.

However, as they cannot access technical information on the exact processes that SBD are actually

FICTIONAL
CASE

employing, they cannot identify which specific conduct has caused the harm. Having proven this much however, the court decides to **reverse the burden of proof**. SBD now needs to prove that its conduct has not been the cause of the water contamination.

It is important to be as specific as possible and to distinguish between the conduct of the local subsidiary and the conduct of a parent company, depending on who is the defendant. **The fact that the parent company may be the majority shareholder of the subsidiary will not suffice to establish parent company liability.** Instead, plaintiffs will have to identify a concrete conduct. So, if the claim is directed against a parent company, but the harm was directly caused by a subsidiary's conduct, it may be useful to consider whether the parent company's conduct has contributed to the harmful actions of the subsidiary. For example:

- has the parent company **given instructions** to its subsidiary?
- has the parent company **been warned** of potential harm, but remained passive? Have parent company executives visited the project site?
- has the parent company **made promises** to ensure that no harm will be caused, but then not taken any reasonable steps to prevent the harm?

>>> *A majority of shares in the subsidiary will not suffice to establish parent company liability.* <<<

c) Breach of duty of care

The plaintiff will have to show that the identified conduct breached a duty of care that the defendant owed to the plaintiff. What constitutes such a duty of care can be derived from legal or technical norms (for example, on maximum allowable concentrations in a water supply), but also from what is generally accepted as good business conduct, that is, the duty to take such care as would be expected of a reasonable person in the same circumstances, and with the same knowledge and capabilities as the defendant. International standards, such as the OECD Guidelines for Multinational Enterprises, or the UN Guiding Principles on Business and Human Rights, may also be referred to when interpreting what such generally accepted standards of good business conduct are.

The concrete content of the duty of care varies from case to case and between different defendants. For example, a subsidiary may have a duty to install a certain filter to prevent contamination, whereas the parent company may have a duty to monitor and control whether the subsidiary has duly installed the filter.

Once the content of the duty is determined, the plaintiff will then have to show that the specific conduct that caused the plaintiff's harm was in breach of this duty of care.

eg. The case against SBD and TNC:

To fulfill its duty of care, SBD needed to conduct an Environmental and Social Impact Assessment, based on a gendered analysis, before commencing its operations, to identify risks and address them through taking reasonable precautions. The assessment mentioned the possible risk of contaminating ground water supplies used by local communities. Nonetheless, SBD began its operations without taking any precautions.

FICTIONAL
CASE

d) Defendant could have foreseen and prevented the harm

The plaintiff will finally have to show that the harm caused by the defendant's conduct could have been concretely foreseen and avoided by the defendant.

eg. The case against SBD and TNC:

Community members had informed the consultants who conducted the Environmental and Social Impact Assessment about the community's dependence on the ground water supply for human consumption, their livestock and the irrigation of crops. They also informed the president of TNC who came last year for a site visit. Luckily they kept the records of these interviews!

The plaintiffs' research into oil exploitation techniques have revealed that the risks of harm of using certain chemicals to human health and the environment have been subject to scientific investigations and were well known years prior to SBD's first explorations.

FICTIONAL
CASE

Again, one should distinguish here between parent company and subsidiary. If the parent company was never directly informed by the affected community about imminent risks of harm, it may be very difficult to show how the harm was foreseeable for them. Hence, it is advisable to always inform directly the parent company and to seek to establish a continuous communication channel with the relevant persons. Note, that corporate responsibility officers might not be the most suitable contacts as they often are responsible for public relations but not for security, environmental, health and safety matters, compliance and legal affairs, human resources, etc.

e) Quantification

Translating the harm suffered by plaintiffs into monetary value can be a complex task. It is important to determine the value of harm and losses not only looking at the short term market value but the real life value of assets. The base-line studies mentioned earlier may be very helpful here.

eg. The case against SBD and TNC:

Having accepted liability for the harm, SBD intends to compensate plaintiffs by covering their medical costs. However, plaintiffs insist that compensation must also include adequate amounts for the loss of income suffered while, due to illness, they were unable to work their fields, maintain their families and care for their children, as well as moral damages for miscarriages.

SBD has also decided to compensate those who have lost cows and other cattle with the equivalent market price for cattle of a similar breed, age and condition. Yet, plaintiffs highlight that as they are now displaced to a nearby town and without access to land, they cannot keep cattle anymore and that ways must be sought to compensate for the loss of not only the market value of cattle but the value of fresh milk they have to buy, of income that calves would have generated, of alternatives to the fuel (cow dung) and means of transport that a cow provided for.

FICTIONAL CASE

Given the inadequacy of the monetary compensation model that civil law offers, negotiations may also provide alternative and more adequate modes of reparation, such as modifications of the company's operational procedures which prevent further harm, or compensation in-kind. However, **whether or not the community achieves a successful outcome from these negotiations will always depend on the strength of their evidential basis, as this will help to justify the demands and paves the way to take a case to court, should negotiations become inefficient or falter.**

4.2. Investigating the corporation

If the plaintiffs wish to build a case against the parent company with headquarters abroad, rather than against the local subsidiary, the case will most likely have to be brought in the home country of that parent company, i.e. abroad.

The case will then be construed of largely the same elements as the case against the subsidiary, namely harm, specific conduct, causation, foreseeability, and so on. Yet one will present the parent company's conduct, the parent company's duty and foreseeability, etc., which can be different from the subsidiary's. Here we will examine some of the particular aspects that should be taken into account when building a case against a parent company.

4.2.1. The corporate veil doctrine

The doctrine of the 'corporate veil' substantially benefits the parent company by limiting their liability with respect to the operations of subsidiaries. This doctrine originally describes the relationship between a shareholder (here: the parent company) who is not liable for the conduct of the company (here: subsidiary), of whom s/he holds shares. Similarly, the buyer is not considered responsible for liabilities that his/her supplier incurs.

>>> A parent company will not be considered legally responsible for actions of its subsidiary, but only for its own actions and omissions. <<<

As a consequence claims cannot be directed against the parent company for operations of its subsidiary, even though it might be the parent company that bears the overall responsibility and the power to produce systematic changes. A parent company will not generally be considered legally responsible for actions executed by its subsidiary or satellite, but only for its own actions and omissions, carried out through its directors or executives.

4.2.2. Parent company's effective control

A plaintiff must investigate as meticulously as possible the parent company's internal structure and working relationships (decision-making, supervision and reporting) with the subsidiary or supplier, in order to understand whether and how the parent company may have concretely controlled and influenced the specific operations that caused a human rights violation.

