

1-1-2001

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### Recommended Citation

Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP.L. Rev. 339 (2001).

Available at: [https://repository.uchastings.edu/hastings\\_international\\_comparative\\_law\\_review/vol24/iss3/5](https://repository.uchastings.edu/hastings_international_comparative_law_review/vol24/iss3/5)

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# Categories of Corporate Complicity in Human Rights Abuses\*

BY ANDREW CLAPHAM\*\* AND SCOTT JERBI\*\*\*

## Introduction

The movement towards greater corporate social responsibility is now entering a phase where the parameters of this responsibility are being defined. In the field of human rights, there are growing expectations that corporations should do everything in their power to promote universal human rights standards, even in conflict situations where governance structures have broken down. At the same time, corporations may fear that they are being asked to take on responsibilities of the state. This is coupled with concerns, including by some human rights advocates, that by stressing the corporate role, government responsibilities for protecting human rights could inadvertently be downgraded.

The boundaries of what is expected from business, and what a state is obliged to do under international law, cannot be neatly drawn. It must be stressed, however, that governments do still possess wide powers over—and primary responsibility for—the well being of their citizens and for the protection of human rights. Corporations, even as they agree to take on greater responsibility in the human rights field, do not have the same legal duties as states under international law and cannot be expected to substitute for the role of governments.

What is the responsibility of a business with operations in a country where human rights violations are widespread or where

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\* This paper is based on a background paper for the Global Compact dialogue on the role of the private sector in zones of conflict, New York, March 21-22, 2001.

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company revenues help support an oppressive regime? Should a corporation be expected to influence government policies concerning human rights and the rule of law? What role should business play in conflict prevention and resolution or in development efforts? It is against this background that the notion of corporate complicity in human rights violations has emerged.

In broad terms, the suggestion of complicity often implies that corporations may aid and abet serious violations of international law by the State. Advocates of greater corporate accountability for human rights violations argue that companies do sometimes significantly contribute to the ability of a government to carry out systematic abuses of human rights. At the same time, business leaders have raised concerns about the lack of clarity in the definition of corporate complicity and the possible damage that such accusations can cause to business reputations.

### I. Putting Complicity in Context

The Universal Declaration of Human Rights is one of the foundations of international human rights law. It is accepted as a statement of universal human rights, i.e., the rights it proclaims are to be respected in every country or culture. The Declaration also serves as a point of reference for good practice and benchmarks, including for business. The preamble of the Universal Declaration states that "every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . ."<sup>1</sup>

As a major guide and compilation of corporate practice in the field of human rights points out:

While companies may not be in the habit of referring to themselves as 'organs of society,' they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration. While a company is not legally obliged under international law to comply with these standards, those companies who have violated them have found, to their cost, that society at large will condemn them. A growing nucleus of transnational companies has incorporated an explicit

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1. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, preamble (1948).

commitment in their business principles and codes of conduct to uphold the rights enshrined in the UDHR.<sup>2</sup>

When U.N. Secretary-General Kofi Annan first proposed the Global Compact in January 1999, he asked world business to “support and respect the protection of international human rights within their spheres of influence” and “to make sure their own corporations were not complicit in human rights abuses.”<sup>3</sup>

We could describe these first two of the Global Compact’s nine principles as containing two basic rules. First, a responsibility to promote human rights and a duty to avoid commission of abuses, and, second, a prohibition on complicity in others’ human rights violations.<sup>4</sup>

The spectrum of activities that have been linked to the notion of corporate complicity in human rights abuses is well described in the beginning of Margaret Jungk’s *Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad*:

Regrettably, multinationals are sometimes guilty of complicity in human rights violations perpetrated by governments. There are many cases where businesses have, for example, promoted the forcible transfer of populations from land which they required for business operations. At other times, by simply “doing business” with the national government, companies have unintentionally aggravated human rights disputes, for example, in cases where minority groups have claimed autonomy over an area. Even where a company’s operations do not directly impact upon human rights issues, the company may nonetheless be called upon to speak out or act when an oppressive government violates its citizens’ rights.<sup>5</sup>

This range of expectations represents the contemporary meaning given to the complicity concept in the literature on business and human rights. One could ask whether this list is complete and whether there are different degrees or types of complicity. To begin to address these issues, it is suggested that the concept of complicity

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2. AMNESTY INTERNATIONAL & THE PRINCE OF WALES BUSINESS LEADERS FORUM, HUMAN RIGHTS: IS IT ANY OF YOUR BUSINESS? 23 (2000) [hereinafter AI & PWBF].

