
Corporate Responsibility for International Crimes

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Introduction

This is a summary of an event held by the International Law Programme at Chatham House, in association with Doughty Street Chambers, to explore the topic of corporate responsibility for international crimes.¹ Two main strands emerged in the discussion:

1. The relationship between business and human rights.
2. How might a corporation be held legally accountable at the domestic and international level?

The meeting was not held under the Chatham House rule.

The relationship between business and human rights

The discussion opened with a framing of the current state of business and human rights. The premise is that capitalism is good for society. It creates wealth through the stimulation of innovation and competition, and it funds the public sector by way of taxation. Arguably, however, it has lost its way, with a growing divide between the richest and poorest members of society, and increased pressure on the middle class. As individuals, we respect human rights and the law, but when we become members of corporations, these entities may not.

Although the objective of corporations is to create wealth, legal abuses may occur along the way. The risk is arguably exacerbated by short-termism arising from the reporting requirements imposed by stock exchanges. If businesses fail to report increasing profits every quarter, they tend to lose share value. The market infrastructure can therefore encourage an excessive focus on short-term profits for the sake of longer-term sustainability. In turn, this short-termism affects the abilities of corporations to invest for longer-term projects, resulting in a lack of consideration of societal beneficial issues, including human rights and the environment.

Recent research by the Economist Intelligence Unit (EIU) found that 83 per cent of companies surveyed consider human rights to be as much a matter for corporations as for states.² This was in line with research conducted by Hogan Lovells International LLP, the Bingham Centre for the Rule of Law and the Investment Treaty Forum, in conjunction with the EIU, which found that adherence by business partners to voluntary codes of conduct such as the UN Guiding Principles on Business and Human Rights (UNGPs) was seen as important by 80 per cent of the corporates surveyed about their foreign direct investment decisions and the relationship between these decisions and rule of law.³ Given that allegations of human rights abuses continue to be levelled at corporations, this potentially gives rise to three questions: Do companies understand what respect for human rights means to their business? Are they confident in their supply chain's compliance? How do the main boards of companies know that they are fully compliant?

The UN Global Compact

In the early to mid-1990s Nike was notably exposed to scrutiny regarding use of child labour and poor working conditions in its supply chain. Nike's initial response was to pass responsibility to the suppliers. However, adverse publicity and its effect on profitability led to a change of policy. Nike's chief executive, Philip H. Knight, worked with the then UN Secretary-General, Kofi Annan, to establish the UN Global Compact, which encourages businesses to embrace principles of human rights, labour rights,

¹ This summary was prepared by Samuel Linehan.

² *The road from principles to practice: today's challenges for business in respecting human rights* (2015), available: <http://www.economistinsights.com/business-strategy/analysis/road-principles-practice> [30 June 2015].

³ *Risk and return: foreign direct investment and the rule of law*, available: <http://www.hoganlovellsruleoflaw.com> [30 June 2015].

environmental practices and, latterly, anti-corruption.⁴ The Compact recognized that in an age of globalization, corporations not only need to play a wider role within society, but also may be more effective agents of change than states.

It was suggested that the issue to be addressed is corporate culture, in particular the two negative factors of bribery and corruption. Good practice in procurement and careful oversight of the supply chain are critical. The irony is that an inappropriate culture is indirectly fostered by banks and stock exchanges. Or, to put it another way, banks and stock exchanges could be the biggest enablers of positive culture change. Banks that have signed up to the Equator Principles are already required to comply with the Performance Standards formulated by the International Finance Corporation. One of the Equator Principles is that where bank loans exceed \$10 million for infrastructure/project finance transactions, corporations must report annually to the bank that they are not having a negative impact on environmental and social risks.⁵ It was suggested that this approach should not be limited to infrastructure loans. Similarly, stock exchanges should require human rights due diligence in their listing rules, to ensure that all our monies invested in pension funds, which in turn invest in companies, do not go towards creating harm to individuals.

