

II Latin American Regional Workshop
The Business and Human Rights Resource Centre (BHRRC)¹
26th – 28th September 2019, Mexico City



1. INTRODUCTION: In August 2018, the BHRRC organised a workshop in Colombia to analyse the challenges and opportunities that arise from the experiences of litigation of land and territorial rights, as well as intimidations and attacks against human rights defenders.

Following on from this workshop we carried out a second workshop in September 2019 in Mexico in order to identify and strengthen defence strategies in favour of communities and land, territory and environmental defenders in Latin America, with particular emphasis on litigations by States and companies against lawyers and leaders which aim to silence them, cause burnout and fragmentation or to appease critics. Many of these legal attacks occur as a result of criticisms by civil society for the direct or indirect participation of companies in human rights violations. These Strategic Litigations against Political Participation (SLAPPs) were analysed in detail in the workshop.²

The workshop integrated environmental perspectives as well as indigenous, afro-descendant and women's visions through the 70 participants from 15 countries across the region.³ Through group work, many similar trends were identified across the countries: the criminalisation of defenders, legal advances that lack implementation, strong presence of energy and extractive projects.

2. CRIMINALISATION AND STRATEGIC LITIGATION: The workshop delved into the topic of criminalisation, including lawsuits, stigmatisation, harassment, intimidation and other ways to close space for civil society in their struggles to defend human rights and the environment in business

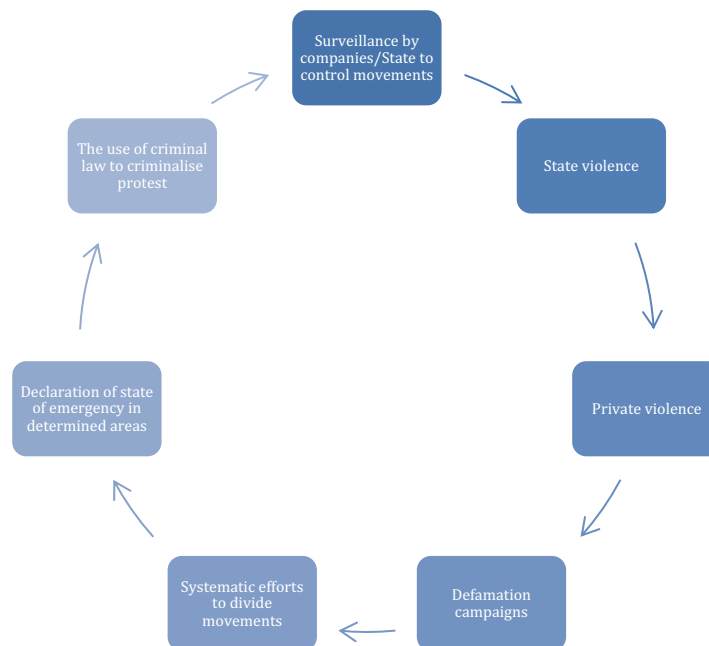
¹ Visit our website: www.business-humanrights.org/

² The BHRRC is currently carrying out a research project to collect and analyse cases of SLAPPs, recognise the litigation strategies currently used by companies against human rights defenders as well as strategies of resistance against SLAPPs, creating a global data base

³ Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Honduras, Guatemala, Nicaragua, Mexico, Paraguay, Peru, Uruguay y Venezuela. Also one person from Sweden and another from Germany

contexts. Criminalisation consists of the use of judicial mechanisms and judicial-political actions by companies and State agents to discredit the defence and promotion of human rights.

According to Rachel Sieder and other’s research, the patterns of criminalisation are:



2.1 Extrajudicial territorial defence mechanisms: In many international, commercial and human rights instances there are mechanisms that territorial defenders can use to report violations and to activate extrajudicial strategies related to companies that attack their rights and territories. Once all national mechanisms are exhausted, the Inter-American Human Rights System and the United Nations Human Rights Systems can also be used. The BHRRC offers many of these tools on our website so that victims can identify which to use.

2.2 Needs and challenges in Latin America with regards to access to justice: Attacks against defenders in the region that are linked to companies have worsened and increased, meaning defenders and their organisations need to better understand the ways to approach the nexus between human rights and companies. The organisation of many communities has allowed them to create their own ombudspersons, to reach out to national human rights institutions or the public prosecutors’ offices and present their cases before courts, using protection tools such as the “*amparo*” or “*tutela*”, *amicus curiae* and public consultations.