Investigations into capital shares and ownership are important as this will help to identify relevant actors and their interests, though it will not be sufficient for establishing legal liability. This is because a shareholder does not normally have any influence on the day-to-day business of a company. Shareholders meet only once a year at the annual shareholders' meeting, approve annual reports and decide whether or not to collectively discharge the company's directors from liability for the past year. Hence, one must establish that the parent company had effective control over the specific actions of the subsidiary or supplier that caused the denounced harm. Furthermore, identifying individuals in key positions of responsibility can be crucial to constructing both civil and criminal cases. In both, it needs to be concretely shown who was in a position to foresee and prevent the harm complained of.

Here it will be helpful if the community can show that it has informed responsible directors within the parent company of any harm caused or imminent harm, in advance. Such communication should therefore be provided in writing, dated and signed, and confirmations of receipt kept, so that knowledge and eventually foreseeability can be subsequently proven.

4.2.3. Investigating the corporate structure

Investigations into the interior corporate structure might seem difficult, as a lot of information is internal to the companies. But a lot can be done through searching for and interpreting public sources.

Commercial registries

The legal form an enterprise has chosen may sometimes tell us something about individual responsibilities. For example, where a company exists as a limited liability company (Ltd, LLC or similar), some of the partners will have limited liability; others will have unlimited liability. This will be registered in the companies' register, which in many countries is public. This can help the investigation, given that partners with limited liability will also tend to have limited decision-making capacity within the company, and vice versa.

Disclosure obligations

In some countries, new legislation requires companies to disclose much more than just financial information. It will therefore also be helpful to understand the applicable company laws and regulations, in order to know where to look and what to look for¹.

Other sources

News in relevant business newspapers or journals may publish announcements of changes and appointments of new directors within the company, as well as sales and acquisitions of other

¹ French law now requires corporations that are listed on the French Stock Exchange to report on the social and environmental impacts of their operations, and on their mitigation, in their annual reports. These obligations include information on labor and employment matters, as referred to in the ILO core labor norms, as well as community issues and impacts on local development. The disclosure requirements furthermore extend to the foreign subsidiaries of companies. (Daniel Augenstein, Study of the Legal Framework on Human rights and the Environment Applicable to European Enterprises Operating Outside the European Union, submitted by the University of Edinburgh, 2010 para. 204 ; available online at : http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm; executive summary available online at : http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/101025_ec_study_final_report-exec_summary_en.pdf, last access to both: 30 May 2012.

companies, the founding of joint ventures, etc. Articles in scientific or professional journals and conference reports, where company representatives present and advertise their newly developed operational techniques, and the company's own websites have been found to be extremely valuable on occasion. Furthermore, trade unions and specialized NGOs, such as SOMO or Profundo (see Annex III), investigative journalists or law clinics might be able to help with investigations; agencies like MISEREOR and "Brot für die Welt" can help find the indicated contacts and may even be able to financially support such research cooperations by their partners.

Build an "organigram"

As information is gathered, it is helpful to collect and organize it into an 'organigram', a diagram of the structure of the relevant corporate relationships. This should show the parent company, its related companies, subsidiaries and joint ventures, as well as all known persons with their formal titles, functions, areas of responsibility, and the exact periods when they held these functions. This can be expanded or further detailed over time. Always note down the sources for each piece of information

Such an organigram can reveal de facto lines of control that are not reflected in the companies' register or official statutes and reports as well as how knowledge may "travel" with a director who changes from position to position within the corporate group.

4.3. Conclusion

Whether embarking on a civil or criminal case against, or engaging in mediation or direct negotiations with either a subsidiary or parent company, it is vital to first have a clear understanding of the legal liabilities of the other party. The elements of the legal argument will help determine which are the relevant facts and evidence that will need to be investigated.

>>> The legal argument will determine which facts and evidence to investigate. <<<

To pursue claims against the parent company requires a considerable investment of time into researching the relationships of effective control within the corporate group in order to argue beyond the 'corporate veil' and establish the parent company's direct liability.

The quality of the evidence-base will also impact significantly on the company's motivation to invest in and commit to the negotiation process. If it is strong enough to support a legal action, this will significantly strengthen the community's bargaining position, including during negotiations, as the community can feel confident to choose an alternative strategy, for instance litigation or a public campaign, if they judge that the negotiation or mediation process is not efficient.

CHAPTER 5

Building a strategy around your compensation claim

When preparing and designing a strategy for compensation claims, certain key issues should be addressed and planned in advance, such as the objectives, foreseeable risks and challenges, and the consolidation and strengthening of the group that pursues the claims.

The following strategic recommendations should always be read in relation to litigation as well as for out-of-court negotiations. It is important to remember that all of the processes we have discussed are fluid and dynamic, and negotiation opportunities may arise at many stages, regardless of which (legal) avenue is being pursued.

5.1. What is strategic litigation?

Strategic human rights litigation aims at setting precedents and advancing policies that strengthen the legal framework for global human rights accountability and achieving greater social justice. To that end it employs a combination of litigation techniques, advocacy, and other legal and non-legal methods, and the use of domestic, regional and international courts or tribunals.

>>> Strategic human rights litigation aims at setting precedents and advancing policies that strengthen global human rights accountability. <<<

The legal actions employed in any particular case should be determined by the specific objectives of that case, because justice and the best way to seek it might mean different things in every case and to every person. Therefore, the objective of a case could be that:

- ✓ the company repairs and mitigates all environmental damage it has caused,
- ✓ the company shares its profits with its workers and the local communities that have granted access to their land and natural resources, in order for all to benefit from the development that the company has promised to bring to the region,
- ✓ the company leaves the region or the country,
- ✓ the case receives public and political attention internationally or in the home country of the company,
- ✓ the case helps to reveal the truth and to make known what has really happened and who is responsible for it,
- ✓ through the case it can be shown that and how the applicable laws are inadequate or insufficient to protect the human rights of people, in order to push for legislative changes, and that
- ✓ people come together and unite their forces behind a common mission.

Which legal or other actions may best serve these objectives again depends on the individual case. The choice of actions should always be guided by the question: does the envisioned action contribute to or distance us from our objectives?

- **mediation?** For example, if the community wants to defend its territory and wants an open-pit mining company to be expelled from the region, a mediation procedure is unlikely to achieve this. It is not realistic to expect a company to negotiate seriously about the termination of its operations. A criminal complaint against the company - if there is evidence to sustain it - might be a more suitable option as it could generate international public interest as well as political support for the company's withdrawal.

