

Corporate Fallout Detectors and Fifth Amendment Capitalists: Corporate Complicity in Human Rights Abuse:

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Ladies and gentlemen

My name is Mark Taylor and I am Deputy Director of a Norwegian think tank in Oslo – called the Fafo Institute for Applied International Studies. We work on social and economic development planning with local partners in a number of countries, with a core focus on generating data and information useful in the management of transition economies and in transitions from conflict.

In recent years we've leveraged this country-oriented experience of working in difficult situations to begin working on thematic issues relevant for human security – child labour, war affected children, trafficking in women and children. And, for two years now I have been the principle researcher on a project called *Economies of Conflict*, which looks at private sector activities in armed conflict.

Much of what I am going to say has come out of this research work, particularly our work on policy options.

I'd like to start by making 3 quick very general points that emerged from our research and that are relevant to a discussion of complicity:

First, understanding the role of the private sector in relation to human rights abuse requires an understanding of the zones of conflict as being also areas of social and economic activity. This perspective focuses on activities, rather than actors, and opens up the possibility of looking at what actors are doing on the ground in a way that doesn't pre-judge their effects because of who or what they are (civil/military, state/rebel, local or multinational).

Second, we found that the key to understanding the links between market-based activity and conflict was to understand how economic opportunities are exploited. In terms of human rights abuse, the most important aspect of exploiting economic opportunities in a zone of conflict is the extent to which *coercion* is integrated to economic activity...or, as we put it, the need to understand the potential for human rights abuse when the use of force becomes a factor of production.

Finally, in zones of conflict, what are actually informal economies are very well integrated to the global markets, often via several steps involving criminal or abusive behaviour. This integration makes it very difficult to distinguish between what are licit and illicit commodities. This complicates the question we face today:

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What does it mean to make sure that you are not complicit human rights abuse?

I am going to try to frame the discussion around complicity, to try to clarify the terms of the debate, in the hope that this will provide some common ground for the discussion that will follow.

In the United States, when someone is hauled before a congressional committee and asked tough questions, they can “plead the fifth amendment”, basically decline to answer on the basis of an amendment of the US Constitution which gives you the right not to incriminate yourself. “Pleading the fifth” has a dual connotation. It implies guilt. But “pleading the fifth” also contains a sense of persecution. This is because of the use of the fifth amendment by the victims of the anti-communist witch hunts of Senator McCarthy in the 1950s.

Recently the Harvard economist John Kenneth Galbraith reacted to use of the fifth amendment before Congress by the former officers of Enron and Andersen Consulting; Galbraith said “I entered politics at a time when there were fifth amendment communists and I’ve reached the age of ninety-four when there are fifth amendment capitalists.”

I think the notion of “fifth amendment capitalists” is a good one to keep in mind this morning because it captures the extreme attitudes that frame our discussion here. On the one extreme, those who feel corporations operating in the presence of human rights abuse are by definition complicit and, on the other extreme, the sense among companies that complicity is a concept that will be used to hunt multinationals as a kind of anti-neo-liberal blood sport.

I think there is middle ground here and I think it rests in the clarity and level playing field offered by the law. I will talk about this in a minute.

But the fact of the matter is, complicity is always bad news, particularly if – like me – you are concerned with the really horrible end of the human rights continuum, namely genocide, crimes against humanity and armed conflict. Perhaps because it is always bad news, people don’t want to talk about it much and that’s why we are always told that complicity is notoriously hard to define. I don’t think complicity is hard to *define*, at least not in theory, although I would argue that, so far, it has proven hard to *avoid* in practice.

To get a better grip on what is complicity, it might help if we first agree on what complicity is *not*.

Corporate complicity is *not* human rights abuse by companies. The word complicity is often used to describe company wrong doing, as though it were synonymous with the abuse itself. But complicity is not the act or commission of an abuse of a human right. A company is not complicit if it uses forced labour, or directly plunders a natural resource; the company is actually perpetrating or committing a human rights violation or a crime. Complicity is not direct commission, it is participating in a violation carried out by another.

This is a semantic point, but it is important, because the implication of this is that complicity is *not* simply the presence of a company in the area of human rights abuse.

In March of this year, a Canadian oil exploration company announced its drilling operations had turned up “a new world class basin” in the Lake Albert region of Western Uganda. This

happens to be just across the border with the DR Congo, about 150 km from the town of Bunia. The same company had signed a deal a year earlier with the Kinshasa government to explore the basin on the DRC side of the border, in effect giving it control of concessions in the middle of a war zone.

At the same time as the company was announcing its find, the UN Security Council declared the situation in eastern Congo a threat to international peace and security. Ugandan troops were withdrawing from the DRC under international pressure, proxy militias for the DRC and Ugandan governments were committing atrocities and forcing people to flee. The EU sent a force to lead the UN in stabilising the situations. And, as the refugees emerged from the war zone, it was alleged that the fighting was an attempt by the Kinshasa government to ensure control the region's oil.

In principle, the presence of that oil company in proximity to human rights violations should not be sufficient grounds for allegations of wrong doing. It will depend on any number of things, not least the extent to which the company supports or benefits from the fighting factions on the ground. So, presence is not enough (and each case needs to be evaluated individually).