The UN Guiding Principles

The UNGPs represent a multi-stakeholder, ‘soft law’ approach to the issue.⁶ Universally adopted as the authoritative reference point for companies to respect human rights, the UNGPs attempt to achieve tangible results for affected individuals and communities, and thereby also contribute to a socially sustainable globalization. The recently launched UNGP Reporting Framework, which was overseen by Prof. John Ruggie, helps companies to operationalize the UNGPs.⁷ The Reporting Framework poses 31 concise questions, to which any company should strive to have answers in order to know and show that it is meeting its responsibility to respect human rights in practice. It offers companies clear and straightforward guidance on how to answer these questions with relevant and meaningful information about their human rights policies, processes and performance. To date, Ericsson has reported, and Unilever and several other companies are to report in the near future.⁸ The Reporting Framework should be seen as a key internal corporate tool and enabler of cultural change that will assist the move towards greater transparency and accountability. It was recognized that behavioural change is not easy for many companies, but that they need to start this long journey somewhere; some companies are much further ahead than others.

In general, a combination of both punitive and incentive measures will provide the solution, but so far the latter have arguably been more common. A recent example of a punitive measure in the United Kingdom is Section 54 of the Modern Slavery Act 2015, which requires that companies both report that there is no slavery and human trafficking involved in their supply chain, and provide a statement as to how they know this. It was argued that this Act could be further enhanced. If the law requires companies to take the trouble to have a deep understanding of whether human trafficking or slavery is taking place in their supply chain, then companies should also go to the little extra trouble of making sure other human rights

⁴ *United Nations Global Compact*, available: <https://www.unglobalcompact.org> [30 June 2015].

⁵ *Equator Principles*, available: <http://www.equator-principles.com> [30 June 2015].

⁶ John Ruggie, *Guiding Principles on business and human rights*, UN Doc. HR/PUB/11/04 (2011), available: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [30 June 2015].

⁷ *UNGP Reporting Framework* (2015), available: <http://www.UNGPreporting.org> [30 June 2015].

⁸ *Technology for good: sustainability and corporate responsibility report 2014* (2015), available: <http://www.ericsson.com/res/thecompany/docs/corporate-responsibility/2014-corporate-responsibility-and-sustainability-report.pdf> [30 June 2015]; *Enhancing livelihoods, advancing human rights* (2015), available: http://www.unilever.com/Images/sd_Unilever-Human-Rights-Report-29-June-2015_tcm244-429448.pdf [30 June 2015].

abuses are also not apparent. This Act is one of a large number of legal tools available in both civil and criminal jurisdictions, but at present a consistent overarching policy is missing.

One speaker commented that the strongest business incentive is the relationship between human rights compliance and profitability. There should be demonstrably measurable financial benefit in compliance that is not limited merely to consumer relations. The behavioural change required will lead to greater corporate engagement with all stakeholders; and this, if undertaken appropriately, will lead to greater trust and understanding. The current difficulty is that many companies have not made this link. The UNGP Reporting Framework will be very useful to this end.

How might a corporation be held legally accountable at the domestic and international level?

Four scenarios in which liability may arise

Although the law in this area has not been fully tested through litigation, it is useful to examine the cases that have arisen. A study of more than 40 cases commissioned by the UN Office of the High Commissioner for Human Rights (OHCHR) has found that businesses have been accused of involvement in gross human rights abuses in one of four ways:⁹

1. As primary perpetrators. Examples include the actions of private security companies in Iraq, and cases arising from the use of forced labour by companies during World War II. This category represents a minority of the examined cases.
2. As suppliers of goods or services that are used in an abusive way. Examples include the provision of logistics for extraordinary rendition.
3. As providers of information or services that have exacerbated abuse. This frequently occurs where state security services are asked to resolve disputes involving the business activities of the company in question.
4. By investing or doing business in states with a poor human rights record. This is arguably the most controversial category.

