

**Business & Human Rights:  
The Role of States in Effectively Regulating and Adjudicating the Activities of  
Corporations With Respect to Human Rights**

**Copenhagen, 8 – 9 November 2007**

## Background Note

### BACKGROUND TO THE CONSULTATION

Sub-paragraphs (b) and (e) of the SRSG's mandate specifically require him to consider states' roles with respect to the business and human rights debate.<sup>1</sup> Sub-paragraph (b) asks the SRSG to "elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation." Sub-paragraph (e) requests the SRSG to "compile a compendium of best practices of states and transnational corporations and other business enterprises..."

Accordingly, part I of the SRSG's March 2007 report focused on the "state duty to protect" with respect to preventing and punishing corporate abuse. In short, the SRSG found consensus that states are the primary duty bearers under international law in relation to protecting against business abuse. Yet important questions remained about the nature, scope and content of state duties in this area, not just in relation to how international human rights mechanisms view the duty but also how states understand and apply the duty themselves.

It was difficult to discern direction from the core UN human rights treaties and treaty body commentaries. First, not all of the treaties provide clear guidance on the nature of the duty to protect, especially regarding business abuse. Second, the treaty bodies' views on these issues are not binding and some states disagree with them; and third, lack of clarity with respect to customary international law makes it difficult to deal with states that have not ratified the treaties.<sup>2</sup>

The SRSG's state survey indicated that even states that might recognize a duty to protect against corporate abuse lack policies, programs or tools designed specifically to deal with corporate human rights challenges.<sup>3</sup> The SRSG recognized growing concern that states either do not fully understand or are not always able or willing to fulfill the duty to protect with respect to business abuse.

### GOALS OF THE CONSULTATION

The Consultation aims to generate key ideas surrounding the legal and policy dimensions of both home and host state duties with respect to business and human rights which could feed into the recommendations the SRSG is mandated to submit to the Human Rights Council in 2008.

The Consultation's agenda could not include every relevant issue in this area. Accordingly, the SRSG asks participants to identify any key gaps and welcomes contributions to the mandate on such issues.

### INTRODUCING EACH SESSION

This section provides brief background information for each session and sets out key questions participants may wish to consider.

### Session I – Meaning, Sources and Scope of the Duty to Protect

Despite the challenges mentioned above, the SRSG's treaty body series and state survey, combined with further research exploring state practice did suggest several trends as to how international

<sup>1</sup> Commission on Human Rights Resolution 2005/69, paragraph (b).

<sup>2</sup> For the main trends in relation to the SRSG's treaty body series, see Addendum 1 to the SRSG's March 2007 report to the Human Rights Council (A/HRC/4/35/Add.1).

<sup>3</sup> See Addendum 3 to the SRSG's March 2007 report (A/HRC/4/35/Add.3).

human rights mechanisms as well as states themselves view the nature of the duty to protect.

The UN human rights treaty bodies generally interpret the core human rights treaties as requiring states to play a key role in effectively regulating and adjudicating corporate activities which might affect the rights of individuals, at least where those individuals are within a state's effective control. The treaty bodies consider this role to be part of the state duty to protect against abuse by third parties and they view the duty as applying to all rights "so far as they are amenable to application between private persons or entities."<sup>4</sup> They have increasingly considered the role of states in protecting against corporate abuse and have discussed state duties with respect to a wide range of corporate actors, from privatized water and health service providers to extractives and property development companies, and of course all types of employers.

The concept of "due diligence" is increasingly seen as part of the duty to protect. In particular the Human Rights Committee has referred to the need for states to act with "due diligence" in fulfilling the duty to protect – it considers that states parties to the International Covenant on Civil and Political Rights should act with "due diligence" to prevent, punish, investigate or redress harm caused by private entities.<sup>5</sup>

The "due diligence" concept as applied to human rights law is generally that states could be held responsible for private acts where they fail to act with "due diligence" to prevent or respond to violations.<sup>6</sup> The "due diligence" concept is rarely defined in detail but does suggest an obligation of conduct rather than result. It appears that the duty to protect simply requires states to take all reasonable steps to prevent, punish, investigate or redress abuse by third parties, including corporations. Thus it is unlikely that a state will violate its international obligations merely because a private actor under its jurisdiction has abused rights — there must be some act or omission by the state evidencing a failure to exercise due diligence in protecting against the abuse.

