



THE 2005 BUSINESS & HUMAN RIGHTS SEMINAR REPORT

EXPLORING RESPONSIBILITY AND COMPLICITY

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Mary Robinson, Honorary Chair

1. INTRODUCTION

Mary Robinson, Honorary Chair

For Mary Robinson, Honorary Chair of the Business and Human Rights Seminar, the event in its third year '*has taken on a special significance*'. Yet this Seminar, held in London in December just before Human Rights Day, was the last in its current form. '*The whole approach to integrating human rights into the business consciousness is changing*'. In 2006 the debate will move to a series of regional conferences.

The 2005 Business and Human Rights Seminar explored the issue of business responsibility and complicity with regard to human rights abuses. The notion of business responsibility in this area forms the basis of the Second Principle of the United Nations Global Compact, and underpins other business and human rights standards, such as the OECD Guidelines and the Voluntary Principles on Security and Human Rights. But how is complicity to be understood, how far do a business's responsibilities extend, and what can businesses do to minimise the risk of being complicit in abuses of human rights? Debating these issues were key figures from a wide variety of organisations, including many from the business community.

2. THE CONTEXT: BUSINESS RESPONSIBILITY AND COMPLICITY IN HUMAN RIGHTS ABUSES

2.1 International Criminal Law and Business

Luis Moreno-Ocampo, International Criminal Court

Luis Moreno-Ocampo is Chief Prosecutor of the International Criminal Court (ICC). As he points out, companies that are complicit in the most serious crimes, such as genocide, can now be investigated by him, or by one of the states that are members of the Court. But Luis Moreno-Ocampo's emphasis is more on what companies can do positively, to play an active role for the long term good of the areas in which they operate. *'It's not enough just to be legal. Of course, you cannot be involved in crimes. But we need more'*.

Introduction to the International Criminal Court

What is the International Criminal Court? *'For the first time in human history, there is a permanent criminal tribunal with eighteen judges, with every continent and a hundred states represented'*. The Court has a very limited jurisdiction, however, covering only the very worst crimes against humanity: genocide, widespread and systematic attacks against a civilian population, and serious war crimes. Its history goes back to the Nuremburg Trials after the Second World War, when France, Russia, the UK and the US took the unprecedented step of forming a collective tribunal of judges and prosecutors, to prosecute the Nazi leaders. The Cold War prevented the idea of an international court really taking off, but then in 1993 the UN Security Council created a tribunal for the former Yugoslavia, which is still working in The Hague. The UN Security Council then expanded the mandate in 1994, and created another tribunal for Rwanda. This created momentum, and in 1998, representatives from more than 150 countries met to draw up the Rome Treaty, which created the International Criminal Court as a permanent tribunal.

The creation of the ICC is the result of an agreement *'between the dreamers and the sceptics - the dreamers who believed that the Court would solve the world's problems, and the sceptics who thought that nothing would happen'*.

The court has an interesting design. *'In some ways it's a global system to protect humanity. What we have learned is that when you have genocide, it's not just national - these crimes are always exported'*. Rwanda is a good example: the Hutus, who were the group committing the worst crimes, moved to the Democratic Republic of Congo, leading to the de-stabilisation of the country, and the downfall of President Mobutu. Ultimately there was a war in the D.R.C., in which more than three million people died - more than in the Rwandan genocide. Altogether eleven African countries were involved in this catastrophe.

'What we can learn from this is that the question is not just about justice, it's about the protection of people. And it's not just about one country suffering. Yet we don't have a global institutional system to deal with problems. We have national systems, which can protect people inside countries, but which don't work well outside them. Countries don't like to give up their own power, and so the Rome Treaty creates a global system that respects nation states'.

The role of the Prosecutor

Luis Moreno-Ocampo's duty is to intervene, not just when there is a crime against humanity, but when the nation state concerned is unable or unwilling to deal with it. *'We are not a supreme court, but a back-up system. We have to work when national courts are not working'.*

One of Luis Moreno-Ocampo's main concerns is *'how to maximise the impact of our cases'*. The paramilitaries in Colombia, for instance, are proposing to disband, because of the work the ICC is doing in Uganda. *'We have a tremendous opportunity to expand the impact of a few cases in The Hague, so that they have an effect around the world'.*

Luis Moreno-Ocampo's work as chief prosecutor involves an office of 150 people from 55 countries (this has grown from a team of three people). *'We have had to design the office with no benchmark to work with, because nothing is similar to it. It's nothing like a national system. When I was a prosecutor just in Buenos Aires, I had 30,000 policemen who could receive my instructions. Here I cover the world, but I have no policemen. It's not a national institution, and not based on command and control, but on agreement and co-operation: it's not what the mind of a criminal lawyer is used to'.*

The International Criminal Court and Business

In terms of business responsibility, the ICC has two duties. The first is to investigate and prosecute crimes, under the conditions of the Rome statute. But the ultimate goal is *'to end impunity, in order to prevent future crimes'*. *'We need not just to investigate what has happened, but to stop it, perhaps by creating a different framework for business'.*

The ICC cannot investigate corruption, or other crimes not connected with its statute. However, some companies have been known to support groups who kill to gain control of a gold mine, for example, knowing that this could be a crime (knowledge is a required condition for prosecution). The ICC could prosecute under these circumstances. But under the principle of complementarity of work, the nation states, in which the companies are based, have the primary duty to investigate the case. Aiding and abetting international crimes is something that business people now face being investigated and prosecuted for in the country in which the crimes took place, or in the countries of which they are nationals.

Current case: Uganda

One of the cases on which Luis Moreno-Ocampo is currently working involves Uganda. In northern Uganda for the last nineteen years, there has been a group called the Lord's Resistance Army (LRA), which started as a rebellion against the Ugandan President Museveni. The LRA's soldiers are mostly children, who were abducted, normally when they were nine (an age at which it is easy to manipulate them). Some children have been forced to take part in the killing of their siblings. As part of the system of punishments and rewards that it uses, the LRA also kidnaps girls to provide for its commanders.

In this case, the ICC collected evidence, presented the case against the five top commanders, and issued a warrant. Congo, Uganda and Sudan, who have had problems with each other in the past, are now committed to working together with the Court, and have arrested the people concerned.

'But my ultimate goal is to contribute to the prevention of future crimes', says Luis Moreno-Ocampo. Arresting the LRA leaders will not be enough. 'I have no state, so someone else has to do the work that the state normally does - building hospitals and schools for example. This is normally something for the public sector, but here this is something that the private sector may have to provide'. Big business can help to develop a framework for reconstruction. 'I know this needs to be done, but it's not part of my mandate to do it. That's why I'm calling on you, as business leaders'.

The danger is that the lack of activity from the private sector will destroy the Court's efforts to prevent future crimes. *'If the children cannot find jobs, the only option for them will be to become killers again. They make some money from this, and it is what they know'. For Luis Moreno-Ocampo, then, 'we don't know how the ICC as an institution will evolve, but we know that what we are doing is not enough. We need business leaders thinking about these issues, connecting with these problems, and taking initiatives'. There have been cases where children have had to go back voluntarily to the LRA, because there has been nothing for them outside of it. 'The international community has not been able to offer them anything better. You have a chance to offer children like these a better future'.*

2.2 'Responsibility and Complicity' from the perspective of business

Peter Sutherland KCMG, BP and Goldman Sachs

Peter Sutherland is Chairman of BP plc and Chairman of Goldman Sachs International. The theme of complicity and business responsibility for human rights abuses is something he has addressed before - *'I remember speaking on human rights at an event held by Amnesty International in Dublin in 1997. But although much has changed in the intervening period, the underlying principles haven't, and never will'.*

The role of business

Re-stating what he said before about the basic relationship of business to human rights, Peter Sutherland quotes the former UN Secretary General, Boutros Boutros-Ghali: 'the right to development is a human right'.

'Business provides the economic vehicle for that fundamental right of development. And to quote the current Secretary General Kofi Annan, it is the absence of broad-based business activity, not its presence, which condemns much of humanity to suffering'.

For Peter Sutherland, it is utopian to think that poverty can be overcome without the active engagement of business. *'Business is the motor for the creation of prosperity. Businesses create revenues, jobs, salaries, dividends, and trade for their suppliers. They develop skills. They innovate to produce new products and services. Businesses can do all of these things in places and in ways that help to alleviate human suffering and help to resolve global problems'.*

Businesses can't do it all, however. They can't provide the basic infrastructures in societies, either human or physical. *'The great challenge for business in the 21st century is to get the wealth creation motor generating value for shareholders, while at the same time helping to tackle big global challenges such as poverty and climate change. That alignment can happen, and now more and more businesses are searching for it'.*

For Peter Sutherland, the glass is too often seen as half empty rather than half full. *'Globalisation to some means the danger of exploitation, the threat of local communities being overwhelmed by multinationals. These dangers exist, but there's a more positive story that still struggles to be told. Globalisation also means that trade has increased about fifteen-fold since the nineteen fifties, average per capita income has nearly tripled, average life expectancy has grown by twenty years worldwide, infant mortality has dropped by two thirds, and millions have been lifted out of poverty'.*

This is not to pretend that the benefits of globalisation have been equally shared: a billion people still live on less than a dollar a day. *'But these are the people who've missed out on globalisation, who've been shut out of the global market by protectionism, lack of basic infrastructure and education, oppression and lack of human rights'.*

Once markets are open and basic framework conditions are in place for a business to operate, it can begin to generate value for shareholders, customers, communities, employees and the environment. *'That's what's been termed "enlightened self-interest", win-win or mutual advantage. Whatever the language, it is this reality that is the cornerstone of sustainability. To survive you need to be trusted, and you build trust by delivering benefits for everyone that you come in contact with'.*

This is the philosophy that BP applies in trying to deal with the very different expectations of different groups - governments, NGOs, communities and so on. *'Society thrives where business thrives, and business thrives where society thrives. Both thrive where human rights are valued and protected, and where there is a genuine concern for social wellbeing and the health of the planet'.* Business and human rights, therefore, are mutually dependent.