In the same way, their struggles accessing justice have led to the use of tools before the Inter-American and universal human rights systems, such as the Universal Periodic Review, Special Rapporteurs, hearings, precautionary measures, provisional measures and recommendations; as well as other bodies such as the OECD, the ILO and the Inter-American Development Bank and also, some embassies in the countries where the head offices of companies responsible for violations are located. The workshop explored all these mechanisms and tools.

However, in the fight against companies, defenders continue to meet challenges and huge difficulties explored through the following elements.

The prevalence of private investment, commercial agreements, negotiations or dialogues and unequal processes over the defence of the autonomy of territories to generate profit at the cost of natural resources.

The partiality and conservatism in national institutions, including judges, in favour of companies, due to their concept of "development" in detriment of the human rights of the population.

The transformation trajectories of the State, in an era of securitisation that results in the imposition of judicial and regulatory models that impeded access to justice.

The presence of organised crime, drug trafficking and other armed actors in territories that make the work of defending rights more complex and difficult.

The imposition of neoliberal models of development, mainly of infrastructure, agro-business, large scale mining and oil, gas and coal that criminalise, judicialise and attack environmentalists, indigenous people, afro-descendants and peasants as "anti-development".

2.3. How can these challenges be overcome and tools for access to justice strengthened? We

spoke about strategic litigation by communities against negative impacts of business projects. These litigations should always be directed to the good of the community and the people, considering victims are the protagonists of the process, and should be carried out through a human rights perspective, questioning the concepts of "common good" or "public order" that are imposed on territories. The participants reflected on the value given to these processes, considering that litigation is political, and that litigation cannot be an end in itself. Strategic litigation is a collective and network-based process; meaning there must be a map of actors and power relations that exist in the territory or country so that we can identify the area we are in and the context in which the case is developing. In the case of favourable decisions, communities should work towards the implementation of the sentence.

The dominant narratives of our economies are concentrated in neoliberal and extractive development models, in the prevalence of private investment and commercial agreements over the autonomy of communities, in the partiality and conservatism of the institutions of the State that favour the business sector and in the securitisation of territories. A strategic litigation effort must seek to change these narratives and should also be a tool to combat structural discrimination that communities suffer when they approach institutions that should supposedly guarantee their rights.

To contribute to achieving this, an accompaniment that guarantees the production and circulation of information is necessary in order to share lessons learnt and generate new litigation and protection strategies from companies; lawyers, international and national organisations and other experts should provide all information, methodologies and tools available to the communities so that they can manage their situation autonomously. Methodologies should be adapted, as well as the use of technical language and the ways in which cases and "macro-cases" are prepared and argued; the participation in hearings, the use of materials from diverse disciplines, advocacy, documentation and investigation techniques must be considered and shared. At the same time, the study of strategies used by companies themselves in their own defence should be prioritised and shared, encouraging the construction of effective counterarguments that include terms that companies themselves use such as comparative advantage, competitiveness and risk.

Finally, it is worth adopting preventative strategic litigation that consists of, for example, contacting organisms and authorities responsible for granting licenses for projects that could affect communities. Prevention can also include initiatives such as the declaration by communities of public lands free of mining, as well as registering territories before public institutions as collective property. Another idea that came up in the workshop was to invite international organisations to participate in relevant judicial hearings to raise political pressure.

3. DUE DILIGENCE, REFORMS AND PROPOSED SOLUTIONS: According to the UN Guiding Principles on Business and Human Rights, due diligence is a tool as well as a methodology and a channel for companies to undertake prior analysis that allows for the identification of human rights, environmental and social risks of their operations, in their direct activities as well as in their supply chains. The aim is to take preventative measures and make responsible decisions to avoid negative human rights repercussions, internally as well as externally. Companies should continually evaluate the effectiveness of these measures.

The workshop provided a summary of global mandatory due diligence initiatives from different countries, that are only just beginning, to analyse their implications in Latin America. One of the challenges to make States and companies accountable for their impacts is to include the use of the term due diligence not only in national human rights plans and programs, but also by judges in their legal arguments.