There seems to be a wide margin of appreciation in how states decide to exercise such "due diligence," though the international human rights mechanisms do provide general guidance as to measures states could and should take to effectively regulate and adjudicate corporate activities. For example, the treaty bodies frequently recommend legislative measures to prohibit certain behavior and the establishment of administrative and judicial mechanisms to effectively and impartially investigate all complaints and bring perpetrators to justice. Importantly the treaty bodies support states developing private sector of the human rights impacts of their activities.

States themselves use a variety of legislative, administrative and judicial regimes to hold corporations accountable for human rights abuses.<sup>7</sup> The difficulty is that while corporations appear to be held to account in "form," the same may not be true in substance due to challenges in implementation.

Under international law, most agree that states are permitted to regulate the overseas activities of companies with respect to human rights, provided there is a recognized basis of jurisdiction, including where the alleged offender or victim is a national; where the acts have substantial adverse effects on the state; or where specific international crimes are involved.<sup>8</sup> An overall reasonableness test must also be met, which includes non-intervention in other states' internal affairs.<sup>9</sup>

The question is whether states are or should be required to regulate such activities under international law. The UN treaty bodies generally consider that state protective action is necessary where the state has "effective control" over the individuals whose rights are affected. However, the situation is less clear where the state lacks such control but has some influence over the corporation.

---

<sup>4</sup> See Human Rights Committee General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,' at para. 8.

<sup>5</sup> Id.

<sup>6</sup> *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) paragraphs 166 - 174. The case concerned violations by state sponsored forces but the opinion notes that states have similar obligations to prevent or respond to private acts not directly attributable to the state under international law.

<sup>7</sup> See for example, "Brief on Corporations and Human Rights in the Asia-Pacific Region - Prepared for Professor John Ruggie, United Nations Special Representative of the Secretary General for Business and Human Rights," Allens Arthur Robinson Law Firm, August 2006, available at: <http://www.reports-and-materials.org/Legal-brief-on-Asia-Pacific-for-Ruggie-Aug-2006.pdf>.

<sup>8</sup> Under the principle of "universal jurisdiction" states may be obliged to exercise jurisdiction over individuals within their territory who allegedly committed certain international crimes. It is unclear whether and how such obligations extend jurisdiction over juridical persons, including corporations. See A/HRC/4/35/Add.2 and A/HRC/4/35, para. 15.

<sup>9</sup> The entire human rights regime may be seen to challenge the classical view of non-intervention. The debate here hinges on what is considered coercive. See A/HRC/4/35/Add.2.

The treaty bodies rarely discuss this question though some treaty bodies, including the Committee on Economic, Social and Cultural Rights (“CESCR”) and the Committee on the Elimination of Racial Discrimination, are increasingly encouraging states to take legislative or political action to prevent companies “domiciled” in the state from abusing rights overseas.<sup>10</sup>

In terms of state practice, there is an increasing trend in states holding corporations accountable for international crimes carried out abroad, though far less action in relation to abuses other than crimes.

The above trends suggest it is increasingly unlikely that the international community will countenance state failures to protect against corporate abuse. Session I aims to test the accuracy of this presumption as well as to further explore the clarity of guidance provided to states on the most effective ways to ensure such protection.

Participants may wish to consider the following issues during Session I:

- **Emerging trends in state practice as to regulation and adjudication of business activities with respect to human rights;**
- **Current views on the activities states could or should carry out to satisfy the “due diligence” aspect of the duty to protect; and**
- **Current views on the extraterritorial dimensions of the duty to protect.**

## Session II - State economic policies and human rights

States juggle a myriad of considerations when deciding how to effectively protect against corporate abuse. In fact, some argue that one cannot ignore a state’s need or choice to balance human rights concerns with wider economic interests. The argument so often goes that states may be focusing on broader economic interests to facilitate development and create an environment more likely to foster respect for rights, an “ends justifies the means” type response.

