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IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED "HUMAN RIGHTS COUNCIL"

"Business and Human Rights I: Mapping International Standards of Responsibility and Accountability for Corporate Acts"

Addendum 2: "Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops"

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

EXECUTIVE SUMMARY

During 2006, four international workshops were convened to assist the Special Representative of the Secretary-General ("SRSG") in clarifying some of the key legal issues raised by his mandate. The workshops addressed: government regulation of corporate human rights issues; corporate complicity in human rights violations; the role of extraterritorial jurisdiction in improving the accountability of transnational corporations ("TNCs"); and the bases for attributing human rights responsibilities to TNCs under international law. Participants included academic experts, legal practitioners and representatives from non-governmental organizations, and at each workshop best efforts were made to achieve broad regional representation.

Summaries of all four workshops are available on the SRSG's website.[1] This Addendum to the SRSG's February 2007 report combines the summaries of the New York workshop on corporate responsibility under international law and the Brussels workshop on extraterritorial jurisdiction (which expanded on the first workshop on government regulation). A detailed report of the complicity workshop is being produced by the convenors and should be available in early 2007. The SRSG and his team have benefited greatly from all these discussions and wish to thank the convenors of each workshop, as well as the participants, for their time and contributions.

The New York workshop considered four issues: whether corporate responsibility for human rights already exists under international law; how state human rights obligations might otherwise be "translated" into corporate obligations; the problem of regulating TNCs in "weak governance zones"; and the extent to which states' duty to protect against human rights abuses by nonstate actors requires them to regulate the overseas activities of TNCs.

On the one hand, there was a broad consensus among the participants that the problem is not simply one of under-enforcement of existing corporate duties: substantial work is needed to adequately define the scope and content of corporate responsibility for human rights violations under international law. Specifically, should corporate responsibility vary depending on the right at issue, or on the corporation's nexus to the affected rights-holders – and how should this "nexus" be assessed? Corporate duties may also need to be balanced against other considerations, such as the respective functions and capacities of TNCs and states. On the other hand, participants cautioned against over-simplifying the current state of international law, as this is one area in which legal doctrine appears to be lagging behind practice.

One proposal was to develop an international statement of public policy that would define a minimum corporate duty to respect (and possibly protect) human rights, with the UDHR seen as a good starting point for identifying appropriate standards. There was broad agreement that a corporate duty to *fulfil* rights would only be appropriate in very limited circumstances, such as where corporations have effective control of an area or assume government functions.

[1] See http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.

There was consensus that the concept of "weak governance zones" – that is, areas in which the territorial (or host) state is unwilling or unable to exercise its authority – was of little help in defining the respective legal responsibilities of home and host states in regulating TNCs operating in such areas, or the legal responsibilities of those TNCs themselves. Participants noted the need to avoid modern-day imperialism on the part of home states, while at the same time acknowledging that home state action may often be necessary to ensure that violations are actually addressed. One option that was discussed was increasing home state leverage over TNCs through various "points of control" in the home state itself, like export credit agency financing or listing on national stock exchanges. Participants agreed on the need for public and private sector actors to pressure governments for leadership on these and other issues in order to move beyond an individual liability model to one involving "shared responsibility" for corporate human rights issues among all relevant actors.

The final topic in New York was whether states are under any constraints in regulating the overseas activities of their TNCs. This was also the central issue at the Brussels workshop, which focused on three inquiries: clarifying the general international law principles governing the exercise of extraterritorial jurisdiction by states; specific questions raised by the regulation of the extraterritorial activities of TNCs; and the provision of effective sanctions against TNCs and remedies for victims.

Participants in Brussels agreed that, apart from the principle of non-intervention in the internal affairs of another state, there are no significant international legal impediments to states exercising extraterritorial jurisdiction. However, whether they are *required* to do so remains an open question. While there may be an obligation to in situations involving serious international crimes subject to universal jurisdiction (where the suspect is present on the state's territory), it is not clear whether this would require action against legal as well as natural persons. It is also unclear whether such regulation would have to take a particular form (that is, criminal, civil or administrative).

The workshop discussed two particular challenges in regulating TNCs: the need to determine corporate nationality to ground state jurisdiction, and the need to look beyond the formal separation of legal entities in a corporate group to attribute liability (for example, by "piercing the corporate veil" to hold the parent company accountable for its subsidiaries' acts, or by holding the parent directly liable for its own acts and omissions in relation to its subsidiaries). There was real interest in home states requiring increased human rights reporting and impact assessments from "their" TNCs.