Another way is that judicial systems should allow the burden of proof to be reversed, given the huge asymmetry of power between companies and victims; one form could be the integration of the communities under the legal figure of “human rights defender”. Laws with clear and proportional obligations and sanctions are necessary, with independent State mechanisms that have the budget to be able to organise consultations and ensure compliance with processes of due diligence.

Some civil society groups argue that companies should not oversee the consultation of affected communities because of conflict of interest. Therefore, sanctions are necessary. They also indicate the many challenges that exist to access information, which makes it difficult to understand how companies really operate and how to prevent and remedy violations. Finally, the role of investors is becoming more and more important in that a sector of them wants their investments to respect human rights.

4. PROTECTION AND SELF-PROTECTION MECHANISMS; CHALLENGES AND OPPORTUNITIES: The discussion in the workshop confirmed that not only is there an absence of State institutions able and willing to protect defenders and lawyers, but also that the State carries out different strategies to weaken social movements in coordination with companies. Forced displacement, the declaration of states of emergency, lawsuits against defenders, the division of communities, threats, harassment, criminalisation and attacks against their personal integrity can often force defenders to abandon their communities and countries for periods of time.

It is necessary that organisations and communities think deeply about their security protocols and mechanisms, as well as self-care strategies. In many cases, those who protect displaced people or people at risk are the same communities and some organisations that have designated funds to protect defenders; but many of these measures are unsustainable in the long term. Few States have protection measures and when they do have them, they are deficient.

The regional working groups discussed these challenges and generated the following strategies to better protect themselves and to continue their work in defence of human rights:

4.1 Colombia → Due to the high level of attacks, humanitarian agreements and State protection mechanisms have been promoted; they have proven not to be useful due to their securitisation (under the Voluntary Principles on Security and Human Rights). This is why self-protection measures, including those of a spiritual character; the strengthening of civil society; women’s organisations; community spaces to dialogue and replicate information; the promotion of peace agreements; communication with the government; data bases of information and documentation; and emergency funds should be prioritised.

4.2. Mexico → Diagnostic of actors and patterns of criminalisation; organisational strengthening; defence and counterattack (legal and extra-judicial tools); fundraising. Corruption, “corporate capture” of the State and impunity are factors that only provide further obstacles to resistance and are factors that must be worked on.

4.3. South America → Shed light on the impacts that companies have; continue to use all the judicial mechanisms and the universal and regional human rights systems; begin experiences of strategic litigation; strengthen and permanently accompany communities in resistance.

4.4. Central America → Generate spaces to share experiences of protection and to build strategic litigation; strengthen internal and regional alliances; improve regional articulation to advocate in international fora in collective, integrating the priorities of communities; call on international organisations to share their material and methodologies in the region and facilitate sharing spaces.

5. “CHILDREN OF WATER”: [This documentary](#) was presented about a case in the Sierra Norte de Puebla, Mexico, as an example of many of the topics discussed.

6. GENERAL CONCLUSIONS: The workshop concluded that communication mechanisms, the exchange of international advocacy and the discussion of strategic litigation to combat increasing criminalisation of defenders are necessary. There is also the need to have a more effective normative system that holds companies to account. It would be good to bring all sentences and case analyses in one place. The creation of a periodical bulletin about Legal Business Accountability in Spanish was proposed.

We spoke at length of the creation of a network of lawyers and experts to strengthen defence, litigation and counterattack processes, as well as to change narratives. This network could include the organisations who participated and could accompany people and communities in their legal processes. Networks strengthen. Individual and disconnected processes of defence are more likely to fail. They are stronger articulated. The construction of a network is the same as the construction of experiences. In general, lawyers do not like to share their arguments and legal theses, but there is precedent and expectation that in a protection network, this could be overcome.

Finally, given the hugely positive evaluations of the workshop from those participating and the full achievement of the proposed objectives, the BHRRC considers it fundamental to organise another workshop in 2020 to follow up on and go into more depth about the topics discussed, and continue to build bridges and networks between countries to increase the effectiveness of strategic litigations related to companies and to strengthen protection tools against attacks by companies. This depends on whether we can raise the required funds.

The BHRRC is hugely grateful to all participants and to the agencies that financially supported this workshop.