



**CORPORATE CITIZENSHIP AND NEW GOVERNANCE –
THE POLITICAL ROLE OF CORPORATIVE ACTORS IN SOCIETAL RULE-SETTING
PROCESSES**

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(40 minutes and then discussion)

Thank you very much to the Forum for Business Ethics and Business Culture for this opportunity to be in beautiful Wittenberg. The focus of these two days is the political role of corporate actors in societal rule-setting processes and I think it is right to say that business and human rights has grown to be a significant player within this context. My presentation will be in three parts:

- First, to set the context of where we are now in terms of the range of policy and practice dilemmas that characterize the business and human rights agenda;
- Second, a quick analysis of the rule-making response by governments that is emerging and also some of the good and bad practice responses of business itself and
- Finally, to look forward to the years to come and what I see as some of the emerging trends in the area.

My Institute would perhaps be out of a job if states were able to perform their central duty to respect, protect and fulfill human rights as set out in the international law that has developed over the past 60 years, and some of it even earlier than that.

There are clearly some major deficits in the international institutional order. Rapid economic globalization, regional conflicts, poverty and the effects of climate change and the rapid uptake of new technologies have all changed the normal mechanisms of rule-making and the ability of enforcement to keep up. Global challenges have shown the limits in the capacity or in the very concept of the nation state to find global solutions.

The linkage of business activity to human rights is not a new phenomenon, but one that has come more into focus over recent years.

During the 1990s, the focus was mainly on two significant but relatively isolated parts of the business and human rights puzzle. The first was the globalization of supply chains and a growing awareness of the exploitation that existed 'out of sight and out of mind', just two or three steps down the value chain from the consumers – allegations of child labour and sweat shops in the production of sports clothing and football, such as those produced by Adidas or Puma. The other area of interest was the role of oil companies in countries such as Nigeria, Indonesia, Colombia or Myanmar. In the early 1990s, Ken Saro Wiwa became one of the first international 'business and human rights' activists until he was executed by the military government in Port Harcourt on 10 November 1995.

Now nearly 15 years later, the agenda has become more strategic. Business and human rights is not a specific problem or series of problems, but is rather a *spectrum* of often interlinked dilemmas.

The Institute for Human Rights and Business, for which I work, was established as an impartial global centre on policy and the evaluation of practice on business and human rights. We observe a wide range of current policy and practice dilemmas that are facing us all.

Here are 10 examples that characterize the business and human rights agenda as we approach 2010:

1. **The supply chain challenge.** The private auditing of labour rights in supply chains is important but is not, on its own, a sustainable solution to the systemic challenges facing the societies where international businesses are increasingly exposed. We need better labour inspections by states, less of the audit fatigue caused by multiple compliance codes and also ways of reaching much deeper into supply chains by developing greater capacity amongst small and medium-sized companies.

2. **The resource curse challenge.** Countries in South America, Africa and Asia are still cursed by their natural resources: oil, coal, minerals and other natural resources should be a blessing – but their correlation with corruption, conflict and the abuse of human rights is still far too high. Efforts such as the ‘Voluntary Principles on Human Rights and Security’, the ‘Extractive Industries Transparency Initiative’ and the ‘Montreux Principles on Private Military Companies’ are important but are, by their own admission, only small parts of the picture. Have the mistakes of oil and gas production in Nigeria, Columbia, Indonesia or

Myanmar truly been learned from by those companies now also in Libya, Venezuela and Angola? How do we more fully engage good practice with the Russian, Indian and Chinese extractive companies in a way that is respectful to their interests and not seen just as western protectionism?

3. **The engagement challenge.** We do not seem to be any closer to understanding the criteria needed for decisions around divestment: what represents legitimate positive engagement and what represents complicity in human rights abuses? Is Sudan a better place because there are no American or Canadian oil companies there? Why do we have different principles each time there is pressure on business to withdraw – be it from Apartheid South Africa, Northern Ireland or Myanmar?

4. **The extra-territorial accountability challenge.** The current mechanisms to hold businesses accountable beyond national jurisdictions are at present relatively weak. The OECD Guidelines on Multinational Enterprises are currently being reviewed, but the way that National Contact Points work varies greatly between states - and business does not always listen to the opinions expressed. It seems that civil law cases, in particular the Aliens Tort Claims Act (ATCA) cases in the USA, continue to be the tail that wags the dog. Is there room for an international or at least a European Ombudsperson to hear complaints and with greater legal powers?

5. **The impact challenge.** Increasingly civil society is calling for greater disclosure of the entirety of a business' impacts on human rights. One example is taxation. If a company is supportive of human rights, but at the same time has policies for minimizing (or sometimes evading) the payment of tax to national governments, then this might be detrimental to the states' ability to fulfill human rights, in

particular rights such as health, education, housing and work. What then are the human rights implications of tax policy?

6. The legal conflict challenge. European businesses operating in other countries around the world sometimes find themselves in direct contradiction between national law (or practice) and international law and expectations. There are many examples of this, such as privacy law in China in relation to information technology, labour rights in the USA or women's rights in parts of the Middle East. Of course, companies from elsewhere in the world operating in Europe might find also that our local laws fall a little short of international norms on issues such as freedom of expression or the rights of migrant workers. What then should a business do when it has to follow national laws but also navigate international norms - and when will we have a more level playing field for *all* businesses regardless of where they are operating?

7. The advocacy challenge. Related to point six, is the expectation on companies to 'speak out' or 'advocate' on human rights issues. This is a very hard one. Business leaders do make confidential interventions with host governments, which sometimes relate to the human rights of workers or other stakeholders. However, it is often inappropriate for a business to discuss publicly that it does this. Is there ever a concept of 'silent complicity' and if so how is this monitored?

8. The corruption challenge. Great progress has been made in some areas of corporate governance and anti-corruption legislation and practice, although it remains a big problem in many countries. How can human rights help here? How do we integrate human rights into business ethics, looking at integrity measures and not just compliance?

9. **The code fatigue challenge.** We have yet to develop a common way of measuring all of our human rights impacts. There is a lot of activity here across many supply chain codes, such as the Global Reporting Initiative and ISO 26000, but there is not yet full convergence around a common series of benchmarks that cover the *full* range of human rights. The Business Leaders Initiative on Human Rights was one attempt to do this.

10. **The methodology challenge.** Finally, we have the problem of competing methodologies. There is much talk now about Human Rights Impact Assessments but we have still to develop quality control around what methods of assessment are truly aligned with human rights and which are not.

So to move on to the second part of my presentation. What is the rule-making response to these and other dilemmas?

I wish to look at the response of states and then at the response of business itself across the ten examples set out above.

I think for many years in the 1990s, most governments had a generally laissez-faire approach to business and human rights. Generally, the 1990s was a good decade for human rights – with the Vienna Conference in 1993 – bridging Cold-War definitions of human rights and getting back to the vision of the 1948 Universal Declaration. There were a number of new human rights conventions that were agreed in this period. The big issue was the sovereignty of nations and when it was justified for the international community to intervene, be it in Somalia, Bosnia, Rwanda or Kosovo.

So the human rights focus was very much on the State rather than on non-state actors such as business. Business responses were therefore seen very much as voluntary and not an issue of international law. This is reflected, for example, in the position taken by the European Union under Jacques Delors – a definition of ‘Corporate Social Responsibility’ (or CSR) that is by definition ‘voluntary’. Business was then protected from even the *threat* of regulation in this space. It was up to Nike, Reebok or Adidas, or Shell, BP or Total to find their own way with their customers, investors, employees and communities in which they worked. It is in this decade that the term “stakeholder” came into being. The decade ended with Kofi Annan’s speech in Davos, the riots in Seattle against ‘globalisation’ and the establishing of the United Nations Global Compact at the end of 1999.

Whilst thoroughly voluntary in nature, the United Nations Global Compact marked out some of the themes for the decade to come. Unlike many other areas of voluntary CSR, the nine and ten principles of the Global Compact did have a normative backbone – they echoed international law on human rights, workplace rights, environment protection and anti-corruption. The compact brought to the table the major human rights Non-Governmental organisations and Trade Union leaders, although not explicitly the Governments themselves.

2003 saw an attempt by a group of experts, nominated by Governments under what was then the United Nations Rights Commission, to create a set of ‘norms’ on business and human rights – the ‘so-called’ UN Norms. The response from the global business community was immediate and almost universally negative. The major criticism was that it seemed to place on business the same legal responsibilities that rested with Governments.

Whilst this criticism might not be strictly fair as much of the substance of the UN Norms was in fact correct and inevitable, it is true that the recommendations for application and enforcement were idealistic and not based on any real evidence of how business could truly face international legal accountability for the violation of human rights.

Whilst the UN Norms were very divisive, they did have two lasting effects:

- They placed the need to clarify the respective legal and non-legal responsibilities of states and businesses into the international debate on business and human rights
- They began to bring governments back into the discussion - and they have increasingly followed and, in some areas, led the agenda ever since.

In 2005, Kofi Annan appointed a Special Representative on Business and Human Rights, Professor John Ruggie – a well-known Political Scientist from Harvard University and also a former Assistant Secretary-General to Kofi Annan, who had had a strong hand in both the creation of the UN Global Compact and the UN Millennium Development Goals. Whilst the immediate response of some human rights organisations was one of suspicion – after all, this man was not even a lawyer - he has in fact played a very astute and fundamental rule-setting game, which has defined business and human rights for decades to come.

Although John Ruggie has not found the answers to many of policy and practice dilemmas I have outlined, he has asked the right questions and created a common policy framework upon which all actors now agree.

In his 2008 report to the United Nations Human Rights Council (what had been the Human Rights Commission), Professor Ruggie sets out a human rights and business framework based on three pillars:

- The state duty to protect human rights in relation to the activities of business;
- The responsibility of business to respect human rights;
- The need for effective remedies and access to justice for the victims of corporate-related human rights abuse.

This framework is a lecture in itself and I am very happy to go into some greater depth during discussion. However there are some very key fundamental points:

- Professor Ruggie is talking about *all* human rights – any time, any place, anywhere – so he is talking about any size of business, any business sector and in any geography. This directly links to the Universality and Indivisibility of Human Rights, proclaimed by States at the 1993 Vienna Conference, which is fundamental and places a challenge to all those aspects of CSR that are ‘culturally relative’ in their normative content.
- There is a duty on states to align their trade, investment, foreign affairs, corporate law, taxation and other policies with their own human rights commitments. He means technical areas such as bilateral investment and trade treaties, export credit guarantees, corporate reporting and international development assistance. It has been true that ‘mainstream’ governmental policies have often acted in complete isolation from international human rights law, and sometimes have directly undermined not just the commitments but the rights of victims themselves.
- The second pillar, the corporate responsibility to respect human rights, is fundamental (note it is a ‘responsibility’ and not a ‘duty’). However, John Ruggie goes to great pains to stress he is not just talking about voluntarism

here – nor is it a responsibility that only applies in relation to the state and its role. If businesses got to Mars before any state authority did, then the corporate responsibility to respect human rights would still apply directly to companies. This is important given the not insignificant number of states in the world that are unwilling or unable to fulfill their human rights duties.

- The third pillar brings into the fold the issue of legal and non-legal mechanisms to hold business accountable. This includes best practice in internal grievance mechanisms – whistle-blower protections and so on. But it also includes the very vexed question as to when a business should be held criminally (or civilly) responsible for their actions by their own government, the government of another country in which they are operating or any ‘third government’ affected by their actions. It brings into focus a question which has arisen since the Nuremburg trials, from South Africa to Rwanda to Bosnia and now in the International Criminal Court – when can businesses or business leaders be legally complicit in the human rights abuses of others?

There is much meat on each of these bones which we might discuss shortly in our discussion – but a few over-arching comments here:

We are now in the realm of *realpolitik*. All 50 – 60 states on the United Nations Human Rights Council have endorsed this framework – including the USA and Russia. Two weeks ago at a conference in Sweden under their Presidency of the European Union, the Spanish and Swedish Governments have called upon the other 25 member states to directly endorse the framework next month. So this is a framework recognized by governments.

In addition, the business response has been the polar opposite to that to the 'Draft Norms' in 2003. This United Nations Framework is seen by the International Chamber of Commerce, the International Organization of Employers, the German Confederation of Business and many major companies as an essential part of establishing a level playing field in future. It creates greater business certainty moving forward and also allows for better management of non-financial and reputational risks. This is increasingly driven by the role of business in the key emerging markets, and in particular the 'BRIC' countries (Brazil, Russia, India and China).

This high level of consensus between governments and business cannot last and perhaps nor should it. Two weeks ago in Stockholm, Professor John Ruggie clarified that he was looking for a 'smart mix between regulation and voluntary approaches'. Business associations will be sceptical at first to a regulatory approach, but as with climate change or biodiversity, the argument for 'smart regulation' can be won if the evidence base is strong.

There are perhaps two elephants in the room.....

The first is the issue of extra-territorial jurisdiction of states. At the moment, all we have in a human rights sense are the OECD Guidelines on Multinational Enterprises and the National Contact Points housed by the member governments. This is a mechanism that is clearly becoming more effective amongst some OECD (and some non-OECD) states. But it is a non-legal mechanism. Do we need a legal mechanism too – such as exists under the OECD Anti-Bribery Convention?

The second 'elephant' is the approach set out under the 'corporate responsibility to respect' as essentially one of due diligence that might provide partially legal and non-legal 'safe-harbors' for companies that really do try to do the right thing but sometimes fail. However is a 'due diligence' approach enough in contexts where states are clearly having to meet one of four challenges:

- Acute poverty;
- The devastation of over-whelming climatic events;
- Rampant corruption
- Or armed conflict?

In these situations, do companies have extra responsibilities? This is clearly not just a legal question but also a moral one. The demands placed on a pharmaceutical company, for example, with regards to its pricing policy in relation to access to medicines are at the moment debated within a moral framework that uses human rights concepts (such as the right to health) and not one bedded in international human rights law (although this might be contested). However, it is certainly true that it is an issue of national law in countries such as Brazil or South Africa – and human rights will continue to bring together the legal and non-legal when we are talk about the right to health of those dying due to disease, malnutrition or poor water.

What then is a responsible corridor of behavior along which any responsible business should tread?

All of these questions are big questions which will keep us all in business for years and decades to come.

Having worked in business, I know that is too distant a deadline. So let me briefly go back to the 10 challenges I set out earlier in my presentation and try to give

some examples of which I (subjectively and personally) might think are some examples of good and bad practice that are emerging directly from business in the meantime. I believe that all these examples are also a type of 'rule setting' by industry itself and there will, I hope, be a symbiosis as Governments start to consider their rule also.

1. The supply chain challenge.

Worst practice: There is still plenty of this around, of which completely ignoring the supply chain completely is the worst case. However, almost as bad are those promoting simplistic or knee-jerk solutions – 'child labour free supply chain' or protectionism. There is no such thing as a 'clean supply chain'.

Best practice: Better Work programmes – 3rd generation approach to supply chain – involving host governments, labour inspectors as well as private auditing firms and suppliers. The Gap response to child labour accusations in 2008, built on transparency and relationships, is a good example of best practice.

2. The resource curse challenge.

Worst practice: Congo is a worst case example – but is the response to boycott all gold and other resources coming from the country? Is it the responsibility of Hewlett Packard, for example, to monitor the metal components used in circuitry ten steps down the supply chain?

Best practice: There has been some progress on transparency issues (EITI) and Security Issues (such as the Voluntary Principles on Security and Human Rights) or the self-regulation of Private-Military Companies. Now the VPs have been extended now to Colombia. How do we get the Chinese, Russian and Indian companies into the game?

3. The engagement challenge.

Worst case: To maintain the status quo and reinventing the wheel on 'positive engagement' and question of divestment each time. Apartheid South Africa, Northern Ireland, Myanmar, Sudan – so many of the issues in these countries are culturally and politically driven.

Best case: Need a common set of principles. One example is the Sudan Divestment Task Force in the USA; another would be the response of companies such as ABB or Ericsson.

4. The extra-territorial accountability challenge.

Worst case: The Trafigura case and allegations surrounding the dumping of toxic waste in Cote d'Ivoire.

Best case: OECD guidelines are really the only show in town, but businesses can and should cooperate here. Best practice is the Dutch model. Need extra-territorial jurisdiction – possible for international crimes, much harder to see for broader human rights issues. We need a vision of what is possible.

5. The impact challenge.

Worst case: The status quo – there is very little disclosure of company human rights impacts.

Best case: The Oxfam/Unilever work in Indonesia set a benchmark on understanding micro-economic and social impacts. There are now a range of similar NGO-Business partnerships in place, which a higher profile for human rights.

6. The legal conflict challenge.

Worst case: The way the European Chamber of Commerce in Shanghai was said to be lobbying against reforms to Chinese labour law in 2008, even though this brought China closer to International standards.

Best conflict: Leveling up to the higher standard, such as The 'Green Dam' dilemma in China.

7. The advocacy challenge.

Worst case: We still don't know who said what and when in relation to the case of Ken Saro-Wiwa in Nigeria. Much human rights advocacy by companies is not shared, even over time, sometimes for good reasons and sometimes not.

Best case: There are a lot of 'stories' but there is very little actually in the public domain.

8. The corruption challenge.

Worst case: Box-ticking approaches to co-governance and business ethics. 'Enron' had one of the best codes of conduct in this area.

Best case: Moving from compliance to integrity measures. The role of rights-based approaches, such as understanding the US Sentencing Guidelines and the 'legal inventives' for ethical conduct.

9. The code fatigue challenge.

Worst case: The competing requests from international brands on suppliers – in some cases such as Jordan there are over 100!

Best case: The attempts to consolidate codes. Global Reporting Initiative or ISO 26,000 are difficult but essential processes. The Global Social Compliance Programme is a good example of a common standard for supermarkets and retailers across Europe and North America.

10. **The methodology challenge.**

Worst case: The let '1000 flowers bloom' approach of the past two years – with only one human rights impact assessment in the public domain

Best case: 15 companies who are willing to share their methodologies on human rights assessment over the next few months in advance of the UN Global Compact Leaders Summit in New York in June 2010.

Finally, to end on some of the challenges for the future.

During the creation of the Institute for Human Rights we spoke to 800 experts around the world, in business, government, civil society and academia. There was a very strong message from the global south to look more squarely at the systemic issues that challenge their societies and economies fundamentally.

Based on pilot work during 2009, we have prioritized these issues for our research and convenings in 2010 – with the hope of playing our own role in hard and soft 'rule setting'.

Water Management

A key issue – the legitimate role of the private sector in the delivery and management of clean drinking water and the management of sewerage and very contentious following the experiences of Bechtel and others in Bolivia ten years ago. For business, it is about market access in developing countries. Some water management companies are already asserting the 'right to water' and their role in 'fulfilling' the right. Where here is the right boundary between state and business in respect, protection and fulfillment of this right?

Land Acquisition

A second clear area of huge importance globally. Business acquires a lot of land – sometimes it needs to do so against the will of people who are already living there. The issue of ‘free prior informed consent’ or ‘consultation’ is central to indigenous peoples but also other communities worldwide. In countries such as India or South Africa it remains THE political issue, not to mention the Middle East. The use of ‘Eminent Domain’ by the state needs clarification in human rights terms – in particular when forced evictions are requested by business or business directly benefit from such developments. Again, ‘Eminent Domain’ is a legitimate legal construct for states provided it is indeed in the wider public (and not just business) interest.

We are also looking at both Water and Land Use – both within the context of Agriculture – where the two conflate closely - but also for other sectors such as the Oil Industry and IT sector that have huge water footprints. What are the social justice or human rights elements of these? We are looking first at South Africa, Kenya and also the so-called ‘cancer alley’ in Louisiana.

Finally, migration is also an enormous issue but we have found two clear points of intervention in the ‘soft power zone’ between states and business. One is the role of the hotel and catering sector in the run up to the 2012 London Olympics (taking the Gangmaster Licensing Authority as a model of best practice) – the other being safeguards for the rights of migrants in Export Processing Zones where we will firstly look at Indonesia and Vietnam.

Thank you for this opportunity. I hope the considerate amount of time granted to me here have helped give something of a picture about how societal rule-setting process is developing in business and human rights.