With respect to meeting the needs of victims, participants debated whether particular sanctions against TNCs were either required by, or were more likely to be accepted as being less intrusive under international law. They discussed measures to resolve jurisdictional conflicts between states as well as incentives to encourage states to exercise jurisdiction in the first place. Complementary market-based mechanisms (including the "contractualizing" of human rights requirements) were also considered. The workshop concluded that practical measures are required to ensure that victims have access to home country remedies; attention should also be given to improving victims' access to law-making institutions and not just after-the-fact determinations of liability. While host state legal systems should generally be respected and strengthened, it was agreed that the overarching goal must always be to provide victims with justice.

I. INTRODUCTION

1. Over the course of 2006, four international workshops were convened to assist the Special Representative of the Secretary-General ("SRSG") in clarifying some of the key legal issues raised by his mandate. In addition to the SRSG's team, participants included academic experts, legal practitioners and representatives from non-governmental organizations. At each workshop, best efforts were made to achieve broad regional representation.

2. The first workshop was convened on 15 June 2006 at Chatham House (Royal Institute of International Affairs) in London, and chaired by Elizabeth Wilmshurst of the Institute's International Law program.[2] The workshop explored government regulation of corporate human rights issues; two areas of particular concern were the potential uses of extraterritorial legislation and civil litigation against transnational corporations ("TNCs").

3. The second workshop was held on 23-24 October in Oslo and was hosted by the Council on Ethics for the Norwegian Pension Fund. The workshop explored political, legal and ethical perspectives on corporate complicity in human rights violations. A detailed report on the workshop is being produced by the Council and is expected in Spring 2007.[3]

4. The third workshop was held over 3-4 November, in Brussels, Belgium.[4] It was co-hosted by Professor Olivier De Schutter from the Catholic University of Louvain and Professor Paul De Hert from the Free University of Brussels. Financial support was also provided by the Belgian Federal Public Service Ministry of Foreign Affairs, External Trade and Development Cooperation, and by the Human Security Policy Division of the Canadian Department of Foreign Affairs and International Trade. The workshop examined how extraterritorial legislation could be used to improve the accountability of TNCs for human rights violations, and was designed to build upon discussions from the June 2006 Chatham House workshop.

5. The fourth and last workshop took place at New York University on 17 November, 2006.[5] Its purpose was to clarify the bases for attributing human rights responsibilities to TNCs under international law. The one-day brainstorming session was convened jointly by the NYU Center for Human Rights and Global Justice and Realizing Rights: the Ethical Globalization Initiative, with additional financial support from the Government of Canada. Professor Philip Alston (Co-Director of the NYU Center) and Mary Robinson (President of Realizing Rights) were the joint chairs.

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[2] See http://www.reports-and-materials.org/Chatham-House-legal-workshop-human-rights-transnational-corporations-15-June-2006.doc.

[3] In the interim, see http://www.reports-and-materials.org/Corporate-complicity-workshop-Oct-2006.pdf for a brief summary.

[4] See http://www.business-humanrights.org/Documents/Extraterritorial-legislation-to-improve-accountability-legal-experts-seminar-Brussels-summary-report-3-4-Nov-2006.pdf.

[5] See http://www.business-humanrights.org/Documents/Workshop-Corp-Responsibility-under-Intl-Law-17-Nov-2006.pdf.

6. All the workshops were conducted on the basis of the internationally recognized "Chatham House Rule", meaning that participants are free to use the information arising out of the meetings, but the identity and affiliation of the speakers are kept confidential. Accordingly, this Addendum provides a general record of the New York workshop on corporate responsibility under international law and the Brussels workshop on extraterritoriality, which expanded on the Chatham House meeting. As noted above, a report of the Oslo workshop should be available in early 2007.

II. CORPORATE RESPONSIBILITY UNDER INTERNATIONAL LAW: SUMMARY OF THE NEW YORK WORKSHOP

A. Summary of Proceedings and Introductory Remarks

7. The workshop was organized around the following broad question: in the absence of states acting to attach direct obligations for human rights to corporations, are there any potential grounds under international law for doing so? The day was divided into four sessions, with individual participants asked to lead different ones:

1. Framing the issue;
2. Transposing state obligations;
3. Exceptional cases; and
4. State responsibility.

8. The co-chairs opened the workshop by inviting participants to consider the ways in which international law has evolved from a purely state-based enterprise to a decision-making process involving a range of participants including individuals, non-governmental organizations ("NGOs"), TNCs, and international organizations. The last two decades have witnessed an evolution in societal notions of corporate responsibility at both the regional and national levels, as well as a proliferation of voluntary corporate codes of conduct and other market-based initiatives. In what ways are, or should, these changes be reflected in international law?

B. Framing the issue

9. The first session focused on whether the topic of the workshop was correctly framed: are there already inherent obligations on TNCs, at minimum, to "respect" human rights in international law? Is the issue simply one of under-enforcement?