International human rights institutions are increasingly rejecting such arguments, calling on states to consider human rights in all aspects of their policies, including economic policies. For instance, a 2003 report from the High Commissioner for Human Rights on trade, investment and human rights highlighted that investment liberalization “should not go as far as to compromise state action and policy to promote and protect human rights” and that states should always retain the flexibility in economic policies to promote and protect rights.<sup>11</sup>

The treaty bodies have also discussed the importance of states considering rights when entering into bilateral and multilateral trade and investment agreements, as well as when they contract with companies. For example, in its latest General Comment 18 on the right to work, CESCR expresses the view that states may violate their treaty obligations if they fail to take into account the Covenant rights “when entering into bilateral or multilateral agreements with other states, international organizations and other entities such as multinational entities.”<sup>12</sup> Concluding observations to states’ periodic reports provide similar messages<sup>13</sup>

It is noteworthy that Article 8 of the European Convention on Human Rights recognizes that an individual’s right to respect for his private and family life may, among other reasons, be interfered with by a public authority in the interests of “the economic well-being of the country.” The European

---

<sup>10</sup> See the individual report on the International Covenant on Economic, Social and Cultural Rights as part of the treaty body series, available at <http://www.reports-and-materials.org/Ruggie-report-ICESCR-May-2007.pdf>. See also Concluding Observations for Canada, UN Doc. CERD/C/CAN/CO/18, at 4, para. 17 (May 25, 2007), where the Committee on the Elimination of Racial Discrimination encouraged the state to “take appropriate legislative or administrative measures” to prevent “adverse impacts on the rights of indigenous peoples in other countries from the activities of corporations registered in the state party.”

<sup>11</sup> Report of the HCHR to the Economic and Social Council E/CN.4/Sub.2/2003/9, pp. 2-3.

<sup>12</sup> CESCR General Comment No. 18, ‘The Right to Work,’ at para. 33. See also CESCR General Comment No. 12, ‘The Right to Adequate Food,’ at para. 50.

<sup>13</sup> For instance, in recent concluding observations, the Committee on the Rights of the Child discussed the impact “bilateral Trade Agreements may have on the access to affordable essential medicines for some individuals and groups, including antiretrovirals for people with HIV/AIDS” and recommended that the state “always take its human rights obligations into account when negotiating Trade Agreements, in particular as to the possible impact of commercial agreements on the full enjoyment of the right to health.” Concluding Observations for Peru, UN Doc. CRC/C/PER/CO/3, 14 March 2006, at paras. 48 – 49 See individual treaty body reports for more examples.

Court of Human Rights has highlighted that when states interfere with rights on this basis, the Court will carefully assess whether due weight was given to the individual's interests.<sup>14</sup> Thus even the Convention's recognition of economic interests in some cases does not allow their outright prioritization. The Court has said that where governments are making decisions about complex issues of economic policy, they should also take care to investigate how such decisions might impact rights.<sup>15</sup>

In the WTO space commentators have suggested that while the jurisdiction of the WTO's complaints mechanisms is limited to applying and enforcing the WTO "covered agreements,"<sup>16</sup> WTO members must also comply with their other international legal obligations, including human rights obligations.<sup>17</sup>

Thus there appears to be increasing discomfort in the international system of outright trumping of economic interests over human rights concerns. This does not detract from recognition of the importance of state freedom to pursue economic well-being. Rather it indicates that states may find it difficult to convincingly argue that economic decisions may be made without any consideration of human rights, both civil and political, and economic, social and cultural.

The aim of Session II is to explore how states are choosing to deal with this delicate balance, including the challenges they face and the strategies they use to reflect balancing in decision-making. Increased understanding of the interplay between economic interests and human rights should also assist participants in their consideration of some of the specific issues to be discussed with respect to trade and investment later in the Consultation.

