On 15 June 2006 the Secretary-General's Special Representative for Business & Human Rights, Professor John Ruggie, participated in the first of three workshops intended to explore the legal dimensions of his mandate. This workshop was convened and chaired by Elizabeth Wilmshurst at Chatham House (Royal Institute of International Affairs), London. Her note of the discussion follows:

Human rights and Transnational corporations: Legislation and Government Regulation

June 15: Chatham House

The interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (E/CN.4/2006/97) states that 'one critical area of legal standards that merits close attention is the possible extension in the extraterritorial application of some home countries' jurisdiction for the worst human rights abuses committed by their firms abroad.' (para.71). The report also points out that the 'role of States in relation to human rights is not only primary but also critical. The debate about business and human rights would be far less pressing if all Governments faithfully executed their own laws and fulfilled their international obligations.'(para.79)

The meeting at Chatham House of 15 June 2006 had on its agenda consideration of possibilities of State legislation regarding transnational corporations and human rights, with a particular emphasis on extraterritorial legislation, and the scope for bringing civil claims relating to transnational corporations. The meeting was intended to cover mainly the legal aspects of these matters, and did not address the factual extent of the human rights challenge to companies.

While State legislation and extraterritorial litigation were the subjects considered by the meeting, there is of course a multiplicity of approaches to issues regarding human rights and business. Other approaches include the insertion of human rights clauses in investment agreements and host state agreements, and the use of voluntary codes of corporate social responsibility in various sectors.

Legislation

The meeting discussed the attempts that had been made in certain countries to adopt legislation which imposed extraterritorial liability on transnational corporations for breach of specified human rights standards: the Australian Corporate Code of Conduct Bill 2000, the Belgian proposal in 1999 (amended in 2003), and the UK corporate responsibility Bills. The extent of the extraterritoriality and of the human rights covered by each proposal varied from case to case. All of the Bills had failed.

The Australian Corporate Code of Conduct Bill 2000 represented an attempt to introduce a home state model of extraterritorial regulation. It required Australian companies employing more than 100 persons in a foreign country to meet environmental, employment (including the core International Labour Organisation conventions), health and safety and human rights standards. The Bill would have applied to companies established in Australia, to a holding company or a subsidiary of such a company, or to a subsidiary of a holding company of such a company. The Bill was referred to a parliamentary joint committee on corporations where the majority recommended that it was unworkable and unnecessary.

In Belgium there was a proposal in 1999 by a socialist parliamentarian to have universal civil jurisdiction for Belgian courts in relation to human rights obligations on companies with assets in Belgium. The scope of the human rights protection was limited to the core International Labour Organisation conventions. The Belgian government opposed the Bill, including on the ground that it took jurisdiction beyond that allowed under international law. The original Bill was amended to insert a link to Belgian jurisdiction so that it would apply to companies incorporated in Belgium or with their central administration or company headquarters in Belgium. The proposal failed, by reason *inter alia* of concerns about the potential adverse effects on the Belgian economy.

In the UK, the 2003 Corporate Responsibility Bill imposed mandatory reporting requirements, a duty to consult extraterritorially with affected stakeholders beyond the company's shareholders, extending the director's duties to take into account the social and environmental impact of oversees operations, and statutory obligations to pay damages to those harmed oversees. A parent company-based system of regulation was envisaged, whereby the parent company would ensure the compliance of subsidiaries with human rights standards. There was provision for a wide range of penalties, ranging from fines to delisting the company. The NGO-led Bill lacked political and business support and was dropped. In 2004 a Bill was put forward, recommending a UK government investigation on the effects of companies' activities abroad.

There was some discussion of existing law in various countries. The position under French law as to the criminal liability of legal entities and extraterritorial laws applied to them was set out in the papers presented to the meeting. The law on the criminal liability of companies was recent and future case law would be interesting. Two Australian statutes were mentioned. The Criminal Code Act 1995 provides for extraterritorial corporate criminal liability in relation to corruption and bribery offences, giving effect to Australia's legal obligations under the OECD Corruption Convention and the UN Convention on Corruption. Section 12.3 (2) (c) stipulates that a company will be considered to have authorised or committed an offence if it is proven that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the legal provisions. The Trade Practices Act 1974 was not intended to address the issue of human rights and business overseas but was regarded as a possible future approach, one limitation being that there must be ministerial approval for proceedings in relation to extraterritorial conduct.