10. To stimulate debate, the discussion began with a presentation of the "classic" view of states at international law as the primary human rights duty holders. According to this view, beyond a narrow category of "international crimes" (torture, genocide, crimes against humanity, war crimes and slavery), corporate accountability for human rights should be the responsibility of states. The international community should insist on robust enforcement by states of their duty to respect, protect and fulfill human rights norms through the regulation of private actors. However, this needs to go beyond merely providing for "after the fact" judicial determinations of liability once violations have already occurred. The boundaries of current doctrine determining when the actions of TNCs can be treated as state action – for example, when a TNC is effectively

exercising state authority, or is controlled by the state – and when states can be held complicit in corporate abuses should also be further explored.

11. The classic view holds that the main obstacles to direct corporate responsibility under international law include: a lack of state practice supporting such a development, likely resistance by states (especially states from the "Global South" that are actively seeking foreign investment), the difficulty in transposing existing defenses to responsibility (such as state sovereignty) to TNCs, and problems with attributing international legal personality to corporations.

12. In response, other participants pointed out that this approach over-simplifies the existing state of international law. First, it is important to distinguish between possible sources of obligations on TNCs within international human rights law, and particularly between the Universal Declaration of Human Rights (UDHR) and the core human rights treaties (including the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights). This is because various key principles in the former (there is debate over how many) now form part of customary international law and do not depend on state consent for their binding effect. The classic approach also fails to take into account developments in international environmental and labor law that have already established direct obligations on TNCs, and it does not provide a coherent explanation for the imposition of human rights obligations on international organizations but not on TNCs. Further, it ignores the importance of soft law (including public policy statements voluntarily adopted by governments, such as the OECD Guidelines and the ILO Tripartite Declaration) in the crystallization of standards.

13. Turning to the regional level, participants discussed provisions of the African Charter on Human and Peoples' Rights, which imposes "horizontal duties" on individuals that are owed to other non-state actors – namely "family and society, the State and other legally recognized communities and the international community." And at the national level, US courts have considered claims under the Alien Tort Claims Act ("ATCA") involving prolonged arbitrary detention and freedom of expression, in addition to the international crimes mentioned above. Participants also noted that the ATCA jurisprudence only establishes rules for incorporating international human rights norms within domestic American law: the cases do not prevent the existence of other norms applying to TNCs, although they may not be judicially cognizable in US federal courts. Participants also discussed key examples from the Indian and South African national systems.

14. Another participant argued that administrative law and regulation has a critical yet underappreciated part to play – giving law an instrumental rather than a purely standard-setting role in this area.

15. A regulatory approach is relational in that it involves a range of actors (beyond the individual parties to a traditional legal dispute) and requires negotiation, balancing and compromise – processes that are not typically associated with a traditional human rights-based approach. Several different models of emerging international regulation were identified, including: regulation by intergovernmental organizations (such as the emissions trading system); what has been called "network governance" among leading actors in certain sectors (for example, within the financial services sector); hybrid

public-private regulatory structures (such as the Montreal Protocol on ozone depletion); and purely private regulation (such as the "fair trade" certification system). However, increased regulation obviously creates its own externalities, as it requires standards and processes for holding the regulators themselves accountable. In this respect, classic administrative law procedural norms (such as transparency, the entitlement to a hearing, and proportionality in remedies) could be especially helpful.

16. As an alternative to a purely legal approach to corporate responsibility, a moral or ethical framework was also proposed. On this view, corporations are moral agents. As economic agents, however, they possess only relatively "narrow" moral personalities and, therefore, cannot be seen as having a general duty to fulfill human rights in the same way that states do. Thus, their moral duties would include:

> (i) to avoid depriving others of their human rights, or contributing to such deprivation;
> (ii) to help protect the human rights of others from deprivation where the TNC has a direct responsibility (as in the case of its employees), or where the protection of rights is otherwise a direct outcome of ordinary corporate activities; and
> (iii) to aid those who have been deprived of their rights but only where the TNC itself has done the depriving (as in the case of a community that has been required to move in order to make way for a company site).

C. Transposing State Obligations

17. This session explored possible ways in which state obligations could be "translated" into corporate obligations under international law. The issues included whether corporate responsibility would vary depending on the right at issue, or the corporation's nexus to the affected rights-holders, as well as the need to balance other considerations such as sovereignty, and the functions and capacity of TNCs.

18. Participants debated whether to "move up" from existing obligations on individuals under international law or "down" from state obligations. It was acknowledged that the former would lead to an incomplete set of rights but would at least start with the most accepted set of duties – those relating to international crimes.

19. One proposal for determining the extent of corporate responsibility was to consider the following factors: (i) the relationship between the TNC and the government, (ii) the nexus between the TNC and the affected population, and (iii) a balancing of the right at issue with the legitimate interests of the corporation (except in the case of certain non-derogable rights).

