

Justice for Corporate Atrocities

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WHERE CAN VICTIMS OF CORPORATE HUMAN RIGHTS ATROCITIES TURN FOR JUSTICE?

On the night of 2 December 1984, toxic gas leaked from a pesticide plant in the Indian city of Bhopal, killing between seven and ten thousand people within three days of the leak. It was the biggest industrial disaster in modern history. The plant was owned by U.S.-based chemical giant Union Carbide Corporation (UCC). On paper, the Bhopal victims had at least two options to pursue justice: the Indian courts (the courts of the state in which the atrocities were committed, commonly referred to as the “host state”), and the U.S. courts (the courts of the state in which UCC is incorporated, commonly referred to as the “home state”). The Bhopal victims pursued both. However, decades of litigation in both countries only led to further frustration and anger with very little in effective corporate accountability and reparations. UCC, though charged with “culpable homicide” in India immediately after the disaster, has for almost three decades failed to appear before the Indian criminal court to face charges. It remains today a proclaimed “absconder from justice” in the country.¹

The case of Bhopal is representative of hundreds of cases across the globe where neither the host nor home state is able to provide victims of corporate human rights atrocities an adequate avenue to obtain legal redress. There often is an abyss between what the law says on paper and what is possible in reality. When multinational companies are involved in serious abuses of human rights, for a number of reasons, they often get away scot-free. In practice, it is as though they operate above the law.

Ideally, justice and reparation should be achieved in the host state. Local courts and judicial systems should be able to hold corporate perpetrators accountable and provide

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¹ For a detailed description of this case, see Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, 33-64, POL 30/001/2014 (Mar. 7, 2014), <https://www.amnesty.org/en/documents/pol30/001/2014/en>; see also Amnesty International, *India: “30 Years is Too Long to Get Justice,”* ASA 20/035/2014 (Nov. 30, 2014), <https://www.amnesty.org/en/documents/asa20/035/2014/en/>.

effective remedy to the victims. However, this is often not the case. While efforts must continue to improve host state response to corporate abuses, options for seeking justice must be found in the next most obvious place: the home state of the multinational corporation involved.

Over the last few years, Amnesty International has increased its advocacy efforts to prompt home states to do much more to ensure corporate accountability for human rights abuses.² The prospect of effective sanctions and an adverse legal finding in the home state can provide companies at the headquarter level with the incentive to put measures in place to ensure that no human rights abuses occur in the context of their global operations.

JUSTICE IN HOME STATES

Home states need to reform their laws and policies to ensure that corporate perpetrators of human rights abuses domiciled or headquartered within their territory are held criminally and/or civilly accountable, regardless of where the abuses took place.

Under international human rights law, the home states of multinational companies are obliged to act to prevent abuses by corporate actors, including abuses that occur outside their territory, when they have the legal and practical capacity to do so.³

Amnesty International believes that two sets of legal reforms are both needed and possible. First, home states should place parent or controlling companies of multinational corporations domiciled or headquartered in their countries under an express legal duty of care towards individuals and communities whose human rights are affected by their global operations.⁴

In France, efforts are underway to pass legislation that would impose on certain large companies a “duty of vigilance.” In 2010 the UK imposed on companies incorporated or carrying out business in the country a “duty to prevent” foreign bribery.⁵ Whether a “duty of care,” a “duty of vigilance,” a “duty to prevent,” or a similar construction is the most fitting response will depend on the particular national legal system. What matters is that the notion that companies in control of subsidiaries or other entities with whom they do business are legally responsible for the harm these entities cause if they knew or should have known of the likelihood of this harm is firmly entrenched in law. The routes to get there may vary.

² See, e.g., Amnesty Int’l, *Too Toxic to Touch? The UK’s Response to Amnesty International’s Call for a Criminal Investigation into Trafigura Ltd*, EUR 45/2101/2015 (July 23, 2015), <https://www.amnesty.org/en/documents/eur45/2101/2015/en/>; Amnesty Int’l, *Côte d’Ivoire: The Toxic Truth: About a Company Called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Côte d’Ivoire*, AFR 31/002/2012 (Sept. 25, 2012), <https://www.amnesty.org/en/documents/af31/002/2012/en/>; Amnesty Int’l, *United Kingdom: Briefing to the UN Committee on the Elimination of Racial Discrimination*, EUR 45/008/2011 (Aug. 2011), http://www2.ohchr.org/english/bodies/cerd/docs/ngos/AI_UK_CERD79.pdf.

³ For an explanation of the legal basis for this, see Amnesty Int’l, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, *supra* note 2, at 21-26.

⁴ This recommendation is explained in more detail in Amnesty Int’l, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, *supra* note 2, at 143.

⁵ 2010 UK Bribery Act, Bribery Act, 2010, c. 23 (U.K.).

These laws could provide the legal basis for home states to take action (for example, to investigate) in cases of alleged breaches; and lead to sanctions if breaches are found. Crucially, they could provide foreign victims with a direct cause of action against parent or controlling companies in their home states, before their home state courts, leading to an obligation to provide reparations if liability is established. However, to be effective, these reforms would have to be accompanied by other measures to facilitate access to justice such as financial assistance to resource-trapped claimants.⁶

Second, home states should scale up their response to criminal activity, including when this occurs abroad, by enforcing existing criminal laws or creating new ones to hold companies under their jurisdiction liable for criminal acts that either are, or lead to, human rights abuses. This should be done in a way that is proportionate to the severity of the crime committed and the human rights impact.

