EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

ECCHR

SPECIAL NEWSLETTER

CRIMINAL COMPLAINT AGAINT SENIOR MANAGER OF DANZER

ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN THE DEMOCRATIC REPUBLIC OF CONGO

Contents

1. Introduction

On 25 April 2013, the ECCHR, in co-operation with the British human rights organization Global Witness, filed a criminal complaint with the public prosecutor's office of Tübingen in southern Germany against a senior employee of the German-Swiss timber trading company Danzer Group. The individual in question, a German citizen, is suspected of breaching his duties by failing to prevent crimes committed by Congolese security forces. There is sufficient initial suspicion that through omission the employee was complicit in rape, inflicting bodily harm, false imprisonment and arson. The public prosecutor's office of Tübingen is now obliged to further investigate the circumstances of the case and establish whether the Danzer employee is criminally liable.

During the early morning hours of 2 May 2011, a task force of local security forces attacked the village of Bongulu (Équateur province) in the Democratic Republic of the Congo (DR Congo). The forces submitted inhabitants of the village to abuse, rape and arbitrary arrests. During the attack, the task force used vehicles belonging to the company Siforco S.A.R.L., a subsidiary of the Danzer group. In addition to providing vehicles and drivers, the company also paid the members of the task force for their involvement in the operation.

This incident follows a dispute between the village inhabitants and Siforco S.A.R.L., which is based in the area, resulting from the failure of the company to abide by its contractual obligations to provide for social projects in the region. On 20 April 2011 a number of residents of Bongulu and surrounding areas took some items from the company as an act of protest and in order to enhance their bargaining power, namely five batteries, a cable, a solar cell and a radio.

Between the end of April and the beginning of May 2011, Siforco was involved in negotiations with the inhabitants of Bongulu aimed at the return of the items. Despite the fact that these negotiations were still ongoing, the Congolese security forces launched an attack on the village, abused and arbitrarily arrested sixteen people, raped five women and girls, and destroyed houses.

Map of DR Congo's provinces as existent since 1997

Source: Wikimedia Commons

2. The concept of strategic litigation in human rights cases

The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit human rights organization based in Berlin. Working primarily with legal instruments, ECCHR initiates, develops and supports strategic legal proceedings to hold state and non-state actors responsible for their human rights violations. We focus on selected cases that highlight structural problems and that can provide a precedent for enforcing human rights in the future.

We work together with victims as well as their lawyers and co-operate with local human rights organizations. We make use of instruments such as the complaint procedures of UN bodies, compensation claims and criminal cases, especially in cases where the background to human rights abuses and, in particular, the role of European companies has to yet to be brought to light. The goal of such strategic human rights litigation is to highlight human rights violations and to effect change above and beyond the individual case at hand by supporting the victims and their local organizations as they seek to enforce their rights.

In contrast to the work of most lawyers, our focus is not limited to the outcome of a specific case. Rather, we believe that the acts of investigating the circumstances of what happened and drafting a legal complaint can in themselves represent important steps for the victim in voicing their complaints, overcoming their trauma and fighting for their rights. Irrespective of whether or not a complaint succeeds before a judge, legal proceedings can play a significant role when it comes to the political debate on responsibility for human rights abuses. Court proceedings clearly demonstrate that apart from being political and social scandals, inhuman policies and behavior also represent a violation of rights, which carries legal consequences.

As well as holding political and military actors accountable for human rights violations, ECCHR also takes action against economic entities. National and transnational corporations often play a sinister role in conflicts between powerful local elites and underprivileged populations. Corporate managers suspected of profiting from repressive regimes often enjoy impunity. Many European corporations have subsidiary companies in areas plagued by armed conflict or in regions of limited statehood. In many cases companies' local management cooperates with security forces that commit grave human rights violations. Companies operating in conflict situations can profit from state actors' repressive and violent treatment of the civilian population. We continue to seek clarification of the law to ensure that in such circumstances international human rights standards are respected locally and that clear guidelines exist on the extent of the liability attaching to the parent company's management.