20. The nexus element could be based on geographical proximity, control (eg, via contract), or market power. The common law tort standard of "reasonable foreseeability" was debated as a potential tool for determining proximity, although this might lead to an industry-based approach (with what was "reasonable" in each case depending on industry practice). The point was made that TNCs should not be able to use a demand for specificity as a pretext for avoiding liability, and that they already engage in risk management in relation to what is "reasonably foreseeable".

21. An alternative approach to deriving corporate liability was proposed. This would start with a "do no harm" standard, requiring corporations to respect human rights and extending this to the corporation's contractors – based on the rights recognized in the UDHR. It would expand into a duty to fulfill where the corporation has effective control of an area or assumes government functions. One participant proposed that a declaration of "international public policy" to this effect be drafted.

D. Exceptional Cases

22. This session considered the usefulness of the concept of "weak governance zones" (WGZs) – areas where the territorial state is "unable or unwilling" to exercise its authority – in defining corporate responsibility under international human rights law, as well as the respective roles of home and host (territorial) states in regulating TNCs operating in WGZs.

23. There was a general consensus that the concept of WGZs was unhelpful in this context. Defining a WGZ is an inherently political process (although it might be made less so, for example by linking it to the definition of refugee-generating countries or adopting a sector-specific rather than regional approach), which creates more rather than less uncertainty about corporate obligations. The concept also ignores the potential for corporate power (and abuse) in developed countries where, for example, extractive industry operations often pit local, frequently disempowered, communities against the central government. Some participants also queried the usefulness of distinguishing "unable" from "unwilling", and were concerned by the potential for governments to abuse the concept to evade their responsibilities.

24. The option of home country courts exercising extraterritorial jurisdiction in relation to WGZs but applying host country laws was considered; however, some participants felt that this was too close to modern-day imperialism. Another alternative would be to base judicial enforcement on the international obligations of either the home or host state, or on their shared obligations – but this raises the obvious problem of differential ratification of international treaties.

25. Participants also discussed how to identify a TNC's home state: one suggestion was that beyond incorporation, financing through export credits or the national stock exchange provided an obvious "point of control" creating a political responsibility on the home state to regulate such corporations. These and other levers may become increasingly relevant if incorporation starts to lose its traditionally territorial aspect – for example, two jurisdictions in Canada no longer require the physical presence of headquarters or directors in that jurisdiction for incorporation to occur.

E. State Responsibility

26. The final session examined whether state responsibility could be pushed further to require states to regulate the activities of their TNCs abroad.

27. Given the problems flowing from inconsistent ratification of the core human rights treaties, the workshop considered whether the customary international law rules on state responsibility provided an alternative basis for state regulation of corporate

human rights responsibilities. Under customary international law, states are obliged to exercise due diligence in protecting foreigners on their territory, including from action by non-state actors. Even assuming that this obligation now extends to a state's own nationals, there was broad agreement that it would be hard to stretch it to require states to provide a remedy for the extraterritorial activities of TNCs.

28. Participants debated whether, where a home state acts in a positive way to contribute to an extraterritorial violation by a TNC (for example, by providing financing to the TNC, or by providing support through its embassy in the host state), the home state will be in breach of its international obligations. Even if it was, it is unclear whether another state would be willing to bring an action against the home state for the breach – though it might provide stronger grounds for domestic social pressure on the home state. Where a state has done nothing to regulate the overseas activities of its TNCs, there was broad agreement that neither the treaty regime nor customary international law currently impose an obligation on states to regulate, as opposed to allowing states the freedom to do so (which they clearly have under the doctrine of "active personality").[6]

29. One participant questioned whether, if a state does decide to exercise this freedom, it is then required to provide a remedy, and whether that remedy must be adjudicative in nature.

30. There was strong support for looking beyond national law and the human rights treaty mechanisms, and thinking creatively about additional avenues for pursuing these issues. Other potential venues in which these issues could be raised include:

- the existing framework of OECD National Contact Points;
- the ILO Committee on Multinational Enterprises;
- through the terms of international investment treaties (for example, including human rights clauses which provide for either a financial penalty by the company or allow the state to sue the company in the event of a violation, or which, at a minimum, require an international arbitrator to take human rights considerations into account as part of their assessment);
- national human rights commissions (which, to date, have not tended to focus on private actors); and
- the main regional human rights mechanisms.

F. Concluding Remarks

31. The workshop concluded with reflections by the co-chairs and the SRSG. The co-chairs emphasized the lack of government leadership on these issues, and the real need for private and public sector actors to pressure governments for change and for clarity. They noted that it was important to simultaneously push for improved state responsibility in this area (for example, through the regional human rights systems and

[6] This provides that a state is entitled to exercise extraterritorial jurisdiction to regulate the activities of its nationals abroad.

the UN treaty bodies) while also encouraging greater participation by non-state actors in the debate (as is being increasingly done through the Human Rights Council individual mandate system). Such an approach recognizes the need for "shared responsibility," discussed below, and would help build relationships among the relevant actors.