Participants may wish to consider the following issues during Session II:

- **The trends in state practice with respect to balancing human rights concerns with broader economic interests;**
- **Arguments for and against providing states with a wide margin of appreciation when engaging in such balancing; and**
- **The obligations states have or should have under international human rights law to consider human rights when entering into trade, investment and other commercial agreements.**

### **Session III - Investment and Human Rights**

Companies invest in foreign countries to achieve one of a number of benefits. They might be looking to expand into new markets; searching for natural resources; pursuing access to cheap captive energy, or looking to take advantage of relatively low labor and production costs<sup>18</sup>.

Foreign investment can also be positive for the balance sheets of host countries and bring benefits to people living in those host countries in the form of technology transfer, local jobs and increased services. Increased governmental revenues from investment, if managed properly, can bring indirect benefits for the people in that country.

The promises investment carries for people in host countries at least partly depends on how the investment's benefits and risks are distributed. A key determinant of this distribution is the investment agreement between the investor and the host government.

<sup>14</sup> See *Giacomelli v Italy*, (Application 59909/00) Judgment of 2 November 2006, especially paras. 80-84.

<sup>15</sup> Id. See also *Lopez Ostra v Spain*, Judgment of 9 December 1994; *Taskin and Others v Turkey*, Judgment of 30 March 2005.

<sup>16</sup> "Covered agreements" generally include all multilateral trade agreements with some exceptions.

<sup>17</sup> See Gabrielle Marceau, *The WTO Dispute Settlement and Human Rights in "International Trade and Human Rights: Foundations and Conceptual Issues"*, ed. Frederick M. Abbott et al, University of Michigan Press (2001), at p. 194.

<sup>18</sup> This section is based on "Finding the Rights Balance for Investment", an upcoming Ethical Corporation Magazine article by Andrea Shemberg, who leads the joint study launched by the SRSB and the International Finance Corporation examining the relationship between the protection of investor rights and the human rights obligations of host states.

Foreign investing carries unique risks. In the case of oil and gas investments, for example, investing companies have to make huge initial investments into exploration. Once resources are found, and the investor has shouldered the initial risk, investors legitimately fear the state will renege on the original deal and take unfair advantage, for example by implementing laws to unilaterally change the rules of the game, making the investment significantly less lucrative or even commercially unviable.

To provide some protection against this sovereign risk, investors have used “stabilization clauses,” which either freeze the laws of the state or provide some form of compensation for changes in law that affect the economics of the project.

In recent years, such clauses have also been the target of concerns from human rights, environmental and sustainable development advocates. These groups have voiced concern that stabilization clauses can infringe on the state’s international legal obligations to regulate industry so as to protect rights in the face of major investment projects. Specifically human rights groups have focused on the host State’s duty to regulate in the areas of health, safety, discrimination, employment and labor law, the protection of cultural heritage, and the like.

Environmental and sustainable development advocates warn that stabilization can be a threat to achieving investment in an environmentally healthy way and in harmony with sustainable development objectives. They are concerned that stabilization clauses may have the effect of tilting the investment bargain too much in favor of investors and distorting good business practices--as they might shield investors from commercial risks that more appropriately rest with the investor.

Yielding to such concerns, in 2003, BP, as the largest shareholder in the Baku-Tbilisi-Ceyhan pipeline, led an effort to amend contracts with the governments of Turkey, Azerbaijan and Georgia to ensure social and environmental legislation could apply to the project without penalty to the governments.

The current joint study of the International Financial Corporation and the SRSR is examining how valid such criticisms may be. The study is the first piece of research to look at modern private investment agreements spanning a large number of industries and regions of the world. The study looks at over 85 private agreements from recent years. This research aims to identify whether the use of “stabilization” clauses might threaten the protection of human rights in host countries.

While it is still early to speculate on findings, it seems clear that the study will provide unique evidence of modern stabilization practice as well as rare views and insights into how stabilization may or may not impact the protection of human rights in host states.

If any of the concerns about stabilization expressed by human rights advocates can be grounded in this research, the next step will be to address them. The key to developing adequate responses to the problems identified will be in finding the right balance among the parties affected directly or indirectly by stabilization clauses and reflecting that balance in the contractual arrangement itself. There are a number of helpful reference points for such an exercise. One essential starting point will be internationally recognized human rights and states’ duties pursuant to them.