3. The current situation in the Democratic Republic of the Congo

DR Congo constitutes a weak governance zone. This term refers to a state which is unable or unwilling to guarantee basic state functions and which can be classified as instable. In the case at hand, this means that the central government has no actual control over the actions of local security forces. While the national police (*Police National Congolaise*) and the army (*Force Armée de la République Démocratique du Congo* – FARDC) do legally have a hierarchical, centralized organizational structure, in practice local representatives of state agencies operate largely with autonomy.

They generally face no sanctions for breaching their duties or violating human rights. Furthermore, the central government is unable to ensure the regular payment of police and military forces. As a result, security forces rely on payments they receive for taking part in special missions, missions which are often used as means of personal enrichment or to settle private disputes. Companies operating in regions like this must be aware of these circumstances and must take their legal obligations into account. Companies must either refrain from hiring police and military forces or must exert influence over these forces to ensure that human rights are not violated.

Sexual Violence in DR Congo

Sexual violence is a common occurrence for the civilian population of DR Congo. Almost every day reports of sexual violence committed by state and non-state actors are carried by the media. Women and girls are raped or sexually abused during the course of most military and police operations. As such, the commission of sexual violence by security forces is foreseeable and cannot be seen simply as excessive acts of individual soldiers or police officers. These attacks occur in all parts of the country, and not just in the eastern regions which for years have been plagued by armed conflict. A scientific study has shown that the province of Équateur – in which the village of Bongulu lies – has the second highest ratio of rape in 2007 within the entire country. One of the main goals of the United Nations mission in DR Congo (MONUSUC) is to fight sexualized violence committed by state and non-state actors. Sexualized violence by police and military forces in the country must be treated as a matter of public safety and has to be expected during any operation by security forces. We are engaged in the fight against the culture of silence surrounding sexual violence and against the tendency to downplay the importance of this kind of human rights violation. We continue to call for clear rules, including rules on corporate behavior, so that companies can, within their sphere of influence, contribute to preventing sexualized violence.

4. The conflict between Danzer Group subsidiary Siforco and Congolese village residents

A commentary from Greenpeace

In view of previous conflicts between the Danzer subsidiary Siforco and Congolese village residents, the tragic events in Bongulu/Bosanga do not come as a surprise. Greenpeace reported on such conflicts in various publications. The first dispute between the parties occurred in 2005. At a demonstration against Siforco police forces were summoned and fired shots at protestors. Five people died and 17 were injured.

In March 2007 a similar incident took place in Mba not far from where the Bosanga incident took place. Local inhabitants were beaten and arrested after taking part in a protest against the company's broken promise to build a school.

In February 2010 in Yaewonge,in the same region,employees of Danzer Group/Siforco called in local security forces to deal with villagers who were blockading its logging trucks. As in the previous cases, police and military personnel were involved. Locals were subjected to arbitrary arrests and bodily harm; one was subjected to rape.

Ultimately, the present case provides an example of the kind of system on which industrial forestry is based in countries such as DR Congo: the central government grants international corporations such as the Danzer Group exploitation rights valid for decades for areas of forest that are often inhabited. The local population generally receives no information about the contracts involved, the extent and limits of the logging rights or about the market prices fetched by wood felled in their forests. Furthermore, the principle of Free Prior Informed Consent (FPIC) is not applied to the local populations during the distribution of logging permits