If complicity is not the direct violation of human rights, and it is not simply company presence, what is it?

Complicity occurs when someone or a company aids or abets - that is, helps or encourages - the actual perpetrator in the carrying out of the abuse or violation.

You will have to excuse me, as here I must get into aspects of legal definition (see, e.g., *Beyond Volunteerism*, [International Council on Human Rights Policy](#)).

In most legal traditions, complicity must usually take the form of substantial or material assistance to the perpetration of the abuse; there must be knowledge of the violation, or in some cases simply good evidence that the participant should have known, particularly if the violations were happening over a period of time. Complicity can also take the form of encouragement - or abetting. This is what the Global Compact principle describes as "direct complicity".

Indirect complicity, called "beneficial" by the GC or sometimes "beneficiary" complicity, involves a company that supports perpetrators of human rights violations and receives a benefit from that support and those abuses. For example, companies may be in joint ventures with government agencies or others in projects that are perpetrating human rights abuse. Again, the company is not committing the abuses, nor is it directly helping specific abuses to be committed - but its support to the perpetrators of the abuse results in benefits to the company.

Finally, a word on what the Global Compact has called "silent complicity", which is explained on the web site rather delicately as the view of human rights advocates that companies who remain silent in the face of obvious human rights violations are in some way complicit. If companies should be reporting human rights abuse, then silent complicity may be a good way to think about the obligation to do so. But the law in most countries has not reached that stage yet. So, silent complicity remains a moral principle, albeit one with the potential to have significant impact on corporate reputation or brand value.

So, complicity may be fairly easy to define in theory. Why is it hard to avoid in practice?

The first part of an answer has to do with the law, particularly international law governing crimes against humanity. The core characteristic of crimes against humanity is their massive and systematic nature. Any company that has operations in situations of crimes against humanity, or has a financial relationship with the perpetrators (government or non-state actors) is going to find it very difficult to extricate itself from the systematic aspect of the violations, particularly if the company does nothing once the crimes become known.

So, at the risk of appearing to contradict myself, I would argue that company entry into or presence in an area may indeed be enough for complicity to be assumed, but probably only in situations in which the violations in question were widespread enough to rise to the level of being crimes against humanity.

This is one sense in which complicity is hard to avoid.

I suspect that is why Luis Ocampo, the Chief Prosecutor of the International Criminal Court, recently announced that he will be looking into alleged complicity of economic actors in the DR Congo. The ICC cannot prosecute companies (legal persons) but it can prosecute individuals acting on behalf of companies. And complicity is a violation of international law.

If the prosecutor goes forward he would be looking at the officers or personnel of companies which have engaged in transactions that may have aided and abetted – that is, have been complicit – in the perpetration of war crimes and crimes against humanity by members of various combatant groups since July 1, 2002.

On this point, Mr Ocampo has specifically mentioned the “Money-laundering and other crimes committed outside the Democratic Republic of Congo which may be connected with the atrocities” as well as [“Various reports have pointed to] links between the activities of some African, European and Middle Eastern companies and the atrocities taking place in the Democratic Republic of Congo. The alleged involvement of organized crime groups from Eastern Europe [has also been mentioned. Their] activities allegedly include gold mining, the illegal exploitation of oil, and the arms trade. There is general concern that the atrocities allegedly committed in the country may be fuelled by the exploitation of natural resources there and the arms trade, which are enabled through the international banking system.” ([Press conference of the Prosecutor – Communications](#), The Hague, 24 July 2003).

The same sort of logic has prompted a resort to the civil courts in a number of jurisdictions. In the US, the now famous Alien Tort Claims Act (ATCA) permits civil action in US courts for violations of international law committed abroad. In these cases – such as Doe versus Unocal involving forced labour in Burma/Myanmar - the principles of private sector complicity established by the post-World War II trials of Nazi and Japanese industrialists are being applied. As with the work of the ICC, this will go a long way to helping to clarify potential liabilities for companies. Of course, the political fall-out from the recent spurt of ATCA cases in the US has been to profile the legislation in business circles as a tool for hunting multinational corporations – kind of like a legal version of the Corporate Fallout Detector I mentioned earlier. The result has been a political backlash against ATCA, seeking to delegitimize and possibly repeal the act. This would be unfortunate because the principles established by such court actions – in the US other domestic jurisdictions – will help

companies avoid complicity in the future and will build the foundations for global norms that will help level the playing field.

But even if ATCA is reformed or dropped from the statute books, it will not stop resort to the courts. Our research indicates that, in many jurisdictions, there are criminal law and civil law entry points for ATCA-type actions that are simply unused, untested and largely unknown.

And there are other ways in which complicity is hard to avoid.

There is an artist in the United States who has developed a [Corporate Fallout Detector](#). It is simple a hand-held bar code scanning device – the sort used in supermarkets – which clicks or beeps when you scroll it past the bar code, only this time it responds to products produced by a company with a “dodgy record” on environmental issues or human rights. A switch on the detector let’s you flip between the two.

