

During the last four days we have heard ample discussion about the protection and accountability gaps that result from the fact that companies operate across borders. Companies make decisions, take certain actions or incur in certain omissions in one place, with repercussions for human rights in another. Yet generally laws, legal enforcement or accountability mechanisms operate within state borders and are therefore insufficient to hold these companies accountable and provide remedy to the victims.

We need laws, legal enforcement and accountability mechanisms that track the same pattern of operation: domestic measures applicable to companies under the jurisdiction of the state concerned designed to prevent, investigate, punish and redress abuses to human rights committed by these companies beyond the state's borders. These measures are still territorial in nature. They apply domestically, but they have repercussions for conduct abroad.

So, who are the companies under the jurisdiction of the state concerned?

The elements correctly define these companies as those that have their "centre of activity, are registered or domiciled, are headquartered or have substantial activities"¹ in the state concerned or "whose parent or controlling company present such a connection to the State concerned."

These bases for jurisdiction (both prescriptive and adjudicative jurisdiction) are recognisable and legal under international law, are practiced widely by states and have been increasingly recognised and adopted by relevant international human rights standards. For example: General Comments 23 and 24 of the UN Committee on Economic, Social and Cultural Rights,² General Comment 16 of the Committee on the Rights of the Child³ and, importantly, in the inter-governmentally negotiated and adopted Council of Europe Recommendation on Human Rights and Business.⁴

In relation to judicial remedy (or, adjudicative jurisdiction) which is the focus of this session, it is correct to suggest as the elements do that states in whose territory TNCs/parent companies are domiciled or headquartered, should ensure their courts admit and hear claims brought against these companies for alleged abuses to human rights committed abroad. However, the elements suggest that these states should "facilitate" that their judiciaries consider claims. This is too weak. In these cases, states should not just facilitate but *ensure* their judiciaries have jurisdiction and that they exercise it in practice.

This requires two things: 1. eliminating *forum non conveniens*; 2. eliminating other barriers to remedy that prevent access in practice.

1. *Forum non conveniens*

Generally claims can be brought against a company domiciled within the forum state even for harm caused abroad. This is because the nationality or domicile of the defendant company is generally accepted as a basis for jurisdiction.

One of the threats to the exercise of jurisdiction is the doctrine of *forum non conveniens* that is commonly raised by companies in states such as Canada and the USA. *Forum non conveniens* is the discretionary power of a court to decline jurisdiction to hear a case when another court is deemed better suited to do so.

The problem is that corporate defendants in these states tend to raise *forum non conveniens* as a matter of course and often maliciously. Courts do not fully consider the real chances of accessing remedy in the alternative court. When claims are dismissed, victims often either do not attempt or fail at attempts to bring claims in the alternative court (generally the host state court).

The elements currently suggest that states should "limit the use of the doctrine of *forum non conveniens*". But this might not be enough.

Given the challenges that *forum non conveniens* poses to effective access to justice, *forum non conveniens* should be eliminated in trans-national human rights claims against companies. This is consistent with the 2016 Council of Europe Recommendation on Human Rights and Business that recommends that the doctrine not apply in civil claims for alleged human rights abuses brought against enterprises domiciled within the jurisdiction.⁵

2. Other barriers to remedy

It is not enough to allow claims to proceed in theory if other barriers to remedy are impeding access in practice. There is a section in the elements on removal of barriers to remedy. This was extensively discussed yesterday. It must be clear that the obligation to remove barriers to remedy also applies to states in whose territory TNCs are domiciled or headquartered and in relation to claims brought against these companies for alleged abuses to human rights abroad.

One final point. For claims to be brought, or be brought successfully, there must be a clear and sufficient cause of action against the TNC (or its parent or controlling company) in the first place. Claims against TNCs have traditionally been brought on the basis of existing tort/non-contractual liability grounds. These bases are limited and often unable to capture the conduct of the parent companies. For this reason, it is critical that the treaty establish clear obligations on TNC and/or their parent or controlling companies to exercise due diligence or vigilance in order to prevent human rights abuses across their global operations. Harm that is a consequence of a breach of these obligations should give rise to a cause of action before the courts of these companies' home states.⁶

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¹ Under EU legislation for example, a company is “domiciled” in the place where it has its statutory seat, its central administration or principal place of business (article 2.1 of Regulation No 44/2001).

² Para 70, General Comment 23: States parties should take measures, including legislative measures, to clarify that their nationals, as well as enterprises domiciled in their territory and/or jurisdiction, are required to respect the right to just and favourable conditions of work throughout their operations extraterritorially. States parties should introduce appropriate measures to ensure that non-State actors domiciled in the State party are accountable for violations of the right to just and favourable conditions of work extraterritorially and that victims have access to remedy. Para 31, General Comment 24: Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.

³ Para 43: A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned. Para 44: States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned.

⁴ Recommendation 13: Member States should apply such measures as may be necessary to require, where appropriate, business enterprises domiciled in their jurisdiction to respect human rights throughout their operations abroad.

⁵ Recommendation 34.

⁶ Para 33 of General Comment 24 of the UN Committee on Economic, Social and Cultural Rights states: Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located. The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States’ national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned.