



Report on Wilton Park Conference WP05/33

BUSINESS AND HUMAN RIGHTS: ADVANCING THE AGENDA

Monday 10 – Wednesday 12 October 2005

Summary

1. While international human rights law traditionally holds governments responsible for the protection of human rights, there is nowadays acceptance that companies, including transnational corporations, should promote and protect fundamental rights, as contained in the Universal Declaration of Human Rights (UDHR). A number of initiatives have been elaborated within the framework of the United Nations (UN) and other intergovernmental organisations to promote and define the responsibility of companies for human rights. These include the UN Global Compact, launched by the Secretary-General in 2000, in which participating businesses undertake to support a set of 10 principles in the areas of human rights, labour standards, environmental protection and anti-corruption. How to ensure that companies throughout the world are held responsible and accountable for human rights has become an acute issue in recent years. International debate on this question has been polarised, especially in UN human rights bodies. This discussion takes place against the background of a transformed world economy, where what was once external trade between separate national economies has increasingly become internalised as global supply chain management with integrated corporate networks. The rise of new economic powers such as China and India also needs to be taken into account.

Advancing the agenda: appointment of the Special Representative of the UN Secretary-General for Business and Human Rights

2. With the appointment by the UN Secretary-General of a Special Representative (SRSG) for business and human rights with a two-year mandate in

July 2005¹, new impetus has been given to finding a global structure for responsible and accountable business practice. Many believe there is a need to bring coherence to existing initiatives – some consider the plethora of these now creates confusion -- and strengthen them by finding a suitable monitoring mechanism for ensuring compliance with these standards.

3. The SRSG's mandate is, in general terms, to identify and clarify standards of corporate responsibility and accountability with regard to human rights, elaborating on the respective role of states and corporations, exploring the concepts of corporate complicity and "sphere of influence", examining tools for impact assessment and identifying best practices.

4. With the exigencies of time, the SRSG has promptly initiated his work, approaching it on a pragmatic basis by gathering information first and then determining how to proceed. This includes: plans to conduct a survey of business policies and practices with regard to human rights, in collaboration with the International Business Leaders' Forum (IBLF), Business for Social Responsibility (BSR), the International Organisation of Employers (IOE) and the International Chamber of Commerce (ICC) to examine how firms themselves conceive of human rights, what if any specific standards they reference and whether they conduct impact assessments, so as to identify good practices as well as gaps; a study to assess how US and European courts understand the concepts of complicity and 'sphere of influence;' plans for consultations in non-Northern countries; and developing a systematic inventory of dilemma situations for business in relation to human rights to which non-governmental organizations (NGOs) are particularly invited to contribute case studies. In prioritizing work, special attention will be given to acute situations, in particular failed states and conflict zones, together with high-risk sectors such as the extractive industries. In the absence of a clear budget, however, as currently pertains, the SRSG's work will be constrained without additional financial resources, in particular voluntary contributions from governments and other supporters.

¹ The appointment was made pursuant to resolution 2005/69 adopted by the UN Human Rights Commission, which was subsequently endorsed by the UN Economic and Social Council. The SRSG, Professor John G. Ruggie, is Kirkpatrick Professor of International Affairs and Weil Director, Mossavar-Rahmani Center for Business and Government at Harvard University's John F. Kenney School of Government. He is also an Affiliated Faculty Member at Harvard Law School.

Examining the 'sphere of influence' of a company

5. Is 'sphere of influence' a useful concept for determining a company's responsibility for human rights? While there is general agreement that "sphere of influence" cannot be translated into law, many feel it has utility as a fluid and dynamic concept that reflects reality, identifying a company's relations. It introduces the notion that companies have at least moral, and sometimes legal, responsibilities, with considerable potential in the exercise of these. Some believe there is greater scope for using the concept if the focus is on a company's responsibilities rather than its accountability. 'Sphere of influence' tends to include individuals to whom a company has a certain political, economic, contractual or geographical proximity: people closest to the company are most likely to have a 'special relationship' with the company, for example its employees. From employees, it broadens to include communities in the vicinity of its operations, business partners, such as suppliers, as well as consumers. Large companies may often have direct and close connections with host or home governments, or armed groups controlling territory in which it operates. In its 'sphere of influence' the company is most likely to know, or should know, the human rights consequences of its acts or omissions. It is in relation to people or institutions with whom the company is closest that it will have the power and authority, or leverage, to ensure that human rights violations are not occurring.

