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HUMAN RIGHTS COUNCIL**

**Mandate of the Special Representative of the Secretary-General on Human Rights and
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Workshop on Attributing Corporate Responsibility for Human Rights under International Law

**Co-convened by
New York University Center for Human Rights & Global Justice and
Realizing Rights: The Ethical Globalization Initiative**

NYU School of Law, Friday, November 17, 2006

SUMMARY REPORT

BACKGROUND

A series of international workshops has been convened over the past six months to assist the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (“SRSG”) in clarifying some of the key legal issues raised by his mandate. The fourth in the series took place at New York University School of Law on Friday, November 17, 2006. The purpose of the workshop was to clarify the bases, if any, for attributing human rights responsibilities to corporations under international law.

The one-day brainstorming session was convened jointly by the NYU Center for Human Rights and Global Justice together with 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 of the workshop. The SRSG is immensely grateful to Philip Alston, Mary Robinson, and the Government of Canada, for making this workshop possible.

There were 37 participants from a range of countries. (See the Annex to this report for a full list of participants and their affiliations.) Despite the best efforts of the

conveners, they found it difficult to secure optimum regional diversity among the participants. Accordingly, the SRSG encourages legal experts from underrepresented areas to share with him further ideas on the issues addressed in this report.

SUMMARY OF PROCEEDINGS

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:

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

Individual participants were asked to lead different sessions. In order to encourage full and frank discussion, and as with the other workshops organized to assist the SRSG, the participants agreed that there would be no public attribution of comments. Following is a general record of the discussion.

1. Introductory remarks

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”), transnational corporations (“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?

2. Framing the issue

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?

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.

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.

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 seven 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.

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.

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

A regulatory approach is relational in that it involves a range of actors (beyond the individual parties to a traditional legal dispute) and involves 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.

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. However, as economic entities performing specialized social functions 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 corporation 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 corporation 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).

3. Transposing state obligations

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 corporations.

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.

One proposal for determining the extent of corporate responsibility was to consider the following factors: (i) the relationship between the corporation and the government, (ii) the nexus between the corporation 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).

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”.

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.

4. Exceptional cases

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.

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.

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.

Participants also discussed how to identify a corporation'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. For example, two jurisdictions in Canada no longer require the physical presence of headquarters or incorporation in that jurisdiction to exercise control over companies.

5. State responsibility

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

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.

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. In any case, even if it did, 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")¹.

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.

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:

¹ This provides that a state is entitled to exercise extraterritorial jurisdiction to regulate the activities of its nationals abroad.

- 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.

6. Concluding remarks

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 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.

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.

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

- as important as litigation is, it is vital also to look beyond it to identify as many leverage points as possible in developing effective approaches to corporate human rights responsibility, including regulation, market-based mechanisms and social processes;
- 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 corporations 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 institutional mechanisms, particularly the UN.

Finally, the SRSB 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).² 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. 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 effectively to the human rights challenges posed by corporate globalization.

The SRSB continues to explore the full range of issues addressed by the workshop.

² Iris Marion Young, “Responsibility and Global Labor Justice” (2004) *Journal of Political Philosophy* 12(4), pp 365-388.

ANNEX: WORKSHOP PARTICIPANTS

SRSB and members of his team:

- Gerald Pachoud – Special Advisor to the SRSB;
- Lene Wendland – Office of the High Commissioner for Human Rights;
- Rachel Davis – SRSB’s legal research team;
- Amy Lehr – SRSB’s legal research team;
- Michael Wright – SRSB’s legal research team;
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