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Panel II: Primary obligations of States, including extraterritorial obligations related to TNCs and other business enterprises with respect to protecting human rights

Subtheme 2 – Jurisprudential and practical approaches to elements of extraterritoriality and national sovereignty

Tuesday 25 October: 15:00- 18:00

Why address extraterritorial obligations?

Addressing extraterritorial obligations (ETOs) of States in relation to the conduct of corporations would be a core enabler of an effective Instrument, and would fill gaps in the current international legal order, which often hinders victims' access to effective remedies.

Reports produced by the project on accountability and remedy for victims of business-related human rights abuse, mentioned by the High Commissioner for Human Rights in his statement to this meeting (2nd meeting of the open-ended intergovernmental working group on TNCs and business enterprises with respect to human rights OEIGW)¹ provide that “lack of clarity at international level as to the appropriate use of extraterritorial jurisdiction”, is a “significant source of legal uncertainty for both affected persons and business enterprises” and undermines the ability of domestic legal regimes to respond effectively to cross-border cases concerning business involvement in human rights abuses².

Why is it essential to address ETOs?

It is important to underline that the wording of Resolution A/HRC/26/9 specifically alludes to the ‘transnational character’ of the enterprises’ operations³. This wording indicates that the Resolution is primarily concerned with situations where transnational corporations and other entities with transnational activities are capable of evading their human rights’ responsibilities based on jurisdictional grounds.

An enterprise owned or controlled by stakeholders residing in one country may have operations of a ‘transnational character’ if it engages in business activities through an affiliate, subsidiary or a controlled undertaking in another country⁴. One can recall that a shared view during the first meeting of the OEIWG was that all entities linked

¹ See: Report of the United Nations High Commissioner for Human Rights “Improving accountability and access to remedy for victims of business-related human rights abuse” (A/HRC/32/19) and its addendum A/HRC/32/19/Add.1 which encapsulates findings from the research undertaken by the Accountability and Remedy project (ARP) and key findings in relation to the six work streams or project components of the ARP presented in the Background Paper accompanying a consultation draft of the ARP available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf.

² See: See: Background document “The Accountability and Remedy Project”, accompanying consultation draft of the OHCHR Accountability and Remedy Project, page 18, available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf (accessed 11.7.2016).

³ See: Carlos Correa (2016), “Scope of the Proposed International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights”, South Centre Policy Brief 28, available at: <https://www.southcentre.int/policy-brief-28-september-2016/>.

⁴ Ibid.

to transnational corporations should fall within the subjective scope of a prospective Instrument; this includes subsidiaries and other entities in their supply chain⁵. Within this context, the focus on clarifying ETOs is necessary to achieve an effective Instrument.

Often as noted yesterday, multinational corporations can manipulate territorially-based jurisdiction in order to evade liability. For example, such groups could shift financial assets within the corporate group to exhaust funds that would otherwise have been recoverable in the territorial jurisdiction. Thus, single States applying national laws within national jurisdictions often lack the capacity to address cases involving international corporate groups and transnational conduct.

ETOs entail the “human rights obligations of Governments toward people living outside of its own territory.”⁶

Extraterritorial jurisdiction entails the ability of a State to exercise its authority over actors and activities when undertaken outside its own territory⁷.

In terms of the current legal context:

It is clear from jurisprudence of international and regional human rights systems and the jurisprudence of the International Court of Justice that States are not prohibited from adopting legislations intended to apply outside the national territory, with a view to contributing to the protection of internationally recognized human rights abroad.

The Permanent Court of International Justice (1927)⁸ had noted that:

“... the first and foremost restriction imposed by international law upon a State is that it may not exercise its power in any form in the territory of another State... It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, ... Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules...”

In later cases, the ICJ clarified that (DRC- Uganda case, Wall case, and Nuclear weapons case) obligations arising for states from human rights norms continue to apply even beyond the territory, under certain conditions for this extended extension.

UN Human Rights Treaty bodies provided that a State must respect and ensure rights to:

- Anyone within its **power or effective control** even if not situated within its territory
- Provided that there is a **reasonable link** between the State and the conduct concerned, namely **where the enterprises have center of activity, are registered**

⁵ See: South Centre South Bulletin Issues 87-88 entitled “Business and Human Rights: Commencing discussions on a legally binding instrument”, available at: <https://www.southcentre.int/south-bulletin-87-88-23-november-2015/>.

⁶ Jean Ziegler, Report of the Special Rapporteur on the Right to Food, ¶ 35, U.N. Doc. E/CN.4/2005/47 (Jan. 24, 2005).

⁷ See: Jennifer Zerk “Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas” (June 2010).

