

UN FORUM on BUSINESS AND HR
4 - 5 December

Taking Stock «1 + year after»

Access to Judicial Remedies

Externalizing Risks to Avoid Liability

- I'd to thank Conectas and Fidh for the invitation;

2. CONTRIBUTION FOR THE DEBATE – EXTERNALIZING RISKS as a pattern of avoidance from human rights violations liability.

- About externalization: it takes place when the enterprise/transnational hires or even creates a small company for the execution of indirect activities where takes place human rights violations, like security activities or environmental impact studies, for example.

- It's related to the principle number 26 in the guide principles, what should necessary be strengthen;

- In Brazil this kind of pattern is usual, concerning to business related to primary agro industry that usually installs their activities in areas belonged or occupied by agrarian communities.

- I'll bring to the discussion two Brazilian cases where only the externalized companies were put into investigation to seek liability for human rights violations that clearly should reach the transnational enterprise involved:

1. Case of the murder of a landless worker at a transnational experimental field, in the city of Cascavel, state of Paraná, Brazil;

2. Case of the construction of a company Port at Tapajós river, at Santarém, state of Pará, in the heart of the Amazon rainforest.

1. CASE OF THE MURDER OF A LANDLESS WORKER BY A HIRED SECURITY COMPANY

- This took place in a experimental field of a major producer of pesticides and genetically modified seeds of the world. In the year of 2007, one of it's fields was occupied by Via Campesina as a denunciation against the impact and disregard to the environmental legislation related to its activities;

- In response to the action of the social movement, the security company hired by the transnational organized a real war counterattack operation, becoming to kill a leadership named Keno, and seriously injuring another (a woman), shot at close clothes after it's surrenders;

- It happens that in the civil lawsuits that seeks the company's liability and compensation for the damages caused to the victims and it's families, only the security company has been held responsible, while in the other hand the transnational claims alleging that it has no responsibility for the occurred, in order to have been accomplished by the hired company;

- It turns out that the security company was been investigated by the Brazilian federal police at the time that occurred the murder, because of a suspicious about its connection to a landless killing militia that acted in the state of Paraná between the years of 1998 and 2007, a notorious fact at that time, because of the murderer of five landless workers in distinct episodes;

- This notorious fact shows, at least, that the hiring, and so the murdering, could have been avoided from the beginning.

2. CASE OF the environmental impact at the construction of the private PORT at the city of Santarém, in Tapajós River, and the question of the mitigates measures:

- Under Brazilian law, the construction of great works must be preceded by environmental impact studies, to be conducted to establish the viability of the installation, the size of the socio-environmental impact, and the resulting mitigation measures that should be supported by the benefited company;

- In the case of the installation of the port in Santarém, that was constructed to flow and export the soybeans that is advancing over the Amazon rainforest; well, the port was installed without any environmental impact study, with full connivance of the government;

- Due to social pressure, however, the transnacional was forced to submit the impact studies, and to do so, hired a company to conduct the study and prepare the report;

- After the studies, the report resulted in the conclusion that the port at the Tapajós river had not generated any impact. Obviously, this was questioned by civil society and affected communities, forcing the Public Prosecution on demanding accountability through a investigation funded on the suspicious of fraud against the report of the environmental impact;

- It turns out that the Public Prosecution of Pará state demanded on justice only the hired company, and mentions nothing about the Transnational;

- In fact, with the report, to the port was given the license, without any mitigation measures or duty at all.

3. Well, the QUESTION is: companies should not be held liable for the actions of its contracts, when hiring companies that violates human rights on the job for which it were hired?

- In this question, what we want is

1. Strict liability and
2. Joint liability

- A good example to be brought is the Mechanism of the Protocol of Nagoya-Kuala Lumpur in the ambit of the UN Biodiversity Convention, that brings joint liability to the exporting country in case of GM contamination and damages, what should be brought to the Business and Human Rights scenario.

Finally, is important to say that the reparation and liability of these hired companies is not enough to inhibit or prevent human rights violation, in fact, this way of reaching this externalized companies finds to be a manner to sustain a business culture of human rights violations.

Thank You Very Much!

GUIDE PRINCIPALS

1. Dever do Estado – adotar medidas adequadas para investigar e reparar violações;
18. B. Consulta às comunidades;
19. Prevenção e mitigação de impactos negativos – empresas devem integrar as conclusões sobre a avaliação de impacto no marco das funções e processos internos pertinentes e tomar as medidas apropriadas;
22. REPARAÇÃO – Se as empresas constatam que causaram impactos, devem tomar medidas de reparação;

26. MECANISMOS ESTATAIS JUDICIAIS – estados devem adotar medidas adequadas para eficácia dos mecanismos judiciais, especialmente considerados de forma a limitar os obstáculos jurídicos, práticos e de outra natureza que possam conduzir a negação do acesso a mecanismos de reparação;

Comentário: • *Quando a forma em que se atribuem as responsabilidades jurídicas entre os membros de um grupo empresarial, conforme a legislação penal e civil, permite que não se prestem contas de maneira apropriada;*