Developments over the last decade

All of this is not to say that businesses do not encounter specific and difficult human rights issues along the way. But according to Peter Sutherland, companies, governments and NGOs have all learned a huge amount in a short period of time, and two important things have happened over the last decade. *'Companies have started to look hard at the nature of their accountability for human rights, where it starts and where it ends. And indeed the UN and others have been looking at the same thing. And two, businesses, governments and NGOs have worked together, to create some very effective voluntary standards in particular areas'*.

On the question of roles and responsibilities, progressive businesses now see a distinction between the areas in which they have control and therefore responsibility (regarding the rights of employees for example), and those where they only have influence, although the distinction is not always an easy one. *'Within their operations, businesses are progressively improving their performance in maintaining high ethical standards. For example in BP we have an ethics and environmental assurance committee as part of the main Board, which has a very detailed ongoing involvement. Codes of conduct are being backed up with assurance processes that bite, and systems, such as the one we have in BP of Opentalk, whereby concerns are raised anonymously if necessary, and breaches of codes are exposed'*.

Working with others

Business also interacts with the society around it, with customers, communities, suppliers and contractors. *'In this sphere it often doesn't have direct control over outcomes, and businesses cannot accept accountability for protecting rights in areas they do not control, for example the rights of citizens beyond their perimeter gates'*. Governments are responsible for protecting human rights across a country. But at the same time, businesses do not want to work in a dysfunctional society. As Björn Stigson of the World Business Council for Sustainable Development has said, *'business cannot succeed in a society that fails'*.

Business can act with others, with governments and NGOs, to support human rights among communities. The issue for companies and others such as aid agencies is what to do when there is a breach, and the answer varies from case to case. *'Sometimes we can work with others to develop a global response, while at other times we can intervene on a case by case basis, privately or publicly. When it's a case of talking to governments it's usually private, because while megaphone diplomacy may appease some observers, it rarely addresses the root cause of the problem and jeopardises our relationships, thereby constraining our ability to be a progressive model business'*.

Mandatory and voluntary principles

Regarding the choice between mandatory and voluntary approaches, in Peter Sutherland's view *'this is not an either-or situation. The world has mandatory laws and regulations, and also voluntary codes and standards. They co-exist, but they perform different roles. Mandatory approaches focus on setting minimum standards, while voluntary codes focus on raising the bar. Progressive businesses fully support mandatory approaches,*

provided that they are reasonable and not anti-competitive, because they create a level playing field and prevent abuses'.

In many cases there is more work to be done in setting mandatory standards at the national level, let alone internationally. At international level the issue with mandatory approaches is the challenge of gaining agreement and the difficulty of establishing effective monitoring and enforcement. So while it is important to seek headway in this area, *'we need to continue also in areas where companies, governments and NGOs can make progress on a voluntary basis, as is already happening'.*

By way of example, Peter Sutherland mentioned two specific initiatives that have been developed recently. The first is the Voluntary Principles on Security and Human Rights, which emerged from a dialogue between national governments - those of the US and UK, then joined by the Netherlands and Norway - companies in the energy and extractive industries, including BP, and a number of NGOs, including Amnesty International and Human Rights Watch. The Voluntary Principles guide companies in maintaining the safety and security of their operations within a framework that ensures respect for human rights. Key among the Principles is the responsibility of companies to encourage host governments to make security arrangements transparent and publicly accessible. Private security providers should be required to observe the contracting companies' policies on ethics and human rights, the law and professional standards of the country in which they operate, and international humanitarian law.

BP is also a participant in the Extractive Industries Transparency Initiative, launched by the UK Prime Minister at the World Summit on Sustainable Development in Johannesburg in 2002. *'This is not of course strictly a human rights initiative, but I believe that it ultimately promotes human rights because it promotes development, and is a good example of people working together towards a common goal'.* This initiative covers the work of extractive industries in fifty developing countries, which are home to 3.5 billion people, about half the world's population. The EITI encourages governments, companies, international organisations, NGOs and others to work together to promote transparency of payments and revenues. *'All of us know how important this is, and how damaging corruption is in the developing world'.* Such transparency improves the general business environment and helps to attract foreign direct investment, which is crucial to development.

Both of these initiatives have been characterised by constructive, detailed engagement between governments, companies and NGOs. *'They're achievements in themselves. But they're also a demonstration of what can be done in a range of areas to establish voluntary standards that make a real difference, and act as a beacon to others'.*

The Tangguh project

One particular BP project exemplifies many of these points. The Tangguh project in Papua is scheduled to go on-stream in 2008, and involves piping natural gas from a large field in a bay on the Bird's Head Peninsula.

The project isn't short of challenges - the site is in an environmentally sensitive area, and it has also required the re-settlement of a village of over a hundred households. *'We're fully aware of the scale of the challenges, and we have sought to take a rigorous approach to managing each risk and considering impacts beyond our fence line. The environmental and social impact assessment took four years, and covered thousands of pages. We also commissioned a macro-economic impact study and developed a distributed growth strategy, with the aim of ensuring that the economic impact of the project is spread throughout the region, rather than being concentrated in a hot spot that drains resources and labour from elsewhere. We formally engaged external advisors, including a Tangguh independent advisory panel chaired by the former US Senator George Mitchell. We took on two re-settlement experts from the World Bank, and we also asked Gare Smith and Bennett Freeman, both former human rights specialists at the US State Department, to conduct a human rights impact study. Last but not least, we applied the Voluntary Principles.'*

The traditional practice in Indonesia has been to provide security by means of patrols and military from other parts of the country, which has historically led to tension. However, taking the Voluntary Principles as its guide, BP instead gained all parties' agreement to an integrated, community-based security programme in which the first line of security is formed by Tangguh's own locally-recruited security guards, who are trained in human rights by Papuan NGOs. BP has set up community forums in villages and districts led by a human rights centre linked to an Indonesian university, and developed a security response agreement and procedure, providing for the security guards to call on the police if necessary, with the military available as a last resort.

The Voluntary Principles *'have had a very positive impact: they've provided frameworks for analysing issues, they've provided a mechanism for convening discussions with governments, security forces and NGOs, and we believe that they've helped to raise standards'*. Of course everything isn't perfect - *'in particular we still face questioning over alleged silent complicity. Are we complicit when an alleged abuse of human rights occurs fifty kilometres from the site, or four hundred kilometres away?'*

Determining whether to remain in country

And if an abuse occurs, *'should we leave the country?'* For Peter Sutherland, this is a classic 'glass-half-empty' argument. *'It presupposes that presence is negative, contributing to the wrong-doing, rather than positive, contributing to the raising of human rights standards. It presupposes that business is part of the problem. It presupposes too that if there are problems in a region or in a country, our speaking out or even withdrawing will help to solve it. We don't believe this to be the case.'*

In the Apartheid years, BP stayed in South Africa while others left - *'we tried to be an island of normality in a deeply divided society. We advanced black people, and appointed a black person as the company's national leader. We provided equal housing facilities for all staff, and after Apartheid fell, Nelson Mandela expressed support for companies that took that approach, and he expressed it personally to me in BP subsequently when he visited. The simplistic answer that might have been demanded by many at the time was probably the wrong one, certainly in his view'*.

In any country, developed or developing, *'there are good guys and bad guys. The reality is that the good guys need support, and they can get it from business. That way lies development. Processes are important, but so are people, and you don't get human rights without the right humans. I hope that the next few years will see further progress, and I'm delighted at the way that NGOs, governments and companies are now working together much more openly and constructively. It reminds me of Einstein's saying to the effect that you never solve problems at the level at which they were created - you need to move up a level, and you often do that through partnership. We have the prospect of a deeper conversation, a wider consensus, and a world where more people enjoy sustainable human rights. I hope we can all continue to work together to that end'*.

2.3 Questions to the speakers

Questions to Luis Moreno-Ocampo and Peter Sutherland focused on ideas of a business's 'sphere of influence' and how far it extends, and also on the question of whether simply being present in a country could represent a form of tacit encouragement of human rights violations.

Question:

'National governments have a responsibility to investigate and prosecute companies headquartered in their own countries, which may have aided and abetted crimes against humanity. Is this a responsibility that they have under international law, and if so, what mechanisms exist to try to ensure that governments live up to that responsibility?'

Responses:

For Luis Moreno-Ocampo, the Rome Treaty's commitment is to prevent crimes, and investigate and prosecute them. *'The countries that are signed up to it have passed specific laws about this, so they are committed to it by national law, but at the same time they are fulfilling their commitment under the Treaty. If there is a case where the country is unwilling to act, the ICC could - that is the only change. So under the system the nation state has the main responsibility, and exceptionally the Court will act. But we have to take cases in order of gravity, with the worst crimes first, dealing with those who were involved personally'*.

In terms of the wider impact that the Court has - in many cases of course if the leaders of organisations go to jail, a second level will simply replace them. Because of the small size of the ICC, *'the issue is how to maximise the impact of our cases. If we select them carefully, other people learn. The International Red Cross recently heard about a Colonel in Chief in a country issuing instructions to ensure that operations there are in accordance with the law, because otherwise they might be brought before the ICC. Even states that are not signatories of the Treaty are adapting their laws to ensure that they have no problem with it, and paramilitaries and other illegal groups are taking it into consideration. In Colombia the paramilitaries are trying to reach an agreement with the government to prevent crimes, and one of the reasons they give openly is the existence of the ICC. So we have a preventative impact'*.