3. Kofi Annan, U.N. Secretary-General, Address to World Economic Forum (Jan. 31, 1999), in U.N. Doc. No. SG/SM/6881/Rev.1 (1999).

4. Global Compact, available at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/thenine.htm> (last visited Aug. 31, 2001).

5. MARGARET JUNGK, PRACTICAL GUIDE TO ADDRESSING HUMAN RIGHTS CONCERNS FOR COMPANIES OPERATING ABROAD 171 (1999).

should be divided into three categories: direct, indirect and silent complicity.

## II. Direct Corporate Complicity

Much of the business and human rights literature avoids drawing up clear boundaries for the categories of corporate complicity in human rights abuses. A review of international criminal law suggests that direct complicity requires intentional participation, but not necessarily any intention to do harm, only knowledge of foreseeable harmful effects. A corporation that knowingly assists a state in violating the customary international law principles contained in the Universal Declaration of Human Rights could be viewed as directly complicit in such a violation. For example, a company that promoted, or assisted with, the forced relocation of people in circumstances that would constitute a violation of international human rights could be considered directly complicit in the violation.

It is important to note that in criminal law an accomplice can usually be tried for complicity in a crime even where the principal perpetrator has not been identified or where guilt could not be proven against that principal. Equally important, the accomplice need not desire that the principal offence be committed. To understand better the scope of direct complicity, we might consider some passages from judgements of the U.N.'s International Criminal Tribunals.

The International Criminal Tribunal for Rwanda addressed both issues mentioned above in the *Akayesu* case.<sup>6</sup> The first question is whether an accomplice can be tried for complicity in a crime even where the principal perpetrator has not been identified or where the guilt of that principal perpetrator could not be proven. The Tribunal Chamber asserted that all criminal systems provide that an accomplice can be tried in the absence of the conviction of the principal perpetrator.<sup>7</sup> The abuse must have occurred but it does not have to have been formally proven in a court of law.

The second issue concerned the question of whether the accomplice must desire that the principal offence be committed. Again, the Chamber embarked on a comparative exercise and

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6. Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T (ICTR Trial Chamber Sept. 2, 1998), available at <http://www.ictr.org/ENGLISH/cases/Akayesu/judgment/akay001.htm>.

7. *Id.* ¶ 531.

asserted that “in all criminal Civil law systems, under Common law, notably English law, generally, the accomplice need not even wish that the principal offence be committed.”<sup>8</sup> They concluded: “As a result, anyone who knowing of another’s criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.”<sup>9</sup>

Interestingly, the U.N. Tribunal’s Chamber bases its reasoning in part on an English case, *National Coal Board v. Gamble*, that involved corporate complicity by an employee of the National Coal Board in the corporate offence of overloading a lorry.<sup>10</sup> The judgment continues:

The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

Moreover, as in all criminal Civil law systems, under Common law, notably English law, generally, the accomplice need not even wish that the principal offence be committed. In the case of *National Coal Board v. Gamble*, Justice Devlin stated:

“an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor.”<sup>11</sup>

With regard to the concept of accomplice liability for someone who generally aids and abets an international crime, we can refer to the intentional participation test articulated by the International Criminal Tribunal for the Former Yugoslavia. In the *Tadic* case, the Trial Chamber summarized the test as follows:

The most relevant sources for such a determination are the Nürnberg war crimes trials, which resulted in several convictions for complicitous conduct. While the judgments generally failed to discuss in detail the criteria upon which guilt was determined, a clear pattern does emerge upon an examination of the relevant cases. First, there is a requirement of intent, which involves

8. *Id.* ¶ 539.

9. *Id.*

10. *See Nat’l Coal Bd. v. Gamble*, 1 Q.B. 11 (1959).

11. *Akayesu*, Judgment, ¶¶ 538, 539.

awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.<sup>12</sup>

These applications of the complicity concept by the U.N. Rwanda and Yugoslavia Tribunals in international trials for war crimes and genocide have to be seen perhaps in their special contexts. But complicity has also been referred to by the U.N. International Criminal Tribunal for the Former Yugoslavia in the *Furundzija* judgement, which discussed torture as a human rights crime even in the absence of an armed conflict.<sup>13</sup> It was even suggested in that case that presence alone may be enough to constitute participation under certain circumstances:

It may be inferred from this case [the *Synagogue* case] that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.

. . . .

