

UNDERSTANDING CORPORATE COMPLICITY: EXTENDING THE NOTION BEYOND
EXISTING LAWS (Public)

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On April 27 this year, Shi Tao, a Chinese journalist, received a ten-year prison term for sending information about a Communist Party decision to a website in the US, using his Yahoo email account. On June 2, Shi's appeal was denied.

In the eyes of Amnesty International, Shi is a prisoner of conscience. He was imprisoned solely for exercising peacefully his legitimate right to seek, receive and impart information. According to court transcripts of the evidence presented by the prosecutor that led to Shi's conviction, his Yahoo account-holder information was provided to the authorities by Yahoo! Hong Kong , including confirming the internet protocol address at a precise time in April.

On 4 February 2005, soldiers from the Nigerian Joint Task Force fired on protesters from Ugborodo, a small community of the Itsekiri ethnic group, who had entered Chevron Nigeria's Escravos oil terminal on the Delta State coast. One demonstrator was shot and later died from his injuries, and at least 30 others were injured, some of them seriously, by blows from rifle butts and other weapons. Chevron Nigeria, which operates the terminal, said that 11 employees and security officers received minor injuries. The industry-strength boundary fence was cut in five places, and windows and helicopter windscreens were smashed. It was several hours before the injured protesters could reach a hospital, a lengthy boat journey away. Neither the security forces

nor Chevron Nigeria provided adequate medical care or assistance to transport the injured.

The protest was over a Memorandum of Understanding signed by Ugborodo community representatives and Chevron Nigeria in 2002. The protesters said that Chevron Nigeria had not provided the jobs and development projects they were promised. The company denied charges and said that the responsibility for protecting its facilities rests with the state security forces, and it could not control the actions of the security forces in any way. Chevron, like other oil companies operating in Nigeria, does provide the state security forces with allowances in line with industry practice, as well as interacts regularly with the JTF.

Human rights law is clear that the state has primary responsibility for respecting and promoting human rights. Human Rights law is also clear that non-state actors such as companies have a responsibility to uphold human rights – as an organ of society, in the words of the Universal Declaration of Human Rights – within their area of control and sphere of influence – whether in the context of their operations or in the communities in which they operate.

But what happens when the company itself does not commit an abuse but benefits from an abuse committed by a government or armed group? Or funds those who commit abuses? Or remain silent in the face of abuse? Or complies with national laws and policies which are clearly in violation of international human rights?

The Second Principle of the Global Compact calls upon companies not to be complicit in human rights abuses.

UN Norms commentary specifically states:

*“Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not **contribute** directly or indirectly to human abuses (sic), and that they do not directly or indirectly **benefit** from abuses of which they were aware or ought to have been **aware**..... Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid **complicity** in human rights abuses. The Norms may not be used by States as an excuse for failing to take action to protect human rights, for example, through the enforcement of existing laws.”¹(Emphasis added).*

A legal or moral case?

Corporate complicity is an emerging area of law – it is also an area where moral questions are as important as legal ones – at least until there is more legal clarity - of what is good practice, what is right and wrong, fair and unfair. It extends from a situation where a company has knowingly funded, supported or benefited from human rights abuse to a situation where it has been a silent witness of abuse committed by others. Where do the boundaries of complicity begin and end? On one side there is law which tells us what can and cannot be done. But we must not stop where the law rests; in protecting human rights sometimes we have to go beyond the law, where there are values and principles which are worth fighting for. To give an analogy, there is currently no international consensus on the abolition of the death penalty. But AI continues to work towards its abolition, and has been instrumental in setting the international strategy for it.

In some cases, criminal or civil liability may be clear. For instance there is jurisprudence on complicity in war crimes, crimes against humanity and genocide. There is also emerging civil liability through, for instance, cases being brought under the Alien Torts Claims Act in the US.

¹ Paragraph B under General Obligations; UN Norms.

But there are many other cases where the parameters of complicity are only emerging – sometimes through campaigning pressure, at other times through greater acknowledgement of corporate responsibility and occasionally through hard lessons learnt from disasters and failures.

So, let me start by laying out some examples of real cases where companies can risk complicity.

Armed Conflict

Companies may provide money, resources, infrastructure, products or services that facilitated human rights violations in the context of armed conflict.

An apparently innocuous trade in rough diamonds was used to fund weapons with which gross human rights abuses were then committed. No court case had to be fought to make the diamond industry realize that the risk to their reputation of complicity in crimes against humanity. That led to the Kimberly Process certification scheme.

