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The role of legal consultation in preparing affected groups for addressing conflicts and in preparing conflict resolution processes (C Müller-Hoff, ECCHR)

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At ECCHR, we have studied different constellations of cases of land grabbing, involving transnational companies. Whether the land grab happens through private contracts, state expropriation or de facto forceful displacement, has an influence on which legal remedies may be available.

1. **But we can identify some of the most notorious problems** that occur in the management of conflicts about land and other vital resources between companies and communities in any of these different constellations. These are:
   a. **The production of power imbalance,**
   b. **The politics of disinformation,**
   c. **The "divide and rule" paradigm.**

   What I mean by that is:
   a. **The production of power imbalance:** companies are surrounded by a powerful support network: their home governments (BITs), the host governments (MoUs, tax exemptions, SEZs with free-trade conditions), military protection, and multilateral and private banks. The community has often nothing to counter that but constitutional rights on paper and their strength of will to defend themselves.
   b. **The politics of disinformation** relates to how companies control relevant information about their project in selective and non-objective ways. They tend to speak about CSR measures and so-called "development projects" and less about environmental and social impacts, rehabilitation costs, uncertainties etc. (FOI does not always help)
   c. **The "divide and rule" paradigm:** Companies engage with communities by way of differential treatment: individuals are singled out and promised jobs or compensation; local chiefs are given extra benefits; whereas opponents are falsely denounced and criminalized; sometimes people are offered rewards for engaging in anti-opposition activities, public stigmatization and violent attacks. So, conflicts about the company's project are intentionally "outsourced" into the community, where they divide the collective and weaken their organizational strength.

2. **How can these problems be addressed?** I want to focus here on out-of-court settings, i.e. negotiation, dialogue, mediation processes.
   a. **Counter power imbalance → through rules of process and exit strategy**
      (1) Whether a company is prepared to negotiate procedural rules for a dialogue process can be taken as an indicator for its good faith. If that is lacking, the process will likely be inefficient and this is why it is important that the community considers alternatives/an exit strategy.
      (2) To secure basic standards of fairness, the following procedural rules might be helpful:

i. **Terms of reference** should be negotiated rather than accepting re-set formulas.

ii. Insist on t**hird party observers** as guardians of just and fairness.

iii. C**onfidentiality** is ok, but should not cover also the results of settlements, these should be open to public scrutiny.

iv. W**aivers** of rights or of judicial remedies are common. But they should not be unconditional and may not extent to criminal actions: these are not be subject to private negotiations but a public interest and a public duty.

v. **Minutes** must be taken, agreed, signed, copies handed out.

vi. Reasonable **time frames** for consultation with the community must be allowed.

vii. Agreements should also address: terms and timelines of **implementation** and monitoring, and measures in case of delays, incompliance or irregularities.

b. Counter Disinformation → documentation and collection of evidence

The information, companies offer, are generally not independent, objective nor comprehensive.

Information is power. Hence, the communities should – independently -

(1) **Document** the relevant facts and

(2) **Collect evidence**, ideally, such evidence that satisfies the **standards that apply in court cases**; e.g. witnesses need to be named and sign their statements, etc.

I distinguish between the two because it is a difference to say "this water has killed already 15 of our cattle, since the company is here" or to say "we know that the company pays the goons to beat us up" and to present sworn witness statements, fotos, log books and scientific expert opinions on these facts. NGO reports, btw, are generally good for context and analysis of the problem, but there are not a sufficient evidence basis, as they are only secondary sources and too generalized in content.

The collection of evidence should as a minimum (1) specify the harm, (2) specify what conduct caused this harm and how it can be attributed to the company, (3) look into the corporate group structure, meaning: the spheres of influence, the decision-making power, the channels of information within the group and (4) contextualize, including information about the status quo situation prior to the harm

And I would recommend to seek legal methodical advice for evidence collection.

c. Counter divide and rule paradigm → strengthen the collective

Here, processes of organizational strengthening are vital. Within this process of collective organization, it is important to define and set out

(1) **participation**: who participates in the collective process and will be bound by or excluded from negotiation results?