32. The point was made that, from a legal perspective, doctrine is lagging well behind rapidly developing practice; it is not surprising that attention, and legal responses, have focused on the worst cases of abuse but this should not preclude a more comprehensive and principled approach.

33. The SRSG then summed up broad themes and areas of agreement from the workshop:

- as important as litigation is, it is vital to look beyond it to identify as many leverage points as possible, including public policy regulation, market-based mechanisms and social processes, in developing a coherent approach to corporate human rights responsibility;
- there was debate over the possibility, desirability and/or necessity of specifying a list of discrete human rights obligations on TNCs by going "article by article" through the existing human rights treaties. However, there was consensus among the participants that the UDHR provided a good starting point for identifying appropriate standards;
- there was a general sense that TNCs should not be subject to a duty to fulfil except in certain, limited situations, where TNCs may need to act to restore a right of which they had deprived others;
- while the concept of "WGZs" was generally considered unhelpful, it was recognized that governments were likely to continue to use it in framing their own regimes for regulating the extraterritorial activity of their TNCs;
- greater clarity is needed on how the relevant nexus between a corporation and affected population should be defined;
- the potential role of incentives (ranging from market-based mechanisms to the recognition of "corporate culture" in criminal law and sentencing guidelines) should be further considered;
- there is a general need for increased attention to these issues within existing mechanisms, particularly the UN.

34. Finally, the SRSG drew attention to the notion of "shared responsibility" (drawing on the work of the political philosopher Iris Marion Young in an article distributed as background reading for the workshop).[7] This view recognizes that the challenges arising from globalization are structural in character, involving governance gaps and governance failures. Accordingly, they cannot be resolved by an individual liability model of responsibility alone but also need to be dealt with in their own right. This requires a model of strategically coherent distributed action focused on realigning the relationships among actors, including states, corporations, and civil society.

[7] Iris Marion Young, "Responsibility and Global Labor Justice" (2004) *Journal of Political Philosophy* 12(4), pp 365-388.

Moreover, rule making in this domain must factor in the likely reactions by all social actors that would be affected by the adoption of new rules. In short, he stressed the need for both a systemic and dynamic framework in order to respond adequately and effectively to the human rights challenges posed by corporate globalization.

III. ISSUES IN EXTRATERRITORIAL REGULATION OF TNCs: SUMMARY OF THE BRUSSELS WORKSHOP

A. Summary of Proceedings and Introductory Remarks

35. The workshop was divided into the following areas of discussion:

1. Extraterritorial jurisdiction under international law;
2. Specific questions raised by exercising extraterritorial jurisdiction over TNCs; and
3. Sanctions and remedies, including comparisons between criminal, civil and administrative liability and discussion of victims' access to justice.

36. Participants were given a particular topic on which to comment but were also asked to contribute to open discussion following each presentation. A detailed background paper, prepared by Professor Olivier de Schutter, was also circulated prior to the workshop.[8]

37. The workshop focused on prescriptive extraterritorial jurisdiction, which involves a state regulating persons or activities outside its territory. Prescriptive extraterritorial jurisdiction differs from other categories of extraterritorial jurisdiction, such as situations in private international law where a national court applies another nation's law, and executive (or enforcement) extraterritorial jurisdiction, under which a state deploys its organs overseas.

38. In opening the workshop, the SRSG noted that the issue of extraterritorial jurisdiction was a relatively small part of an extremely broad mandate. He explained that the workshop's focus on extraterritorial jurisdiction did not mean he was neglecting other pertinent issues. The SRSG noted an emerging trend to use extraterritorial responsibility as a potential tool for overcoming weaknesses in corporate accountability but looked forward to constructive debate on the challenges involved.

B. Extraterritorial Jurisdiction under International Law

(a) Aims and introductory remarks

39. The main aim of this session was to understand better when states may, and/or are required, to exercise extraterritorial jurisdiction. While the participants accepted that there was some overlap between these questions and substantive issues, such as

[8] See http://www.business-humanrights.org/Documents/de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.doc.

what types of human rights obligations should be imposed by extraterritorial legislation, they agreed to focus on jurisdictional issues.

40. The discussion began at a very practical level with the political feasibility of states exercising extraterritorial jurisdiction over companies. It ranged over various issues including differing national approaches to holding legal persons criminally responsible, the potential role of civil litigation (with the ongoing Bhopal case as an example), and procedural issues such as international cooperation in relation to evidence-gathering.

41. Participants agreed to focus the discussion mainly on the exercise of extraterritorial jurisdiction by a home state over the overseas activities of TNCs with some link to that state.