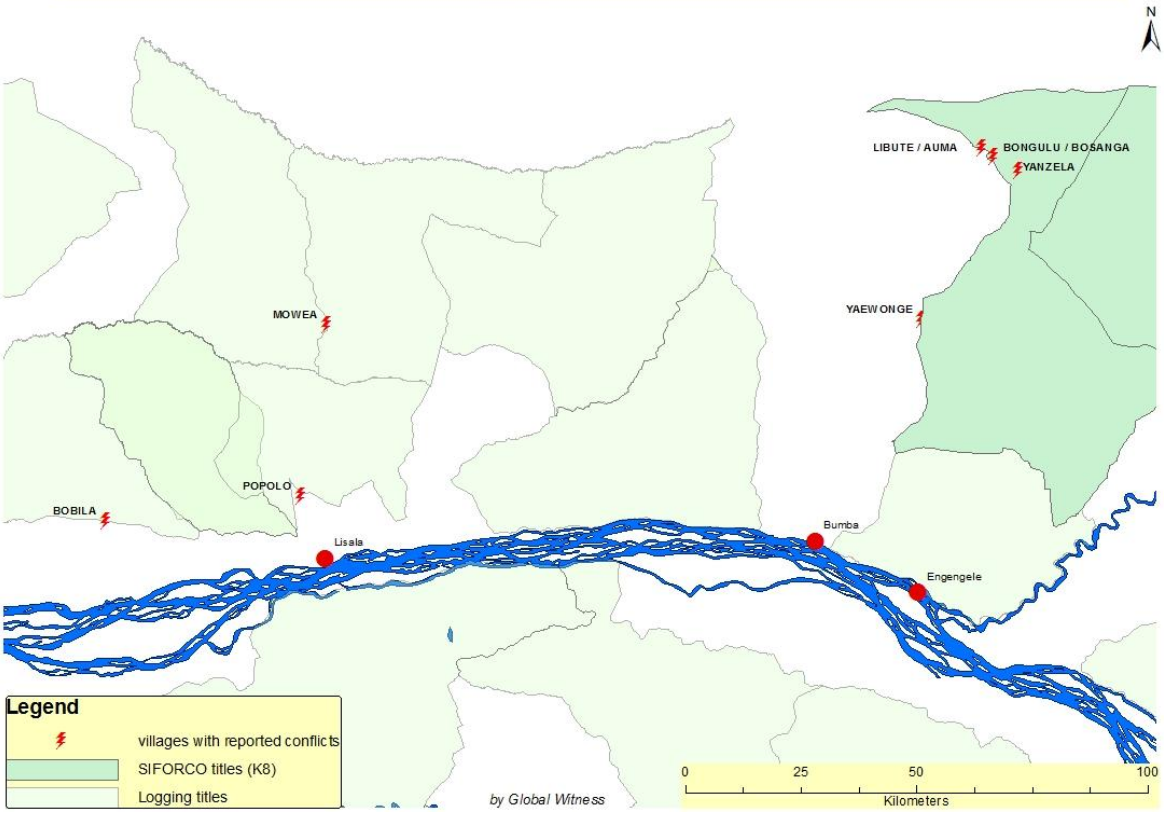
In DR Congo the 2002 Congolese Forest Code (*code forestier*) obliges companies to negotiate subcontracts in the form of social investment agreements (*cahiers des charges*) with local communities. A *cahier de charge* is concluded between the company and affected communities, usually represented by the traditional village chief (*chef de village* / *chefs de groupement*). On the basis of these agreements the company is obliged to provide for certain social services such as building and maintaining roads and setting up health facilities and schools for the villages where the logging takes place. There is, however, no independent monitoring of compliance with these agreements. The negotiations between the parties almost never lead to a fair result for the local communities. This is due to a number of factors, including disregard for the principle of free prior informed consent, legal uncertainty regarding the *cahiers des charges* as well as a lack of information and the power imbalance between the parties.

In the Bongulu/Bosanga case the Danzer Group/Siforco had, in 2005, contractually agreed to build a school and a medical facility. The company failed to meet its obligations, at least until mid-2011. Local populations generally do not profit in any significant way from commercial logging. No sustainable jobs are created and the processing of the wood takes place elsewhere. For the logging companies, on the other hand, every felled tree represents profit made on the international market. This increases the dissatisfaction amongst

local populations at companies' failure to uphold the *cahiers des charges* and increasingly leads to social conflicts. Furthermore, commercial logging causes permanent damage to the forests that serve as the basis for life for people and animals and play a central role in regulating water supplies and the climate.

It is high time that investor countries such as Germany stop supporting this system. The focus must move from looking after the interests of corporations to protecting the interests of the Congolese population. The last decades have shown that commercial logging in DR Congo and other countries in the Congo basin have neither helped to fight poverty nor contributed to sustainable economic development for rural populations; on the contrary, it has in fact led to increased poverty. This was confirmed by a February 2013 report of the World Bank.

