

The Corporate Accountability Evolution

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People or profit? The choice should be an easy one. But for companies it isn't always that simple. Companies are not moral entities.

Over the years, companies have developed rights, personalities and even reputations of their own. Companies remain profoundly human organizations but, unlike those who work in them, companies do not have a moral compass or ethical faculties. Even so-called 'value-based' companies rely on their people to figure out the difference between right and wrong, and depend on employees to manage the balance between people and profit. Companies are social organizations and as such look to society to spell out their responsibilities. In this sense, social norms regulate company behavior, at times communicating expectations about ethics and at times insisting on legal accountability for certain kinds of unethical behavior.

The law has always played a central role in defining corporate responsibilities. In the private realm, legal responsibilities evolved for parties to contracts and for companies to their shareholders. The law developed licensing regimes, and created criminal liability (which is another word for responsibility) for market-based violations, such as monopolistic behavior, price-fixing, fraud, and insider trading. Such legislation, and the evolution of so-called 'white-collar crimes', had an economic logic – such rules were deemed necessary for the efficient operation of markets. But inseparable from that logic were the demands of social norms on economic actors. The market has not been good at delivering public goods and, when there have been obvious imbalances, society has demanded regulation to ensure fairness in the market and justice more broadly. As a result, responsibilities evolved for companies with respect to, for example, labour codes, health, environmental protection and, more recently, anti-corruption.

In the evolution of laws applicable to companies, corporate legal accountability for human rights has not been an easy or logical process. Yet, in the debates about business and human rights, one legal responsibility has remained uncontested: companies should obey the law in the jurisdictions in which they operate. For many years this meant companies could ignore human rights and still obey the law: human rights protections were either non-statutory (declarations but not legislation), not enforced or non-existent. But the steady evolution of a global social expectation that companies should respect international human rights standards, and the slow but continuous integration of international human rights laws and standards to national law, have changed the nature of corporate legal accountability for human rights. It seems that national laws may have evolved some human rights teeth, and that they have done so in a way that complements and strengthens international human rights law. In the words of the International Chamber of Commerce: "All companies are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."

The interplay between national and international laws is a crucial influence on this evolution. Almost unnoticed over the past ten years, states have been slowly turning their national laws into mechanisms to control for the worst forms of human rights abuses. Since 1998, some 105 countries have ratified the Rome Statute of the International Criminal Court (ICC) - which governs genocide, war crimes, crimes against humanity, including inter alia torture and enslavement. Many states have set about integrating those laws to their own domestic penal codes, with new extraterritorial provisions that permit cases of violations to be heard by national courts even when they occurred abroad. Even places that reject the ICC, like the United States or India, have their own laws which cover much the same substance and provide for similar jurisdictional reach. The effect has been to globalise criminal law protections against the worst forms of human rights abuse via domestic jurisdictions.

In so doing, this process of integration has coupled international human rights norms – in the form of international criminal and humanitarian law – with two key domestic law concepts. The first is the widespread penal code principle which extends domestic court jurisdiction to cover not only individuals (natural persons) but also legal entities, like companies. The second is the almost universal concept of complicity, or aiding and abetting the commission of a crime. Together, these two common domestic legal concepts make it theoretically possible for economic actors, like companies, to be held legally accountable in national courts for their business activities abroad which support the commission of international crimes.

Complicity, or aiding and abetting, is already the focus of intense research and conceptual thinking. Complicity involves knowingly providing material support to the commission of a crime. Legal standards for complicity vary according to jurisdiction and legal tradition, and there are variations on these themes but, in most cases, its basic components are three: the commission of a crime, material support provided to the commission of a crime, and knowledge, e.g. a reasonable expectation that a crime was intended by the principle perpetrator or that the support provided would contribute to a crime (for those interested in a detailed read out on the topic, See John Ruggie's Companion Report from June 2008 "Clarifying the concepts of 'sphere of influence' and 'complicity'" <http://www.business-humanrights.org/Documents/RuggieHRC2008>).

In operational terms, the complicity concept implies that in some circumstances, normal business activity can create associations with human rights abuse and, depending on the nature of the violation, may thereby create criminal liability for the company. By providing financing or logistical support, for example, companies may associate indirectly with human rights abuse by sub-contractors or government agents. For companies operating in war zones or under repressive regimes, existing complicity provisions suggest that what may appear to be normal business activities – e.g. hiring abusive security providers – may also be acts that constitute aiding and abetting under criminal law.

In this way, complicity is likely to be the single most significant form of corporate legal liability for human rights abuse. Whether the problem lies somewhere down the supply chain or embedded in a relationship with a host government, companies will have to conduct due diligence to ensure they avoid participating in the international crimes of others.

To help with navigating this emerging terrain of human rights liability, an informal group of lawyers, diplomats and researchers put together something called the 'Red Flags' guide to liability risk for companies operating in high-risk zones (www.redflags.info). The Red Flags guide can be used by company compliance officers, legal counsel, risk analysts and others as part of their due diligence activities to avoid company participation in the worst forms of human rights abuse, or by communities affected by company activities seeking to better understand what their rights of redress may be. The guide can be used by governments in providing advice to companies operating high-risk zones, such as war zones and repressive regimes, and by practitioners seeking a starting point into state practice on these issues.

The Red Flags guide is an attempt to communicate, in simple and clear terms, the changing nature of liability risk based on the latest research into recent case law. The cases compiled there are testimony to the fact that, when it comes to the worst forms of human rights abuse, the law-free zones are shrinking. For all of us concerned with ending impunity for human rights abuse, that's good news. But the struggle for clarity as to the business responsibilities for human rights is not over. The ICC statute and the corresponding national laws cover only a part of the human rights protections elaborated under the Universal Declaration of Human Rights. It remains to be seen how the national courts and legislators will translate the emerging social expectations concerning the human rights responsibilities of companies.

For the legal counsels of multinational corporations, as well as for government prosecutors and policy makers, it means a new trans-national legal terrain is opening up. The law – and legal accountability – is evolving. As with other global policy challenges, corporate responsibilities for human rights are evolving slowly from vague commitments to hard laws. This not an unique process: a decade ago in many countries it was possible for businesspeople in many countries to claim as tax deductions payment that in fact amounted to

bribes. Today, there is a UN convention which prohibits bribing public officials, and it is illegal in most jurisdictions.

The laws on corruption interact with social norms, both drawing on and influencing conceptions of ethics or efficiency, and thus shaping or communicating society's expectations about behaviour. For companies, the enforcement of the law – legal accountability – is a crucial part of influencing corporate behavior. Human rights constitute a vastly more complex set of norms and laws than does the issue of corruption. But no law is the only form of regulation. The courts cannot monitor and control everyone or every company to ensure respect for the law, nor should they. Rather, legal accountability interacts with social norms and market incentives to create and regulate corporate behavior. The importance of legal accountability is that by holding some people and organizations accountable, the law influences how others behave. In this sense, law regulates behavior beyond the scope of its enforcement. If implemented effectively and fairly, the law has a socializing effect on people as well as companies.

Yet, this evolution is not an inevitable process. Much practical work needs to be done to clarify the methods and measures needed for companies to ensure that they respect human rights, and change their behavior where they don't. There is hard grassroots political work to be done to get states to take the necessary next steps to ensure corporate respect for human rights, to fill the gaps in the international legal order with respect to the responsibility of companies and, not least, to prosecute those companies who insist on ignoring the law governing international human rights crimes. It is possible, although by no means certain, that a decade from now states will have matched the rights that companies have been given with a responsibility to respect human rights for which they will be held accountable.