Session III will explore these challenges and next steps. However, it is also important to recognize that stabilization is just one part of wider problems that need attention to ensure international investment reflects a balanced approach to legitimate interests and responsibilities. The right balance is vital if investment is to realize its potential promises for investors, governments and people.

Participants may wish to consider the following issues during Session III:

- **Views as to how stabilization clauses may impact state action to promote and protect rights and ways to address any such impacts;**
- **How the current international jurisprudence under BITs and FTAs might directly or indirectly have implications for the state duty to protect and what to do about it; and**
- **More generally, strategies for a more equitable balancing of investor, state and community interests – i.e. what might be the role of human rights impact assessments, model clauses and international negotiators and arbitrators?**

## Session IV - Trade and Human Rights

Some commentators view the international trade system as undermining the human rights system by its very nature, "others see the potential for strong synergies between the two regimes, and argue that international trade can be a powerful force for raising global standards of human rights protection."<sup>19</sup> Session IV aims to identify the challenges that the trade regime may pose to the promotion of human rights, and to explore how the regime may raise human rights standards.

Concerning the first issue, key factors to consider include any links between trade liberalization and market changes and increased abuse of human rights. It is also important to examine how the trade regime affects states' ability and willingness to protect human rights from corporate abuse

The role played by the WTO is clearly important here. Academics have argued that while the WTO may limit the ability of states to bring human rights concerns into the international trade system, it does not prohibit their consideration. Yet not all states will agree on the ways in which a trade agreement may impact rights. Even more challenging may be state claims that short-term gaps in protection may be necessary to facilitate long-term development.

Key to Session IV will be a consideration of the ways international institutions have developed to address human rights in the trade arena. Important lessons may be learned not only from the EU experience but also from regional institutions on labor and environment created by NAFTA, despite the fact that those institutions do not refer to human rights as such. Although such institutions have real promise as potential mechanisms for holding states accountable for failing to adequately regulate and adjudicate corporate abuse, they have not been as successful as their proponents hoped. Nor have they been duplicated in other settings. This failure may be attributed to a lack of political will, due in part to a hesitation to use trade-related institutions to address such issues, and in part to a lack of agreement about how best to use such institutions. Proponents disagree, for example, as to whether the institutions should be able to use trade sanctions to address human rights concerns and as to when and how such sanctions may be triggered.

Also important to Session IV will be a consideration of the roles corporations may play in encouraging states to negotiate certain aspects of trade agreements which may pose a foreseeable risk to human rights. Recognizing the importance of a well-functioning international trade system, it is intended that participants will discuss how trade agreements could be better formulated so as to more effectively and fairly balance the interests of all affected parties.

Participants may wish to consider the following issues during Session IV:

- **The ways in which the trading system and trade agreements may impact rights;**
- **Current state practice with respect to encouraging human rights principles (labor rights, public participation, equality and non-discrimination, and the like) throughout the trade system; and**
- **The role of international institutions in encouraging and facilitating states to consider rights in the context of the trading system.**

## Session V – State support to companies operating abroad

States provide various types of support to their companies operating abroad. As discussed above, such support may be provided for a variety of reasons, including a home state's desire to facilitate international trade, investment and economic development.

Recently, states have received increasing attention for the support they provide through their export support schemes including through export credit agencies (ECAs). Most ECA support involves insurance or guarantee cover for funds provided by private financial institutions. ECAs can be government institutions or private companies operating on behalf of government. In 2005, the amount of business covered by such support exceeded US \$65 billion.<sup>20</sup>

ECAs provide specific examples of states' interaction with business, and illustrate the challenge of implementing human rights principles in light of economic considerations. It is also important to note

<sup>19</sup> Dr Andrew Lang, "Rethinking Trade and Human Rights" Bepress Legal Series, 2006 (paper 1685).

