Intervention at Panel VI: Lessons learned and challenges to access to remedy (selected cases from different sectors and regions). **Intervention by** **Claudia Müller-Hoff, European Center for Constitutional and Human Rights**

Thank you very much for the opportunity to share our experiences at the European Center for Constitutional and Human Rights, ECCHR. We conduct and support litigation and other legal interventions in cases about transnational corporations’ presumed involvement in human rights violations, in home and host states, on behalf of or in support of the victims. This includes criminal actions against a parent company; civil actions, under tort law or under commercial law; administrative actions; amicus curiae interventions in host state legal proceedings or in international fora such the ICSID tribunals for investment disputes; reports and complaints to different UN instances, and also complaints under soft-law instruments such as the OECD-Guidelines for Multinational Enterprises and Human Rights.

Our cases ocurr in countries all over the world, in the Americas, Africa, Asia and Europe.

Access to remedy is a necessary element if we want to end impunity. However, in our experience, only in a few of our cases are we able to include those affected actively and with formal standing in the proceedings: And this is not a coincidence: corporate Human Rights violations tend to affect those most vulnerable, most marginalized by society and most disenfranchised, for whom access to justice is particularly difficult: children, illiterate labourers, landless peasants, migrant labourers, rural population and displacede persons, trade unionists and political opponents in conditions of violent repression.

This is no coincidence, because corporations seek conditions where their investment involves least risks: where natural resources can be accessed easily without the risk of high environmental standards or opposition by indigenous groups; where labour is cheap because labor rights are not enforced and trade unions are suppressed; and where democratic opposition is effectively repressed.

We identify several problems with effective access to remedies across different jurisdictions in our cases:

1. **First, on the question of legal standing**

Affected persons not only have practical difficulties to access the courts, they also often lack *legal* *standing* in the requested courts:

For example,

* In a case about trade union persecution, the trade union, whose member was murdered by paramilitaries, did not have standing in the criminal proceeding, as it was considered not directly affected by what was legally qualified as an individual homicide case;
* In a case, where police forces shot at and killed student protesters, victims and their families have no standing in an action to investigate whether the transnational weapon sale was in accordance with export regulations, as this is an administrative process, considered to concern the regulating state and the regulated corporation only;
* A commercial action was brought against a large retailer company, for misleading publicity. It had advertised that its products stemmed from labour-rights complying factories, when in fact the workers were exploited, underpaid, sexually harrassed, and trade unions were repressed; here the affected workers did not have standing, only competitors or consumer associations in the far-away marketing countries did;
* In a conflict between a timber company and a government about access to land, the indigenous groups inhabiting the land, did not have the right to intervene in the investor proceeding before the World banks arbitration tribunal ICSID; their Amicus Curiae Intervention was rejected, as they were considered not impartial to the case;
* In a case about forced displacement for a mega-dam project in Africa, thousands of families were affected. A civil action in Europe against the dam engineering company was not possible, because the jurisdiction did not allow for class or group actions, so to bring individual claims for thousands of clients many of whom have no identity cards, are unable to read or to document their damages, was impossible.

So, what is needed here is a broader definition of legal standing, based on a contextualised understanding of affectedness in cases that effectively deal with human rights violations; as well as the possibility for representative, class and group actions.

1. **Second, on the question of responsibility within and across the corporate web**

Access to remedy is not only a question of procedural law, but also of what qualifies as actionable set of facts, under substantial law.

I will not go so far as to argue here for the abolition of the corporate veil. In practice, we deal with related, even complementary, but distinct responsibilities of parent companies and their subsidiaries: for example, in a case about persecution of trade unionists, it was presumably the subsidiary, that slandered the trade unionist as a guerrilla fighter, knowing that this would expose him to attacks by anti-insurgent paramilitary groups. The subsidiary should have abstained from doing this. Whereas the parent company was informed of the failure of its 100% subsidiary and refused to intervene with the local management. The parent company should have acted to prevent its controlled company from getting involved in a crime.

In another case, 260 workers died and 30 suffered serious injuries as a result of a textile factory fire in Asia. The principle client of this factory was a large European retailer company, that bought around 75% of its production. Here we have a supply chain of separate legal entities, but we also have presumably power of influenceand power to prevent, for example through contractually stipulated binding safety requirements and effective monitoring.