6. Within the corporate sector, some express caution at the use of the concept, concerned as to how a company may sufficiently verify what is happening throughout its 'sphere of influence'. It is also pointed out that media tend to report negative action by companies, such as when they are perceived as responsible or complicit in human rights violations, without giving credit for the positive engagement a company may have in improving the health or education provisions, for example, in a local community. Others recognize the validity of the concept in denoting the responsibilities of companies, but question how it can be effectively imparted to workers in the field who are faced with in-country dilemmas. Some suggest that country risk assessments will help a head office and local employees to work together in identifying the company's human rights responsibilities within its 'sphere of influence'. Others propose that if companies facilitate access to information, which they have the potential to do, rather than relying on annual reporting, this transparency will encourage and assist companies, and others in their 'sphere of influence', to act responsibly.

How can the private sector affect issues and policies impacting on human rights within their 'sphere of influence'?

7. The private sector is often perceived as being resistant to addressing human rights, regarding rights issues as dangerous terrain. Some believe the challenge lies in demystifying human rights for companies, and building a business case to show the commercial advantage in integrating human rights strategies into corporate activity. They argue that this can be done by 'unpacking' human rights, so that these will be more readily comprehensible to the private sector, which will gradually reach an holistic understanding. For example, a company can be encouraged to focus initially on a non-contentious issue such as safety for employees. Ensuring zero casualties will save money by avoiding costly investigations and reducing insurance premiums, which is good for business and provides competitive advantage. Some question whether companies will be prepared to share information and experience which gives them a competitive edge, and that this cannot be cost-free. Others believe there are examples where companies have shown leadership in addressing human rights that has had significant impact on other companies, as evidenced by the Business Leaders Initiative for Human Rights (BLIHR); companies are sometimes in advance of governments in this respect. Many agree that companies need to address both the moral and commercial grounds for embracing human rights, looking at value in broader terms than purely financial. With, as yet, no market understanding of the benefits of this, social investment funds have a crucial role to play, and more needs to be done to explain these to companies and promote their use.

8. Experience gained through the work of the Free Labor Association (FLA) in promoting accountability in the US apparel industry through establishing an industry-wide code of conduct with verifiable and enforceable, not aspirational, standards has also produced useful findings. Companies and trade unions took two years to develop benchmarks for standards, which are explained in detailed documentation so as to be fully understood by all concerned. This process revealed considerable ignorance among both companies and trade unions about the standards of the International Labour Office. To ensure compliance with the standards elaborated, factory visits are conducted, with the results made available on the internet, so that the process is transparent and thus credible. Remediation procedures are vital to the initiative, since endemic problems need to be fixed. Attention is now moving to establishing a set of strategic objectives: assessing country situations, through use

of a matrix; engaging in local consultations with workers and unions; training monitors to work with the matrix; elaborating country specific remedial plans; resource development and training for sustainable improvements; and undertaking impact evaluation with all stakeholders. Arriving at these objectives required intense debate and argument, but companies have been prepared to yield control. The experience of this initiative underlines: industry-wide initiatives, based on common interests, get the best results; transparency is crucial for external credibility; only what can be defined, measured and enforced should be included in benchmarks; and monitoring alone is insufficient, sustainable improvements are needed. Problems remain: for example, in the scope of the supply chain obligation; efforts are underway to divide this into categories to identify more clearly what can be done. The relationship between monitoring and capacity building needs greater attention, and greater engagement of trade unions and investors is necessary. Some express concern that superficial monitoring can be detrimental to corporate social responsibility, since it penetrates only the façade of business activity; most agree more investment should be made in capacity building.

How far does a company's complicity extend, and how can it be avoided?

9. Some identify three types of corporate complicity. In the narrowest sense, companies can face criminal complicity for involvement in an international crime for example war crimes or genocide, for which they could be held accountable before US federal courts under the Alien Tort Claims Act (ATCA). While few cases have ultimately succeeded, they are hugely expensive, consume senior management time and inflict severe reputational damage, in an area of evolving jurisprudence. In a recent ruling, the Court of Appeals held that complicity will result in legal liability under international law where the company has knowledge that its assistance has a substantial effect on the crime.² Illustrative examples could be when a company assists a government or a rebel force by lending an airstrip, providing fuel or transport when it is known or should be known that the targets are civilians. The way to avoid such complicity is to conduct due diligence research whenever providing assistance or services to an entity engaged in an armed conflict. Some suggest it may be useful to explore whether criminal cases can be pursued in other jurisdictions than the US.