- **criminal action?** On the other hand, if a community considers that there might be advantages to the company coming to its area, provided that it is prepared to share its gains fairly, then a strategy to pursue a criminal case will not be suitable, because it is unlikely to bring the company to the negotiation table.
- **negotiation?** Out-of-court negotiation or mediation is less effective than court litigation where the objective of the case is to obtain an authoritative court statement condemning the company or where there is no trust that the company will negotiate in the good faith.

These examples show that it would be over-generalized to think that an in-court strategy will be more difficult, costly and time-consuming, or that out-of-court negotiations are preferable and lead to concrete results quicker or more efficiently.

>>> *Decide for a legal or other action depending on whether and how it may serve the broader objectives of the human rights struggle.* <<<

Success without victory

When formulating the objectives, one must be realistic as to the prospects of litigation projects. Human rights cases against transnational corporations are still innovative projects that challenge the legal and jurisprudential status quo. And there is a considerable chance that such cases will lose before a court. This is one of the reasons why most of the recent important compensation claims brought for example in the USA or in England against large corporations, such as the **Trafigura**, the **Shell/Wiwa** or **Burma/Unocal** cases, have been settled before a court judgment was handed down: to avoid the risk of losing the case, receiving zero compensation and instead having to pay all the costs.

Hence, the possibility of losing the case should be built into the litigation strategy, and an alternative action plan should be designed detailing how to work with such a negative court statement. If a case is lost in court, the ruling might be used as an opportunity for a public awareness-raising campaign, for example. This means that a lost case can be turned into “success without victory”, if, for example, it is used:

- to give publicity to a legal-political question and **generate a public debate** about it in the country of operation or in the country of origin of a company,
- to **identify shortcomings** in the existing legal system,
- to **pursue investigations**,
- to generate a political debate about how to **deal with the risks of corporate conduct** and with corporate human rights responsibilities;
- to **exhaust remedies** in order to bring the issue to the next higher level of jurisdiction, the appeal court, constitutional court or an international court.

>>> *The possibility of losing the case should be built into the litigation strategy.* <<<

Monitoring outcomes and impacts of the case

Objectives should be formulated in ways that allow verification of whether and how they have been achieved. How do you follow-up and demonstrate the effects of a case? Here are some ideas for helpful questions:

- does the case generate follow-up actions, such as positive administrative measures? How does the affected community evaluate the process and outcome of the case? Do they feel reaffirmed or discouraged in their struggle?
- does the case generate public solidarity support? Does it bring you in contact with communities or journalists or activists? Can these contacts help to increase political pressure, bolster your credibility or access further resources?
- does the case lead to public discussions in public fora and the media? Does this generate further activities?
- are the arguments of the case used to argue similar cases? Do courts or law journals discuss the case?

5.2. Develop a negotiation strategy

A company is likely to have more experience with negotiations than a local community. So, from the outset there is an inherent power imbalance. However, preparation of certain key aspects of the group's negotiation strategy will greatly increase the potential for a successful outcome.

What follows is a non-exhaustive list of recommendations. While these are of central relevance, the limitations of the present publication format mean these guidelines cannot serve as a comprehensive negotiation training manual.

Set the frame for negotiations

It is within the nature of a negotiation or mediation process that both parties mutually move away from their original position in order to reach a compromise agreement. So, the community should prior to negotiations define its maximum demands as well as an absolute minimum set of demands. These will serve as an indicator as to how successfully the negotiations are progressing. Failure to achieve even the minimum position indicates that negotiations are not progressing successfully and should be exited.

The community should communicate clearly the maximum demands to the other negotiating party, but need not divulge the minimum position.

Define the terms of negotiation

Given their broader experience, companies tend to set the terms for the negotiating process. Yet, the terms are very important, as they will influence the power balance between the parties.

>>> Setting the terms for negotiations will influence the power balance between the parties. <<<

Hence, these terms should be negotiated, agreed and fixed in writing as **Terms of Reference**. They should, among others, address the following questions:

- **secrecy:** Companies frequently demand confidentiality about the negotiation process and outcome. A secret agreement might be acceptable, but it could also be considered counter-productive as part of a strategy for the defense of human rights precisely because public scrutiny and political debate around the agreement will be impossible. Public scrutiny and the invitation of international observers might be measures which redress such an imbalance. So, if secrecy is posed as a “yes” or “no” condition for the continuation of the process, it might be indicative of the power imbalance between the two negotiating parties. The conditions of confidentiality should be negotiated and agreed upon.
- **waiver of rights:** The waiver of current and future legal actions may be used to consolidate the validity of the final agreement. Two aspects should be negotiated, namely (1) that it extends only to questions concretely dealt with and resolved through negotiations, and (2) that it does not extend to criminal actions, because the persecution of criminal conduct is not at the disposition of the parties but is a matter that lies in the competence of the justice system because it touches upon the public interest in re-establishing a state of legality and the rule of law.
- **timing and time pressures:** To avoid time pressures making consultations with the community difficult, the community's representatives should stipulate beforehand that appropriate time periods must be allowed to consult with the community on proposals.
- **documentation:** Negotiations should be documented and minutes taken of every meeting; communities' representatives should insist that minutes are read, understood, amended, where necessary, and signed by both parties. Representatives are well-advised to keep copies of anything they sign as well as their own notes of any such meetings.
- **offering payments to representatives:** While financial recompense for their time and efforts might initially seem like an attractive proposition for the community's representatives, there is a risk that these benefits create conflict of interests and distrust, which will damage the community's negotiating power.

Secure the results

Where an agreement is reached it is vital to not only document this, but also to stipulate the terms of when and how it should be implemented, how this can be verified - for example by a third party - and what should happen, if there are undue delays or other irregularities.

Exit strategy and 'Plan B'

An exit option should be included in the negotiation/mediation strategy as without such an alternative strategy a party can become dependent on the process and lose its bargaining power. The exit strategy should be accompanied by an approximate time schedule. Ideally, it contains a 'Plan B', i.e. an alternative action plan. These options should not be just vaguely formulated ideas, but should be thoroughly planned. If the community just "bluffs" to abandon negotiations for a legal action, but is not in a position to realize this, the company might start taking community's arguments generally less seriously. For example, if the community threatens to go to court to claim compensation the company could respond: "How will you do this, given that your claims, if they exist, are already prescribed?" If the community has no convincing answer to this, the threat loses its potential immediately. For example: check whether jurisdiction is opened in another country, where prescription periods are longer.