So, what is the corporate liability if an oil company provides aviation fuel to the Sudanese air force to bomb villages? This is a case where the company concerned withdrew from its contract with the Sudanese government. Naming and shaming – or reputational damage on moral grounds – can be as strong an incentive as legal action, as companies operating in Sudan, the Democratic Republic of Congo, Columbia, Sierra Leone, and Angola have found to their cost.

Slavery and forced labour

The right not to be held in slavery or servitude was recognized in the 1926 Slavery Convention, which obliges states to prevent slave trade and abolish slavery in all forms. The International Labour Organisation adopted a convention in 1930 to end forced labour. UNOCAL was sued in the United States under the ATCA for participating in a joint venture with the government of

Myanmar in which the Myanmar army had used forced labour to build a pipeline. UNOCAL settled the case of out court.

Companies that use migrant labour directly or through their suppliers may need to be particularly careful, given the increase in human trafficking and abuse of migrant workers. When a gang master hires undocumented foreigners to work under inhumane conditions in certain industries, the companies that benefits from the products they make could run the risk of being complicit, even though they themselves do not own the factories.

Child Labour

Many companies in the developing world employ children. Many of those companies supply their products to major international chains in the developed world. Ending child labour will take time, but some forms of child labour are inherently exploitative, dangerous and unacceptable. If a company in the developed world turns a blind eye to such child labour and continues to contract work to offending subcontractors, it could run the risk of being complicit in the abuse of children's rights.

Trade Union Rights

A company provides residential addresses of its employees who are active trade union members to a government which is hostile to trade unions. Or calls in the police which brutally disperses trade unions officials. Or remains silent when its trade unions officials are systematically killed by the authorities or “disappear”.

Technology

There have also been instances where companies have provided technology to governments to commit human rights abuses, for instance, surveillance technology to authoritarian governments which then used that technology to track down and punish dissidents, and, the international tribunal at Nuremberg after World War II sentenced senior executives of German firms that provided the Zyklon B gas to the Nazis. Other executives, who facilitated the abuses in concentration camps, were also sentenced.

The role of international IT companies in China has drawn great attention in recent months. Access of users in China is being severely restricted. The Chinese government cannot do this on its own; it is able to do so because companies are assisting the government in blocking certain sites and sources of information.

Earlier I mentioned the case of Shi Tao – could such a case create a claim of corporate complicity on the part of Yahoo? What about Google and Microsoft which have acquiesced with the Chinese governments' requests and policies of restricting freedom of expression and information? Such corporate behaviour raises not only issues of complicity but also undermines the value of an industry committed to free access of information.

Discrimination

At the heart of human rights law is the principle of non-discrimination. Many companies operating in South Africa during the apartheid era not only followed the discriminatory laws of that time, some of them also aided and abetted the South African government's policies – by providing technology, infrastructure, and other means to implement its policies. The Truth and Reconciliation Commission established three levels of moral responsibility for business in the context of apartheid:

First order involvement – companies that actively helped to design and implement apartheid policies e.g. the mining industry that worked with the government to shape the migrant labour system from which it benefited.

Second order involvement – when companies knew their products would be used for repression. For instance arms producers who knew that their weapons would be used by the security forces in the townships or banks that provided covert credit cards to repressive security operations.

Third order involvement – companies that benefited indirectly by virtue of operating within a racially segregated environment.

During the apartheid era, many US companies operated under Sullivan Principles, which aimed to eliminate discrimination at workplace.

Companies need to be careful about non-discrimination in employment practice, including retirement, promotion and dismissal; in their choice of suppliers and partners; in meeting quotas under affirmative action programs where such programs are in place; and in a whole range of other policies, including laws that specifically discriminate against women and minorities.

Non discrimination may be particularly relevant also for companies that run hospitals, food distribution systems or schools. Acquiescing with discriminatory policies of states may expose a company to the risk of complicity in a wide range of human rights, including economic, social and cultural rights.

Many companies seek to hide behind national laws, but what may be legal at the national level could be wholly unacceptable at the international level. Standards for human rights are set internationally, but unfortunately the international legal system is too weak to enforce international standards. But this does not exonerate companies from moral scrutiny and

reputational damage. Some of the toughest campaigns against corporate behaviour were not fought in the court of law but in the court of public opinion.

Towards a definition

It is clear from these examples that the concept of complicity is nuanced and multilayered, with different meanings in different contexts.

At one end of the spectrum complicity must be differentiated from direct abuse. There are many cases in which companies are directly responsible for human rights abuses e.g. the disaster at the Union Carbide plant in Bhopal, India.

At the other end of the spectrum, the mere presence of a company in a country with a poor human rights record does not make it complicit in human rights abuse.