<sup>20</sup> See [http://www.oecd.org/document/4/0,3343,en\\_2649\\_34169\\_38752004\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/4/0,3343,en_2649_34169_38752004_1_1_1_1,00.html).

that states may be held responsible under international law for activities by ECAs which detrimentally impact human rights.<sup>21</sup> There have been increasing allegations in recent years about ECA involvement in controversial projects as well as criticism that few ECAs explicitly factor potential human rights impacts into their decision-making.<sup>22</sup>

In June 2007, OECD countries agreed to a Recommendation that requires member states' ECAs to review projects for their potential environmental impacts and to benchmark them against international standards, such as those of the World Bank. It also calls for more public disclosure of information to increase transparency for the most sensitive projects.<sup>23</sup> This Recommendation, which replaced the 2003 version, also committed participant ECAs to exchanging "information more regularly in order to improve common practices and promote a level playing field between export credit providers."<sup>24</sup>

However, critics say that the Recommendation is voluntary, offers no guarantee of stopping ECA involvement in environmentally and socially harmful projects, and refers to only a small number of human rights issues.<sup>25</sup> One can see great variation in the implementation of the previous version of the Recommendation from the responses of the ECAs themselves to an OECD questionnaire on the topic.<sup>26</sup> And of course, as only OECD ECAs are impacted by the Recommendation, there is concern about ECAs from developing economies not apply similar standards.

There are other recommendations to improve ECA practices with respect to human rights. Some NGOs say that states should require ECAs to develop policies that protect against clients interfering with rights, and that such policies clearly identify standards to which clients must conform, procedures for assessing human rights impacts, and the nature of accountability mechanisms.<sup>27</sup> They also recommend better interaction between ECAs and other state departments, for example to ensure that ECAs have current information about the human rights situation in the prospective host state.

Session V will consider the best practices, challenges, and potential for improvement for ECAs to take human rights into account. Participants should also consider other types of assistance states provide to companies operating abroad, and how such assistance might impact corporate respect for rights.

Participants may wish to consider the following issues during Session V:

- **ECA best practices with respect to human rights, for example in policies, due diligence, monitoring, accountability, and information disclosure; and**
- **Incentives, obstacles, and specific recommendations for better ECA standards and practices with respect to human rights.**

## Session VI – Regulatory steps to prevent corporate abuse abroad

As suggested in relation to Session I, there do not appear to be any major impediments under international law to states regulating with extraterritorial effect in order to curb corporate abuses abroad. Nevertheless, only a limited number of states have such regulation in place.

There are three main ways in which states can exercise extraterritorial jurisdiction. They may legislate via prescriptive jurisdiction so that they apply their laws to certain persons or actions outside their

<sup>21</sup> Secondary state responsibility for the acts of state organs and agents is described in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), generally viewed as codifying customary international law. (GA Res. 59/35, 2 December 2000; UN Doc A/RES/59/35) The ILC Articles provide that a state may be held responsible for internationally wrongful acts committed by state organs (Art. 4); entities empowered by the law to exercise elements of government function (Art. 5); entities acting under the state's instructions or direct control (Art. 8); and entities exercising government authority (Art. 9). A forthcoming Halifax Initiative paper argues that states may be held responsible for the acts of any ECAs which fit these descriptions.

<sup>22</sup> See generally [http://www.eca-watch.org/problems/human\\_rights/index.html](http://www.eca-watch.org/problems/human_rights/index.html). Participants should also note the forthcoming submission to the SRSR from the Halifax Initiative providing background on concerns related to ECAs and policy options for addressing these concerns.

<sup>23</sup> The Recommendation is available in full at [http://webdomino1.oecd.org/olis/2007doc.nsf/Linkto/tad-ecg\(2007\)9](http://webdomino1.oecd.org/olis/2007doc.nsf/Linkto/tad-ecg(2007)9).

<sup>24</sup> See [http://www.oecd.org/document/4/0,3343,en\\_2649\\_34169\\_38752004\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/4/0,3343,en_2649_34169_38752004_1_1_1_1,00.html).

<sup>25</sup> *Risk, responsibility and human rights: Taking a rights-based approach to trade and project finance*, Discussion paper prepared by The NGO Working Group on EDC for an expert meeting on human rights, trade and finance, Final Revised Version, July 2004, p.6.

<sup>26</sup> The Questionnaire and responses are available at: [http://webdomino1.oecd.org/olis/2006doc.nsf/Linkto/td-ecg\(2006\)16](http://webdomino1.oecd.org/olis/2006doc.nsf/Linkto/td-ecg(2006)16).