It appears from the *Synagogue* and *Pig-cart parade* cases that presence, when combined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. This emphasis on the accused's authority was also affirmed in *Akayesu*. Jean-Paul Akayesu was the *bourgmestre*, or mayor, of the Commune in which atrocities, including rape and sexual violence, occurred. That Trial Chamber considered this position of authority highly significant for his criminal liability for aiding and abetting: "The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of

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12. Prosecutor v. Tadic, 112 I.L.R. 1, 229 (ICTY 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm> (May 7, 1997).

13. See Prosecutor v. Furundzija, Judgment, No. IT-95-17/1 (ICTY Trial Chamber Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>.

his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place. . . .” Furthermore, it can be inferred from this finding that assistance need not be tangible. In addition, assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.

. . . .

In sum, the Trial Chamber holds that the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.<sup>14</sup>

It is relevant for our purposes that the complicity concept has been examined and applied by these U.N. Tribunals in situations where the accused was not the principal perpetrator of the crimes, but has merely through his or her knowing participation encouraged and contributed to the wrongful act. The Rwanda Tribunal simply stated that “[t]he ingredients of complicity under Common Law do not appear to be different from those under Civil Law. To a large extent, the forms of accomplice participation, namely ‘aid and abet, counsel and procure,’ mirror those conducts characterized under Civil Law as ‘l’aide et l’assistance, la fourniture des moyens.’”<sup>15</sup>

The U.N. International Criminal Tribunal for the Former Yugoslavia summarized its examination of the international case law in a way that distinguishes complicity (aiding and abetting) from common design. This is the same as the distinction between accomplices and co-perpetrators. For the crime to be committed one needs both the actus reus (material element) and the mens rea (mental element).

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal

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14. *Id.* ¶¶ 207, 209, 235 (footnotes omitted).

15. Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T, ¶ 535 (ICTR Trial Chamber Sept. 2, 1998), available at <http://www.ictor.org/ENGLISH/cases/Akayesu/judgment/akay001.htm>.

enterprise and the mens rea required is intent to participate.<sup>16</sup>

What could this review of the international cases imply for the category of direct corporate complicity in human rights abuses? We could summarize our review by stating that, if we apply the same reasoning to corporations, a corporation will be directly complicit in human rights abuses where it decides to participate through assistance in the commission of human rights abuses and that assistance contributes to the commission of the human rights abuses by another. The primary perpetrator does not necessarily have to have been found responsible in order for the corporate accomplice to be found liable for having contributed to those same human rights abuses. Nor need the corporation actually wish the results. It is enough if the corporation or its agents knew of the likely effects of their assistance.

### III. Beneficial Corporate Complicity

The notion of corporate complicity in human rights abuses is not confined to direct involvement in the execution of illegal acts by others. As mentioned earlier, complicity has also been used to describe the corporate position vis-à-vis government violations when the business *benefits* from human rights abuses committed by someone else.

The Danish Human Rights and Business Project combines the Confederation of Danish Industries, the Danish Centre for Human Rights and the Industrialization Fund for Developing Countries. Their report, *Defining the Scope of Business Responsibility for Human Rights Abroad*, sounds a warning to companies who benefit from human rights abuses.<sup>17</sup> The report labels this “indirect complicity” and takes as an example an oil company embroiled in litigation concerning forced labour:

In the modern world, the decisions taken by a business can have major implications for lives and communities geographically and culturally remote, so businesses do have to be discerning in identifying their indirect connection to violations. For example, in the early 1990s several international oil companies undertook a

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16. *Furundzija*, Judgment, ¶ 249.

17. See Human Rights & Business Project, *Defining the Scope of Business Responsibility for Human Rights Abroad*, available at <http://www.humanrights.dk/humanrightsbusiness/index.html> (last visited Aug. 31, 2001).

joint venture with the Burmese government and the state oil company, Myanma Oil and Gas Enterprise (MOGE). MOGE assumed responsibility for providing labour and security for the construction of a gas pipeline for the project. Allegations later emerged that forced labour and child labour were used to construct the pipeline, and that other violations, including torture, and forced relocation, occurred in MOGE's operations to clear the area and provide security. Although the main Western partner, Unocal, did not directly carry out these purported violations itself, because of its involvement in the project, its liability for acting in concert with the Burmese government and MOGE in breaching universally recognised human rights standards is now under consideration in the United States District Court of California [*Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc.*, 176 F.R.D. 329 (N.D. Cal. 1997)]. Businesses must, therefore, be alert to the extent to which they can be indirectly complicit in human rights violations.<sup>18</sup>