Question:

'A few years ago, human rights were not even discussed at conferences on corporate social responsibility - we were talking about voluntary codes and guidelines. Now big conferences like this, with corporate attendants, are starting to look at human rights. How can we move more into the mandatory realm, to set out rules and responsibilities and create a level playing field? How do we do this particularly in relation to the UN Norms, the Equator Principles (which currently don't have the access-to-justice mechanisms to bring complaints), and the GRI reporting guidelines that are currently voluntary?'

Question:

'Given BP's experience in South Africa, what would Peter Sutherland say about Zimbabwe, and is that an issue that the ICC might want to think about in terms of longer-term impacts?'

Question:

'Luis's challenge to the business community is to engage in situations of conflict. What sorts of mechanisms and institutions might facilitate this task for the business community? Most people would imagine business engaging post-conflict - in reconstruction. But are there opportunities to engage during the conflict?'

Responses:

According to Peter Sutherland, at BP the mandatory-versus-voluntary debate is considered largely irrelevant. *'When we sign up to voluntary initiatives, we in effect make them mandatory within the company. They affect compensation and evaluation, and they're constantly reviewed in the context of the individual's performance. They become part of the contract of employment, which is taken very seriously. The argument that it has to be mandatory presupposes a lack of integrity in the internal systems. I'm not saying it's not a good thing to have mandatory standards: in many cases it is - they help to create a level playing field, so we can avoid being at a competitive disadvantage. But I don't accept the basic idea that voluntary principles are less valuable. They can be and are enforced by a proper corporate structure.'*

As for the draft UN Norms - *'these are not in themselves an answer, as the Commission on Human Rights ruled, but clarity of expectation is something that everybody should support, and to that end we support the appointment of a Special Representative to the Secretary General. A set of Norms that sets out a code of conduct, responsibilities and expectations of businesses is something that can therefore be supportive. BP didn't support the UN draft Norms for a number of reasons - we were concerned about the tone of the document, which we felt ignored the potential beneficial effects that business has per se on the realisation of international standards. We also felt that business cannot and shouldn't be held accountable for what is the role of government. And finally the proposed monitoring and verification process was vaguely defined and impractical in our view. Having said that, we already incorporate the expectations implicit in the draft*

UN Norms, in all material aspects, in our policies, operations and practices, and are happy to be judged against them’.

Peter Sutherland’s personal view on the question of dealing with countries which are under sanction is that *‘it’s very difficult to answer in a black-and-white way. If you simply say “we’ll cut off all aid, all trade and communication - we’re going to isolate and vilify, and therefore destroy the operation of a regime clearly acting in a way that contravenes basic norms of human society”, what in fact are you doing? You have to judge it in the context of what you’re doing to that society and to the prospects of real change. You may be reinforcing the very regime that you’re trying to bring down. You may in reality be doing far more damage, and at the same time proclaiming yourself publicly as one of the good guys, which may be the easy option’.*

Ultimately for Peter Sutherland, however much it can make a contribution in society, *‘you can’t expect business to go against its fundamental mandate, which is to bring returns for its shareholders. It’s not an altruistic endeavour. Those NGOs that expect businesses to go out and take on the role of development are living in cloud cuckoo land’.*

For Luis Moreno-Ocampo, the ICC has created a new paradigm. *‘Before, international relations were relations between states. Now, the ICC statute provides for us to investigate heads of states: it recognises individual responsibility. Normally the mandate to provide security and health is in the hands of territorial states. But I have to intervene when the state cannot handle the problem, or is unwilling to do so. When the state can provide no other solutions, then the mandate clearly is with the UN. The UN is working on this area, through the private sector: my proposal is to expand on this’.* For this to work, though, greater co-ordination is needed: *‘you have to learn how to co-ordinate your influence to get the framework that then allows you to work easily. We cannot develop the world just with heroes. We need heroes, but then we need normal people doing normal work. That’s why we need more co-ordination, not just to avoid committing illegal acts, but to work proactively’.*

3. INTERPRETATIONS OF LEGAL AND MORAL COMPLICITY IN A BUSINESS CONTEXT

3.1 Introductions

Wilma Wallace, Gap Inc.

Introducing the panel discussion, Wilma Wallace, Vice President and Associate General Counsel, Gap Inc., gave some current definitions of complicity in relation to business and human rights. According to the website of the UN High Commissioner for Human Rights, for example, *'a company is complicit in human rights abuses if it authorises, tolerates or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse'*. The panel, all of whom have practised as lawyers in the area, offered their thoughts on how companies, and those who advise companies, should be thinking about complicity.

3.2 'Responsibility and Complicity' from the perspective of international human rights law

Nicholas Howen, International Commission of Jurists

Nicholas Howen is Secretary General of the International Commission of Jurists. He is a human rights lawyer, but for him *'law does and should play a fairly small part in our moral universe. I'd think we'd all probably agree that the best sort of law is the type that doesn't have to be enforced in a court of law: it's one that helps to build a culture of compliance, where we know what the limits are. But in the end we need the law to hold companies accountable who may not be here today - those who aren't prepared to spend money, or to deal with risk, or to deal with this openly in the way that those in this room are'*.

Examining legal liability

As for the likelihood that a company or company officials could be held legally liable for helping someone else to commit a human rights violation: there's been some confusion about this. Complicity is not when a company carries out the primary abuse, but only when a company helps or participates in a human rights violation carried out by someone else. Who's the 'someone else'? *'Governments, armed opposition groups, other companies in the supply chain, joint venturers, sometimes even individuals'*. Complicity in what? *'My starting point is that we're talking about complicity according to what's called the international bill of rights - the Universal Declaration of Human Rights, and the two covenants that go along with it on economic, social and cultural rights and on civil and political rights'*.

According to Nicholas Howen, there's currently not much likelihood that companies will be held legally liable for complicity. There are many reports of complicity, but few cases end up in court, and even fewer are

successful. In the US there are currently no more than about twenty cases under the Alien Tort Claims Act, which allows foreigners to sue entities, including companies, for injury.

As for Europe, after three years in a French district court, Total have recently agreed to an out-of-court settlement with eight Burmese people, who accused it of complicity in enforced labour. A Swiss court has allowed five Roma people to sue IBM for allegedly helping the Nazis carry out the Holocaust, by supplying punch-card machines to code and track victims. But there's little else. So is complicity in the eye of the beholder?

'We are in the very early stages of understanding the profound complexities of complicity, and where we draw the line when we say that companies are to be accountable. However, the basic principles are already there both at the international and the national level. The problem is that the mechanisms to enforce them - the procedures, the courts, the jurisdictions - are behind where the legal principles are. So we have a strange situation where a company could be said to be liable under existing principles of criminal or tort law, but there's nowhere where that law can be enforced. That's useful for enlightened companies, because you can start to map out what the limits are. But for those that are not prepared to do anything, it means there's nowhere to go.'

To achieve that legal accountability, there must be reform in many areas. Currently criminal law can prosecute individuals, but in very few jurisdictions can it prosecute companies as legal entities. For Nicholas Howen, *'even though there are difficulties in identifying the directing mind of a company, we must move in that direction. We have the difficulty that victims face insurmountable problems in a fairly classic legal system, with huge costs, huge delays, the inability to sue parent companies when they cannot get justice in their own country, and regularly being told by courts to go and try to sue in another country. These procedural obstacles, which were created for another time and another sort of litigation, are now obstacles to access to justice for victims who are not dealing with enlightened companies. And while complicity may be spelt out in many international law principles, rarely except in the criminal law area are they really translated into national law'*.

The Alien Tort statute in the United States is unique: *'we need something like the Alien Tort Claims Act in other jurisdictions'*. The fact that we cling to this one jurisdiction and have to extrapolate the implications of it for the rest of the world is *'sad'*, and an Alien Tort statute in other countries would not be a threat. It would help hold accountable those who need to be held accountable, and *'the more legislation there is, the less frivolous litigation there'll be'*. There will be more remedies, and *'the more remedies there are the less need there is to cling to something that is inappropriate'*.

In the end ways will be found to reinforce the principles of liability, in the same way that the Nuremberg tribunal held Nazi leaders accountable for laws which judges said had existed for a long time before, even

though there had not been a way to enforce them. *'So the message is that unaccountable companies are likely to be the subject of court cases in the future'*.

Level of participation in human rights abuses

What level of participation in a human rights violation, committed by a government or opposition group or other company, is enough to expose a company or individuals to possible legal liability for complicity? How much does a company have to know about the violation?

Some human rights violations in the International Bill of Rights are serious enough to be a crime in most national jurisdictions, and certainly in international law: slavery, forced labour, torture, summary execution, forced displacement and rape. Some of these acts are so serious and so systematic that they amount to a crime against humanity. *'Clearly when we're dealing with those types of violations we're in the realm of criminal law, and there are ways of enforcing in some situations the responsibilities of companies, despite the lack of extra-territorial reach of most national laws'*.

In this situation an individual or company will be complicit if they have given practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime, and if they knew or should have known that they were doing so. There are obvious examples - the coffee companies in Rwanda that hid the weapons used in the genocide, or companies that call in the police to disperse peacefully striking workers violently. But the vast majority of human rights violations are not crimes, let alone international crimes. *'Violations of the freedom of religion and association, or rights of expression - these are not areas of criminal complicity, but the tests are lower. You don't need the same level of contribution to the act, and the degree of knowledge can be lower'*.

Common defences to accusations of complicity

Nicholas Howen lists six defences that companies or individuals in companies often put forward when they're accused of complicity.

One - 'it was a perfectly legal act - we were building a pipeline, or financing development in a country'. *'But that doesn't matter, if there's a causal ink between the legal act and an illegal one, such as forced labour or suppression of freedom of expression. What about a company that pays taxes to a government that systematically violates rights - there is unlikely to be any legal liability in this case, but it's getting close, especially if it is a specific tax, say, that directly finances abusive security forces. This has to be dealt-with on a case-by-case basis'*.