⁸ The Case of S. S. Lotus (France v. Turkey)

or domiciled or have their main place of business or substantial business activities in the State

The Inter-American Commission of Human Rights provides that reference to ‘any persons subject to [a state’s] jurisdiction’ under Article 1 of the American Convention of Human Rights refers to “*conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state - usually through the acts of the latter’s agents abroad.*”

The African Commission recognizes as well the existence of extraterritorial state obligations at least in circumstances where states or their agents act beyond their borders⁹. The African Commission further recognizes the obligation of African states to protect their people from the infringement of their rights by non-state actors, including transnational corporations.¹⁰

Approaches to ETOs:

The discussion of ETOs will ultimately grapple with queries regarding the potential implications on sovereign domestic affairs. In this regard, Olivier De Schutter, former Special Rapporteur on the right to food, notes that “[i]f the adoption by the State of origin of the investor of extra-territorial regulations in fact facilitates the role of the host State in regulating the investor, then ensuring that the investment will contribute to human development and will benefit local communities enhances rather than restricts the exercise by the host State of its sovereignty¹¹”.

In the debate about the bases to exercise extraterritorial jurisdiction in the field of human rights, “domestic measures with extraterritorial implications” are differentiated from “direct extra-territorial jurisdiction”. This was also distinguished in the work of the SRSG under UN ‘Protect, Respect, Remedy’ Framework.

For example, domestic measures with extraterritorial implications would require that a company domiciled in the forum jurisdiction has to supervise a foreign subsidiary or contractor. These measures thus deal with the actions or omissions of the company at home, which could have effects in other countries¹².

Direct extra-territorial jurisdiction on the other hand entails exercising the State’s extraterritorial obligations through direct jurisdiction over the foreign subsidiary or parties contracted. The level of intrusiveness in regard to sovereignty issues is also differentiated between these two approaches, with the latter approach imposing deeper challenges to sovereignty-related issues.

⁹ Communication 227/1999, Democratic Republic of Congo v Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2004) (20Annual Activity Report). In its decision in the case DRC v Burundi, Rwanda and Uganda, the Commission found the respondent states in (extraterritorial) violation of a range of rights of the Congolese, including ESCR.

¹⁰ Communication 155/96, Social and Economic Rights Action Center and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (15thActivity Report); and Communication 245/2002, Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006) (21St Activity Report).

¹¹ Olivier de Schutter, “Sovereignty plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations” (2010).

¹² Jennifer Zerk (2010), “Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas”, page 206, a report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG’s Special Representative on Business and Human Rights, Working Paper No. 59, available at: https://www.hks.harvard.edu/m-cbg/CSRI/publications/workingpaper_59_zerk.pdf (accessed 11.7.2016).

Within this context, a prospective Instrument could focus on clarifying two main elements:

1. the home states' responsibility to impose on parent corporations an obligation to comply with certain norms wherever they operate¹³. This would include due diligence requirements on the parent company for prevention of harm, disclosure requirements, and reporting requirements.
2. and the jurisdiction of the courts in the home State of a corporation over cases brought by victims of human rights abuse done in the host State of the corporation.

It is worth noting in this regard that European Union Members States have taken steps towards clarifying the obligation of home States in terms of recognizing the jurisdiction of their national courts when civil claims are filed against persons (including corporations) domiciled in their territory, wherever the damage has occurred and whatever the nationality or the place of claimants' residence¹⁴. Thus, the doctrine of 'forum non conveniens'¹⁵, which gives discretion to the courts to dismiss a case, is not available in cases involving European Union defendants (including companies)¹⁶.

This would help in overcoming major difficulties facing victims of corporate human rights abuse by enabling litigation to take place in alternative jurisdictions besides the host state where harm occurred.

Exercising extraterritorial jurisdiction as suggested here does not exclude the courts of the host State from exercising jurisdiction as well.

In closing, it is worth highlighting that in several areas of law, there is substantial State practice of extending national law to regulate the conduct of corporate nationals operating extraterritorially through foreign subsidiaries, such as in areas of competition law, shareholder and consumer protection, and tax¹⁷. Overall, there are no controversial perspectives or doubts on States' extraterritorial jurisdiction over their own companies.

¹³ See: Olivier De Schutter (2010) "Sovereignty-plus in the Era of Interdependence", page 6, CRIDHO Working Paper.

¹⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, replacing the Brussels Convention. European Court of Justice (ECJ) decision in *Owusu v. Jackson* (2005) has clarified that the doctrine of forum 'non conveniens' is incompatible with the regime established under Regulation 44/2001. See: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-281/02>

¹⁵ The doctrine of *forum non conveniens* allows a court, whose jurisdiction is established under the applicable rules, to decline to hear a case if it finds that it is an inappropriate forum or that another forum would be more appropriate. It is based on the idea of discretionary dismissals of specific cases, leading into an assumption that jurisdictional rules are sometimes too broad, resulting in the allocation of jurisdiction to a court which is not an appropriate (or not the most appropriate) forum. Forum non conveniens is applied almost exclusively in common law countries such as the United States, United Kingdom, Australia and Canada. The effects of this doctrine were seen in the Bhopal case and the Asbestos Miners case. See: "A Critique of the Doctrine of Forum Non Conveniens", markus a petsche, Taylor's University (2011).

¹⁶ Presentation by Richard Meeran at the first meeting of the open-ended working group on transnational corporations and other business enterprises with respect to human rights (6-10 July 2015).

¹⁷ See: Gwynne Skinner, Robert McCorquodale, Olivier De Schutter (December 2013), "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business", p. 60.