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SHORT STORIES FROM INFO-ACTIVISTS

The burden of proof: Evidence in environmental litigation

By Dr. Carolijn Terwindt

On 24 July 2008, Manasir communities living along the Nile River in Sudan were forced to flee their houses due to flooding. While floods were common in the area, this time the water was rising much higher than usual because a new dam had been built and this had closed off one of the waterways that would usually take much of this water. Within a week, 600 families had lost their houses due to the rising water (a YouTube video of the flooded houses can be watched here).

The flooded Sherri Secondary School for Girls taken by Ali Askouri

The Manasir wanted to call attention to the responsibility of the companies involved in the construction of the dam and got in touch with the US-based Environmental Defender Law Center, which contacted my organisation, the European Center for Constitutional and Human Rights (ECCHR), who act to assess the legal responsibilities of European corporations for human rights abuses caused by their operations abroad. In May 2010, ECCHR submitted a criminal complaint regarding the loss of livelihoods of the Manasir people against the engineering company involved in building the dam, Lahmeyer. The complaint was lodged to the office of the prosecutor in Frankfurt am Main.

Court cases always depend on evidence. When infrastructural or extractive projects are alleged to cause destruction of the environment or lead to health damages, it can be a challenge to prove all relevant aspects of the case. Especially the requirements to prove future damages, causation, and intent can make it challenging to have claims of corporate abuse

stick in court. In this article I briefly outline these three evidentiary requirements and I discuss some of the legal and practical strategies that communities can follow to overcome them.

First, proving future damages can become an issue as often communities want to intervene in mega-projects as early as possible in order to prevent damage from being done. While most litigation tends to be “after-the-fact”, holding someone accountable for damage already done, there frequently are administrative remedies available to address future damages, which can then have a preventive effect, such as the Writ of Kalikasan in the Philippines. In these petitions, evidence has to be presented regarding the risk of the project to the environment and the subsequent health and livelihood effects. Scientific uncertainty about future impacts can make this a challenge. The ‘precautionary principle’ is, however, an important legal device to shift the burden of proof, as frequently the plaintiffs do not have the means or resources to gather the relevant scientific data. Instead of having to prove that a certain project causes harm, an Argentinean judge applied the precautionary principle and halted a mining project until the company could show that there is “no possibility or certain danger” that the mine would contaminate the environment. In this way, the burden of proof can, to some degree at least, be reversed from the community to be impacted, to the corporation creating the impacts.

If preventive action has not been successful, communities might want to prepare for future litigation. In order to trace changes in the environment and the adaptation of the community to such changes, communities can do so-called baseline studies to document living conditions, water purity, or cultural practices before the proposed project begins. Such documentation can become key evidence in a lawsuit if damages indeed occur. Again, judges may decide to shift the burden of proof. In a case in Ghana regarding the demolishing of a village by a mining project, aerial photographs in the possession of the company could easily have decided the matter. The refusal by the company to turn over the pictures was interpreted by the High Court that the evidence might have been in favour of the plaintiffs. Communities can also elect to draft a community protocol describing their heritage and customs, as well as their claims regarding their rights and informed consent, in order to stand strong in negotiations with corporations or other regulatory bodies involved.

Second, proving causation is frequently a challenge, because evidence will have to show that environmental destruction or health damages were indeed caused by corporate activity and not other social and environmental changes. Such trials then tend to turn into a battle between experts. For example, an Indonesian company, Lapindo Brantas, evaded legal responsibility for the eruption of a mud volcano leading to the displacement of tens of thousands of people. In the court case, expert witnesses disputed whether the volcano was indeed a consequence of the gas drilling or of an earthquake, as Lapindo Brantas claimed. Proving causation was also a challenge in the mass environmental tort litigation against Chevron in Ecuador in which residents of the Ecuadorian Amazon demanded a clean-up of the former oil-production site. While the residents suspected that the oil production and waste were responsible for the high cancer incidence in the area, it was difficult to provide the scientific data to prove that connection. The judge in that case, however, held that the lack of access

to health centres was one of the reasons why it was a challenge to produce satisfactory data and that this could not be held against the plaintiffs.

Third, it has to be proven in court that the company or its managers knew about the damage and could have intervened to prevent it. For example, the criminal complaint in relation to the flooding in Sudan notes that the managers of Lahmeyer themselves had written an environmental impact assessment report which stated that six months before the construction of the dam there were no resettlement plans yet. Furthermore, the complaint provides details of letters and e-mails in which it is made clear that the accused were aware of the situation. This leads to a key point in order to prove corporate knowledge and possibly intent. When damages occur, it is essential to notify the company, and possibly also the parent company of such damages. If the company does not respond adequately to such damage, copies of notification letters can later demonstrate that the company knew about the harm. Again, in order to prove intent while lacking relevant documentation, communities may be able to reverse the burden of proof by arguing that the required information is in the possession of the company and thus they do not have access to it. For example, in a case by South African mineworkers against Anglo American SA Ltd., the UK court ordered the company to disclose information to which the company had exclusive access.

In the case of the Manasir communities living along the Nile River in Sudan, the Frankfurter prosecutors were convinced enough by the evidence presented in the ECCHR criminal complaint to open official investigations into the criminal liability of the Lahmeyer managers in charge of the Merowe dam. If the prosecutorial investigations lead to an indictment, the next step is to present the evidence in court. Whether this happens or not, already a signal has been sent to engineers involved in infrastructural projects in Sudan and elsewhere: if they are involved in human rights abuses, they too might have to face the judicial consequences.

Additional Resources:

A more in-depth description of the strategies to hold corporations accountable can be found in the ECCHR publication 'Making corporations respond.

The website for the European Centre for Constitutional and Human Rights

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