Criteria for defining corporate complicity are emerging from existing jurisprudence and by analogy with complicity in international and domestic criminal law, and through academic research and analysis, but also through greater consciousness about the role and impact of corporate behaviour on human rights.

To understand corporate complicity it is important to know the nature and scale of a company's participation in the economy, the way and extent to which the company supports or benefits from the human rights abuses, the nature and duration of the company's relationship to the perpetrator and the victims, the company's knowledge and intent, and the scope and character of the abuse itself.

In addition, emerging jurisprudence in criminal law, building on complicity for war crimes, crimes against humanity and genocide, developing civil standards and principles in different tribunals and courts have advanced definition and criteria which, combined, provide a broad understanding of complicity.

Key considerations are:

Proximity: How close is the company to the violation? The higher proximity, the higher the likelihood of complicity. How proximate is the company to the violator/abuser? (Does the company have a joint venture with the company? Does the company control the abuser in any way? Is there a trading relationship? Does the company have the greater bargaining power in the relationship? Is the abuser the company's subsidiary?)

How proximate is the company to the victim? (Are the victims members of the staff? Employees of subcontractors or subsidiaries? Communities around the facility of the company? Residents in the town?)

Knowledge and Awareness: Did the company know, or should have known about the abuse? (The longer the duration the greater the likelihood that the company knew or should have known, and hence of complicity)

A large multi national may not always be aware of every detail in every subsidiary. Nike has over 650 suppliers spread in 65 countries, not including the US, where it is headquartered. Nike initially did not know the conditions in which employees of its sub-contractors worked until activist groups highlighted the abuses. Should it have known? In the end, Nike could not get away from the reputational damage, and had to establish a mechanism to monitor workplace conditions.

During World War II, Friedrich Flick was convicted of crimes against humanity not only because he used forced labour, but also because he provided money to the SS, knowing what SS did. Two German businessmen were sentenced to death for knowingly supplying Zyklon B, the poison gas used in concentration camps. IBM Corp has been accused of facilitating efficiency in concentration camp management by providing punch card technology.²

A financial institution that provides loans to an engineering company that builds a power plant on land from which people have been evicted forcibly may be considered complicit, if it can be established that the financial institution knew, or should have known, the consequences of its action. That is the basis on which some NGOs have begun to target the World Bank group, for instance.

Benefit: Does the company benefit from the abuse? Any benefit the company derives as a consequence of the abuses raises the risk of complicity). For instance a state evicting people from their agricultural land so that the company can prospect for oil or build a golf course creates a benefit for the company. A state that passes legislation to ban unions so that companies can operate in free trade zones at lower costs also creates a benefit for the company. In such cases, the company is not actively assisting the state, nor in a partnership with the state, but it stands to benefit from the state's act.

Avoiding complicity

What can companies do to avoid complicity? What companies must do is to create and maintain a culture of non-complicity in every aspect of their operations. To do so, companies must move towards a culture of compliance with human rights and international standards. For guidance,

² See *IBM and the Holocaust: The Strategic Alliance between Nazi Germany and America's Most Powerful Corporation*. Edwin Black. (Crown Publishing, 2001).

they can turn to principles suggested by the Office of the High Commissioner on Human Rights.

These principles ask companies to:

- Establish assurance mechanisms internally within the company.
- Make these mechanisms transparent and easily accessible to staff, communities around the company's facilities, subsidiaries, partners, associates, collaborators, shareholders, and other stakeholders.
- Make the mechanism enforceable.
- Consult experts within and outside the company, NGOs, local communities.
- Raise internal awareness of complicity.
- Create risk maps.
- Identify functions the company performs which place the company most at risk.
- Analyse functions to be undertaken and identify potential, direct and indirect, intentional or otherwise, impact on human rights through a comprehensive human rights impact assessment.
- Identify sources of suppliers.
- Establish external verification systems.
- Respect labour rights.
- Lobby governments where appropriate.
- Make the policies apply to the supply chain, partners, associates, etc.
- Do not take steps that may undermine the state's obligations to respect, protect, fulfill and promote human rights.

Companies should also seek broader, industry wide commitment to non-complicity. One example is the Kimberley process where companies have joined with governments and NGOs to develop voluntary codes of conduct to avoid complicity in human rights abuses from diamond trade in

conflict ridden countries. The Kimberley Process is not a perfect system, but it shows what can be achieved.

Of course, corporate complicity does not weaken state responsibility – indeed, it strengthens it by ensuring that a perpetrator state is deprived of allies. Just as good citizens avoid being complicit in crime, so good companies must avoid complicity in their spheres of influence.