So, with power comes responsibility. And accountability. This should be clarified in the law. And safeguarded procedurally: for example by shifting the burden of proof. It cannot be entirely up to those affected, as described, to investigate into the internal procedures inside a multi-layered business enterprise or its secret business relations across borders. Even the public prosecution authorities are reluctant to investigate transnational corporate cases of human rights violations.

So, in the case of Akzo Nobel vs European Commission,[[1]](#footnote-1) the European Court of Justice for example assumed a rebuttable presumption of control by the parent company of the subsidiary’s operations, if it owns 100% of its shares. Similar constructions could be developed where control relationships are built on majority investment or dominant supplier-client relations. Where supply chains are long and multi-link, this becomes more difficult and care needs to be taken to not open loop-holes. Some bribery laws provide possible models of accountability of a benefitting company for acts of an associated person, with association being defined according to all circumstances.[[2]](#footnote-2)

With respect not only to scope but to standards of liability, it is important to be aware, that very often transnational corporations are engaging in particularly risky or risk-prone activities: for example, the mining and oil sector risks producing irreparable environmental damage; infrastructure and agro-industry risk producing displacement and social conflict; armament and surveillance technology may risk complicity in torture and crimes against humanity; pesticide manufacturers risk indiscriminate public health and environmental impacts;those doing business in a high-risk-zone or corruption-prone area risk fuelling violence and corruption; where trade unions are prohibited or repressed, a company risks complicity in labour rights violations.

In such situations of foreseeable risk, due diligence serves as an analytical tool to manage human rights risks; but liability standards should be informed more by categories such as strict liability and precautionary principle, and procedurally be secured through, for example, the reversal of burden of proof and rebuttable presumptions.

1. **Thirdly, on the question of jurisdictional scope**

Jurisdictional scope needs to be able to respond to the complementary responsibility of the various corporate actors. Limiting jurisdiction to the place of domicile of the defendant is inadequate, because it means to artifically separate substantially closely related issues, which complicates the investigation and makes procedures inefficient. Where cases are closely related, jurisdiction should allow them to be considered together in the same forum, in the interest of procedural economy, of truth and of effective access to justice.

1. **Finally, on the question of effectiveness**

Briefly, I would like to address the question of non-judicial remedies. Sometimes, problems that underlie corporate human rights violations, adress larger questions about distribution of wealth in a society, about competing development models, and about democratization of a society. Here judicial remedies can seem too reductionist as an avenue and so affected communities as well as corporations often would prioritize out-of-court negotiations or dialogue models over judicial remedies.

The problem is that, for one, there is a great imbalance of power at play: we have seen cases where companies offer money, cattle or cars to individual community leaders to unduly influence negotiations; cases where illiterate indigenous people are asked to sign lengthy agreements in English; cases where negotiations are delayed for months and years while the company continues its operations, causing more damage every day.

A second problem is that states are not involved in a way that allows them to comply with their guarantors‘ function for HRs. Even, where the state is involved as a facilitator, as in the procedures under the OECD Guidelines, even if ideally proceedings end with clear recommendations or a clear statement about human rights violations, but: no remedy is provided; recommendations are not implemented or implementation is not verified; no sanctions in case of non-compliance imposed: these procedures do not provide any incentive for corporations to review, correct or change their conduct. Non-judicial remedies in order to be effective, first and foremost need to address the imbalance of power between the parties, and states should have a role here as guarantors. Procedural guarantees, external monitoring, and enforceability are some necessary elements here, as well as – in the interest of truth and prevention – the determination, whether an alleged human rights violation has or hasn’t taken place.

My finalising comment is good news: for most if not all of the mentioned aspects, there are already jurisdictions that have helpful models in place. This shows that things are doable. And that one can take them as inspiration. - Thank you.

1. Case C-97/08 Akzo Nobel NV and Others v Com­mission, judgement of 10 September 2009. [↑](#footnote-ref-1)
2. e.g. sec 7 and 8 of the UK Bribery Act 2010. [↑](#footnote-ref-2)