(b) Is it permissible to exercise extraterritorial jurisdiction?

42. Participants explored whether states have unlimited latitude under international law to exercise extraterritorial jurisdiction. There was general agreement that a nationality link adds support to the exercise of jurisdiction, unless the state is exercising universal jurisdiction as may be invoked for a limited number of international crimes (crimes against humanity, genocide, war crimes, torture, forced disappearances). There was also broad reference to an overarching requirement of "reasonableness," including respect for the principle of non-intervention in the internal affairs of the territorial state.

43. In exploring this limitation, participants discussed whether exercising extraterritorial jurisdiction with the goal of protecting human rights could amount to intervention through coercion. One participant argued that international law has developed to the extent that such an exercise of extraterritorial jurisdiction would not amount to coercion. Others agreed that until there is a definitive rule prohibiting the exercise of extraterritorial jurisdiction for human rights purposes, states are free to do so. Nevertheless, some participants were less sure and sought more discussion of the meaning of reasonableness and coercion. Regardless, participants generally agreed that apart from the non-intervention principle, there are no significant international legal impediments to exercising extraterritorial jurisdiction.

(c) Are states required to exercise extraterritorial jurisdiction?

44. The discussion then turned to whether there are any situations in which states are required to exercise extraterritorial jurisdiction. Participants first questioned whether the duty to protect, incorporating the duty to exercise due diligence to prevent abuse and provide an effective remedy, somehow incorporates a duty to exercise extraterritorial jurisdiction.

45. The participants looked to the concept of "international cooperation" and guidance in international human rights treaties as a starting point. They questioned whether any UN human rights treaty bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights (CESCR), as well as any of the regional human rights bodies, provide guidance on whether the duty to protect requires the exercise of extraterritorial jurisdiction, at least where the primary perpetrator is a national.

46. While some participants considered a duty to exercise extraterritorial jurisdiction could be implied from commentary from UN treaty bodies (namely CESCR) and regional human rights bodies, others were more sceptical. Accordingly, the participants agreed that whether the duty to protect extends extraterritorially is an open question requiring further debate. In this context, the SRSG mentioned that his research team is mapping commentary from the core UN human rights treaties on state obligations regarding corporate human rights abuse, including any references to extraterritorial jurisdiction.

47. The debate then turned to whether other areas of international law support the existence of a general duty to exercise extraterritorial jurisdiction. At the outset, it seemed there was at least some agreement that states should exercise universal jurisdiction for breaches of international humanitarian law where the defendant is present on its territory. However, participants then diverged as to whether there was a wider duty to exercise universal jurisdiction. They also debated which crimes trigger the duty and whether universal jurisdiction requires actions against legal persons rather than individuals.

48. Participants also discussed from where, and how, obligations other than those related to universal jurisdiction might arise. Little agreement was found on this issue but there was some consensus that even if a general duty did exist, it was unlikely to require a particular form of action (i.e. civil or criminal) against legal persons, even if some kind of criminal regulation was required for natural persons. Rather, the object might be to afford an effective remedy instead of being required to facilitate either civil or criminal action.

49. Accordingly, the most definitive conclusion one could take out of this discussion is that states have certain obligations under universal jurisdiction, but that otherwise both the source and content of any general duties regarding extraterritorial jurisdiction remain unclear.

(d) Ways in which the exercise of extraterritorial jurisdiction could be affected

50. Participants discussed how extraterritorial jurisdiction could be limited to safeguard the territorial state's interests. In particular, the background report prepared for the workshop referred to (i) prosecutorial expediency; (ii) the doctrine of *forum non conveniens*[9] and other subsidiarity doctrines designed to respect the primacy of the territorial state; (iii) application of the *non bis in idem*[10] rule where the territorial state

[9] Meaning, literally, a forum that is not convenient. The doctrine is often used by defendants in foreign court proceedings to argue that the forum chosen by the plaintiff creates an undue hardship, often because of difficulties in bringing witnesses or evidence to the foreign court. The requirements for proving a *forum non conveniens* claim vary amongst common law jurisdictions. The doctrine does not exist in this exact form in civil law jurisdictions though similar balancing tests may be carried out.

[10] Meaning, literally, not twice for the same thing. The principle applies to limit proceedings where a party has already faced legal proceedings for the same matter. For example, a court in the home state

has prosecuted the same acts; (iv) the doctrine of double criminality where a state may decide to exercise jurisdiction over an action only if that action is also criminalized in the territorial state; and (v) situations where jurisdiction is limited because the territorial state mandated the TNC's actions.

