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The Human Rights Responsibilities of Business: from Complicity to Advocacy

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The Division of Responsibility in the UN Framework

Separation of duties

- "*Companies have **unique** responsibilities,*" which should not be "*entangled*" with state obligations.
- Responsibilities are seen to be "***differentiated but complementary***"
- I.e. clear-cut, rather than overlapping division of responsibility

Corporate responsibility to respect

- Responsibility "***not to infringe*** on the rights of others - put simply, to ***do no harm.***"
- "*The responsibility to respect is the **baseline expectation** for all companies in all situations*"
- Includes direct and indirect infringements, i.e. avoidance of complicity



Corporate Complicity

General definition

- Complicity *"describes a subset of the indirect ways in which companies can have an adverse effect on rights through their relationships."*
- Narrow definition in reports: *"indirect **involvement** by companies in human rights abuses."*
- Broad definition in literature: aiding and abetting

Specific criteria

- Knowledge vs. intent
- Substantiality vs. indispensability

Types of complicity

- Active types (involvement, commission)
 - direct and indirect complicity
- Passive types (no involvement, omission)
 - beneficial and silent complicity



Silent Complicity in the UN Framework

Silent complicity in the legal context

- Mere presence, paying taxes, *silence* as questionable sources of complicity
- Legal liability for acts of omission only in very narrow contexts
- Consistent with Framework's definition of complicity as "involvement"

Silent complicity in non-legal contexts

- Concept of complicity "*has legal **and non-legal** pedigrees...the implications of **both are important** for companies.*"
- Companion report: "*the **most relevant considerations** underpinning complicity" include "both legal and **non-legal points of view.**"*
- Legal standards are "*only part of the story*"
- No explicit exclusion of silent complicity as a relevant concept in non-legal context

Defining the non-legal context

- "*Social expectations*"
- Of particular relevance: organizations such as UN Global Compact, public and private investors, and human rights advocacy groups



Silent Complicity in the UN Framework and Beyond

Reference to UN Global Compact

- Reliance on UN Global Compact for complicity in non-legal context
- Three main forms of complicity: direct, beneficial, *silent* complicity
- I.e. silent complicity turns into "*part of the story*" and one of the "*most relevant considerations*" also for the Framework

Defining silent complicity: two elements (Wettstein 2012)

- Omission of a duty to speak out
 - If silence is complicity, then avoiding it requires speaking out
 - I.e. silent complicity presupposes a *responsibility/duty* to speak out
- Legitimization or encouragement
 - Omission has a legitimizing or encouraging effect

Two key questions

- What counts as "speaking out"?
- Can corporations have a *responsibility/duty* to speak out?



Defining the Duty to Speak Out

Two Interpretations of "speaking out"

- First interpretation: "mere" public condemnation
- Second interpretation: exerting influence

Evidence from the debate

- **Global Compact/UN Framework:** *"failure by a company to **raise the question** of systematic or continuous human rights violations in its interactions **with the appropriate authorities.**"*
- **Mary Robinson:** *"the growing acceptance [...] that there is something culpable about **failing to exercise influence**" in circumstances of "systematic or continuous human rights abuses."*
- **International Council on Human Rights Policy:** *"A company is aware that human rights violations are occurring, but **does not intervene** with the authorities to **try and prevent or stop** the violations."*
- **John M. Kline:** *"a non-participant is aware of abusive action and, although possessing some degree of ability to act, chooses **neither to help protect nor to assist victims** of the abuse, remaining **content to meet the minimal ethical requirement to do no (direct) harm.**"*

I.e. literature and UN Framework seem to favor a demanding interpretation



Two Interrelated Inconsistencies in the Framework

First inconsistency: leverage vs. impact

- *Conceptual starting point*: demanding interpretation implies leverage-based responsibility
 - *Inconsistency*: Ruggie adopts demanding definition of speaking out, but rejects leverage-based responsibility
- *Consequence*: change either definition (at odds with literature) or expand responsibilities

Second Inconsistency: protect vs. respect

- *Conceptual starting point*: duty to speak out is a *positive* responsibility (cannot plausibly be justified on basis of do no harm)
 - *Inconsistency*: speaking out means protecting human rights, but Ruggie limits corporate responsibility to category of respecting human rights
- *Consequence*: constitutive separation of duties in the Framework collapses



The duty to speak out: Four conditions (Wettstein 2012)

First condition: Influence

- Realistic expectation regarding actual improvement of the victims' situation

Second condition: Autonomy

- Responsibility presupposes free and voluntary choice.
- E.g. corporation must be able to withstand potential retaliation

Third condition: Connection

- Morally significant connection to the human rights violation
- Limits the scope of responsibility, i.e. to whom it is owed

Fourth condition: Status

- legitimizing/encouraging effect presupposes social or political status or prestige of agent



Silent complicity: Summary

Two interrelated circumstances

1. *Omitting a positive duty*: corporation is in a position and has a positive responsibility to help, but chooses to remain inactive.
 - Three conditions: autonomy, influence, and connection
2. *Legitimizing/encouraging violation*: Omission of this positive duty lends moral support to the abuse.
 - One additional condition: status or prestige within the wider social or political environment



Ruggie's objection against leverage-based responsibility: "can" does not imply "ought"

Ruggie's objection

- *"Anchoring corporate responsibility in influence defined as leverage is **problematic**, because it **requires assuming, in moral philosophy terms, that 'can implies ought'.**"*
- Corporations *"cannot be held responsible for the human rights impacts of every entity over which they may have some leverage **because this would include cases in which they are not contributing to, nor are a causal agent of the harm in question.**"*

First response

- Straw man: no one argues for such responsibilities *unconditionally*
- "Can", implies "ought" depends on connection, normative burden
- I.e. leverage is only one among several conditions

Second response

- Context in which responsibility is not based on contribution or causality are nothing new: E.g. role-based responsibilities, "good Samaritan"...
- I.e. Ruggie's nonchalant and categorical rejection seems peculiar



Conclusion: Guiding Principles and Beyond

Business and Human Rights: The Evolving International Agenda (2007)

- Focal point “needs to **expand beyond** establishing individual corporate liability for **wrongdoing**...An individual liability model alone **cannot fix larger imbalances** in the system of global governance.”

Framework

- Categorical rejection of moving beyond individual liability for wrongdoing

Guiding Principles

- “The responsibility to respect human rights requires that business enterprises: [...] **Seek to prevent or mitigate adverse human rights impacts** that are **directly linked** to their operations, products or services by their business relationships, **even if they have not contributed** to those impacts.”
- At the same time: reasserts Framework's clear separation of duties



Conclusion: From Complicity to Advocacy

Duty to speak out equals human rights advocacy

- 4 conditions of legitimate human rights advocacy by corporations (Wettstein 2010, 2012)

Condition 1: Scale of human rights violations

- Limited to severe, ongoing and systematic violations

Condition 2: Responsiveness

- Responsive to concerns of global public and its institutions as well as to the victims of human rights abuse

Condition 3: Collaboration

- Collaboration decreases moral uncertainty and increases leverage

Condition 4: Publicness

- Accountability requires transparency: taking a public stance.



A Final Statement from Sir Geoffrey Chandler

“These companies are vital to the countries they serve. They help to sustain economically regimes of very varied complexions – from democracies to oppressive dictatorships. We ask them and see it as part of their agenda, to speak out in defence of human rights where they are violated in the countries in which they work. This is a wholly legitimate role. It is not interference in domestic politics, an argument that companies have used as an escape route in the past.” (Chandler, 1999, p. 43)