<sup>27</sup> See forthcoming submission from the Halifax Initiative.

territory; they may subject a particular person or action to their judicial process through adjudicative jurisdiction; and in extremely limited circumstances they may use enforcement jurisdiction to compel compliance in another state. Session VI will focus on the use of prescriptive and adjudicative extraterritorial jurisdiction.

State practice suggests that states are not averse to exercising either prescriptive or adjudicative jurisdiction over the overseas acts of companies, though such legislative or judicial action usually relates to international crimes. For example, the Fafo survey noted that as states increasingly incorporate international criminal law (following the Rome Statute's provisions) into their domestic legislation, many have also provided for extraterritorial jurisdiction in respect of those crimes.<sup>28</sup> Some of these states already provide for corporate criminal liability, meaning that corporations may have increased exposure in domestic courts for international crimes committed abroad.

Victims and plaintiffs in a number of forums have relied on such legislation to challenge TNC actions – such as private criminal cases brought in Belgium and France regarding corporate complicity in human rights abuses in Burma. However, many states have also experienced significant political pressure to limit the effect of any such legislation, particularly when it is based on theories of universal jurisdiction rather than on the nationality of the corporation or the victim.<sup>29</sup>

There is also an increase in the use of court processes to hold corporations accountable for international crimes in states which have not ratified the Rome Statute. The vast majority of these cases have been brought in the US under the Alien Tort Claims Act (“ATCA”).

ATCA allows foreign nationals to bring civil claims in US federal courts alleging violations of the “law of nations.” Most ATCA cases against corporations have alleged corporate “complicity” in violations of international criminal law. Judges have reacted differently about the existence of aiding and abetting liability under ATCA, and its application to private actors, including corporations. While the weight of current opinion appears to support corporate aiding and abetting liability, including a recent second circuit decision in the South African apartheid litigation,<sup>30</sup> the issue will remain open until a higher court considers one of the cases on its merits.

As suggested above, the existence of legislation or judicial processes facilitating action against corporations for abuse abroad does not always equate to increased corporate responsibility and accountability for human rights abuses. Even where relevant legislation or judicial processes exist, victims face significant hurdles in obtaining remedies with respect to corporate abuse. Such hurdles include jurisdictional “blocks” where home state courts may decide that the case should be tried in another jurisdiction; legal challenges to “piercing the corporate veil” where allegations are made against a parent company for a subsidiary’s acts; politically based objections from home states that host states should be given the chance to deal with the allegations; and the chance that even if a remedy is awarded it may never reach all affected parties.<sup>31</sup>

Further, many remain concerned that state action in this area too often focuses on international crimes without considering other abuses, particularly those related to economic, social and cultural rights. There is the added challenge that legislation or judicial processes generally focus on punishing corporations “after the fact” instead of introducing regimes that might help to prevent abuse in the first place.

In sum, it appears that any steps states are taking with respect to regulation with extraterritorial effect remain slow moving and often encounter weaknesses in implementation, making it difficult for both corporations and victims to predict when a corporation may be held to account. There has also

---

<sup>28</sup> See Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – Executive Summary* (2006) available at [www.fafno.no/liabilities](http://www.fafno.no/liabilities).

<sup>29</sup> For instance, in 1999, Belgium amended its laws to include universal jurisdiction over serious international crimes. Following a wave of complaints against high-ranking officials from various countries, political pressure led to the repeal of the law in August 2003. Belgian courts can now only exercise jurisdiction over their nationals in relation to these crimes.

<sup>30</sup> *Khulumani v. Barclay National Bank, Ltd., Ntsebeza v. Daimler Chrysler Corp.*, US Court of Appeals for the Second Circuit, decided October 12, 2007. In a famous 2002 decision, *Doe I v Unocal* 395 F.3D 932 (9<sup>th</sup> Circ, 2002), the court held that the international aiding and abetting standard was applicable under ATCA. However, the decision was subsequently vacated, and the case settled in December 2004 before it could be reheard.