Even where no alternative 'Plan B' exists, an exit strategy from negotiations might be necessary to save the community from the risks that are inherent to a negotiating process: the risk of spending excessive resources in the process, the risk of internal conflicts, the risk of damage to public support and the risk that the company might use the process to 'clean' its own public image and reputation.

>>> *An exit strategy will help manage the risks that come with the negotiation process.* <<<

A negotiation process can itself bear significant risks:

- **conflict:** Individual negotiations can provoke internal conflict within the group.
- **organizational strength:** Such conflict in turn weakens the organizational strength and negotiating weight of the group.
- **resources:** A lot of energy, time and capacities can be tied up in the process and thus diverted away from the development of alternative strategies.
- **public image:** The company might use negotiations to "clean" its public reputation, which can reduce the community's chances of generating support for their position.
- **power imbalance:** There is also a danger that negotiations are so asymmetric in terms of access to information and resources and ultimately in terms of power, that fairness and sustainable benefits are difficult to achieve.

There are, of course, ways to mitigate these risks. The first step is to become aware of them, then to plan responses. It is also advisable to work with observers or consultants, for example, from other communities with similar experiences.

5.3. Organizational strength

The first important challenge for those who undertake to collectively defend their human rights is to gain internal strength as a group. A group is not automatically formed by the common destiny of having suffered harm by the same company, it needs to establish itself and ensure cohesion by working through the questions of participation, representation, conflict as well as security and protection.

Participation should be both broad and equitable, involving all individuals who have suffered harm, particularly those most often marginalized, such as women, landless peasants, migrants, etc. Groups made voiceless by marginalization and discrimination are still bearers of human rights and the risks of a violation of their human rights are even greater if their concerns are not taken into account. For example, if women are not consulted, it will be impossible to understand the full impact of displacing a family.

Representation: The group should work towards an agreement on who should undertake to represent them in front of the company. The group should also come to an agreement that sets out the duties and mandate of the representatives with regard to reporting, consultations, decision-making and transparency, so that the community can actively accompany and influence the negotiation process and support their representatives.

>>> *Representatives need clear instructions and the active support of the community whom they represent.* <<<

Conflicts: Ideally, the group should strive for a strong common position. Where differences arise within the group, these should be made transparent and integrated into the negotiation strategy. Many communities have reported that companies sometimes employ what could be called a ‘divide and rule’ strategy, by dividing a group and negotiating individually, thus breaking the social and political cohesion of the group. Efforts should be made to ensure that differences are dealt with internally and collectively in the group. It is important to remember that the greatest opponent is not within the group, but outside of it.

Security and protection: In all cases we have seen of human rights struggles against the impacts of corporate behavior, security issues were a common feature, appearing in different forms, such as:

- **intimidation**, through open observation and surveillance, threats by phone, email or through spoken messages of “friends”, or simply by “strange” incidents that leave the victim confused and unsettled;
- **defamation campaigns** by state institutions or media, that incite violence;
- **physical and sexual attacks**, by illegal actors; violent interventions by police and private security forces in public demonstrations or in detention; provoked accidents; kidnapping and disappearances;
- **spying**, through office raids, theft of information, interception; infiltration of spies into an organization;
- **paralyzing progress** through attempted criminalization of persons based on false denunciations, and through arrest warrants and prolonged detention.
- **conditions of impunity** also create pressure, because impunity allows aggressors to act without risk and leaves victims defenseless against such aggressions. This reduces the victims’ spaces for action in defense of their rights.

These issues are often neglected in the development of strategies for human rights defense. This may be because they are considered less important than the struggle itself, or because they challenge us to confront our fears, or because they leave us without clear answers. Yet, this can be a dangerous omission.

>>> *Security concerns warrant being a central component of any strategy.* <<<

Here, we will offer some initial thoughts on the issue, relating to:

- **collective risk analysis**
- **tools and trainings**
- **support network.**

In the Annexes III and IV you will find references to further resources and contacts.

An initial imperative is to include discussions and **analyses of security concerns** as a continuous element of your work and to do so collectively, as this concerns the group and not only the individual attacked. For example, incidents such as a lost or stolen mobile phone or an apparent misdial of one’s phone number by an unknown person may not seem significant until it is uncovered that several members of the group have had similar incidents. Security problems should never be dealt with individually, as the very purpose of intimidation and threats to security is to generate isolation.

Risk analysis and protection plans can be complex, so a number of **tools and resources** have been produced to help communities to develop such plans. Several **organizations** such as Peace Brigades International, Protection International or Frontline (see Annex III) and a growing number

of local organizations specialize particularly in the protection of human rights defenders and offer accompaniment and protection trainings. A number of protection manuals are available for free online (see Annex IV) and an online protection training facility has been recently developed¹.

The building of **support networks** with international or local human rights-, media- and civil society organizations can also help to bring any threats to the community to the prompt attention of the wider public. Development agencies, such as MISEREOR and “Brot für die Welt” might have the capacity and be in a position to support you and your case through their own lobby and advocacy work.

A number of **advocacy tools** can help you in your protection work. The EU has issued a guideline specifically on the protection of human rights that helps member states and their diplomatic missions to be active in their support and protection of human rights defenders². The UN³, the Inter-American⁴ and the African System⁵ of Human Rights have established Special Rapporteurs for Human Rights Defenders, who can be contacted and invited to undertake country visits.

5.4. Conclusion

In summary, central to building a strategy around your compensation claim are: the collective definition of objectives and the choice of legal or other actions that correspond to these objectives; the awareness and anticipation of risks and challenges as well as failures and the advance planning of responses to these, and finally, the building of internal strength within the group, including a systematic and collective approach to security concerns and protection needs.

These preparations will significantly strengthen the community’s position, from the first time their representatives sit down at the negotiation table, and all the way to court if necessary.

¹ Available in English, French and Spanish, see <http://www.e-learning.protectioninternational.org/?lang=en>.

² Available in 15 languages of the European Union: http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/l33601_en.htm.

³ <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx>.

⁴ <http://www.oas.org/en/iachr/defenders/activities/activities.asp>.

⁵ <http://www.srhrdafrica.org>.

RECOMMENDATIONS

Whether compensation is sought through litigation, out-of-court negotiations or mediation, none of these approaches are completely separate from each other and communities would be well advised to apply an integral approach that considers the interplay of different options.