Two - 'we didn't know that the violations were happening'. This is a defence against criminal complicity, but not in civil cases, where companies may have injured individuals who are seeking damages. Even in relation to criminal cases, though, if one ought to have known, one could be liable. *'A joint venture, a supply chain - it's unclear how far we should go. Do you stop at the diamond trader who buys from abusive combatants, or do*

you go to the banks that financed the diamond trader? When a company is close enough that they ought to have known, that suggests that there might be complicity'.

Three - 'we didn't want the violations to occur'. *' This doesn't matter if the company had enough knowledge, and continued assisting. So beware of joint ventures - if you make a pact with the devil, and the abuse is a natural and foreseeable consequence of that, then you're in danger'.*

Four - 'the human rights violations would have happened anyway'. Companies are liable not just where the violations couldn't have happened without their assistance, but also where they wouldn't have happened in the same way. In the IBM case, for example - *' the Holocaust would have happened anyway, but the test is whether IBM contributed to it, or made it more efficient'.*

Five - 'we did not do anything, we were silent'. If there was no obvious act of assistance, no joint enterprise, then under any existing criminal or tort law there's no liability. *' But we start to get into grey areas if there's benefit. If the government forcibly displaces whole communities to make way for your commercial development, or suppresses union activity in export processing zones, then passive presence can quickly slide into another, more active category of complicity'.* The Global Compact already captures the idea of beneficial complicity even though it's beyond the law. And in criminal law, silence is not always neutral. *' A spectator to a crime could have aided or abetted if their status or authority is so high that their mere presence could give moral support for the crime. There are plenty of criminal cases like that. What if a company is hugely dominant in a country? The law hasn't developed in this way yet, but it may increasingly do so - towards the idea that presence plus authority equals endorsement'.*

Six - 'we were just abiding by national laws': as in the case of companies in Saudi Arabia that are not able to hire women, or Yahoo in China giving information about an account user who sent pre-Tiananmen Square briefings by the police to an overseas website, and who's now in prison. But even the OECD guidelines for multi-national corporations say that 'enterprises should respect the human rights of those affected by their activities, consistent with the host government's international obligations and commitments'.

So - how are companies and individuals to avoid complicity? Nicholas Howen's advice is: *' look for the warning signs. The closer you are to victims, the more you have a responsibility to watch out for the impact of your actions. The closer you are to those who commit the violations, the greater the danger. And the more systematic the nature and scale of the violations, the more dangerous they are. Finally, do not be limited by the law. The law is a vital test of accountability and will give clarity to what is acceptable and unacceptable behaviour. But we're all forced to swim in a much rougher and more profound sea of morality and public policy, and that's how it should be. In the end, morality will come before law, and law will follow morality'.*

3.3 'Responsibility and Complicity' and the moral expectations of society

Irene Khan, Amnesty International

Irene Khan is Secretary General of Amnesty International. She also quoted the example of the Chinese journalist who in 2005 received a ten year sentence for sending information about a Communist Party decision to a website in the US, using his Yahoo e-mail account. In the eyes of Amnesty International, this journalist is 'a prisoner of conscience', imprisoned solely for exercising peacefully their right to information. According to court transcripts, information about the account holder, including confirmation of the internet protocol address, was provided to the authorities by Yahoo Holdings Hong Kong Limited.

Also in 2005, soldiers from the Nigerian Joint Task Force fired on protestors who had entered Chevron Nigeria's oil terminal on the Delta State coast. One demonstrator was shot and later died, and thirty others were injured, some of them seriously. As Irene Khan describes it, the protest was over a memorandum of understanding that was signed between the local community and Chevron - the protestors claimed that they had not been provided with the jobs and development projects that they had been promised. This was denied by the company, which claimed that the responsibility for protecting its facilities lay with the authorities, and that it could not control the actions of the security forces.

For Irene Khan, 'these are two cases where the state clearly had the primary responsibility and obligation to protect human rights, but it also shows the kind of complicity issues we are talking about, when a company itself does not commit an abuse, but benefits from an abuse committed by someone else, remains silent in the face of the abuse, or assists, aids and abets the state in committing abuse'.

Development of corporate complicity

'Corporate complicity is of course an emerging area of law, where moral questions are as important as legal ones'. What is good practice? What is right and wrong? What is fair and unfair? For Amnesty International this is an interesting area, because the organisation sees human rights 'not as bound by principles of international law, but as principles that are there to push further the notion of humanity and human dignity. That is why we picked up the issue of the abolition of the death penalty at a time when it was lawful under international law'.

As Irene Khan sees it, 'the parameters of complicity are being pushed as much through campaigning pressure and consciousness on the part of the companies themselves of their corporate responsibility, as it is by judicial decisions domestically or internationally'.

The trade in rough diamonds, for example, was being used to pay for weapons which allowed gross human rights abuses to be committed in Sierra Leone. No court case had to be fought, however, to make the diamond industry realise the risk to its reputation of complicity in these crimes, leading it to adopt the Kimberley Process certification scheme. Naming and shaming can be as strong an incentive as legal action.

In relation to the issue of labour and labour rights, *'it'll be interesting to see how what has happened in the Unocal case influences the issue of migrant labour, particularly where there's a risk of human trafficking and abuse of migrant workers in some industries'*. Unocal was sued in the US under the Alien Tort Claims Act, but settled out of court.

Child labour is another area where international chains that have suppliers in the developing world have come under pressure from campaigners, and have subsequently improved compliance with human rights standards along their supply chains.

In relation to trade union rights too, there have been major campaigns to discredit companies, where they had provided residential addresses of active trade union members to governments hostile to trade unions, or had called on the police to disperse trade union meetings brutally, or remained silent as trade union officials were systematically killed.

Irene Khan picks out information technology as a new area where human rights abuses are emerging, as a result of complicity between companies. Yahoo is not alone - Microsoft has also been accused of supplying software to the Chinese government to block certain websites, while other forms of technology have allowed governments to improve their surveillance, of dissidents for example.

Discrimination is *'an interesting area - non-discrimination is at the heart of human rights law, yet this is a particular area where national laws are not necessarily meeting international standards'*. The Truth and Reconciliation Commission in South Africa, for example, established three levels of moral responsibility for businesses in the context of Apartheid. The most serious applied to companies that actively helped to design and implement Apartheid policies. Then came those companies that knew that their products or services would be used for repression. Finally there were the companies that benefited indirectly, by virtue of working in a racially-segregated environment. The fact that some companies operated under the Sullivan Principles shows that even where discriminatory national laws exist, it is possible to operate to higher moral standards. Today, in the context of employment practices relating to women and minorities, for example, *'acquiescing in the discriminatory practices of states may expose a company to the risk of complicity'*.

'Hiding behind national laws is something companies do because the international system is too weak to hold states to account. But again, some of the toughest campaigns against corporate behaviour were not settled in a court of law but in the court of public opinion'. For Irene Khan, it is from this nuanced, multi-layered, moral approach to complicity that new standards are being developed. Some key elements are emerging - proximity to the abuse, the abuser and the victim, for example - as criteria that can be used to determine whether a company is complicit or not. Knowledge and awareness also - *'Nike had 650 suppliers in 65 countries, and claimed at least not to know the conditions under which some of the sub-contractors were working. But that didn't particularly help the company when the campaign began against it'*.

A financial institution that provides loans to an engineering company, which then builds a power plant on land from which people have been evicted, may be complicit. *'You might think it's a long chain, but it's precisely that kind of relationship that NGOs are using to put pressure on financial institutions, to incorporate human rights principles into their lending policies'*.

Steps for companies to take

Looking ahead, for Irene Khan *'it is clearly in the interest of companies to seek to clarify the concepts and principles of complicity. Operating in a zone of uncertainty is never good for business'*. There is the possibility that companies that are complicit may not be held accountable, but there is also the risk that companies may be wrongly accused. If the laws of complicity are left to develop haphazardly in different national jurisdictions, companies may be put at risk in a global economy. It may be in companies' own interests to develop international standards.

Then what organisations need to do is instil a culture of non-complicity. *'Human rights abuses are really issues of risk management. Whether it's Amnesty International or ABB, we all need to map the risks, and then set out strategies to manage them - policies, procedures, systems for compliance and verification'*.

People are moved to campaign against injustice when they see it, so it's not necessary for a company to be taken to court and have its liability proven for it to suffer. *'It is enough if ordinary people can be moved to feel outraged about what is clearly unfair. That's difficult for companies to counter, but they can do so if they set up clear rules in their areas of operation'*.

3.4 'Complicity and Responsibility' - the perspective of a corporate lawyer

Paul Watchman, Freshfields Bruckhaus Deringer

Paul Watchman, who is a Partner with Freshfields Bruckhaus Deringer, worked in a legal aid clinic in Glasgow in the 1970s, which was regularly torched by the husbands and boyfriends of women in the Gingerbread Group (for lone parents), to whom he gave advice. He also worked with Shelter to introduce the first piece of legislation in Great Britain that gave vulnerable homeless people a right to accommodation. What he found through this, looking at the way the law operates and how the law can deliver, was that *'the more we looked at intensive litigation, at legal solutions, the less we achieved for people'*. More useful was getting the buy-in of local authorities who controlled the gates to accommodation, and the development of voluntary codes of practice, going beyond the basic legislative standards. *'We learned not to expect too much of the law and litigation'*.

As a law professor in the 1980s, Paul Watchman was asked to look at the effectiveness of criminal law in relation to liability. Cases ranged from ones of absolute liability, to others where there are various defences

to the charge of liability. In some there was a requirement for notification before triggering offences, in some there was clear guidance, and in others not.

