

CASE REPORT _____

Luciano Romero and the Nestlé case

The Swiss judiciary has refused to investigate the role of multi-national conglomerate Nestlé in the murder of Colombian worker and trade unionist Luciano Romero. On 18 December 2014 the European Center for Constitutional and Human Rights (ECCHR) responded by submitting a complaint on behalf of Romero's widow to the European Court of Human Rights in Strasbourg.

The murder of Luciano Romero

On 10 September 2005 trade unionist, human rights activist and former Nestlé-Cicolac employee Luciano Romero was kidnapped, tortured and murdered in Valledupar (Colombia) by members of a paramilitary group. His murder came after a number of death threats that arose in the context of a long-standing labor dispute between the trade union Sinaltrainal and the Nestlé factory Cicolac.

The trade union Sinaltrainal had reported the death threats made against Romero and other members to the Nestlé subsidiary in Colombia as well as to the parent company in Switzerland. Instead of taking the necessary precautionary measures, local Nestlé-Cicolac managers spread libelous reports that Luciano Romero and his colleagues were reputed to be members of the guerilla, rumors which put these individuals in even greater danger. The parent company Nestlé in Switzerland failed to take actions to prevent the threats and defamations

Criminal proceedings were launched in Colombia resulting in the conviction of the direct perpetrators of the murder of Luciano Romero. In his verdict the Colombian judge stated that Nestlé's role in the crime was of particular relevance and ordered an investigation to look into the matter in more detail. The Colombian prosecution authorities, however, has to date failed to take up the issue.

ECCHR criminal complaint against managers at Swiss parent company

On 5 March 2012 ECCHR and the Colombian trade union Sinaltrainal filed a criminal complaint against Nestlé and some of its top managers with the Swiss prosecution authorities in Zug. The complaint accuses the Nestlé managers of being in breach of their obligations by failing to prevent crimes of the Colombian paramilitary groups and failing to adequately protect trade unionists from these crimes. The prosecution passed the case on to authorities in Vaud which have jurisdiction over the company's other headquarters in Vevey. Prosecution authorities in Vaud closed the proceedings on 1 May 2013.

The prosecution failed to address the substance of the criminal complaint, rejecting the claim and closing the proceedings on the basis that the crimes were now statute-barred. The appeals lodged by Romero's widow against the closing of the proceedings were dismissed in all instances and ultimately rejected in a decision by the Swiss Federal Supreme Court of 21 July 2014.

The Supreme Court affirmed the findings of the prosecution authorities and the cantonal court that the crimes are statute-barred. In doing so it departed from the view held by the Federal Council and much academic commentary that the criminal liability of corporations represents an ongoing offence – with the effect that the crime in this case would not be statute-barred. The court dismissed the proceedings on formal grounds.

The argument based on the statute of limitations highlights the urgent need for law reform. The Nestlé/Romero case also sets a precedent for others showing that corporations with complex organizational structures can in practice benefit from the long period of time required to undertake investigations.

The Supreme Court did however go some way toward clarifying the duties of corporations. It held that corporations must ensure, among other things, “a clear description and division of responsibilities and authority” as well as “specific and named plans of work within the corporation”. Yet the rejection of the call for an investigation means that it remains unclear whether or not Nestlé fulfilled this obligation.

This left the European Court of Human Rights as last instance, where ECCHR brought a complaint on behalf of Romero's widow against Switzerland in December 2014. But the court rejected the case in March 2015 – without justification.

Insufficient risk management in conflict regions

This case is an example of a wider problem of transnational corporations failing to conduct adequate human rights risk assessments in regions of weak governance or conflict and in particular, failing to react appropriately when their employees and trade unionists are at risk. Indeed, through their activities, corporations often trigger social conflict and can exacerbate the human rights situation when their managers on the ground have not been trained in dealing with the risks.

In the case of Colombia it is common knowledge that many crimes against international law have been committed in the course of the armed conflict and that human rights defenders are at particular risk of persecution. Almost 3,000 trade unionists have been murdered in Colombia over the last thirty years, making it the most dangerous country in the world to carry out trade union activities. 13 of those killed worked for Nestlé.

The persecution of trade unionists in Colombia can undoubtedly be characterized as a crime against humanity. ECCHR filed a criminal complaint with the

International Criminal Court in The Hague on 9 October 2012 which also includes the case of Luciano Romero.

Corporate due diligence obligations for subsidiaries

By filing the criminal complaint ECCHR hopes to demonstrate that management at the headquarters of European corporations are obliged to monitor their subsidiaries and prevent management at their subsidiaries from contributing in any way to human rights violations.

Corporations that operate in weak governance or conflict regions must take the given social, economic, political and military situation into account. In particular they must not exacerbate the existing conflict and must not cooperate with the local parties to the conflict. This is all the more important when subsidiaries are active in regions such as Colombia where state institutions are unreliable and prone to committing human rights abuses.

Management of any company operating in Colombia must foresee such risks and must establish appropriate measures to avoid any involvement of the company in human rights violations.

ECCHR's legal arguments are based on the existing jurisprudence on the liability of principals as well as on the many international standards that require corporations operating in regions where human rights are under threat to undertake comprehensive risk analyses. We are also for the first time calling for the application of Swiss laws on corporate criminal liability in cases of human rights violations.

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