Adequate responses to criminal activity might require home states to investigate and prosecute cases through the effective enforcement of existing laws. Where these laws do not exist, home states may need to adopt new laws or reform existing laws to criminalize certain unacceptable corporate conduct, to ensure criminal laws apply to crimes committed abroad or to provide for corporate criminal liability, whatever the legal gap may be.

As radical as these reforms may sound, home states already have many of these measures in place in areas such as human trafficking, sexual abuse of children, corruption and transnational organized crime. For example, national and international efforts to tackle corruption and to expose its negative impacts on society have increased over recent years. Today, there is greater acknowledgement by governments of the scale and trans-national nature of the problem. Bribing a foreign official to obtain a business advantage is now a crime in a large number of states.⁷

Corporate impunity for serious abuses to human rights is an issue of increasing international concern, particularly in cross-border cases. There is no reason why the international momentum and commitment to take action to tackle corruption cannot be emulated to combat corporate involvement in human rights atrocities.

JUSTICE IN HOST STATES

A focus on home states is in addition, and not as a replacement to, host state justice. Efforts to strengthen the functioning and effectiveness of host state courts and other

⁶ This and many other measures to alleviate barriers to justice in home state courts are addressed in the recently adopted Council of Europe Recommendation of the Committee of Ministers to member States on human rights and business, Council of Europe, *Recommendation of the Committee of Ministers to member States on human rights and business*, at 31-43, CM/Rec(2016)3 (Mar. 2016), <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec%282016%293&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true>.

⁷ For example, forty-one states have passed anti-bribery legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. See Organization for Economic Co-operation and Development, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> (last visited February 2016).

accountability mechanisms should not be abandoned. On the contrary, efforts to improve justice both in host and home states should go hand in hand so that victims of corporate human rights abuses have more options for obtaining justice.

In recent years, there have been a number of powerful and promising developments. For example, on 14 February 2011, an Ecuadorian judge found multinational oil company Chevron guilty of severe environmental contamination of the land where it operated in Ecuador for over thirty years. The company was ordered to pay \$8.6 billion in damages and cleanup costs, with the damages increasing to \$18 billion if Chevron did not issue a public apology. Ecuador's Supreme Court later halved damages to \$9.51 billion. This decision followed over two decades of litigation against the company, including a class action lawsuit in the U.S. which was dismissed on *forum non conveniens* grounds.⁸

The claimants are now trying to have the judgment enforced in various national jurisdictions where Chevron has assets, and this is bringing a whole new array of legal and political hurdles. Ideally, it should not take over a decade of litigation to reach a court decision. However, the fact that the claimants managed to obtain a final court judgment in a case of this nature, establishing Chevron's liability and ordering payment of substantial damages is a victory in itself.

In another development, on 25 November 2015, Argentina passed a law creating a Truth Commission⁹ to investigate, identify and report on the economic actors who contributed to and/or benefited from the country's military dictatorship of 1976-1983. The creation of this Commission follows years of concern, allegations, investigations and some judicial decisions over the way in which several business actors, both national and foreign, collaborated with and benefited from the human rights violations of the military regime.

The Commission is not meant to replace the courts but to supplement and contribute to judicial efforts. It will have ample powers to receive complaints and request information and evidence, including from all parts and levels of government, companies and other private actors. Its mandate includes a number of innovative features, which should help fulfill critical aspects of the right to remedy, such as the ability to order reparations and seek full knowledge of the truth and guarantees of non-repetition. It is an unprecedented initiative that could serve as a model for efforts in other parts of the world to unmask and combat corporate complicity with abusive governments. The next big battle now that the law has been approved will be forged on the ground and determined by the Commission's ability to fulfill its mandate and deliver on its stated goals in practice.

Both these examples demonstrate that local responses are possible, even against foreign corporate giants. This type of effort must be encouraged, respected and supported, including by the home states of the foreign corporations involved. Despite some encouraging developments, many obstacles still prevent effective justice and accountability in a large number of cases of human rights abuses involving multinational companies in the developing world. While efforts to improve local judicial and other mechanisms to hold

⁸ See Business & Human Rights Resource Centre, *Texaco/Chevron lawsuits (re Ecuador)*, <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>.

⁹ The "Bicameral Commission for the Truth, Memory, Justice, Reparation and Strengthening of Democratic Institutions."

corporate perpetrators of human rights abuses to account must continue, the spotlight must also be placed on home state responses.

SHOULD FORUMS OF INTERNATIONAL JUSTICE BE MADE AVAILABLE?

Forums of international justice should be available and a number of options have been put forward by some experts, including the idea of an international court of civil justice. A crucial question in relation to such a court would be about its ability to respond adequately to a potentially large and increasing number of claims. If, to address this challenge, the remit of the court was narrowly defined and provisions were made for only a few types of case to qualify, adequate solutions would still need to be offered to the other cases that did not meet the criteria.

Whatever the nature and scope of a supranational body, its creation seems a long way away. In the meantime, efforts must be intensified to move home states to take action to prevent corporate atrocities, to hold corporate perpetrators of these atrocities to account and to provide adequate reparations to the victims.