

Wilton Park Conference on Business & Human Rights
Opening Remarks
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October 10-12, 2005

For my purposes, this conference could not have come at a better time. When Isobelle Jacques first invited me she suggested that I speak on the subject of “Business and Human Rights: Where do we go from here?” I replied, I’m not sure, but that’s exactly what I want to find out by coming to Wilton Park. So I thank the organizers and fellow participants for helping to enlighten me as I embark on an extraordinarily challenging mission. I very much welcome your engagement in helping to meet it.

You may be familiar with the general terms of my mandate: briefly, to identify and clarify standards of corporate responsibility and accountability with regard to human rights, elaborating on the respective roles of states and corporations, exploring the concepts of corporate complicity and sphere of influence, examining tools for impact assessment, and identifying best practices. All of this with no budget to speak of, and a Harvard day job.

At this point, I don’t have a precise roadmap or even a fixed destination for the mandate. But in order to get the conversation started, I thought it might be useful to share with you some of the broad framing of these issues that, inevitably, I will bring along on this journey from my other lives as academic and former UN practitioner, and then to say a few words about some initial steps already under way.

I’m not trained as a human rights lawyer, or a lawyer of any kind. For better or worse, I am a political scientist who has spent much of his career trying to understand, and on a modest scale at the UN to deal with, the impact of globalization on multilateral rule making and institutions.

The immediate post-World War II era still comprised the classic *international* world. The world economy was made up of separate and distinct *national* markets, engaged in *external* transactions, conducted at *arms length*, which governments could buffer effectively at the *border* by point-of-entry measures like tariffs, non-tariff barriers and exchange rates.

In the area of peace and security, when the UN was created the most common threat was expected to come from acts of *external* aggression, which might require collective *external* power balancing to stop or prevent.

Article 2.7 of the UN Charter prohibited intervention in the *internal* affairs of states. And even when the human rights regime was constructed, which seemingly clashed with this principle, it was designed by states for states. States were responsible for implementing international human rights law by enforcing treaty-based obligations or customary standards within their jurisdictions – and only states were capable of violating it.

Those were all attributes of an international world. But today, we also live in a global world. The territorial state hasn't gone anywhere, and it will remain with us for as far into the future as anyone can see. But globalization has generated layers of transactions and institutional practices that envelop and cut across the system of states.

Reflect for a moment on the most visible manifestation of globalization: some 70,000 transnational firms operate in the world today, together with roughly 700,000 subsidiaries and millions of suppliers connected through distributed networks across the globe.

There are no longer solely arms-length transactions. For example, intra-firm trade accounts for some 40 percent of total US trade, and that does not include the related party transactions of branded marketers like Nike or of retailers like Wal-Mart. In this respect then, what was once external trade between separate national economies increasingly has become *internalized* as global supply chain management within integrated corporate networks, directly shaping the daily life chances of people around the world.

The rights of transnational firms – their ability to operate and expand globally – have been greatly enhanced over the past generation, as a result of trade agreements, bilateral investment pacts, and domestic liberalization. In the 1990s, intellectual property rights were successfully reframed as a trade issue and consequently became more firmly rooted than ever before, while in some sectors, such as telecommunications, companies participate directly in international standards setting.

A large fraction of disputes related to foreign investments nowadays is settled by private arbitration, not national courts. And so corporate law firms and accounting firms add yet additional layers to transnational rule making.

These comments are meant to be descriptive, not judgmental. I happen to be one of those who believes that globalization has produced numerous positive effects in terms of higher standards of living in the industrialized countries as well as economic growth and poverty reduction in parts of the developing world – most notably in Asia, though the results are more mixed elsewhere. But that isn't my point here.

I merely wish to observe that, in light of this transformation in the institutional features of the world economy, it is hardly surprising that the transnational corporate sector – and by extension the entire universe of businesses – has attracted increased attention. Elephants standing in the center of rooms, even when friendly, tend to have that effect.

There are at least three distinct factors at work here – three variants of the elephant analogy, if you will. The first is simply the latest expression of one of the oldest axioms of political life: the successful accumulation of power by one type of social actor will induce efforts by others with different interests or aims to organize countervailing power. When large firms in the industrialized countries first became major players on the national scene in the late nineteenth century, countervailing efforts came from labor and faith-based communities, among others, and ultimately the state. At the global level today, a broad array of civil society actors has been in the lead.

The second reason is that some companies have made themselves and even their entire sectors targets by doing bad things on a big scale, as a result of mistakes, shortsightedness or malfeasance. This, in turn, has generated increased demands for greater corporate accountability.