Conflicts between Communities and Logging Companies 2008 - 2011, Bumba and Lisala Counties



5. The criminal complaint against a Danzer Group manager – summary of the legal argument

The criminal complaint claims that the Danzer Group manager in question was in breach of his duties because he failed to prevent the crimes of the security forces. He had a duty to take action due to the position he held at the time as a member of the governing board of Siforco and as head of the Danzer Group's African Management Team.

German criminal law obliges top level managers to prevent business-related crimes committed by its employees. The examination of the circumstances of the case at hand must take into account the conditions under which industrial logging and timber trading is carried out in DR Congo.

In order to obtain permission to fell trees, companies are generally obliged to provide a certain amount of social services. Very often these obligations are not met, or are fulfilled only after very long delays. This has already led to conflict between the timber companies and local populations in the past. Local security forces are repeatedly brought in to deal with the conflicts. In the last years there have been several attacks by security forces against local populations, particularly in the region where the incidents of the 2 May 2011 took place. These attacks arose from disputes with timber companies including Danzer subsidiary Siforco. This shows that the possibility that corporate activity will give rise to the commission of violent acts by security forces belongs to the common business related risks attached to logging in DR Congo. In DR Congo in particular, acts of sexualized violence carried out during operations by security forces cannot be seen as crimes of excess. Such acts represent a gender-specific extension of violent crimes in a broad sense, crimes which include arbitrary arrests and bodily harm. The legal violation inherent in rape and sexual assault lies primarily in the act of coercion and therefore concerns the violent aspect of the offense. Where violent attacks on women and girls are carried out, there is a particularly high risk that sexualized violence will also be involved.

The Danzer manager should have taken this risk into account. In the complaint, he stands accused of failing to meet his corporate due diligence obligations. As a member of the governing board of Siforco and head of African Management Team for the Danzer Group, he should have issued clear directions to Siforco employees stipulating that

- in principle, security forces must not called in to deal with conflicts with the local population;
- where security operations are considered, they must be postponed until the results of any ongoing negotiations are clear;
- it must be agreed as a precondition to the use of security forces that no human rights violations will be committed, and
- security forces must only receive payment if no human rights violations have been committed.

6. International standards for companies in weak governance zones

Companies operating in weak governance zones run the risk of becoming involved in or encouraging the violent activity of local security forces. The European parent companies of such companies must adapt their risk management strategy accordingly and must ensure that they are neither directly nor indirectly involved in human rights violations. In these cases organizational safeguards must be subjected to higher standards, which can be derived from existing international standards.

Risk management principles for companies were initially developed with regard only to financial risks such as corruption and money laundering. From 2000 onwards, however, there was increased debate within the framework of the UN Global Compact and other international forums on the due diligence of companies in weak governance zones. This resulted initially in the UN Voluntary Principles on Security and Human Rights from the year 2000, which were further developed in the 2006 OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. In June 2011 the UN Human Rights Council adopted the most important internationally recognized standards for corporate human rights responsibilities, the UN Guiding Principles on Business and Human Rights.

While these standards are not binding they do represent international soft-law and therefore serve as internationally recognized, commonly applied business standards that conscientious business actors and companies must take into account when exercising due diligence.

Specifically, company executives must continually examine whether these international due diligence standards form part of the company's strategy and policies. They must also check that all employees who are directly involved with the relevant situation are aware of the due diligence standards. All employees should be aware of the potential risks attaching to their work in weak governance zones and they should receive support and advice from the highest management in case of problems, especially if in involved in activity where there is a heightened risk of becoming involved in human rights violations and particularly where there is a risk of sexualized violence.

In the case at hand, Danzer management should have ensured that clear directions were given to employees of Siforco not to call upon the local security forces in order to resolve conflicts with the local population, especially not while negotiations between the company and the local population were still ongoing. If the involvement of local security forces was absolutely necessary, local management should have insisted that there be no violence and, in particular, no sexual violence. Each operation should have been controlled by the local management and payment should have only been made on the condition that no violence was used.