With regard to other possible models of legislation, the Belgian Social Label law was mentioned: it offers companies the possibility to acquire a label, which is granted to products whose whole chain of production respects the eight fundamental ILO conventions. It combines voluntary initiatives with legal constraints. A firm with the social label which does not comply with the requirements is liable to criminal fines and public scrutiny. The Act has not attracted very much support in practice. The suggestion was made that if the model was taken up at a wider level, for example among OECD countries, it would be likely to have more success because of attracting a far wider group of consumers. The benefit of the model is that it combines voluntary with mandatory – companies are not obliged to apply for the label, but if they do so, the State enforces it.

The problem with other proposals for unilateral extraterritorial legislation which applied solely to companies with a close link to the home country, was that such legislation could result in a competitive disadvantage for the companies concerned, leading to disinvestment in the legislating State. The question was raised as to

whether a multilateral approach would be preferable, for example a treaty requiring States Parties to legislate extraterritorially.

A treaty requiring States to legislate?

What kind of standards might be covered by such a treaty (and subsequent legislation)? There are a number of suggested approaches. First the protection might be limited to the most egregious breaches of human rights requirements: international crimes and the most egregious breaches of the core ILO conventions. It was pointed out that these were largely, if not entirely, already covered by legislation on international crimes (which does not, however, apply in all countries to corporations). Secondly, the protection might be set at the level of complicity with violations of the host State's international human rights obligations, within the limits of the company's responsibilities. Thirdly, there were other approaches imposing specific obligations on companies having regard to their particular functions, which were of course very different from States'; such approaches would demand considerable further work on those standards which should be required of companies.

In any treaty requiring extraterritorial legislation to be adopted, what would be the link between the 'parent' company and the overseas actor? Two approaches were discussed:

i) the 'imputability' approach whereby the acts of the entity overseas were imputed to the 'parent' company in the home State if there were sufficient day to day control; and

ii) the 'systems' approach whereby the 'parent' company has an obligation to ensure the maintenance of a system and culture of policy, practice, rules and an effective monitoring mechanism among the range of entities it deals with (subsidiaries, suppliers, franchises). The parent company's responsibility is engaged by the failure to have an adequate system in place; it is not responsible for the acts of individual entities which act in violation of the system introduced by the parent company (if the system was effectively functioning). The meeting discussed possible difficulties with this approach, while recognising its strong merits; Australian legislation (mentioned above) had a similar approach, which seemed to work well.

There was discussion as to whether there was political will for such a treaty. It was pointed out that, whether or not there exists at present such political will, it was possible for it to be increased or created over time.

Civil litigation

There was discussion by the meeting of the different possibilities for civil litigation in the US (primarily under the Alien Tort Claims Act) and in South Africa, France and the UK (in relation to which reference was made to the Chatham House working paper at http://www.chathamhouse.org.uk/pdf/research/il/ILP_TNC.pdf)

It was noted that the use of extraterritorial litigation in civil courts has several **advantages**: it can provide a remedy for victims, it contributes (at least in the case of the US) to the application of international law, it raises public awareness and has an educative function; it also has an important impact on corporate behaviour, not the least because of the negative publicity surrounding major cases, even though as yet there has been no judgment under the ATCA which has ruled against a corporation. In a world in which the legal systems of some countries do not enforce obligations

against transnational companies (whether because of weak governance or because of the economic might of the companies and their home States) it is necessary for there to be a choice of forum for victims to claim redress.

However, extraterritorial litigation as a tool to enforce human rights raises many **concerns**. There is an inevitable lack of universality when national courts adjudicate such cases. They cannot provide a remedy for all affected parties; claims will necessarily be selective. Litigation is necessarily begun *ex post facto*. More generally the focus on litigation, particularly under ATCA, may distract efforts towards building an international framework of corporate accountability. There is controversy about the jurisdictional reach of ATCA. Litigation is generally limited to egregious human rights violations, such as torture; there have been no effective social or environmental claims under ATCA, for instance. Its impact on corporate behaviour is mixed: companies need to have clarity with regard to their obligations, and litigation does not always bring clarity.

Extraterritorial litigation regarding human rights violations in just a handful of countries is therefore not the perfect tool for ensuring compliance with human rights. However, in the absence of effective enforcement mechanisms for human rights, litigation has its role to play.

The multilateral approach

The meeting concluded with a recognition that in all of the areas discussed it was apparent that a multilateral approach was needed.