Water pollution in the UK, for example, is a strict liability offence - the mere entry of any matter into water is in itself an offence. *'But we found that only 1% of water pollution incidents were prosecuted. Was that 99% failure, or success? When we interviewed the enforcers, they often said that the law was the last resort, as it should be'*.

Businesses require clarity

'When we look at business and complicity we are faced with a multiplicity of definitions, and a lack of conceptual clarity. Business requires certainty'. How can businesses be encouraged to buy in to concepts of complicity where the definition is wide and perhaps difficult to interpret? Where the tests are so amorphous that it's difficult for them to see how they will achieve a fair and reasonable practice? There's a risk of un-enforceability of human rights: *'the nightmare scenario is that you create obligations and definitions that are too vague and amorphous to be implemented'*.

So what does success look like? For Paul Watchmen, the dichotomy between mandatory and voluntary approaches has been exaggerated. *'There's a need for both, but in some instances the mandatory can diminish what's happening in the voluntary area, and if the legal process is not rigorous and robust enough you can, as with UK environmental law, end up with low-level enforcement, low-level fines, and the real progress is made through persuasion and conciliation rather than prosecution'*.

'Does success look like stuffing the odd CEO and putting him on your wall? Or a real change in business culture, in the day-to-day process of doing business - checking supply chains, making sure you're not participating in something where you shouldn't be?'

Companies and the criminal law

The idea of criminal law and corporate responsibility goes back to the eighteenth century. As long as companies have existed, people have been aware that with companies *'there's no body to kick, no soul to damn'*. The Law Commission for England and Wales have looked at complicity twice in the last thirty years, and have come to the conclusion that it's not a helpful concept.

It is rare for responsible companies to be involved in direct complicity or joint venture complicity, although that does happen. The more difficult areas are beneficial and silent complicity - *'how can we help companies provide for due process, and put in place procedures so that they don't fall into these traps?'* In the Yahoo case, for example, *'I would like to understand the commercial issues for Yahoo - whether there was endangerment to their own staff, whether or not they were obeying the law. The rule of law is not something easily to be overturned. I'm not defending what Yahoo did, but I think it's a more complex case than perhaps has been described'*.

Are we looking to companies, because we cannot get intellectual leadership from states? Are companies the new means of pushing things forward, when the major states of the world - Russia, India, the US - refuse to do so?

Defining 'knowledge'

For Paul Watchman, there are other conceptual problems in the area of knowledge. Criminal law uses the idea of 'knowingly committing' - sometimes this is actual knowledge, sometimes constructive knowledge, sometimes implied knowledge. Sometimes it's enough if the knowledge is with an employee, sometimes it's not enough unless it's with the 'mind' of the corporation. *'One of the difficulties in recent years, which has brought criminal law into disrepute, is that the railway cases indicate that the law in relation to manslaughter and corporate manslaughter is not where the public perceives it should be. It's a basic tenet of criminal law - you need to have something that people can adjust their conduct to, with clear standards and implementation provisions'.*

On the question of knowledge, how do we determine what investigations a company should carry out, and how it should structure its information-giving? *'Are we just looking for deep pockets, for someone to be accountable where there is no real measure of accountability? It's very rare to have criminal law arising from an omission. So can we impose on companies something we generally don't impose on the rest of society? What does a company have to do? When does a company have a duty to act? Does it have to refuse to cooperate, or can it be important to stay and keep the dialogue open, providing you're not compromising your integrity?'*

Engaging with businesses

Paul Watchman's suggestion is that companies should be given the chance to buy in to raising human rights standards. *'We talk about ticking boxes rather than quality outcomes, but the beginning of a change in culture is to ask whether there is adequate due diligence, and whether staff have been trained. Are there clear lines of responsibility - does this go to the Board? Who handles grievances within your company on human rights? Where is the dispute-resolution mechanism? There are voluntary codes, there is international best practice that you can look at'.* The mandatory and voluntary approaches can assist and reinforce each other. *'What's good about voluntary codes of practice is that they can be adjusted much more readily than legislation. You're more likely to gain corporate buy-in if you take it step by step, rather than going all the way to international criminal law norms'.*

'As an environmental lawyer, it used to be that I was only brought in when a business had an explosion or something awful had come out of their pipeline, but now we're consulted at a more strategic time in the development of projects. Through clear definitions we're allowing people to adjust their conduct, which can involve bringing in codes and other protective mechanisms. What's good for the companies can be good for

their employees and for society in general. That's why I like CSR - not as a PR tool, but as a way of encouraging companies to think about what they do, and what impacts they have'.

3.5 Questions to the panel

The key questions for Paul Watchman are *'do we want to avoid a conceptual morass, or create a goldmine for crackpots and lawyers? Do we want a situation where it takes a long time to get the court process going? The prosecutions of business leaders in the US, for example, don't happen overnight. Do we want a situation where only the worst offences are prosecuted, or where companies are brought to book often? We don't want to risk being oppressive, or to throw the baby out with the bath water. We need to work together, as we are doing with the WWF, with Amnesty, Friends of the Earth and other important NGOs, to develop a new business culture where human rights are central to business decision-making'.*

Question:

As a development organisation in this field, ActionAid frequently comes across the distinction between the business case for higher human rights and other standards, and the moral case. Company executives, who have to report to their shareholders as their primary duty, face a dilemma - what's best for the shareholder may not be what's best for higher standards on human rights. It is not companies' responsibility to lead on the development agenda, nor do they have the capacity to do that. Companies need guidance, whether through national law or international standards, for them to make the business case, because the same conditions must apply to all their competitors as well as themselves. And information and transparency are pre-requisites for everything we're talking about here - you need consistent standards of reporting. What's happened in the UK recently with the destruction of the OFR is unfortunate, but the GRI needs to be developed further.

Question:

If one assumes that companies can contribute positively to human rights, but often find themselves in situations where they could be accused of being complicit, what sort of collaborative systems could we create to help ameliorate that complicity, on the basis that we can't expect perfect solutions?

Question:

Could Paul Watchman comment on the emerging of fiduciary duties of company directors to ensure that their companies are not complicit in human rights violations?

Responses:

For Paul Watchman, the last few years have seen a vast increase in the number of banks that have sought dialogue with organisations like Amnesty International and the WWF. *'That's what we can do to help companies - dialogue on things like due diligence before going into a difficult area, where there's indigenous*

people, or a regime that doesn't have the same view of the rule of law and importance of due process that we do'.

Business and NGOs need to work together: as with the human rights toolbox of the Business Leaders Initiative on Human Rights (BLIHR), and other programmes in different areas.

Irene Khan acknowledges the progress in developing tools, guidelines and standards. *'But it seems that sometimes we're speaking to the converted, and putting the most pressure on those who are the most willing'.* How do we reach out, not just to BP and Shell, but to Petrobras and the Chinese oil companies that are operating in South Sudan? *'It's not enough to have voluntary codes targeted at those who'll do it anyway. There are others over whom we have very little leverage as NGOs. It's in the interests of all companies that we reach out to them too'.*

'And are we looking to companies because states are failing? I think we're looking to companies because economies are changing and the world is changing. The power of companies has changed, what they can do for good and for bad'.

On the question of their fiduciary duties, Paul Watchman's message to companies is to think of them *'not as frozen, but something that evolves in terms of their relationship with society and communities'.*

For Nicholas Howen *'it's one thing to point out the inconsistencies and loose language that are inevitably out there, another to reduce the amount of confusion'.* Are we trying to impose on society something we do not impose on ordinary people? *'I'd put it the other way round - the whole movement to clarify the complicity of companies is about making sure that companies are accountable under precisely the concepts of complicity that ordinary people are already bound by. We already have a hardcore of truth amongst the morass of conflicting and loose language: aiding and abetting a crime is a crime. The criminal law principles are clear - at the international level we have been holding industrialists accountable for more than fifty years, for criminally aiding and abetting. What we're in the process of doing now is seeing how the hard core can be applied in situations where it hasn't been applied before'.*

Nicholas Howen agrees though that there is not yet the legal clarity that is needed. The International Commission of Jurists will be bringing together a group of international experts in 2006, who will spend a year clarifying the emerging legal principles around company complicity.

Finally, the concept of due diligence means doing what is reasonable. Many companies in China avoid being complicit in the suppression of the right to freedom of association and collective bargaining - by creating alternative mechanisms of representation and consultation with workers, for example.

Paul Watchman's message to his clients is *'to be as transparent as you possibly can and give reasons for your decisions, because you should have worked them out. One of the things the Equator Principles are doing is minimising the retro-fitting of big projects. It used to be that companies would only start to work hard on their environmental and social impacts once they felt that the project was going to be properly funded'*.

Question:

What's the role of lawyers, both external and internal, in all of this? Some NGOs have begun to suggest that lawyers should look carefully before they advocate on behalf of clients that are accused of complicity. Might some of the more extreme interpretations of complicity inhibit skilled practitioners from offering advice to multi-national companies?

Question:

On the rule of law issue - could companies use contract negotiations to put pressure on governments to ratify the various international treaties which include definitions of complicity?

Question:

It's not enough to monitor your compliance - it's more important to monitor the access to justice mechanisms to people who have been affected. And if we're voluntarily adopting environmental and social principles and human rights, we can't be drafting host government agreements that undermine them.

Question:

In cases where there are real conflicts between national laws - what do companies do when there are repressive governments? And while there may not be de facto or formalistically legal mandatory standards that apply to companies, the social expectations have been there for about a decade. Doesn't it therefore behove companies to err on the side of caution, and work to the higher standards?

Question:

What advice might you provide to small and medium-sized businesses in relation to complicity, particularly given that their ability to exert influence over governments or joint venture partners, and monitor what goes on down the supply chain, may be limited? (Paul Watchman: There are companies that will validate supply chains for small businesses: they have tremendous databases of supply chains validated for much larger companies).