² The case concerned Unocal's conduct in Myanmar (Burma)

10. Secondly, civil complicity may exist where a company assists a government to violate human rights in ways which do not amount to international crimes, but rather they are international torts or delicts, for example complicity in denial of freedom of association, or expression. The tests for complicity would be less stringent: the company will not need to have had the same intention as the wrong doer, knowledge of the abuse and the contribution of the company will suffice; the company need not make a significant contribution to the commission of the abuse, it could be enough that there was actual facilitation of the act; and the company's obligations are not defined by criminal law but rather by the customary law of human rights, including the principles contained in the UDHR. Again, to avoid complicity the company has a legal duty to ensure that no assistance at all is given in the commission of a violation of the UDHR; it should conduct investigations before it acts. Some see the distinction between criminal and civil jurisdictions as messy and argue that only criminal cases can be used as precedents; many agree it is much more difficult to hold companies to account in bringing civil suits.

11. The third category comprises a grey area between legal liability under international law and the poorly defined 'court of public opinion', *in extremis* holding a company responsible for its presence alone in a badly governed country. Some argue, however, that there is a case for 'beneficial' or 'silent' complicity, where shareholders, consumers or others feel that companies have a moral, rather than a legal duty: there is an expectation that corporations will not knowingly benefit from human rights abuses nor will they remain silent in the face of such abuses where they can act within their 'sphere of influence'. There is no answer as to how to establish accountability, and some question whether it is necessary to concentrate on this. Business and civil society generally agree that the best means of avoiding accusations of this type of complicity is for regular communication between the two. Reacting to problems as they arise can defuse most charges of complicity: the company needs to reflect on the most feasible and effective response when faced with human rights abuses, not remain silent. Some assert that quiet diplomacy, as opposed to forthright advocacy, serves well this purpose.

12. Some argue there should be greater recognition of the context in which companies operate: demands for accountability from a wide range of stakeholders, while in law a company's responsibility is still primarily to its shareholders; expecting high standards can drive away investors; how can companies play a role in

managing indirect impacts, such as when mining in a particular area that will prompt significant inward migration; the flux in the traditional boundaries of corporate social responsibility; the difficulty of driving change in big multinationals, and embedding human rights principles at management and operational levels, for which there is a need to change mindsets; the difficult relationships involved in joint ventures; and the complex reality on the ground which internationally-agreed guidelines do not always fit. Is it responsible action for a multinational to withdraw its operations when it will likely be replaced by a Chinese, Russian or other company upholding lesser standards? How can companies in all parts of the world be persuaded of the domestic and international advantages of engaging in responsible business conduct?

Are voluntary initiatives sufficient?

13. Business and human rights issues most often come into conflict when multinational companies operate in countries that lack an acceptable framework for the protection of human rights, or where there is little willingness or capacity to enforce those human rights laws that exist. Particularly in these situations, is it enough for a company to have human rights principles written into voluntary codes of conduct, and to commit itself to international guidelines, without any monitoring mechanism to ensure compliance? Should certain standards of business behaviour not be mandatory?

14. Some suggest the dichotomy between voluntary and mandatory standards may be a false one; instead, they suggest a pragmatic approach governed by 'what works'. Voluntary initiatives should supplement the mandatory requirements of national law, which in turn is reflected in and reinforced by international norms. It is suggested this case can be argued by reference to the model of the Voluntary Principles on Security and Human Rights. Focused on the extractive industries, the Voluntary Principles are seen by many as the most significant example of a process of an ongoing multi-stakeholder dialogue among companies and non-governmental organizations (NGOs), convened by home governments – initially the USA and UK, subsequently joined by The Netherlands and Norway. They remain the only concrete standard developed with companies in any sector to address the roles and responsibilities of businesses in zones of conflict. The Voluntary Principles have a narrow remit, in seeking to ensure that human rights are fully protected in companies' security arrangements for their personnel and property. The deliberate narrowness of their scope, it is argued, allowed a greater potential for identifying common

interests and then forging a consensus around them among the governments, companies and NGOs that together produced them. They are framed around three sets of issues: the criteria companies should consider as they assess the risk of complicity in human rights abuses in connection with their security arrangements, including their relationships with local communities and diverse other stakeholders; company relations with state security forces, both military and police; and their relations with private security forces.

15. Some voice strong support for the Voluntary Principles, seeing their impact as transformational. Others feel the record is more mixed. Firstly, the number of convening governments remains unnecessarily limited without the participation of northern governments such as Canada, Australia, France, Spain and Italy, and at least as importantly governments of the south such as South Africa, Brazil, Argentina, Mexico and Malaysia, all home country governments of extractive sector companies operating in zones of conflict outside their home countries. Without greater inclusion, the Voluntary Principles will lack credibility.

16. Secondly, the current convening governments have more often than not managed rather than led the process. Consistent leadership by governments is needed to give the process the ability to facilitate the sharing of best practices, to address governance issues such as criteria for admission of additional companies and governments, and especially to engage the range of host country governments. Some believe governments must create greater political momentum for the initiative, as those companies that have been in the vanguard cannot otherwise do more.

17. Thirdly, the implementation of the Voluntary Principles by the participating companies has been uneven, reflecting varying degrees of commitment and focus. Companies that are serious about implementation need to: create or revise operating guidelines, procedures and training for their facilities and/or personnel in relevant countries to reflect the substantive provisions of the Voluntary Principles; add or strengthen clauses in security contracts with public and private security forces, detailing expectations on key issues such as the deployment of forces, the use of force itself, and the use or transfer of company equipment; draw on the risk assessment and accountability provisions of the Voluntary Principles as companies manage their community relations and develop community-based security programmes.

18. Creative corporate use of the Voluntary Principles has led to a fusion of voluntary and mandatory standards. One company, at least, BP, has locked the principles into contracts, giving them legal contractual status. Host Government Agreements (HGAs), *inter alia*, are thus a promising vehicle through which the Voluntary Principles can be implemented in new extractive projects through a binding framework.

19. Some believe the central challenge to the Voluntary Principles is to bridge the gap between a standard linked to a continuing multi-stakeholder dialogue increasingly focused on implementation issues, though with weak reporting and monitoring mechanisms and a set binding obligations with the force of law, but without regular dialogue and interaction among companies and stakeholders. The Voluntary Principles could do this in two ways: by ensuring the credibility of the process; and by promoting the universality of the standard, without going beyond what can reasonably be achieved without a fundamental change in structure and governance. To ensure credibility, there must be a greater emphasis on participating companies reporting on their implementation efforts. Companies that do not comply should be 'outed'. Greater engagement with civil society in local consultation processes in countries of the South is needed, as well as some representation for them in the global process. Making the process more inclusive by bringing in several additional home country governments from both North and South, and engaging more directly the governments of the key host countries, would promote the standard. At the same time, some express concern that widening the process by making it more inclusive may tend to slow it down, or dilute standards. Others point to the need to continue the strong partnership with the extractive industry created with the initial elaboration of the Voluntary Principles; success will depend on deepening this relationship and understanding how business assesses risk.

20. Some discern encouraging signs that the Voluntary Principles are already gaining greater recognition from the World Bank, while the OECD is considering the Voluntary Principles in its current work on zones of conflict. Others point to the urgent global need to elaborate principles for the conduct of private security forces. Further concerted promotion could lead to the Voluntary Principles becoming touchstones for multilateral frameworks, as well as for socially responsible investment funds and private sector financial institutions as they evaluate risk and

responsibility in their investment decisions. They may also prompt other industry sectors, for example those operating in heavy infrastructure, food and agriculture, into spin-off initiatives. Some suggest that governments need to drive this process. While it was not feasible in the original construct of the Voluntary Principles for these to be other than non-binding, adaptation to other sectors on a mandatory basis could now be considered.

The role of governments

21. All agree that states continue to bear the primary responsibility for protecting the human rights of people under their jurisdiction. Yet in the dynamics of an increasingly globalised world some believe there has been a blurring of the roles of government, business and civil society. In this, governments have the role of enabler or facilitator in the inter-face between business and civil society. A number of initiatives in recent years can be cited to demonstrate this role, including the Voluntary Principles on Security and Human Rights, the Extractive Industries Transparency Initiative, the Kimberley Certification Process, revised OECD Guidelines for Multinational Enterprises, the OECD Bribery Convention, the UN Convention against Corruption, the UN Global Compact and many other sectoral initiatives. The French authorities have proposed an international convention on corporate social responsibility, although some question whether the time is ripe for negotiating such an instrument. Yet the very number of such initiatives leads to criticism: some believe what is currently needed is a cohesive approach to standard setting. Moreover, while, for example, efforts to build capacity at national level to combat corruption are welcome, such measures will likely take considerable time to become effective; what is needed is for governments to demonstrate leadership by taking initiatives which will have much quicker impact.

22. In the UK, incorporation of the European Convention on Human Rights (ECHR) into domestic legislation is deemed to have had significant impact in mainstreaming human rights into government policy and practice. The Human Rights Act 1998, which makes it unlawful for public authorities to act in breach of the rights set out in the ECHR, covers corporations fulfilling a public function, and judges are currently developing the case law on what constitutes a function of a public nature. Ongoing UK company law reform may also provide opportunities to strengthen international human rights obligations on companies.

23. As local representations of government, embassies can have an important role to play in raising with host governments human rights violations. They can also raise concerns with local subsidiaries of national companies operating without due regard for human rights but are often unwilling to do so. Training needs to be given to diplomatic personnel on international human rights standards, as well as their government's obligations to combat corruption and bribery. Embassies are also well-placed to identify projects which business or government could support to promote corporate social responsibility overseas.

24. Governments have an important potential role in relation to Host Government Agreements by offering clear guidance to companies on how to formulate these in a way that is consistent with international human rights law and promotes greater transparency. Similarly, governments can use their influence with international financial institutions (IFIs), which have traditionally been weak in their approach to human rights concerns, to give greater priority to human rights protection, ensuring greater safeguards are integrated into negotiation, planning and execution of projects, especially in countries with weak systems of domestic regulation. The International Financial Corporation is willing to consult at an operational level and is asking for performance standards. Efforts should be made to encourage the World Bank to work towards a new legal opinion, even if the time is not right at present to obtain this. All IFIs could be encouraged to publish more information on their perspectives in relation to human rights protection.

How to move the agenda forward?

25. With a common position on the primacy of governments as duty-bearers for ensuring respect for human rights, the role of business needs to be put into its proper context: companies should play their part in promoting and protecting human rights globally. Many agree there is a need for greater clarity at the international level, as well as locally and nationally, about the precise nature and extent of these business responsibilities. Experience has been gained following the negative reaction from the corporate sector to the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (the Norms), adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2003. BLIHR has played a vital role in defusing the polarised debate between business groups and civil society through its road testing of the Norms, which the companies involved believe have been helpful as a benchmark to develop

their own policies and practices. Some suggest the standards the Norms contain have now become more generally acceptable. Future work in standard setting, many believe, should be based on these standards, building consensus through taking account of the views of communities affected by companies' activities and case studies from different sectors. There are still strong calls for standards to be binding, although recognition also that this may be a longterm achievement. Yet mandatory standards would benefit companies that take their responsibilities seriously and establish the means to hold others to account.

26. BLIHR's has created a valuable forum where companies interested in pursuing a human rights agenda can meet together and share experiences. Several suggest BLIHR could usefully expand into regions beyond Europe and North America. Some suggest it is only by major multinationals, in particular US corporates, showing leadership that it will be possible to engage companies in countries such as China.

27. The UN Global Compact also has its role to play, particularly in reaching out to companies unfamiliar with corporate social responsibility. The Global Compact will shortly be formally launched in China, and has already received significant support from companies in developing countries. For most companies in the developing world, it is the first corporate initiative in which they have been engaged; it represents an important learning network. The Global Compact aims to have its principles integrated into the work of the International Organization for Standardisation (ISO). Some voice concern that the bar set by the Global Compact is too low and it should be more rigorous in ensuring reporting requirements are met. In response, it is argued that work is in progress to improve compliance with reporting requirements by assisting companies to report adequately through national network support.

28. Through the Commission on Human Rights, governments have recognized the need for more intensive work on the issue of business and human rights. The establishment of the SRSG post is highly significant. There are many expectations, while at the same time, some believe, the SRSG's mandate is relatively weak and constrained; the SRSG will require political and material support. It represents a new approach, requiring the involvement of new actors, more sustained and substantive multi-stakeholder dialogue, and greater willingness to think again how

human rights can be more effectively protected in the contemporary world. Many welcome the SRSG's intent to give priority to the role of business in protecting human rights in zones of conflict, one of the most visible areas where governments are also not living up to their human rights responsibilities.

29. Some express confidence that business can and will do the right thing if the incentives are right. Twenty years ago, few companies had environmental policies, whereas the environment is now a mainstream business issue. Having a strong human rights policy and a sound implementation strategy is about risk management and reputation assurance, which the business community cannot afford to ignore.

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