(2) **representation**: the terms and mandate for spokespersons or representatives,

(3) **conflict rules**: and procedures for dealing with internal conflict.

These are some very basic recommendations for negotiation processes.

(more in ECCHR publication: "Making corporations respond to the damages they cause", for download available at: http://www.ecchr.de/index.php/ecchr-publications.html)

3. How can soft law help in resolving conflicts?

Maybe because I am a lawyer, I see in fact more potential for the use of soft law in litigation than outside the courtroom.

Soft law instruments are not binding. But they can become relevant in legal arguments and could – hence – move slowly from soft to hard law:

- In litigation against companies, courts often will have to work with legal terms that are quite open to interpretation, such as due diligence, duty of care, standard of care, *"Sorgfaltspflicht"*, breach of duty, negligence or recklessness.
- For example what does due diligence require of a company that deals with a supply chain, or for a company that operates in a conflict zone, or for a company, that works with environmental risks?
- The answers often are not written in the law. A judge can find answers in what are considered accepted norms of reasonable behaviour in those specific settings. Such norms can be found for example in soft law instruments, if these are well done, meaning, if they are concrete and practically applicable, and if they find broad approval among relevant stakeholders, i.e. are recognizable as norms – as opposed to simply policy proposals.
- In that sense, we have used for example the OECD Guidelines, or the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones in some of our cases.
- **Whether and how this can work with the VGs specifically**, needs further exploration, maybe in a team with litigators and experts on the VGs.

4. I was also asked to speak about what **conditions for the creation of local complaint mechanisms** in situations where effective justice systems do not exist. This question makes me think: Is it a good strategy, to replace a dysfunctional justice system with an alternative one that lacks the authority of a state institution, grounded in a constitution? What would be its source of authority?

   And: Why do justice systems not work? Often, justice systems are „partially" functional, they protect certain interests but not others. They protect interests of politically and economically powerful forces. Where such forces are above the law and justice, would they not also be above other complaint mechanisms? Which social force would have enough standing to institute such a mechanism and make it work beyond the particular interests of the economic and political elites?

But I do not want to leave the question entirely unanswered: looking at existing complaint mechanisms I see the problems in **3 areas: (1) the self-imposed limitation to mediation**. If parties lack the will to mediate, there needs to be the option to have an accountability-oriented process of arbitration. **(2) Implementation and compliance**: often the outcomes – agreements or resolutions – are formulated too vaguely, so that it is impossible to monitor and measure efficiency of implementation. For example, if the outcome is that company and community will continue to maintain regular dialogue to resolve issues related to access to land and water – what, if these dialogues are not held or are inefficient? **(3) Binding character:** that difficulty is related to the fact that agreements are normally not obligatory for parties and hence there is no authority mandated to monitor implementation and, if needed, execute a decision.

So, some recommendations from our perspective are that local complaint mechanisms, in order to offer effective remedy, should:

a. Be independent,
b. Offer binding decisions,
c. As well as preliminary injunctive relief and preliminary protective measures,
d. Be accessible, to individuals and to groups,
e. Address the right to consultation, through procedural safeguards,
f. Offer alleviations of burden of proof for the complainants (for lawyers: precautionary principle, legal assumptions and inversion of burden of proof),
g. And comply with UN GP standards for remedies (principle 31): legitimate, accessible, predictable, equitable, transparent, rights-compatible, provide for inclusion of relevant stakeholders through consultation.

These are basically conditions that would make it as quasi-judicial as possible.

5. In conclusion I would like to suggest, that

(1) Implementation of the VG should address scenarios and related problems as I have earlier illustrated,

(2) next to policies and institutions, it is important to strengthen local actors in terms of organizational strength, tools and trainings for strategizing negotiations, documentation and evidence collection etc.,

(3) soft law should be integrated into legal arguments in courts to improve access to justice for victims; potential of VGs needs further exploration;

(4) Alternative complaint mechanisms should follow the above recommendations.

Thank you!