7. Responsibility of the European parent company – What does the Danzer case mean for the future?

As a minimum standard for corporate responsibility, companies recognize that they must act in compliance with existing laws. There is need for legislative action, particularly in extraterritorial cases:

German Corporate Criminal Law

The Danzer Case shows the difficulties in applying the German criminal law to the complex management structure of a transnational enterprise. Traditional German criminal law, with its focus on individuals, is not properly equipped to deal with the conduct of increasingly decentralized globally active companies with sprawling corporate structures. The concept of the liability of company executives (Geschäftsherrenhaftung) developed in German jurisprudence does provide in principle for the liability of leading employees of a company. Yet in cases where the legal responsibility for a company's internal risk management cannot be neatly attributed to an individual person, there lacks any basis for corporate liability, something which is already provided for by law in other European companies. While a debate on criminal liability of companies is currently not part of the political agenda in Germany, the introduction of criminal liability for corporations is necessary in order to avoid loopholes in national criminal law.

Rules on the Prevention of Sexualized Violence

The Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) highlighted in its General Recommendation No. 19 the important connection between violence against women and discrimination. Sexual violence, that effectively prevents the enjoyment of human rights, is considered to be a form of discrimination under the UN Convention for the Elimination of all Forms of Discrimination against Women. The extent and the systematic use of violence against women within armed conflicts have been confirmed by the numerous reports and resolutions on women, peace and security by the UN Security Council. In Resolutions 1325, 1820, 1888, 1889, and 1960 the parties to a conflict were for the first time explicitly requested to protect women and girls against sexualized and other forms of violence and to bring perpetrators to justice.

In its Recommendation No. 28 the CEDAW Committee highlighted the responsibility of states to adopt any measures necessary for the prevention of violence against women. This relates to state acts as well as activities of non-state actors and explicitly includes the activities of companies that operate extraterritorially. The Committee thus obliges states to take appropriate measures to eliminate discriminations by national enterprises operating extraterritorially.

Clear standards for corporate risk management standards

General rules for an appropriate risk management strategy that prevents human rights abuses as well as crimes are set out in more detail in instruments such as the OECD-Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, the UN Guiding Principles on Business and Human Rights and the corresponding Protect, Respect and Remedy Framework than in national legislation. German legal terms such as due diligence ("Sorgfaltspflicht"), duty of care ("Obhutspflicht") or guarantor duty ("Garantenpflicht") can be clarified by having reference to these international instruments. What is missing, however, is a legislative clarification of the content of these terms, which up to now have just been interpreted on a case by case basis and thus fail to offer sufficient legal certainty for both victims and perpetrators. There is a need for clear standards on the extent of corporate due diligence obligations within a globally operating company as well as on the relationship between various executive positions and the delegation of power between the different levels of corporate management. In sum, there is a clear need for regulation.

Management needs to establish an ongoing and comprehensive risk analysis process that takes into account the subsidiary company as well as other business relations such as those with suppliers, buyers, employees, trade unionists and populations affected by the company's work. Special attention must be paid to the specific dangers attaching to corporate activity in a given area, particularly in relation to women and girls in conflict regions and areas of limited statehood.

Management must oversee risk management of subsidiary

Management of a company must employ a conflict-sensitive approach in relation to its business relations, employees, subsidiaries and all those affected by the company's activities. Any dealings with local security forces must be particularly clearly regulated and kept under continual review. Management must prevent employees of a subsidiary from creating or exacerbating human rights risks through unsuitable cooperation with security forces. While certain tasks may be delegated to others, the ultimate responsibility for risk management may not.

8. Final note

Our partners in the Global South work to ensure that human rights violations are punished, often at great personal risk to themselves. In the course of this work they often come up against the limits of their own legal systems and in these cases hope for action to be taken on an international or European level. Bringing cases before European courts cannot, of course, fully compensate for deficiencies in the judicial systems of other countries. In cases involving European actors, however, it is both justified and imperative that we turn to the courts in Europe. Yet there remains a dearth of landmark decisions from European courts on the human rights related limits to corporate conduct.

At this stage almost every case of human rights violations involving corporations is a 'pilot case', raising legal questions that have until now gone unanswered. This means that with every case the judiciary has a new opportunity to develop the law to ensure that victims can effectively defend their rights and that corporations can in future have greater legal certainty as to what is expected of them by law in the context of corporate responsibility for human rights.

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