Accountability in domestic courts

The Alien Tort Statute

Companies may be liable under domestic law for their involvement in extraterritorial human rights abuses, notably in Alien Tort Statute litigation in the United States.¹⁰ In *Presbyterian Church of Sudan et al. v. Talisman Energy, Inc. et al*, Talisman Energy was initially accused of aiding and abetting the government of Sudan in the commission of genocide, war crimes and crimes against humanity.¹¹ Talisman Energy was awarded summary judgment, upheld on appeal, on the basis that the *mens rea* component for complicity for aiding and abetting under customary international law requires that the accused purposefully intended the violations, rather than simply had knowledge of the violations alone.

More recently, *Kiobel v. Royal Dutch Petroleum* has significantly reduced the reach of the Alien Tort Statute.¹² It found that there is a presumption against extraterritorial jurisdiction under the Statute,

⁹ Jennifer Zerk, *Corporate liability for gross human rights abuses* (2014), available:

<http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> [30 June 2015].

¹⁰ 28 U.S.C. 1350 (1789).

¹¹ 582 F.3d 244, 251 (2nd Cir. 2009).

¹² 133 S. Ct. 1659 (2013).

which may only be rebutted if the alleged tort sufficiently touches and concerns the United States. Since *Kiobel*, the prospects for *Talisman*-type litigation under the Statute are poor.

It was noted that *Kiobel* left open a number of questions regarding the reach and interpretation of the Alien Tort Statute. First, it remains unclear whether it is conceptually possible for corporations to be subject to international law, which usually applies to state actors. Second, there is a question as to whether there is a future for this type of litigation on extraterritorial claims. In *Cardona v. Chiquita*, a majority of the US Court of Appeals for the Eleventh Circuit found that although the defendants were the US corporations the *Kiobel* test was not met, despite the fact that the alleged torts occurred in both the United States and Colombia. This case appears to support a narrowing of the Statute in *Kiobel*, suggesting that future claimants will find it difficult to bring a case that involves extraterritorial allegations.¹³

An effective remedy?

Very few cases brought against corporations in national courts result in a final decision or settlement. This is not a matter of a legal vacuum or impunity. Indeed, a 2005 report by the Norwegian think-tank Fafo and the International Peace Academy found that criminal liability for corporations is at least a theoretical possibility in many jurisdictions.¹⁴ The necessary law is there, often as a result of implementation of international conventions such as the OECD Anti-Bribery Convention and the Rome Statute of the International Criminal Court (ICC). However, this theoretical liability rarely translates to actual liability. In recognition of this, in 2013 OHCHR established an initiative to enhance accountability and access to remedy.¹⁵ This involves six related projects, including work on clarifying domestic law tests for corporate liability; obstacles to legal action; and prosecutorial practice.

The majority of litigation is extraterritorial. The most popular forum so far is the United States, because of the Alien Tort Statute. The fact that claimants go to the trouble of litigating in foreign jurisdictions raises questions about how well domestic courts and prosecutors in countries where abuses are taking place are responding to these cases. It was therefore noted that there is a need for capacity-building to ensure that courts with territorial jurisdiction are able to deal with claims. The picture is likely to change in the wake of *Kiobel*, with a possible tendency for NGOs to take a more significant role in criminal prosecutions. This has already been seen in some European jurisdictions, where victims can participate in criminal litigation.

Hitherto, there has apparently been no conviction of a company for an international crime. However, individual employees and corporate officers have been convicted. Examples include the Blackwater prosecutions in the United States, and *Public Prosecutor v. van Anraat* in the Netherlands.¹⁶ The issue is more with enforcement than with inadequate legislation. On the criminal side, limited budgets may well dissuade public prosecutors from investigating and prosecuting what tend to be complex matters. It was suggested that there may be an argument for 'polluter pays' legislation, or for private investigations by NGOs. On the civil side, the costs of litigation can act as a major barrier.

¹³ 760 F.3d 1185, 1191 (11th Cir. 2014).

¹⁴ *Business and international crimes: assessing the liability of business entities for grave violations of international law* (2005), available: http://www.faf.no/index.php?option=com_zoo&task=item&item_id=3742&Itemid=927&lang=en [30 June 2015].

