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**"Extraterritorial jurisdiction is the surest means to secure access to remedy for victims of human rights abuse in supply chains" - true or false? Linda Kromjong explores the question in the second of her blogs on the topic of supply chains**

## Access to remedy is a human right

Access to remedy in cases of human rights violations is not only a human right *per se*, but a prerequisite for the full enjoyment of these human rights. It is only when people have access to justice and remedy that rights become meaningful. Article 8 of the Universal Declaration of Human Rights states that "*everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*"

The importance of access to remedy is also reflected in the three pillars of the UN Guiding Principles on Business and Human Rights - the "protect-respect-remedy" framework. Pillar Three's "foundational principle" is that "*as part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy*." Guiding Principles 26 and 27 further expand on this State duty, explaining that States "should take appropriate steps to ensure the effectiveness of *domestic judicial mechanisms*," including by *"considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*," and "*should also provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse*." As these statements make clear, access to remedy is first and foremost a responsibility of the State.

## In many cases, governments do not fulfil their role

However, in many countries governments are not properly fulfilling their duty to provide access to remedy. The American Bar Association (ABA)[1] identifies deficiencies in the ABA Rule of Law Initiative, which include, for instance:

1. Inadequate financial support and political will on the part of governments and bar associations.
2. Lack of independence, accountability and transparency in judicial systems.

[1]http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_roli_2014_program_book_web_email.authcheckdam.pdf

3. Inadequate judicial education and professional training, as well as insufficient emphasis on judicial ethics.
4. Overwhelming caseloads, coupled with inadequate resource allocation and a lack of modern case-management systems, which results in procedural delays that undermine the administration of justice.
5. Corruption, which undermines the fragile public trust in the fairness and efficiency of the judicial system.

**Challenges with regard to access to remedy affect all workers – not only workers in supply chains**

These challenges do not only restrict access to remedy for workers in supply chains, but for all workers, indeed for all, including employers The ILO estimates that 20.6 per cent of the global workforce is linked to Global Supply Chains (GCSs). This is an impressive figure. However, at the same time we have to recognise that around 80 per cent of workers are not linked to GSCs. Similarly, Margaret Jungk from the UN Working Group pointed out in a recent article in the Huffington Post that "*the vast majority of economic activity is carried out by small-scale companies, ones you've never heard of, mostly in the informal sector. Their goods don't travel across borders, and when they exploit their workers or harm communities, you don't hear about it*". We have to improve access to remedy for all workers – not only for the 20 per cent of the global workforce that is linked to GSCs. People who work in the informal, purely domestic economy have the same right to access to remedy as the worker in the factory next door working to produce an item that is sold on the global market.

**Only strong and effective jurisdiction at local level will give the majority of victims access to remedy**

In her article, Margaret Jungk raised the case of a shoe factory, Kentex, located outside Manila, which burned to the ground in May of 2015, killing seventy-two garment workers. As Ms Jungk points out, the company had no permit to operate, no sprinkler system and no fire exit. However, because the company was not producing for recognisable brand names or international consumers, but making shoes almost exclusively for the domestic Filipino market, the case did not become an international rallying point. The workers of Kentex and their families have the same right to access to remedy as the Rana Plaza workers. The only way to give workers like those at Kentex, and their families, access to remedy is to strengthen national judicial systems. Extraterritorial jurisdiction is not a solution in the vast majority of cases.

**Who is responsible?**

The UN Guiding Principles apply to all companies – not only those with international brands, but also suppliers. The suppliers must do everything they can to respect the human rights of their workers. Indeed, the UN Guiding Principles stress the responsibility of a company to seek to prevent and mitigate human rights abuses in the supply chain, but at the same also stresses that "*where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation".* Similarly, the OECD Guidelines for Multinational Enterprises state that although companies should seek to prevent or mitigate an adverse impact occurring in a business relationship, this does "*not shift responsibility from the entity causing an adverse*

*impact to the enterprise with which it has a business relationship*". Thus, even for adverse human rights impacts in supply chain companies, in the majority of cases the buying company will not be responsibility for remediation.

**Extraterritorial jurisdiction is not a quick fix**

In this debate, extraterritorial jurisdiction is often seen as a panacea to the access to remedy issue often without closer scrutiny as to whether this is the most effective or surest means of ensuring access. The shortcomings of extraterritorial jurisdiction are too often overlooked, including the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years; the challenges presented to foreign courts when they must rule according to foreign legal principles; the difficulties in obtaining evidence and testimony abroad, as well as the question of which court is the right forum for the case to be heard. Independently of all the arguments for the need to ensure access to remedy for all workers and the limited responsibility of business partners, because of the inherent challenges, extraterritorial jurisdiction is not a suitable tool to address gaps in access to remedy in the vast majority of cases.

**What needs to be done?**

We need to increase pressure on governments to improve judicial systems. The international supervision of efforts for improving access to remedies by UN member countries should be strengthened. The Office of the High Commissioner for Human Rights (OHCHR) should elaborate on ways in which established mechanisms such as the periodic review mechanism could be used to this end.

Moreover, capacity building is a key means to improving access to remedies. The OHCHR and other relevant organisations should engage in supporting countries to reform their judicial systems and to embed these reforms in comprehensive strategies to implement the UN Guiding Principles.

Business has a key role to play, as do representative business organisations in raising awareness and providing guidance on the UN Guiding Principles - especially the provisions on non-judicial grievance mechanisms for companies. Business organisations should engage constructively and pro-actively at national and international level in the debate on access to remedy as well as on strengthening national legal systems and governance generally.

***The International Organisation of Employers (IOE) is the largest network of the private sector in the world, with 155 business and employer organisation members. In social and labour policy debate taking place in the International Labour Organization, across the UN and multilateral system, and in the G20 and other emerging processes, the IOE is the recognized voice of business.***