This brochure highlights a number of elements that can support communities in undertaking to defend their rights against transnational companies and hence directly contribute to redress the power balance between companies and communities.

Extracting the essential conclusions, we present the following six recommendations:

1. **define objectives and success** not in terms of “winning” or “losing” a case but in a long-term and strategic way; develop alternative options and exit strategies.
2. **strengthen the cohesion and organization** within the group of human rights defenders. Integration and participation of every person concerned is of primary importance when seeking sustainable and effective results.
3. **build your support** network carefully and based on trust: transnational human rights violations require transnational alliances.
4. **protection:** Threats are meant to weaken the group as a whole. Adopt security and protection as a mainstream approach and always deal with it collectively.
5. **burden of Proof:** Do not underestimate the importance of a solid factual and evidential dossier in any of your strategies. Meeting the required standard of proof will significantly boost both your bargaining position and the legal potential of your case.
6. **compensation:** Define compensation on the basis of concrete harm suffered or loss to be expected and do not replace but rather complement it with CSR measures.

ANNEX I

Relevant human rights provisions

Assembly and association, freedom of peaceful

Art. 20 United Nations Universal Declaration on Human Rights (UDHR); Art. 15 & 16 American Convention on Human Rights “Pact of San José, Costa Rica” (American Convention); Art. 24 VI Arab Charter on Human Rights 2004 (Arab Charter); Art. 11 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention); Art. 21 & 22 I ICCPR; Art. 7(c) & 14(2) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Cultural, economic and spiritual rights

Art. 5 (a) ILO Convention No. 169; Art. 1 International Covenant on Civil and Political Rights (ICCPR); Art. 1 International Covenant on Economic, Social and Cultural Rights (ICESCR); Art. 25 United Nations Declaration on the Rights of Indigenous Peoples (DRIPS)

Discrimination, prohibition of

Art. 23 II, 1 & 2 UDHR; Art. 1 American Convention; Art. 3 Arab Charter; Art. 2 & 18 III African (Banjul) Charter on Human and Peoples’ Rights (Banjul Charter); Art. 14 European Convention; Art. 1 Protocol 12 to the European Convention; Art. 2 I & Art. 3 ICCPR; Art. 2 II & Art. 3 ICESCR; Art. 2. CEDAW; International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Expression, freedom of

Art. 19 UDHR; Art. 13 American Convention; Art. 32 Arab Charter; Art. 10 European Convention; Art. 19 II ICCPR; Art. 7, 8, 10, 13(c) & 14(f) CEDAW

Food, right to

Art. 11 ICESCR; Art. 38 Arab Charter; Art. 25 I UDHR

Free Prior and Informed Consent

Art. 10, 11, 19, 28 & 29 DRIPS; CERD General Comment No. 23 on rights of indigenous peoples; ILO Convention No. 169; Art. 14(2)(f) CEDAW

Health, right to

Art. 39 I Arab Charter; Art. 16 Banjul Charter; Art. 12 I ICESCR; Art. 24 I Convention on the Rights of the Child (CRC); Art. 11(1)(f) CEDAW

Integrity, right to physical and mental

Art. 5 (b) ILO Convention No. 169; Art. 5 I American Convention; Art. 4 Banjul Charter

Land, right to

Art. 14 & 16 ILO Convention No. 169; Art. 10 & 26 DRIPS; Art. 14(g) & 16(h) CEDAW

Liberty and security, right to

Art. 3 UDHR; Art. 7 I American Convention; Art. 14 Arab Charter; Art. 6 Banjul Charter; Art. 5 European Convention; Art. 9 I ICCPR

Life, right to

Art. 3 UDHR; Art. 4 American Convention; Art. 5 Arab Convention; Art. 4 Banjul Charter; Art. 6 CRC; Art. 7 DRIPS; Art. 2 European Convention; Art. 6 ICCPR

Living & housing, right to decent	Art. 38 Arab Charter; Art. 25 I UDHR; Art. 7 (a)(ii) & 11 I ICESCR; Art. 14(g),(h) CEDAW
Property, right to	Art. 17 UDHR; Art. 21 American Convention; Art 31. Arab Charter; Art. 14 Banjul Charter; Art. 1 Protocol I to the European Convention; Art. 15(2) & 16(h) CEDAW
Security, right to	Art. 3 UDHR; Art. 7 I American Convention
Sexual exploitation and prostitution, freedom from	Art. 6 CEDAW
Torture and cruel inhumane and degrading treatment or punishment, freedom from	Art. 5 UDHR; Art. 5 II American Convention; Art. 8 Arab Charter; Art. 5 Banjul Charter; Art. 3 European Convention; Art. 7 ICCPR
Trade union rights	Art. 35 I Arab Charter; Art. 22 I ICCPR; Art. 8 I ICESCR
Water, right to	Art. 39 II (e) Arab Charter; Art. 24 I & II (c) CRC; Art. 14(2)(h) CEDAW
Work, right to	Art. 23 I UDHR; Art. 34 Arab Charter; Art. 15 Banjul Charter; Art. 6 I ICESCR; Art. 6, 11 & 14(d),(e),(g) CEDAW

ANNEX II

Lines of action for lawyers and communities

LINES OF ACTION FOR LAWYERS AND COMMUNITIES CONFRONTING TRANSNATIONAL COMPANIES ACTING WITH IMPUNITY

(Jointly elaborated and approved by the participants of the International Seminar “Transnational corporations and Human Rights – litigation from the victims’ perspective”)

Bogotá, Colombia/November 13, 2009

Recognising that, although States have the principal obligation of promoting and ensuring compliance and respect for human rights, transnational companies have the responsibility to ensure that their activities respect those human rights established by International Human Rights Law and the domestic laws of the countries where they carry out their economic activities;

Emphasising that the obligation to monitor and guarantee human rights, created by related international treaties and conventions, prevails over international commercial directives and accords;

Reminding States of the need to adopt enforceable international instruments of this matter, as a way to compel the creation of a body to verify and monitor on-going compliance issues;

Recognising the existence of an economic development model principally led by transnational companies that are responsible for massive and generalised human rights violations by planning, financing, or benefiting from serious human rights violations perpetrated on all continents and taking into account the absence of adequate mechanisms and bodies to hold transnational companies accountable nationally and internationally for these violations;