Responses:

For Nicholas Howen, *'clearly if Saddam Hussein has the right to the best legal representation, everyone and every company does. In no situation should a lawyer be intimidated from carrying out their professional*

duties. We as the International Commission of Jurists would be the first to defend any lawyer carrying out their professional duties in defence of a company that was accused of complicity'.

On the role of companies in negotiating contracts with states, *'this has to be a matter of standard procedure rather than the subject of slow and particular negotiations'.* If a company is prohibited from doing anything that would be incompatible with its international legal obligations and the international legal obligations of the country concerned, then the starting point would be *'what treaties has that country ratified? You then follow it through using the do-no-harm principle, so that you can go into negotiations with a clear policy already'.*

Finally, there are many cases where there is a conflict between national and international law, just as there are conflicts between human rights. *'There is no easy answer - it comes down to an understanding of the practical meaning of these rights'.* But *'there's still too much of a gulf between human rights lawyers and company law lawyers'.*

For Irene Khan, the rule of law *'without some value behind it, without respect for human rights, could be a system of oppression. There was rule of law in Nazi Germany'.* In terms of what needs to underpin a legal system, *'the global values today are the values of human rights'.* And since multi-national companies operate across many different boundaries, it's in their interests to press for respect for international standards when they negotiate agreements. *'You can lead or you can be a laggard in this business, and those who lag behind tend to find out the hard way that it's better to push international standards and principles in everything they do'.* Regarding representation - it's an important principle of human rights that they are for the guilty as well as for the innocent.

For Paul Watchman, the question about the role of lawyers is important. *'The commercial imperative of getting a large project done means that there's often disjunction from the lawyers that understand international law - companies only tend to ask questions once things go wrong. There's a corporate view that those lawyers that understand the human rights or environmental aspects aren't really central to the project. That has to change'.*

4. EXAMINING COMPLICITY AND RESPONSIBILITY DILEMMAS FOR BUSINESS

4.1 Introduction to interactive session and panel

Luke Wilde, TwentyFifty Ltd

Introducing a round table discussion on three business dilemmas, Luke Wilde, Director of TwentyFifty Ltd, spoke of the way that law and the application of law are developing to meet society's expectations of business accountability for human rights. *'But it's not yet all there. This is complex territory. We've heard about the importance of the underlying principles of a human rights approach, and the importance of implementation, of changing culture and operational practices. But with so much complexity, how are we still to carry out successful business? What practical things should companies be doing now? This session can potentially provide some useful input for John Ruggie to consider in terms of his mandate and his report to the Commission in March next year.'*

The three issues discussed in table groups were:

1. The classic danger of businesses 'putting their heads above the parapet' - making a public commitment to responsible practice, bringing them into the spotlight for scrutiny and criticism from NGOs and the media. Is that really effective, in terms of moving other businesses forward as well?
2. The impact of products, and the use or misuse of them. Products can be put to uses that were never envisaged or condoned by their designers, manufacturers and distributors, with serious human rights consequences. Examples include the use of products as currency to support conflict, medicines used for torture, IT products used for surveillance and censorship, and construction equipment used in the destruction of homes. What can be done about this?
3. The question of operating where governance is weak. Businesses operating in states whose governments are unable or unwilling to meet their human rights commitments have a vested interest in the restoration of a positive and stable environment. How can they help achieve this?

Commenting on the feedback was a panel comprising:

Jorge Daniel Taillant, Executive Director of the Center for Human Rights and Environment;
Alan Detheridge, Vice President, External Affairs, Exploration and Production, Shell International, and
Lise Kingo, Executive Vice President, Novo Nordisk A/S.

4.2 Feedback on Issue one

Making a public commitment, and companies sticking their heads above the parapet.

Companies that make public commitments certainly do attract attention if they don't 'walk the walk', but others that put their head in the sand are equally liable to be criticised. Should NGOs and the media change their focus to encourage more companies to improve? NGOs and the media need to continue to play an advocacy role, the NGOs need to engage more with companies to help them improve their human rights business practices. The role of government should be to enforce the laws that are already on the books - that may not be properly appreciated by those who are urging the creation of new laws. In terms of creating a working space for committed companies without letting them off the hook, that is a laudable goal. And as for a company's business associations not acting appropriately, that's a question of due diligence - making sure you know what your partners are up to before you get into a business relationship with them. Perhaps more could be done to help get media coverage of good examples as well as bad ones. And maybe NGOs could do more to show companies what they need to do, rather than just exposing bad practice. Common standards should be developed that NGOs can support. And if an NGO is going to expose a company, do it on a Monday not a Friday, so they can get their information together during the working week! Have a discussion with them first, and then maybe go to the media.

Jorge Daniel Taillant, Executive Director of the Center for Human Rights and Environment, is committed to *'differentiated responsibilities. The people who are going to pat you on the back are your shareholders, not NGOs. Patting companies on the back would put our credibility with our stakeholders - who are the victims - at risk. It's difficult particularly for smaller NGOs to talk favourably about businesses'*.

How should a company respond when its partners are not complying? *'You could - either anonymously or openly - sponsor NGOs, academics or government programmes to build regulatory frameworks and monitoring systems for your sector. Having someone checking on your competition might go a long way'*.

Alan Detheridge is Vice President, External Affairs, Exploration and Production, at Shell International. *'I also don't think companies should look to NGOs or the media for plaudits. We each have our role to play. The current model of NGOs exposing abuses, and defining what they think companies and governments should do, sometimes leads to progress, and certainly to awareness of the issues, but it doesn't necessarily solve the problems on the ground. We have to explore other means, involving dialogue with NGOs, with home governments as well as host governments, and focusing on what we agree on as well as what we disagree on'*.

Lise Kingo is Executive Vice President, Novo Nordisk A/S. For her, NGOs are currently fulfilling their role, challenging society and companies to think in new ways, and working with companies to develop their human rights agendas. The role of media, meanwhile, should be to create awareness and help educate people around human rights. *'But they mainly go for stories that put people in a negative light. It's a missed opportunity'*.

Finally, government should set direction, and create the framework for society. *'I'm not sure that is happening at the moment'*.

4.3 Feedback on Issue two

The misuse of products.

Should companies do something about product misuse? Yes - they should report about it, be open about it, share information. Whether companies can act depends on what the product is and how it's being misused. If your duct tape is being used to tie up kidnapped people, it's difficult for you as a duct tape manufacturer to do much about it. If you make glue that's being misused, you could potentially re-formulate it. You need some reasonableness tests in terms of the product. All companies should have a misuse or unintended-consequences part of their product risk assessment, looking at what else a product might be used for, the likely impact of misuse, and the likely risk of it happening.

In terms of how other actors can support business in this, again this needs to be on a case-by-case basis. Government can do a number of things to restrict the way products are traded, but when government leads on an issue it often gets it wrong. It's better if business leads, working with other groups such as NGOs, customers and government to set guidelines for how products might be used and traded. There's a developing grey area between voluntary and mandatory codes. There's an interesting question once you've opted in to a voluntary code about how you comply with it and how it's enforced, with different potential mechanisms on different levels.

Finally, how other businesses should act when someone has a problem with product abuse. You could of course kick them when they're down. More helpfully, companies could carry out an internal risk assessment, and then look at developing an industry-wide approach.

There are a number of different steps and processes that a company could go through. Of course, companies should address the issue. The first step is to engage with the accusations of product misuse. Secondly there should be a full analysis of the nature, scale and geographic spread of the misuse. Is it intentional or unintentional? The latter could suggest a solution through education and information. More difficult situations arise when the misuse is intentional. Are they gross violations, or minor? That has a bearing on the action you might take. Then follows a feasibility analysis of the solutions. Can the product be re-formulated? Then comes assessing your relationships, and the leverage you have over the violators - how far is it down the distribution chain? Then you face the decision over whether you take action, assessing the relative positive and negative impacts of the various courses open to you. Finally, using other business networks can be a helpful way to increase leverage and reduce the risk of first-mover disadvantage.

Lise Kingo gave a specific example of a dilemma faced by Novo Nordisk. One of the company's smaller product areas is in growth hormones. These are used by people who suffer from growth disorders - there's a

serious medical need for the product. But there have been repeated break-ins, with huge amounts of growth hormone being stolen and sold on the black market, probably to body-builders and sports people. *'Should we stop supplying a product that sick people are in need of, to prevent individuals from misusing it? We felt that we could do something to raise awareness around the issues of doping. We have volunteered to become a member of the Olympic Committee's anti-doping task group, and have tried to share our knowledge about hormones. Together with the Olympic Committee we have developed a number of test kits that can be used quickly to tell if athletes have different kinds of hormones in their blood or urine. So the way we have been trying to deal with this dilemma is to become engaged, to share our knowledge and help raise awareness.'*

For Alan Detheridge, the link with oil and gas is through the use of products as currency to support conflict. *'Being aware of the issue, responding to it, analysing it, engagement, dialogue and transparency - these are indeed part of the way to deal with the problem, before tackling the thorny issue of how to act'*. The Extractive Industries Transparency Initiative was based on agreement - between governments, NGOs, industry - over transparency regarding those revenues paid by companies to host governments. *'That may not sound very much, but it's a good starting point. Often the action cannot be undertaken by any individual industry, government or NGO alone'*.

For Jorge Daniel Taillant, an issue that shouldn't be overlooked is the sector impact of products. *'We tend to think of products as tangible items. But industries can impact on the broad natural resource use in a certain area - it can affect entire ecosystems'*.

4.4 Feedback on Issue three

Operating where governance is weak.