This case is currently under appeal, the complaints against the oil company having been rejected in August 2000. Whether or not the U.S. courts ultimately find complicity in this case, the labels of "indirect" or "beneficial" complicity appear likely to be applied where companies knowingly benefit from human rights abuses. In a more recent case, a complaint has been filed against Exxon Mobil regarding activity in Aceh, Indonesia. The complaint filed in the U.S. District Court for the District of Columbia on June 11, 2001, specifically asks the court to enjoin "Defendants from further engaging in human rights abuses against Plaintiffs and their fellow villagers in complicity with the Indonesian Government and military."<sup>19</sup>

Violations committed by security forces such as the suppression of peaceful protest against business activities or use of repressive measures while guarding company facilities are often cited in this context. What is important for present purposes is the sense that, where human rights violations occur in the context of a business operation, the business need not *cause* the harm for it to become tainted by the abuses. This is the danger that is being warned against.

#### IV. Silent Complicity

The notion of silent complicity reflects the expectation on

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18. *Id.* at 13.

19. For full text of the complaint, see <http://www.laborrights.org> (last updated Aug. 31, 2001).

companies that they raise systematic or continuous human rights abuses with the appropriate authorities. Indeed, it reflects the growing acceptance within companies that there is something culpable about failing to exercise influence in such circumstances.

The comprehensive report by Chris Avery, *Business and Human Rights in a Time of Change*, refers to the approach of Sir Geoffrey Chandler (Chair of the Amnesty International (UK) Business Group) who has stated that "Silence or inaction will be seen to provide comfort to oppression and may be adjudged complicity. . . . Silence is not neutrality. To do nothing is not an option."<sup>20</sup>

Whether or not such silent complicity would give rise to a finding of a breach of legal obligation against a company in a court of law, it has become increasingly clear that the moral dimension of corporate action or inaction has taken on significant importance. For example, according to the Ethical Investment Research Information Service, ethical investors "are becoming less concerned about where a company operates, and more concerned about the positive steps that are being taken to prevent complicity in violations and to further human rights actively."<sup>21</sup> Similarly, shareholder resolutions may put pressure on chief executives to raise with the authorities issues regarding human rights defenders or labour activists who have been imprisoned, even in the absence of any legal obligation on the company to do so.<sup>22</sup> The clear recommendation in the literature designed to assist companies is that a narrow reading of complicity does not meet today's expectations, particularly in situations where there is little trust in government and security forces.

The importance of avoiding accusations of silent complicity is considered by some to be central to sensible risk management in this area. "TNCs operating in countries with repressive and corrupt governments are at particular risk of criticism from a wide range of stakeholders for complicity, tacit or active, in human rights abuses perpetrated by the state."<sup>23</sup>

The manual *Human Rights: Is it Any of Your Business?* contains a key element for any corporate human rights strategy. This recommendation makes it clear that the limits of silent complicity will

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20. CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE 22 (2000) (quoting Sir Geoffrey Chandler).

21. AI & PWBF, *supra* note 2, at 70; see generally <http://www.eiris.org> (last visited Aug. 31, 2001).

22. AI & PWBF, *supra* note 2, at 68-70.

23. *Id.* at 24; see also *id.* at 11, 15, 38, 45, 82.

vary from company to company and depend on the country's context:

Raise human rights concerns with government authorities either unilaterally or collectively with other companies. Senior managers should be prepared to speak out where abuses persist and quiet diplomacy has failed. In developing policies and practices with regard to human rights, companies need to delineate clearly the boundaries of their responsibilities, their willingness to become involved in advocacy and exert influence. This clarifies the extent of assumed responsibilities and makes it possible to monitor progress against objectives and targets.<sup>24</sup>

In other words, quiet diplomacy may not be enough to avoid accusations of silent complicity.

### Conclusion

This paper has sought to shed some light on the categories of complicity currently used in the context of the business and human rights debate. It has also examined the specific meaning of complicity in international law with regard to individual complicity in international crimes. Corporate complicity at the international level has had less attention due to the obvious lack of international courts with jurisdiction. But it seems safe to assert that international law considers that intentional participation in an internationally wrongful act constitutes complicity in the breach of international human rights law.

One should not underestimate the difficulties of categorizing the different meanings of complicity in the business context. The limits of what is meant by complicity tell us a lot about our sense of community and responsibility towards others as well as expectations in the communities of those affected by business practices. In attempting to apply this conceptual breakdown at the U.N. level, it is worth remembering the Oxford English Dictionary's second listed meaning for complicity: "state of being complex."<sup>25</sup>

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24. *Id.* at 11.

25. OXFORD ENGLISH DICTIONARY 617 (2d ed. 1989).