Recognising the direct advocacy that transnational companies employ during the process of approving and issuing laws that favour their economic interests in countries in the Third World, in terms of the environment, taxes, energy, mining, and commerce, including free trade agreements and those commercial agreements focused on promoting and protecting investment, creating a parallel judicial context of private arbitration where investors’ rights are privileged, and thereby affecting the capacities of States to comply with their human rights obligations;

Considering in particular the especially negative impact of the actions of transnational companies regarding workers’ rights in general and specifically indigenous peoples, trade unionists, farmers, women, and Afro-descendants, who have been subjected to processes of displacement from their territories of origin and the disintegration of their community ties;

Emphasising as well the impact of transnational companies on the environment, whose projects create irremediable consequences for the economic, social, and cultural rights of communities;

Rejecting the plans for military intervention directly and indirectly impelled by the United States that, among other motivations, has the objective of favouring multinational interests in Latin America;

Mentioning again the precarious security situation and lack of guarantees faced by those people who demand that transnational companies respect their fundamental rights, and in particular considering arrests and prosecutions carried out in the name of the fight against terrorism; threats, torture, arbitrary detention and assassination of leaders, social activists and members of communities that defend their rights;

Denouncing the militarisation of those territories where there are natural resources and communities whose human rights are disproportionately affected, in particular ethnic and indigenous peoples, that in the best of cases are obliged to abandon their lands, threatening their cultural and social survival;

Opposing the use of mercenaries contracted through private security companies;

Attorneys and victims, in searching for justice for the abuses committed by or with the complicity of corporate actors, have confronted many obstacles at the national level, which necessitates highlighting the following:

- Insufficiency of norms and judicial mechanisms related to corporate responsibility. For example, a lot of legislation regarding agriculture, the environment, and mining favours companies and their investors to the detriment to the rights of communities and indigenous peoples. In several cases, we have seen where corporate interests have influenced legislation.
- Lack of independent judicial power and official mechanisms to protect human rights. These have tended to protect the most powerful, and companies have corrupted public functionaries.
- Problems of procedure that do not allow access to an effective recourse to protect human rights against transnationals. For example, many lawsuits are rejected for procedural defects, or because of extremely short statutes of limitations. In other cases, the burden of proof becomes too onerous for poor communities without resources. Proof in the hands of corporations is frequently destroyed or manipulated.
- Problems faced by communities and victims seeking access to legal representation. Few lawyers are available to work with communities, and those few that are willing to work on behalf of the victims' cause often suffer a lack of preparation due to the few available resources and geographic and cultural distances. In other cases, unscrupulous lawyers exploit the need and desire for justice among the victims, giving them false expectations and taking their few resources.
- Permanent threats from paramilitary groups, mercenaries, or armed groups prevent communities from continuing in their process of denouncing and reclaiming their rights through judicial means. We witness the intimidation of victims, witnesses, and a lack of judicial systems effective in protecting the rights of the victims.

Lawyers and victims have confronted many obstacles at the international level, and, among other elements, we mention the following:

- Lack of adequate mechanisms and bodies to hold transnational companies accountable internationally for their civil and criminal responsibility for violating human rights;
- The existence of a parallel judicial system created by arbitration tribunals, which reduce the ability of States to comply with their obligations to protect and promote human rights through judicial mechanisms. International arbitration fora are designed to protect the companies and leave no opportunity to hold them accountable. Both the international human rights system and its corresponding mechanisms are designed to receive complaints against States, but not complaints against companies. There are not, save for a few exceptions, adequate international systems in which to bring environmental complaints.
- Limited legal and financial capacities within the regional and international protection systems of human rights to attend to cases and protect victims and human rights defenders from threats, risks, or acts of repression suffered as a result of their activities;
- Lack of compliance with the decisions of regional and international protection bodies;
- Lack of information on the instruments and procedures of international bodies among many victims and communities;
- Lack of financial, human, and technical resources to enable victims to access these mechanisms;
- Lack of independence and impartiality in quasi-judicial mechanisms such as the National Points of Contact for resolving disputes about the Principles of Conduct for transnational companies of the OECD. The quasi-judicial rules and mechanisms of International Financial Institutions favour companies and are ineffective for the affected victims;
- Evidentiary difficulties in establishing liability at company headquarters for the actions of subsidiary or sub-contracted companies (for example: the corporate veil). The civil and criminal judicial systems have great limitations on establishing responsibility at corporate headquarters. Even if there is jurisdiction, the tribunals of the countries where companies' headquarters are located frequently decline their own competency to hear the case, invoking the legal doctrine of *forum non conveniens* (improper venue).
- There are cases that require accessing foreign judicial systems to enforce a favourable sentence obtained in the local courts against corporate headquarters. In these cases a new difficulty can emerge if foreign justice does not recognise the validity of that sentence and declines to enforce it. Even if a lawsuit succeeds in the country of origin of the company, the

same difficulties exist with regards to immense inequality between the parties. Structural difficulties related to military, judicial, and political power of companies continue.

For these reasons, we propose the following action steps for lawyers and communities in the struggle against impunity on the part of Transnational Companies:

We emphasise that affected communities, accompanying organisations, local lawyers and international lawyers should act within an ethical framework of solidarity, respect, equality, and trust, always seeking to defend the interests of the persons affected;

We recognise that legal work is, and has to be, consistent with the political and social work and strategy of the communities affected by transnational companies. Thus, litigation only makes sense if it is oriented with the defined objectives of social groups and the defence of their rights;

We are conscious of the fact that the custom of several lawyers to, in certain cases, come to amicable settlements in litigation with transnational companies, can be concerning and counterproductive when it is done without extensive consultation of victims and the interest of justice in the form of truth and integral reparation for victims, is sacrificed;

We have observed the negative social consequences that individual financial settlements generate in communities, and we also highlight the obstacles that block fluid relationships between communities, victims, and local and international lawyers such as, among other things, the distrust of the affected communities in the lawyer due to the level of affectation and lack of knowledge among victims about legal processes;

Reiterating the importance for legal actions to be effective, integral, and carried out in the best interests of the victims in respecting their right to integral justice, **we propose the following:**

Proposals and alternatives for obstacles in access to justice at the national and international level:

- Develop strategies of enforceability like the use of constitutionality mechanisms, administrative and disciplinary actions, protection actions, complaints for violations of the penal code, law reform, and the use of ethical commitments adopted by transnational companies;
- Search for strategies of coordination and enforceability so that there is a true recognition of the rights of peoples in defence of their territory regarding the use of natural resources and right to prior, free, and informed consultation in all projects that could affect them;
- Appeal to regional courts of human rights, naming States of origin as stewards of the actions of transnational companies;
- Appeal to monitoring mechanisms of the World Bank, regional banks, and other financial institutions so that they condition their assistance in strict compliance with human rights;
- Explore the possibility of invoking criminal liability of companies by way of other enforceable directives in regional and international law in areas such as environmental protection, corruption, and money laundering;
- Push for the expedition of laws and judicial proceedings in countries where the headquarters of transnational companies are located to guarantee that those affected in third countries can bring extraterritorial civil and criminal actions if necessary;
- Advocate for the UN to adopt a world convention on corporate responsibility with regards to human rights as a supervisory mechanism with purview to decide on the respective liabilities of companies and provide enforceable, effective recourse for victims;
- Reflect on the opportunity and eventual modalities of the creation of an International Environmental and Economic Court;
- Develop possibilities to apply the Rome Statute to prosecute those responsible within transnational companies for criminal acts that fall under the competency of the ICC and work for a conference to revise the Rome Statute with the objective of considering crimes committed by or with the complicity of company official or by multinational companies as legal persons;
- Continue to create and apply independent and alternative systems of justice such as, for example, the Permanent Peoples Tribunal.

Proposals for the development of ethical and political criteria in relation to victim communities, local and international lawyers, and social organisations:

- Develop a code of ethical conduct between lawyers and organisations, whereby lawyers agree to respect the position and decisions of the organisation. As part of this ethics code, lawyers should never create unrealistic expectations among the organisations, and should constantly inform them as to the state of the process of negotiating liability of transnationals and States; they should not speak for the organisation without consulting them first. The parameters, criteria, and strategies to be employed as part of their representation need to be agreed upon clearly and from the beginning with the communities and within their relationships of accompaniment. An additional proposal is to hold periodic meetings with those persons most affected.
- Develop a well-articulated, coherent legal strategy for domestic and international actions based on mutual trust between lawyers from the home countries of transnational companies, and local lawyers where the violations take place, always keeping in mind the most important interest — that of the victims;
- The strategies developed should respect the criteria of represented communities to ensure respect for their informed consent;
- Promote legal trainings throughout communities and sectors of victims to empower those affected. In this sense, lawyers should explain legal topics with language that is comprehensible to the organisations;
- Improve lawyers' competency on strategic themes such as ancestral territories and other concepts unique to the communities, and the practice of litigating against transnational companies;
- Promote accompaniment of victims in the field with periodic visits from national and international lawyers working in coordination with regional and local victims' organisations;
- Create, in cases where victims are represented collectively, judicial committees within the community to ensure that all members understand the mechanisms and how to bring an action;
- In litigating cases, risks for the VICTIMS AND THEIR FAMILIES should be taken into consideration and supported by collectively agreed-upon protection measures and legal actions that do not worsen their vulnerable situation;
- In developing judicial or quasi-judicial actions nationally or internationally, those who have been most directly affected should decide when to seek conciliatory agreements with corporations regarding their rights, in coordination with information provided by lawyers. Avoid including confidentiality clauses and other elements in those agreements that limit the capacity of victims to demand their rights outside of judicial systems regarding truth, justice, or integral reparations for those affected by transnational companies;
- Communities, lawyers, and professionals should work together to form interdisciplinary teams that support the communities in environments other than judicial processes, and to overcome geographic and cultural distance between lawyers and victims. It is necessary for them to work together to build effective protection strategies;
- Lawyers and victims should, together, search for a way to arrive at integral justice not limited to financial reparation for individuals, without taking into account the psychological affects and psycho-social reparation, such as collective forms of damages and reparations. This obligation includes consideration and promotion of cases in collective form.
- Lawyers and others accompanying victims should develop a means of permanent communication, such as the creation of permanent and virtual spaces like a virtual international network where they can meet and collaborate;

To achieve the above-mentioned objectives, we propose that all practices, bars, and law schools reflect and work on

GOOD PRACTICES AND ETHICAL CRITERIA FOR LAWYERS WORKING WITH COMMUNITIES AND VICTIMS.

ANNEX III

Selection of relevant organizations

a) Litigation

Name	Website	Contact	Languages
Center for Constitutional Rights (CCR)	http://ccrjustice.org	Center for Constitutional Rights 666 Broadway, 7th floor New York, NY, USA 10012 T +1 212 614 6464	English
Center for International Environmental Law (CIEL)	http://www.ciel.org	CIEL (United States) 1350 Connecticut Avenue NW Suite #1100 Washington, DC 20036, USA T +1 202 785 8700 F +1 202 785 8701 E info@ciel.org CIEL (Switzerland) 15 rue des Savoises, 1205 Geneva, Switzerland T +41 22 789 0500 F +41 22 789 0739 E geneva@ciel.org	English
EarthRights International (ERI)	http://www.earthrights.org	Southeast Asia Office PO Box 123 Chiang Mai University Chiang Mai, 50202, Thailand T +66 81 531 1256 E infoasia@earthrights.org Washington Office (Administrative office) 1612 K Street, NW Suite 401 Washington, DC 20006, USA T +1 202 466 5188 E infousa@earthrights.org Amazon Office Casilla Postal 45 Barranco 4, Lima, Peru T +51 1447 9076 E infoperu@earthrights.org	English
European Center for Constitutional and Human Rights (ECCHR)	http://www.ecchr.de/index.php/home_en.html	European Center for Constitutional and Human Rights e.V. Zossener Str. 55-58 10961 Berlin T +49(0)30 400 485 90 F +49(0)30 400 485 92 E info@ecchr.eu	English, German, Spanish