51. Participants highlighted that not all states are equipped to exercise extraterritorial jurisdiction. They gave examples from developing countries where the state lacks both the ability and inclination to exercise jurisdiction, particularly where it seeks to encourage companies registered on its territory to expand their overseas operations. There were also examples of developed countries choosing not to prioritize evidence gathering for extraterritorial cases, especially where such practices are seen as too costly, time-consuming or politically hazardous.

52. Arguments were raised as to whether a duty to exercise extraterritorial jurisdiction could impose unrealistic expectations on states to keep abreast of every overseas abuse by a "related" TNC. Participants also suggested that another practical consequence could be transnational corporations delegating more activities to local companies to avoid liability.

C. Questions Raised by Exercising Extraterritorial Jurisdiction Over TNCs

(a) Aims and introductory remarks

53. The discussion then turned to two key issues in holding TNCs accountable via extraterritorial jurisdiction, namely: determining a company's nationality and looking beyond its formal legal structure for the purposes of attaching accountability, such as where abuse may have been committed by the TNC's subsidiaries or contractual partners.

(b) Determining the 'nationality' of the corporation

54. There was general agreement that international law does not prescribe any particular method for determining the nationality of legal persons. However, nationality is generally based on place of incorporation, location of registered main office or the principal center of business. Participants debated whether other factors should be considered, such as whether there is a genuine link with the home state. Participants also queried whether investment treaties provide any hints as to nationality and whether the parent company's nationality should be determinative of its subsidiary's nationality. The requirement for a genuine link was mentioned both regarding a state's ability to exercise jurisdiction, and to protest against regulations imposed on "their" TNCs by other states.

(c) Piercing the corporate veil

55. Three solutions to the problem of the formal legal separation of corporate entities were discussed, together with some of their benefits and disadvantages:

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might decide to reject jurisdiction in a case against a corporation if the corporation has already faced legal proceedings in the host state or any other state that has assumed jurisdiction.

Solution to the separation of legal entities within the multinational group	Description	Advantages/Disadvantages
Classic derivative liability (also known as "piercing the corporate veil")	Close examination of the factual relationship between the parent and the subsidiary to identify abuse of the corporate form.	Real disincentive for parent companies to control the day-to-day operations of their subsidiaries, and may lead to competing attempts to exercise extraterritorial jurisdiction over foreign companies.
The "integrated enterprise" approach	Absolute presumption that the subsidiary's acts are attributable to the parent because of the interconnectedness of what would otherwise be separate legal entities.	Clear incentive to the parent to control its subsidiaries but implies extraterritorial jurisdiction being exercised over foreign entities as part of the "integrated" multinational group, which may raise problems in terms of jurisdiction.
Direct liability of the parent company	May arise from failure to exercise due diligence in controlling subsidiaries' acts and therefore may relate to both the parent company's acts (where there is direct or indirect involvement in the subsidiary's acts) and omissions through failing to control the subsidiary.	If only actions are relevant and omissions are ignored, there could be a disincentive for parent companies to control the day-to-day operations of their subsidiaries.

56. At a more practical level, there was genuine interest in the proposal that home countries should consider requiring their companies to conduct HRIAs and to report periodically on issues materially related to their human rights performance through their subsidiaries (and possibly also their contract partners). However, participants recognized the obvious issues of inconsistent reporting standards and accountability mechanisms, associated costs and the need to consider whether such reporting could jeopardize commercial secrets.

57. Several participants also presented examples from their own countries, including situations where corporate culture is becoming increasingly relevant in deciding whether a corporation has the requisite knowledge element in a crime.

D. Sanctions and Remedies: Criminal, Civil or Administrative Liability?

(a) Aims and introductory remarks

58. Day Two of the workshop turned to the issue of sanctions and remedies. The aim was to discuss whether states are obliged to ensure that "their" transnational corporations operating abroad are subject to effective, proportionate and dissuasive sanctions, whether criminal or civil, for human rights abuses. Participants were also asked to explore the principle of *non bis in idem* and, more generally, how to resolve situations where more than one state seeks to exercise jurisdiction over alleged abuse.

59. The discussion began with the implications of choosing one type of remedy and the types of penalties that could best deter TNCs. Participants mentioned penalties such as depriving companies of export credits, disqualifying directors from certain activities, placing the TNC under supervision and closing certain corporate establishments.

(b) Type of liability

60. Participants suggested that there was uncertainty as to whether a requirement exists to provide victims with a civil remedy for torts committed abroad, where a TNC of the nationality of the forum state is involved. They also debated whether one form of liability is more likely to be permissible under international law — i.e. because it is less likely to be viewed as an intrusion into sovereignty. One participant argued that civil liability could be seen as more acceptable than criminal liability in this regard.