¹⁵ *Initiative on enhancing accountability and access to remedy in cases of business involvement in human rights abuses*, available: <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx> [30 June 2015]; *Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/26/22 (2014).

¹⁶ 09/751003-04, District Court of The Hague (2005).

Accountability at the international level

At the international level, various ‘soft law’ dispute resolution measures do exist, such as the OECD National Contact Points.¹⁷ The OHCHR initiative, however, deliberately focuses on more formal – in the sense of judicial – processes as a remedy for very serious abuses and international crimes.¹⁸

Article 25(1) of the Rome Statute makes it clear that the ICC has jurisdiction over natural and not legal persons. By contrast, the Special Tribunal for Lebanon (STL) is currently prosecuting two media corporations for contempt of court.¹⁹ However, this is not a core crime under the STL’s statute, and given the special circumstances of the tribunal’s establishment, it was considered unlikely that this prosecution would amount to a compelling precedent.

It was pointed out that individuals may be prosecuted as employees or agents of a company under the doctrine of superior responsibility established by Article 28 of the Rome Statute, or under accomplice liability established by Article 25(3). The convictions of Charles Taylor and Alfred Musema provide relevant precedents for development of these modes of liability.²⁰ It was mentioned that the ICC Prosecutor, Fatou Bensouda, has indicated her office’s commitment to investigating the links between business and international crime. Various Article 15 communications have been received at the ICC, for example in relation to alleged actions of Chevron in Ecuador.²¹ It was considered that the barrier here, in view of the Prosecutor’s limited resources, is likely to be the gravity and interests of justice test under Article 53(1)(c).

What constitutes complicity – divergent approaches

Domestic and international courts have divergent approaches to international crime, which is likely to cause concern. In national courts, very old legislation providing for violations of international law has been brought into play alongside domestic standards for mode of liability.

It was argued that this gives rise to the risk of universal jurisdiction crimes being tried in domestic forums according to various different domestic standards. As *Talisman* and *Doe I v. Nestlé* demonstrate, this can cause problems in determining the requirements for complicity.²² Some domestic courts apply the international standard, but there is confusion here too. Article 25(3) of the Rome Statute clearly states that the standard is intent. However there is a tendency, flowing from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, to apply some form of mere knowledge standard. There is a real need for clarification in this area.

More broadly, there is a danger that if the standard drops too low, the effect will be to deter investment in states with poor human rights compliance. This may be counterproductive, as those states become more isolated and impoverished.

¹⁷ *National Contact Points for the OECD Guidelines for multinational enterprises*, available: <http://www.oecd.org/investment/mne/ncps.htm> [30 June 2015].

¹⁸ Note 15 *supra*.

¹⁹ *Prosecutor v. Mohamed et al.*, STL-14-05 (2014); *Prosecutor v. Al Amin et al.*, STL-14-06 (2014).

²⁰ *Prosecutor v. Taylor*, SCSL-03-01-A (2013); *Prosecutor v. Musema*, ICTR-96-13-A (2000).

²¹ *Communication: Situation in Ecuador* (2014), available: <http://chevrontoxico.com/assets/docs/2014-icc-complaint.pdf> [30 June 2015].

²² 10-56739, 2014 WL 4358453, (9th Cir. 2014).

Due process

Cases such as *Talisman* tend to involve complicated facts and investigation into very broad historical allegations. It is frequently difficult for prosecuting authorities to gather trial-ready evidence, and proportionally more difficult for the defence to counter the allegations. On a related point, the experience of the ICC has demonstrated the difficulty in securing reliable and credible witnesses. In cases arising from armed conflict, self-interested testimony is arguably more likely.

It was noted that there are no easy answers to these problems, but it is important to engage with prosecutors as early as possible, and to ensure that evidence is retained. As domestic prosecutions of international crime become more common, judicial capacity-building and cooperation are also essential. One solution suggested by a speaker was a binding treaty on business and international crimes, but finding consensus for this among states would be a real challenge.