Environmental Defender Law Center (EDLC)	http://www.edlc.org	Environmental Defender Law Center 407 W. Koch St. Bozeman, MT 59715 USA T +1 406 586 8294 F +1 320 323 0072 E info@edlc.org	English, Spanish
International Commission of Jurists (ICJ)	http://www.icj.org	International Commission of Jurists P.O. Box 91, 33 rue des Bains 1211 Geneva 8, Switzerland T +41 (0)22 979 38 00 F +41 (0)22 979 38 01 E info@icj.org	English
International Federation for Human Rights (FIDH)	http://www.fidh.org	The International Federation for Human Rights 17, Passage de la Main d'Or 75011, Paris, France T +33 (0)1 43 55 25 18 F +33 (0)1 43 55 18 80 E fidh@fidh.org	Arabic, English, French, Russian, Spanish
Leigh Day & Co Solicitors	http://www.leighday.co.uk/ home	Leigh Day & Co Priory House 25 St John's Lane London, UK EC1M 4LB T +44 (0)20 7650 1200 F +44 (0)20 7253 4433 E postbox@leighday.co.uk DX 53326 Clerkenwell	English
Sherpa	http://www.asso-sherpa. org/sherpa-english	Association SHERPA 22 rue de Milan 75009 Paris, France T + 33 (0) 1 42 21 33 25 E contact@asso-sherpa.org	English, French

b) Soft law mechanisms

Name	Website	Contact	Languages
Accountability Counsel	http://www.accountability- counsel.org	Accountability Counsel 8 California Street, Suite 650 San Francisco, California, 94111, USA T +1 (415) 296 6761 E info@accountabilitycounsel.org	English
OECD Watch	http://oecdwatch.org	SOMO Sarphatistraat 30 1018 GL Amsterdam The Netherlands T +31 (0)20 639 1291 F +31 (0)20-639-1321 E info@oecdwatch.org National member organizations: http://oecdwatch.org	English, French, Spanish

c) Research on corporate conduct

Name	Website	Contact	Languages
Business and Human Rights Resource Centre	http://www.business-humanrights.org	<p>London Office 1-3 Charlotte Street, 3rd floor, London W1T 1RD, United Kingdom T +44 (20) 7636-7774 F +44 (20) 7636-7775 E: contact@business-humanrights.org</p> <p>USA Office 333 Seventh Avenue, 14th fl., New York, NY 10001, USA T +1 (212) 564 9160 F +1 (212) 202 7891</p>	English, French, Spanish
CEE Bankwatch Network	http://bankwatch.org	<p>Central Office CEE Bankwatch Network Na Rozcesti 1434/6 190 00 Praha 9 - Liben Czech Republic T +420 274 822 150 +420 274 782 208 F +420 274 816 571 E main@bankwatch.org</p> <p>Brussels Office CEE Bankwatch Network/ Friends of the Earth Europe Mundo-B Building Rue D'Edimbourg 26 1050 Bruxelles Belgium T +32 (0) 2 893 1031 F +32 (0) 2 893 1035</p>	English, Russian
Profundo Economic Research	http://www.profundo.nl	<p>Profundo Naritaweg 10 1043 BX Amsterdam The Netherlands T +31 20 820 8320 E profundo@profundo.nl</p>	Bahasa, Dutch, Indonesian, English, French, German, Portuguese, Spanish
SOMO- Centre for Research on Multinational Corporations	http://somo.nl	<p>SOMO Sarphatistraat 30 1018 GL Amsterdam The Netherlands T +31 (0)20 639 12 91 F +31 (0)20 639 13 21 E info@somo.nl</p>	Dutch, English

d) Protection

Name	Website	Contact	Languages
FIDH / OMCT Observatory for the Protection of Human Rights Defenders (OBS)	http://www.fidh.org/+Defenseurs-des-droits-humains-+?lang=en	Please visit web site for individual contact details	Arabic, English, French, Persian, Russian, Spanish
Front Line Defenders	http://www.frontlinedefenders.org/	<p>Front Line - The International Foundation for the Protection of Human Rights Defenders Head Office, Second Floor Grattan House, Temple Road Blackrock Co Dublin, Ireland T +353 (0)1 212 3750 F +353 (0)1 212 1001 E info@frontlinedefenders.org</p> <p>Front Line EU office Square Marie-Louise 72 1000 Brussels, Belgium T +32 2 230 93 83 F +32 2 230 00 28 E euoffice@frontlinedefenders.org</p> <p>Emergency Hotline +353 (0) 1 21 00 489 Secure Email Support (secure and encrypted channel) https://www.frontlinedefenders.org/secure/comment.en.html</p>	Arabic, English, French, Spanish, Persian, Russian
Peace Brigades International (PBI)	http://www.peacebrigades.org	<p>Peace Brigades International Office Development House, 56-64 Leonard Street EC2A 4LT London, U.K. T +44 20 7065 0775 country offices http://www.peacebrigades.org/country-groups/?L=0</p>	English, Spanish
Protection International	http://www.protectioninternational.org/	<p>Protection International 11 Rue de la Linière 1060 Brussels, Belgium T +32 260 944 07 F +32 260 944 06 E pi@protectioninternational.org</p>	English, French, Spanish

e) International development cooperation

Name	Website	Contact	Languages
Brot für die Welt / Bread for the World	http://www.brot-fuer-die-welt.de/english	Brot für die Welt Caroline-Michaelis-Straße 1 10115 Berlin, Germany T +49 (0)30 65 21 10 E programme@brot-fuer-die-welt.de	English, German
MISEREOR	http://www.misereor.org/en	MISEREOR Mozartstrasse 9 52064 Aachen, Germany T +49 (0)241 4420 F +49 (0)241 442188 E postmaster@misereor.de	English, French, German, Portuguese, Spanish

ANNEX IV

selection of relevant online materials

- **Fédération Internationale des Droits de l'Homme, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms***, 2012, available online for download (pdf) at: <http://www.fidh.org/Updated-version-Corporate> [English, French], [Spanish (print only)]
- **International Commission of Jurists, *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes***, 2008, available online for download (pdf) at: http://www.icj.org/default.asp?nodelD=349&sessID=&langage=I&myPage=Legal_Documentation&id=22851 [English, French, Spanish]
- **Oxfam Australia, *Guide to Free Prior and Informed Consent***, 2010, available online for download (pdf) at: <http://resources.oxfam.org.au/pages/search.php?search=indigenous> [English, French, Spanish, Khmer, Pidgin, Indonesian, French, Spanish, Dutch]
- **Protection International, *New Protection Manual for Human Rights Defenders*** (3rd edition 2009), available online for download (pdf) at: <http://www.protectionline.org/New-Protection-Manual-for-Human.html> [English, French, Portuguese, Spanish]
- **Trades Union Congress, *What kind of company are you keeping? a short guide to Strategic Corporate Research***, 2009, available online for download (pdf) at: <http://www.tuc.org.uk/union/tuc-16870-f0.cfm> [English]
- **Sherpa, *Comprendre les obstacles à la mise en oeuvre de la responsabilité des entreprises transnationales***, 2009, available online for download (pdf) at: <http://www.asso-sherpa.org/nos-programmes/gdh/nos-publications-ii> [French]