Many businesses face this situation. What do you do if you're working in a state or society that fails? Where a government is not complying with its commitments under the Universal Declaration? Clearly you can't do nothing. Disinvesting and pulling out is the ultimate resort, and in some respects the gospel of despair - once you've gone you can have no more influence. Clearly there are circumstances where the human rights abuses are so terrible that it is inappropriate for a company to stay. But in others you can have more influence on the situation just by remaining and working, albeit under difficult circumstances.

Then there's the 'nuclear option', to go public, and make a public declaration or declamation against a host government. Clearly that has a very negative effect on your on-going relationship. What may be better is a stepped approach, where that's the final resort short of pulling out, and you have the option of warning a host government in advance that that is what you're going to do, so they have the chance to take remedial action.

What is the real influence of companies in these host countries? Sometimes this is over-estimated. Taking on host governments directly can lead to you being shown the door very sharply. The best option may be multi-

lateral action, working together with other legitimate partners. What might be useful is to develop more specific examples of how to work together, with international governmental organisations and development banks for example. In terms of providing workable long-term frameworks, for companies to assess entry into countries which may have undesirable human rights records - this is unlikely to involve a yes/no approach, and more of a balanced scorecard which would include the benefits which flow from business presence, as against the negative impact of human rights abuse within a country.

There may be cases where a government is willing to act but unable to for economic reasons. In these cases it might be easier for a company to use its influence. In most contexts it would be plausible to hold public consultations, and for a company to take action with its contractual partners. There are good examples of collective action between companies in the same industry who face the same health and safety challenges, for instance, who individually do not have the leverage to bring about change, but have been able to work together to persuade governments to take up a more progressive position. The option to use private lobbying depends greatly on context and personal relationships. Similarly, public lobbying might be effective where a willing government was short of the resources it needed to live up to its obligations, and companies might be able to pool resources with government and other actors to exert a positive influence. There may be situations where a company feels forced to disinvest, but there's a danger in that case that a less scrupulous company will replace them. Disinvesting might not be in the interests of employees in a country who might be out of work, but staying might put the company's reputation at risk, putting employees globally at greater risk of losing their jobs.

For **Alan Detheridge**, these issues don't lend themselves to simple or straightforward solutions. *'Doing nothing is never an option, and public declamation needs to be treated with great care - you're closing the door behind you as you walk out. It's right to look at a whole range of options, though companies often do that too much in isolation, and perhaps don't consult enough with home governments or within the countries themselves. It's rare to get all sections of a government unwilling to do anything about human rights. There are always people here and there in the government or civil service who are willing to take issues on. Action by a company on its own is unlikely to remedy the situation. It's the collective action that will deliver the best results. But that's more difficult to bring about, because it depends on trust between the participants. Trust takes time to develop, and can be difficult in difficult situations'.*

Lise Kingo, coming from a company dealing in medical products, sees the dilemma slightly differently. *'If we were thinking of pulling out of a country, would we be punishing the government that is responsible for the human rights abuse, or the people with diabetes who will die if you don't deliver insulin to their country? That gives a dramatic flavour to the whole question. This is not just about obeying global rules and regulations. What we have tried to do in many cases is choose the proactive solution, where we try to promote engagement, and at least try to be a role model for how companies should be run. You can go and pick a fight with the authorities, or you can just keep being persistent and insist on the values you bring to the situation, the way you do things, what your values are, what human rights and sustainability are all*

about. Making sure that all your business partners have signed up to the company's business ethics policies and procedures'.

'Trying to change things in a quiet way is best. It's not easy, but dealing with dilemmas is a key competence that companies and other people in society need to develop. It's all about making choices, and being aware of what you're choosing between'.

Jorge Daniel Taillant's message to business is 'your conscience needs to be your guide. And in making a difficult decision, there can never be regret, even when it entails financial loss, when your guide is moral, universal principles of human rights. Time in the end will favour you, even if you suffer short-term commercial loss. Proactive engagement is your greatest capital - you need to be working with your communities, especially in countries with severe human rights problems'.

4.5 Further ideas recorded by table moderators

Issue one

- *NGOs may face reputational risks in being less critical of businesses, if their reputation is based on challenging business.*
- *Customer pressure needs to be brought to bear on company behaviour.*
- *Governments could provide information to companies investing abroad on the human rights records of certain countries.*
- *Governments could make public awards to the best performing companies, to provide positive publicity. The 'rules of engagement' for the media and NGOs in criticising company action should be explicit.*

Issue two

- *Responses depend on whether the sale is a one-off, or ongoing.*
- *Companies do have scope to choose who they do business with - see the 'know your customer' regulations in UK financial services.*
- *Contracts should set out expectations of what a product will be used for, and be clear about how the company will deal with violations.*
- *Export controls could take human rights principles into account, in the case of potential 'dual use'.*

Issue three

- *Much comes down to the quality and detail of prior risk assessment.*
- *Collective action through business networks is an important tool.*
- *Home governments have an important role to play in helping to lobby host governments.*

5. THE WAY FORWARD - THE MANDATE OF THE SPECIAL REPRESENTATIVE

5.1 Introduction

Jane Nelson, The Prince of Wales International Business Leaders Forum

The final session was introduced by Jane Nelson, a Director of the International Business Leaders Forum, and Senior Fellow and Director of the Corporate Responsibility Initiative at the Kennedy School of Government at Harvard University.

'The role and mandate of the Special Representative of the United Nations Secretary General on Business and Human Rights are absolutely unprecedented: in the 60 year history of the UN, this is the first time that a Secretary General's Special Representative has been given a mandate focused on the role of business. It shows the growing awareness of the vital role that business can play in addressing complex and strategic global issues. It also positions human rights as absolutely central to that role for business. And as we've heard, we have to look at business and human rights from the perspective not just of political and civil rights, but also economic, social and cultural rights, and not just looking to do no harm, but to play a positive role.'

The Special Representative's mandate has five key areas of focus - to identify and clarify standards of corporate responsibility and accountability; to elaborate on the role of states in effectively regulating and adjudicating on the role of business with regard to human rights, including through international co-operation and collective initiatives; to research and clarify the implications of concepts such as complicity and spheres of influence; to develop materials and methodologies for undertaking human rights impact assessments, and finally to compile a compendium of best practice from state and trans-national corporations and other business enterprises in this field.

5.2 The UN Special Representative commenting on his mandate

John Ruggie, UN Special Representative

For John Ruggie, Special Representative of the UN Secretary General on the Issue of Human Rights, Transnational Corporations and Other Business Enterprises, the mandate is '*almost unlimited in scope. Probably not in twenty years could all the issues raised in it be resolved*'. Drawing on his own academic work in history and international relations, John Ruggie sees the severe imbalances in the scope of markets and business organisations on the one hand, and the ability of societies to protect fundamental social values and objectives on the other, as unsustainable historically. '*Something has to give, and will give. The Victorian version of globalisation collapsed, and the attempt to restore laissez-faire financial markets after World War*

One collapsed. They collapsed precisely because of such imbalances, and in both cases very ugly 'isms' emerged as a result, bad for business and human rights alike'.

'I am concerned that if we can't bridge global markets and social capacity, there will be increased inward-turning on the part of political leaders and electorates alike, and possibly the resurgence of nationalism and various forms of fundamentalism, as societies struggle to protect themselves, as they will seek to do'.

Achievable objectives of the mandate

In an attempt to make progress on this mandate, John Ruggie has started to identify where achievable objectives may lie. One of those areas concerns the relatively narrow set of issues around corporate liability for abuses that rise to the level of violating international criminal law. *'This is hardly the most prevalent issue on the business and human rights agenda, but it's a critical one. I address it for two reasons - first because greater clarity and predictability in this area is imperative, and second because my mandate comes in a context, concerning prior debates in Geneva. Some parties there claimed that international law has already reached the point where corporations have direct legal obligations for a whole battery of human rights standards. Others argue that this should be the case, though it might not yet fully be the case. I thought that as a starting point, looking at some actual case law might shed some light on the validity and viability of those claims, which I have to address in the context of my mandate. I can't proceed without coming to grips with the issue of how fundamentally has the international legal order already transformed, or is in the process of transforming, and the consequences of that'.*

The first point to address is the ambiguity in case law concerning the issue of legal liability, for abuses that rise to the standards of criminal law. If in this narrow and relatively hard body of law there is ambiguity, how much worse will it be in the softer areas of social, cultural and economic rights. In terms of complicity, John Ruggie sees the clearest judicial definition as being rendered by the US Court of Appeal for the Ninth Circuit, in the Unocal case. That ruling stated that complicity involved three things: practical assistance being given to the perpetrator; assistance having a substantial effect on the commission of the criminal act, and finally the knowledge criterion. But the decision was vacated because the parties settled the dispute, and so it has no current legal standing. It will require another court to take it up and reach similar or different conclusions before we know how much can be built on this edifice.

A US District Court recently dismissed the Alien Tort Claims Act (ATCA) case against ExxonMobil, in part on procedural grounds, but the court also ruled that it remains unsettled whether aiding and abetting violations of international criminal law gives rise to civil liability under international law, and the ATCA under which this case was brought provides a civil remedy for criminal violations. In rendering this decision, the Court may well have reflected a 2004 Supreme Court decision, the only ATCA case to have gone there, widely held to have raised the bar on what it takes to constitute a violation of the law of nations under the Act. *'Our work is ongoing - I'm benefiting from some comparative case law work that others are doing, but at this point the case law doesn't offer a definitive standard for complicity'.*

Sphere of influence

If complicity in international crimes still lacks precision, the related concept of sphere of influence has no established legal pedigree at all. Its origins derive from geo-politics - a country having a sphere of influence in a region. *'When we wrote "spheres of influence" into the Global Compact it was precisely my own discipline's geo-political origins that I drew upon, hoping to encourage companies to promote corporate responsibility practices throughout their supply chains, and then develop a broader and more robust concept of spheres of influence. I'm happy to see that a number of the leading companies have readily accepted the Global Compact construction of what spheres of influence mean to them. They don't always use the concept as such, but it's widely used, viewed as a series of concentric circles expanding out from a core. At the core are employees, then come suppliers, customers, and other parts of the value chain in the next circle, then surrounding communities, and finally the country of operation and society as a whole. Generally, companies also see their direct obligations as declining with distance from the core. This means I think we have established a relatively clear and robust conceptual understanding of sphere of influence, which companies have built on very productively. But beyond fairly direct agency relationships, the notion of sphere of influence in the legal sense, particularly in the hard criminal law sense, is virtually non-existent, and will take some time to evolve.'*

Examining the Alien Tort Claims Act

Returning to the Alien Tort Claims Act, which has been one of the chief vehicles for bringing cases against companies, John Ruggie described an e-mail exchange on the Exxon case that was dismissed, with a leading European legal theorist on corporate complicity. *'He insisted, correctly in principle, that a ruling by a US court doesn't change the state of international law. In practice, this is the only venue in which cases have been brought against companies. It's where the action has been, so it's worth a closer look'*.