61. Regional differences were also discussed, including whether some states were more likely to impose criminal or civil liability simply because of more experience in using either type. Participants suggested that one benefit of administrative liability was that it did not require either an individual plaintiff or a willing and able prosecutor. They also debated whether it was better to leave states with discretion in choosing the type of liability, provided it is clear that an effective process should be chosen. Some participants were unconcerned about the type of liability or whether the liability attaches to a natural or legal person, provided some person or entity is held responsible. Participants mentioned the importance of looking to the market for accountability and provided examples of market forces that could deter companies, such as share price drops and shareholder motions to further investigate certain officers.

62. The concept of "contractualizing" human rights was highlighted — with the suggestion that states could then allege breach of contract where a TNC fails to abide by its contractual promises regarding human rights. The implication was that a contractual action could be more effective than a civil tort action as there would be no need for a willing plaintiff. As part of this discussion, participants also spoke of making the provision of export insurance and other government services conditional on human rights compliance.

(c) Jurisdictional conflicts

63. The background report mentioned a number of ways to resolve such disputes, such as utilizing the principle of *forum non conveniens* and even entering into

agreements with other states which set out when jurisdiction should be exercised. Participants suggested that such agreements could specify the types of corporations each state intends to regulate, including whether regulation would extend to foreign subsidiaries and the scope of consultation with other states, particularly before a prosecution commences.

64. In relation to the *non bis in idem* doctrine, the debate also focused on whether states are obliged to respect another state's decisions if they are contrary to human rights. One participant referred to the Rome Statute of the International Criminal Court as establishing a clear precedent for the proposition that states should be permitted to disregard other states' decisions where they are contrary to the pursuit of justice and would frustrate human rights.

65. Participants also wondered whether jurisdictional conflicts are probable — they argued that the problem is generally that there are no states willing to prosecute or accept a civil case rather than states competing for the same cases. The Total litigation in Belgium and France was mentioned as an example of where there was little connection between the victims and either state and where, particularly in relation to France, the state had close ties with the TNC, likely making it even more unwilling to exercise jurisdiction. Participants also mentioned that pressure from the business community in general can be a powerful deterrent to states exercising jurisdiction. Participants suggested more creative thinking was needed on incentives to exercise jurisdiction.

66. There was also some scepticism about the use of *forum non conveniens* and the ways in which both TNCs and state institutions might seek to exploit the concept in order for the former to forum shop and for the latter to avoid taking a case, whether for political or other reasons.

E. Sanctions and Remedies: Access to Justice by Victims

(a) Aims and introductory remarks

67. The final session aimed to discuss three issues inherent in home states granting remedies to foreign victims:

1. What mechanisms would ensure that victims who are geographically distant from the home state actually have effective access to justice?
2. Where such remedies are provided, should they be provided without any restrictions or with a subsidiarity requirement, i.e. only where there is no domestic remedy?
3. Whether the principle of mutual assistance is relevant in ensuring that territorial countries assist in evidence gathering and facilitating victims to file complaints in other jurisdictions.

68. From the outset, participants agreed that practical measures were required to ensure victims have access to home state processes. There was also support for mutual legal assistance and inter-state cooperation to facilitate such access, although it was

noted that, in general, one should not assume that the host state authorities will cooperate.

(b) Accessibility issues

69. Participants discussed practical impediments to victims seeking remedies in home states, such as facilitating travel by witnesses, finding advocates and raising funds. Both local and international non-government organizations were highlighted as key players in helping to solve these issues.

70. Participants also mentioned the difficulty in knowing against whom to take action, particularly in the case of "disappearing corporations" where it becomes almost impossible to track the original entity responsible for the harm. Some participants were concerned about tactics sometimes used by TNCs to intimidate victims or to stall processes and called for both territorial and home states to address this issue.

71. There was also a reminder to think carefully about the types of victims generally involved in such cases and their lack of access to institutions that make and enforce the law. In this regard, it was suggested more attention should be paid to access to lawmakers rather than simply access to courts after the abuse has already occurred.

(c) Avoiding restrictions on remedies

72. There was a suggestion that one should not assume that home states are the best forum for a remedy — where the victims' priority is to strengthen accountability mechanisms, an action in the territorial state could be more effective even if monetary damages are unlikely. However, there was also a sense that home states might have a role to play where remedies in the territorial state are unlikely to be effective. While territorial legal systems should be respected and strengthened, the overall aim should be providing victims with some form of justice.

F. Concluding Remarks

73. The SRSG noted that due to their complexity, it would take time to resolve many of the issues addressed by the workshop. He suggested that any conclusions drawn from the discussion for the mandate would need to reflect the concerns of multiple stakeholders to be successful. In this regard, the SRSG spoke of building bridges among these stakeholders to facilitate common language and interests.

74. Finally, the SRSG emphasized the importance of focusing not only on improving corporate conduct but also strengthening state institutions in order to ensure that governance institutions keep pace with corporate globalization.