Now, to stock the Corporate Fallout Detector with data, the artist (a PhD Student at the Media Lab at MIT), used a data set that consisted of a list of companies he compiled from bar code databases available on the web, cross-referenced those names with two other online resources. He ranked the companies giving each a percentile score for social and environmental transgressions.

When asked about his invention, the artist said something that I think runs to the heart of the notion of complicity: “As I was doing it, I learned a lot of the information you can gather is subjective... It’s really hard to collect a bunch of data about a company and come up with an objective assessment... With increasing globalisation it becomes more and **more difficult to trace accountability to specific companies.**” ([Adbusters, Jan-Feb 2004, No. 51](#))

So, there is a real problem of evidence, of knowledge, or about the fact pattern concerning the kinds of activities that would create complicity. This just confirms how young the overall issue of corporate accountability for human rights really is as a political problem. Much of the work being done here during this meeting is trying to address that knowledge gap. This is important work because, as most companies well know, in the absence of a good understanding of what complicity really *is*, consumer markets and shareholders will act on whatever information they do have, be it well founded or not.

The problem of knowledge points to the fact that there is an administrative gap. The law, as I’ve just described, creates liabilities and defines complicity. But, short of the law (which should be a last resort), there is no way to raise the problem of corporate complicity in human rights abuse, except by using things like Corporate Fallout Detectors.

In my view, this is precisely what happened last year, when the UN Panel on Illegal Exploitation in the Democratic Republic of the Congo referred to the OECD Guidelines for Multinational Enterprises when it listed 85 companies that it felt were somehow complicit in the wars in that country. It was a bit of a shock, not least to the officers of the companies listed and to the OECD officials who never imagined the Guidelines could be used in such a way (they have since recovered, by the way, and are adamant that governments need to follow up). But it was a shock because the Guidelines say nothing about conflict and little about human rights.

But, I imagine, the panel members did what they did out of desperation. Put yourself in their shoes: You know the people are dieing in massive numbers; you have clear evidence that the elite networks in the DRC are plundering the countries natural resources and asset stripping the state companies; you know they these elite networks are well integrated into the global economy and that this is often made possible by OECD based companies; and you see that the law of the land is powerless, that there is no effective exercise of state sovereignty, particularly in the east of the country. And yet, you have very little in the way of standards against which to measure the behaviour of companies and, more importantly, no mechanism, no body, that has responsibility for these kinds of issues. Nowhere that could even begin to ask the right questions.

What do you do? I think you do what the MIT artist did. You improvise a way to ensure that complicity does not go unnoticed. In effect, you try to turn the National Contact Points of the OECD Guidelines into a kind of Corporate Fallout Detector.

Until very recently, the basic decision-making framework for foreign investment involved the laws of the host state. Today, there is an international norm emerging which views private sector complicity in human rights abuse as unacceptable. Companies operating in contravention of this norm, or commodities produced in contravention of this norm, run the risk of being labelled as rogue companies or conflict commodities. Yet, the fact is we have no administrative or regulatory mechanism that can deal with the problem.

Is there a regulatory gap? Any good social scientist will tell you that “gaps” don’t exist. They are always filled with something. And it is true that the Global Compact and other initiatives are trying to address this gap. Notions of benchmarking, voluntary measures, peer review, etc. are all in their own ways filling that gap. The application of the principle of corporate complicity – by legal action and by ethical consumerism - is also part of trying to bridge that gap.

Take, for example, the UN Sub-commission norms on the Responsibilities of TNCs and other businesses with regard to human rights, completed in August of this year. The norms are clear on the issue of complicity, both direct and beneficiary. They state business “shall not engage in nor benefit from” the full range of human rights abuses, and further, companies “shall refrain from activity which supports, solicits, or encourages States or any other entities to abuse human rights.”

The norms do conclude with an attempt to suggest an administrative framework for implementation, via reporting, monitoring of violations, and including input from all sides. But it is very preliminary.

This is the state of policy concerning complicity in human rights. I’ve already mentioned that the problem of corporate accountability, of which complicity is a very large part, is relatively young as a political problem. This determines much of the debate around these issues. On the one hand we find it absurd that there is no mechanism through which companies can be held accountable for participation in human rights abuse. On the other hand, it seems ridiculous that companies should be held to account for violations that have always been the responsibility of governments to control and that have been, therefore, none of their business.

In the context of this lack of policy or regulation, companies could probably be forgiven for feeling as though complicity is in the eye of the beholder. Equally, we should be outraged by

the notion that that three million people in the DRC can die in four years and the companies that participated in the economies, which were a key part of that conflict, cannot be held to account.

That's a problem. It is called impunity. And it is a direct result of the lack of a regulatory or administrative framework that is mandated to take up these issues. Until we deal with this lack of accountability, the corporate responsibility goalposts will keep shifting and companies will not have much clarity for their decision making in relation to human rights. In the absence of regulation, they will not know what *not* do, what to avoid. And the communities affected by human rights abuse will not know against what standards they should be trying to hold those companies – and their governments – to account, or where they can take their complaints of corporate complicity.

Thank you.

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