At last count, there were 36 ATCA cases brought against companies since this judicial door was opened in the 1980s. Of them, 20 have been dismissed, 15 on substantive legal grounds (at least in part) five on procedural grounds. Thirteen are ongoing and 3 have been settled out of court, including the Unocal case

'So the record of this one legal forum, the most important thus far, is not particularly encouraging for either side in these cases. It's not encouraging for companies, though they haven't lost any cases - their fear is being dragged into such a case in the first place, given the reputational and procedural costs involved, as well as the opportunity costs - it soaks up a great deal of time and effort on the part of senior officers. For the human rights community this is not a particularly satisfactory process - the statistical record is not good, and it is enormously expensive for plaintiffs to get a hearing. So ATCA has been an important instrument, but it is clumsy, costly and uncertain for all parties'.

What is the possibility that there might be many ATCAs in other jurisdictions? The Norwegian Institute of Applied Social Science has carried out surveys of various national legal systems which suggest, as a working hypothesis, that any country that has integrated the International Criminal Court statutes into its domestic

legal system may thereby have created the potential for greater corporate liability in domestic criminal law for grave violations committed abroad. They suggest that the same may be true of those jurisdictions which have adopted implementing legislation over the years for such international conventions as those on genocide and torture. *'Legal minds will have to assess how significant a development this may become. The possibility of numerous ATCA-like cases, although these are national and not universal jurisdictions, should alert all parties to the fact that clear and stable standards are not only highly desirable but also urgently needed, even though they don't have an established track record'*.

The way forward

What is the way forward, in broad conceptual terms? *'Progress on my mandate, and on the issues that it's intended to address, will require a willingness among several major players to modify strongly held positions'*. Some members of the business community have argued that because we live in a state-based system of governance, host country jurisdiction is a necessary and sufficient condition to meet human rights challenges. *'But it cannot suffice where it does not exist - the most serious abuses take place in what we euphemistically call weak governance zones, which is the way we now describe war-torn or dictatorial or kleptocratic countries. Companies are discovering at their peril that when they operate in weak governance zones they do not thereby operate in law-free zones. Slowly, home country law may stretch to cover these operations, but it's unpredictable and uneven, so we need modification in this core position among some members of the business community'*.

Some members of the human rights community, by contrast, contend that the broad array of human rights standards should be turned into direct legal obligations for companies, and that firms should be subjected to some form of international jurisdiction. *'This position too is problematic - if we can't yet establish this in the relatively narrow and hard areas of the law, how will we do it in any meaningful way in the very soft areas that would be included under such a prescription? As for governments, too many of them have reacted to the evolution in this area over the last twenty years as though they were merely spectators. Some may believe they're doing business a favour by standing aside. They're not - they're making business's life harder. Others simply may not rank human rights high enough as a priority. A few have been trying to find common ground, knowing that the status quo is unsustainable'*.

'The bulk of my mandate lies well beyond the narrow legal realm that I've addressed today, but it's useful as a starting point. In my work and in my reports, I plan to address the entire array of governmental responsibilities in relation to business and human rights - not just as law-makers and enforcers, but also as enablers, facilitators and partners. I also plan to address the broad array of mechanisms for achieving corporate responsibility; not only legal compliance, but also the role of social norms, moral considerations and strategic behaviour. It's important to acknowledge that these are radically different spheres of human activity, and not to try to subject them all to a single approach or instrument. There are different structures of incentives and disincentives, and if we're going to make a difference we have to learn how to use the different levers in different spheres. There are no silver bullets'.

'In sum, we need our ideas, ideologies and institutional practices to catch up with economic and social realities - if we don't, we'll move into a very unhappy environment, unhappier than the one we live in now, which won't be good for business or for human rights. We need to rise above some of the doctrinal differences, and focus on concrete, practical steps to identify, clarify and implement standards of business responsibility and accountability in relation to human rights'.

5.3 Questions to the Special Representative

Question:

What's your sense of urgency here? We all understand the problem, but is there enough push behind this?

Question:

Regarding the track record of court cases so far and the concept of complicity, at the moment in the Dutch courts there's a case proceeding against a Dutch businessman who allegedly traded chemicals used by Saddam Hussein in genocide. Would this judgement have the same value for the development of international law as those in the US courts?

Question:

Given that law follows custom, and corporations go beyond borders, don't we need to think of this as a long-term evolution of international law and local laws, to bring corporations into a legal system where they are the subject of those laws?

According to John Ruggie, *'my personal sense of urgency is very high. As I look at the various players, the weakest link in the chain in my judgment has been governments, as I continue to say to them. This is an area where whatever progress there's been so far has been largely due to the work of civil society organisations, leading companies, and a small number of governments (including the UK government). The case of the Dutch businessman as I understand it involves an individual rather than a company, so there's no issue in terms of bringing international criminal law to bear. Finally, I agree that we're involved in generational change - I have a two year mandate, which is almost funny given the magnitude of the problem. The best that I can do is identify what the productive directions of change might be. It's important that the first steps are the right ones'.*

6. CONCLUSION

Mary Robinson, Honorary Chair

Drawing the 2005 Business and Human Rights Seminar to a close, Mary Robinson reiterated that this will be the last international conference in this format. Over the three years of the Seminar, it has provided important insight and perspectives on issues of the responsibility of business for human rights. *'But there was a difference this year. In previous years there was a tendency to think of two different camps - the business sector and NGOs - even if there was a willingness to reach across. This year there's a strong sense of one unified camp, in which there were different perspectives, with a greater sense of respect for the fact that businesses and NGOs increasingly work together, constructively and appropriately.'*

'The way that we've been able to reach this common ground is also paradoxically a reason why it is right not to have a conference here in London next year - we are beginning to preach to the converted. That's what's behind the idea of moving to regional conferences during 2006, beginning with a conference in Johannesburg at the end of March.'

Looking forward to another three years of the BLIHR group, possibly expanded and maybe with some national groups mirroring what the BLIHR companies are doing, there are many tools that can be strengthened. These include the Global Reporting Initiative, the initiatives in various sectors (such as the extractive industries), and the Global Compact, which Mary Robinson has been re-assessing, particularly in the light of the recent major conference in Shanghai, involving more than 500 Chinese companies, and around 100 multi-nationals doing business in China. *'It was fascinating to see Chinese companies grappling with the ten principles of the Global Compact, talking about other ways of framing human rights as "harmonious relations". Some of us who have worked in human rights don't always think that you can equate them with harmonious relations, but it's important to work with Chinese companies on that terminology, to make them feel that this is an area that is relevant to what they're doing, and then to begin asking hard questions, particularly about issues of labour standards, and what Chinese companies are doing abroad. The Global Compact has become a value system for the corporate sector in China, which hitherto didn't have one. That's going to be increasingly true in developing countries.'*

Other tools include the business-humanrights.org website, which is becoming an increasing source of information for NGOs, and also an outlet for those who want to raise an issue or make a complaint. And the Danish Institute of Human Rights has been doing some important work in helping companies to work through indicators that will encourage them to integrate human rights into their business at every level.

'In my role as the chair of the board of the International Institute for Environment and Development, I was recently involved in a conference on the role of local groups in reaching the Millennium Development Goals.'

The representatives of local groups, such as the slum dwellers of Mumbai, have the perspective that business is definitely part of the problem, that it's very hostile to them, undermining their livelihoods and habitat, is responsible for large displacements, and is complicit with governments that are also not safeguarding their interests. So in this progressive environment we might have too rosy a view: if you're very poor and marginalised in your own country, you probably don't have a very pleasant view of business'.

'Finally, something that John Ruggie emphasised in relation to his own mandate was the sense of urgency - we need to retain this. Businesses don't need to take on what is the role of government, but to reinforce that role, and hold government to its responsibility, knowing that power has shifted. The simple way that we explain the Realizing Rights project is to say that we use the term in two senses. Since the Universal Declaration the guarantee of human rights is our birthright. Article 1 says that "all human beings are born free and equal in dignity and rights". But at the same time, those with power must realise those rights, in the sense of progressively implementing them. Primarily this means governments, the UN (which now has a common understanding of a rights-based approach), the World Bank and the WTO. And in our globalising world, of course it means businesses. This provides the moral imperative and sense of urgency - business is the powerful force in the world, which can gather energies to make a change'.

The organisations involved in organising the 2005 Business and Human Rights Seminar were Amnesty International UK, One World Trust, The Prince of Wales International Business Leaders Forum, Respect Europe, TwentyFifty Limited, Business for Social Responsibility, the Danish Institute for Human Rights, Realizing Rights - the Ethical Globalization Initiative, the Fund for Peace, the Global Compact, Oxfam International, and the Business Leaders Initiative on Human Rights.

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