<sup>31</sup> For a more detailed discussion see: Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations- background paper for Brussels seminar prepared by Prof. Olivier de Schutter, Catholic Univ. of Louvain & College of Europe, Dec 2006, available at: <http://www.business-humanrights.org/Updates/Archive/SpecialRepresentativeMeetingsInitiatives>.

been little consideration of ways in addition to or other than regulation to encourage better corporate behavior abroad, such as incentives schemes and support of voluntary initiatives.

Accordingly, Session VI will delve into why states are generally reluctant to exercise extraterritorial jurisdiction over corporate abuse and why even when they do so, there are so many issues in securing implementation, certainty and remediation of victims. The session will also explore how such challenges could be addressed, including thoughts on whether states can make a real contribution to corporate responsibility and accountability through individual domestic regulation or whether more collective action is necessary, and what kind of preventative tools could be developed.

Participants may wish to consider the following issues during Session VI:

- **Arguments for and against particular situations meriting regulation with extraterritorial effect, i.e. where a corporation operates in a conflict zone; in relation to particular types of abuse; in relation to particular industries;**
- **Legal, practical and other challenges faced by victims in obtaining access to justice even where regulation with extraterritorial effect in its place; and**
- **Policy options in addition to or other than regulation, including incentives' schemes and support of voluntary individual and collective company initiatives.**

## **Session VII – Strengthening domestic and international policy coherence**

“The state-based system of global governance has struggled for more than a generation to adjust to the expanding reach and growing influence of transnational corporations.”<sup>32</sup>

As states have a key role to play with respect to the impact such corporate influence may have on human rights, Session VII will explore what areas of domestic and international policy coherence may be strengthened so as to assist states to adjust to this new world system.

In the domestic arena, some government departments which deal with corporations remain wholly unaware of human rights risks in the corporations' areas of operation.<sup>33</sup> There are also difficulties in implementing regulation and policies with respect to business and human rights, particularly where different government departments are responsible for various stages of implementation. Thus there is a need to consider ways to improve internal knowledge sharing so that relevant government departments are better equipped to deal with business and human rights issues.

Further, there seems to be a disconnect between the impact national human rights institutions (“NHRIs”) can make on corporate awareness and accountability and the mandates and resources provided by governments in this respect. It is necessary to explore the ways state agencies may better coordinate with independent mechanisms such as NHRIs, as well as civil society and corporations, to increase and sustain corporate respect for human rights.

At the international level, there have been issues with the level of support states provide each other when one seeks to hold a corporation accountable for abuse. Also concerning is the apparent willingness of home states to discourage legal action against corporations for abuse abroad on political interest grounds, without digging deeper into whether the host state's sovereignty is truly threatened by remediation against corporate acts in foreign courts. There is a strong sense that states could work together more effectively to encourage better corporate behavior.

In relation to international institutions, there remain gaps in the guidance from international human rights mechanisms on what states could do to better protect against corporate abuse. However, these mechanisms can only provide such guidance if both states and civil society provide adequate information as to relevant challenges as well as best and worst practices. The SRSG is considering recommendations on how to improve such information sharing, not only in relation to institutions such as the UN treaty bodies and regional human rights mechanisms but also concerning other key international human rights institutions such as the Human Rights Council.

<sup>32</sup> See the SRSG's forthcoming article in the American Journal of International Law

<sup>33</sup> Participants should note that together with Global Witness, the SRSG will explore the advisory, facilitative and regulatory means home states have available, or could develop, to prevent and deter corporate abuses in conflict zones. A consultation on this key topic is being held in Berlin, also in early November 2007.

Given the Consultation's discussion about trade and investment issues, another question concerns the role other international institutions, such as the WTO, the World Bank, regional development banks and international arbitration tribunals may play in facilitating states to better protect against corporate abuse.

Participants may wish to consider the following issues during Session VII:

- **Tools states could use to ensure that all relevant government departments are aware of the risks and action points concerning business and human rights issues;**
- **Support states may provide to other states in minimizing corporate abuse of rights; and**
- **The role international institutions may or should play in facilitating states to fulfill the duty to protect with respect to business and human rights.**