

Speaking notes - Sandra Epal Ratjen

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PANEL 7 - Jurisdiction

Thank you Mister Chairperson.

It is an honour and a pleasure to address this intergovernmental working group today, so thank you very much for the invitation to join this panel on the issue of jurisdiction.

I would like to share only some reflections of rather general nature and my colleague Gabriela will talk about more specific aspects of jurisdiction.

So my intervention, I hope will help to make bridges with previous discussions under other panels/sections of the elements document. And to place the discussion on jurisdiction within the context of the whole elements document.

In general, jurisdiction is a key point in our discussions and central to the entire purpose of the future legally binding instrument. And I think that it is to be welcomed that the elements document gives a prominent space to the discussion around this issue by dedicating a specific section to it. The exercise of jurisdiction over transnational business activities is essential to avoid denial of justice, especially for acts and conducts that have a transnational dimension and to prevent and remedy abuses of rights due to business activities with a transnational character. However, the elements document could be perhaps clearer since some ideas described under the elements document on jurisdiction actually refer to states obligations, access to justice, and effective remedies, among others.

Hence, one question I think has to be asked: how should this point be handled in a future binding instrument? Shall it be the subject of a specific section and if so what can such a section contain or can provisions on jurisdiction be included in other parts /sections of the future instrument?

Especially because there is already the mention of jurisdiction/territory in various parts of the elements document. (I will come back to this at the end of my intervention).

A first point on the various aspects of jurisdiction

Because of this general relevance of the issue of jurisdiction for our discussion and for the future legally binding instrument, I think it is important to unpack the concept and consider the different aspects that jurisdiction entails in international law:

- Prescriptive jurisdiction: the State has the power to regulate or prescribe conducts, create legislation;
- Adjudicative jurisdiction: domestic courts have the ability to entertain law suits and take judicial decisions;
- Enforcement jurisdiction: the power of a state to investigate, arrest, prosecute, punish, or otherwise enforce the law.

In our particular context here, regulating TNCs and OBEs, we need to consider these dimensions not only at a traditionally territorial level but also consider these aspects across and beyond borders.

I think what the elements paper is doing, and rightly so, is to focus on prescriptive and adjudicative jurisdiction: i.e regulation of conducts that have impact beyond territorial borders and making sure that domestic courts may be able to decide on cases brought to them that concerns conducts or harm occurring outside of the state territory (Gabriella will talk to this point more specifically). Concerning these aspects of jurisdiction, international law already allows states to exercise broad prescriptive and adjudicative jurisdiction as already elaborated upon by previous panels and experts including Olivier De Schutter and David Bilchitz.

At an extraterritorial or transnational level, enforcement jurisdiction would need to be considered in a much more restrictive manner and could be handled in the context of international cooperation.

I am coming now to my second point which is linked to the first one: Where to address different aspects of jurisdiction across a future legally binding instrument?

I am not aiming to be exhaustive here in giving all possible options but just to mention one I think that definitively important elements could be covered under States obligations.

More particularly, I think a future legally binding instrument shall include an explicit obligation of states to protect rights in the context of business activities (including beyond their borders) and define parameters or the scope of this obligation. In this respect, one option that could be considered to make things clearer and more accurate would be to spell out the basis for the protection that States may be bound to give beyond their borders. This basis for protection should be broad enough to avoid regulatory, protection and accountability gaps. Here I think General Comment 24 of the UN CESCR provides interesting language under its provision on the State extraterritorial obligation to protect which says, I quote:

"The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control (...)

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."

So in other words, States shall regulate their companies - those headquartered or registered or with substantial business activities in their territories - thus engaging in a form of prescriptive and adjudicative jurisdiction, that is territorial but with transnational effects.

Last but not least

As I said, it is clear that jurisdiction is extremely relevant to and already mentioned in various parts of the elements document. I think the need to perhaps streamline the use of territory/jurisdiction in a future draft treaty has been mentioned by several speakers in previous sessions. I agree with this and I think a future draft treaty should also prefer

the use of "under the jurisdiction of States" and even more a broad understanding of jurisdiction (following the example of the GC 24 of the UN CESCR and other international human rights instruments) in order to offer the most effective protection of human rights possible.

Thank you very much