Yet a third rationale for engaging the transnational corporate sector has emerged in the past few years: the sheer fact that it *has* global reach and capacity, and that it is capable of making and implementing decisions at a pace that neither governments nor international agencies can match. Other social actors increasingly are looking for ways to leverage this platform in order to build broader social capacity to cope with pressing societal problems – be it to provide access to medicines in poor countries, mitigate climate change, or curb human rights abuses.

Corporate leaders understand these dynamics, which explains the willingness of many among them to participate in corporate social responsibility initiatives and capacity building partnerships – even as they resist stricter regulatory approaches and seek to establish clearer boundaries around their sphere of commitments.

Everything I have said about corporate globalization and some of the responses it has triggered also holds specifically for business and human rights, the subject of this conference. Human rights in many respects are unique – and uniquely precious – among value systems. But the escalating expectations we are witnessing today regarding corporate responsibility, accountability and engagement in the domain of human rights reflect a far broader pattern of social discourse, contestation and action intended to enable societies to manage the forces of globalization.

My SRSG mandate is but one small instrument intended to advance a big goal – and on a relatively short timeline: my first interim report is due in mind-January, so I’ve had to get off to a quick start. Thus far I have held preliminary consultations with human rights groups in New York and Geneva, and will again later this week in London; with international business associations and firms in Geneva, as well as the BLIHR group in New York; and with UN delegations in Geneva. In addition,

- I plan to conduct a survey of business policies and practices with regard to human rights, in collaboration with IBLF, BSR, IOE and ICC. My aim is to learn how firms themselves conceive of human rights, what if any specific standards they reference, whether they conduct impact assessments and, if so, how. This information will provide important input for any subsequent effort to identify good practices as well as gaps.
- In a similarly empirical vein, I have asked legal teams in the US and UK on a pro bono basis to assess how American and European courts understand the concepts of complicity and sphere of influence.
- I am eager to expand the debate on these issues well beyond Geneva and other Northern venues into key developing country regions, and have approached several governments for funding.

- Equally, I hope to be permitted to visit overseas operations of firms in key sectors, not to report on them but to educate myself.
- Harvard Law School has constituted a faculty group to advise me on the critical legal dimensions of the mandate, and is providing me with a research assistant. The Corporate Social Responsibility Initiative at the Kennedy School, led by Jane Nelson, is also lending its support.
- The Office of the High Commissioner has assigned two outstanding human rights officers, Simon Walker and Lene Wendland, to work on the mandate, and the Government of Switzerland has made it possible for Gérald Pachoud, a human rights expert, to take a leave of absence from the Foreign Ministry and serve as my full-time special advisor.
- On a parallel track, the High Commissioner's Office is convening an extractive industries consultation in Geneva next month.
- To round out this first phase, I would welcome additional assistance to develop a systematic inventory of dilemma situations for business in relation to human rights. The contributions of human rights groups would be particularly valuable here, drawing on the many case studies they have conducted.

Although I am still very much in a listening mode, before concluding I do want to share with you a few preliminary thoughts about the mission that lies ahead:

One is my firm belief that we must not let governments off the hook. On the contrary: if governments everywhere did what they are supposed to do – to govern in the public interest and enforce the law – the scope of this challenge would be considerably circumscribed and its urgency diminished.

Second, I hope to avoid doctrinal debates as much as and for as long as possible. Doctrinal debates create echo chambers. People hear their own voices bouncing back at them and think they're having a dialogue. Besides, doctrinal debates rarely solve real world problems. My mandate is intended to contribute to greater clarity, deeper understanding and wider consensus. I believe that those are best achieved when posturing is left at the door.

And thirdly, we must all recognize that no policymaking arena, least of all one as inchoate and fragile as the one we are dealing with, can cope with every related challenge at once. Therefore, priorities have to be set.

Looking ahead to the prescriptive elements of the mandate, it may make sense to begin by addressing situations in which the existing system of international human rights law has broken down entirely, or where it cannot possibly be expected to function as intended. Think of failed states, for instance, or cases in which firms aid, abet or benefit from human rights abuses by governments, their internal agents or foreign allies. More than 3 million people have been killed in the Democratic Republic of Congo in the past few years, and perhaps as many as one in every five people in southern Sudan alone – with governments and companies implicated in the carnage.

Let me bring these remarks to a close. I don't underestimate for a moment how difficult this mandate will be. The issues are complex, we are in novel terrain, and the debate to date has been highly polarized. But we need to step back and remind ourselves that the issue at stake is of a truly historic magnitude: what rules shall govern our common humanity on this small planet, and how shall they be set? Even more important, our response to those questions will affect the quality of life – indeed, life itself – of men, women and children throughout the world, especially the most powerless and, therefore, the most vulnerable among us. Failure is not an option. Kofi Annan has put it well on a number of occasions when he has said: "The simple fact of the matter is this: If we cannot make globalization work for all, in the end it will work for none." So we have no choice but to get it right.

Thank you.

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