2015

Complicity in Business and Human Rights

James G. Stewart
Allard School of Law at the University of British Columbia, stewart@allard.ubc.ca

Citation Details

James G Stewart, "Complicity in Business and Human Rights" ([forthcoming in 2015]) 109 ASIL Proceedings 181.

COMPLICITY IN BUSINESS AND HUMAN RIGHTS

James G. Stewart [*]

ABSTRACT

These remarks, delivered on April 9, 2015 at the American Society of International Law's Annual Conference, address the context of complicity discussions in public international law generally then their significance and scope in Business and Human Rights in particular. The Panel on which I delivered this talk was one of the first to discuss the topic of complicity across different fields, including International Criminal Law, the Alien Tort Statute, Business and Human Rights and the Public International Law of State Responsibility. In my comments, I offer five initial points contextualizing these discussions for the field of public international law writ large, then five more about their significance for Business and Human Rights as a discourse. In the first part I suggest that a robust discussion about complicity is vital if we are to lead decent ethical lives in a world that is at once increasingly interconnected and very dysfunctional. In the second, I problematize the use of international criminal law to supply the standards for complicity Business and Human Rights should employ. I suggest that negligence, not normally sufficient for criminal responsibility, should ground the standard for accomplice liability in the human rights context. Overall, I posit the idea of a tiered wall of complicity standards that are attuned to the conceptual pre-commitments of the fields they operate in, not a monolithic system that takes international criminal law as the sole determinant of the concept. Nevertheless, even if a coherent system of complicity along these lines never emerges across international law as a whole, the mere fact that we are discussing the topic improves our chances of leading ethically decent lives in this our very imperfect world.

[*] Dr James G. Stewart, Associate Professor, Allard School of Law, University of British Columbia. See www.jamesgstewart.com

Complicity in Business and Human Rights

Thank you very much for the invitation to speak here today. It's a great pleasure for me to be on a panel with a set of distinguished scholars whose work I admire and respect.

I want to divide the time allotted to me into two parts. In the first part I want to offer five points that contextualize our discussions about complicity today, then in the second part, I'd like to turn to complicity in business and human rights in particular.

Let me begin with my five contextual points in part one.

First, complicity is a form of attribution. Forms of attribution, or modes of liability as they are also known, can be fairly arid, technical, technocratic things, that aren't normally of much interest to international lawyers. I wanted to depict them in a way that highlights their great regulatory potential on an international plane. If you think of all of the harms in the world on the one hand, then all of the actors operating globally on the other, modes are attribution are those devices that exist between these two positions, reaching into the ocean of actors to tie them to particular atrocities. So, one can understand how these mediating concepts can have huge implications for global governance, even though they're cast in fairly technocratic language.

Second, complicity is just one mode of attribution, that makes up a far wider set that also have important implications for the actors I'm speaking about, namely businesses. I wanted to mention this at the outset because there is an occasional tendency in this discourse to conceive of corporate responsibility for international law violations as coterminous with complicity. That view is a mischaracterization of the full scope of potential liability and a part of my hope is that in discussing complicity now, we do not lose sight of the need for a much thicker understanding of the relationship between modes of attribution generally and business in this our increasingly globalized world.

Third, I often use a metaphor to describe what's at stake with complicity globally and why I sense it holds such importance for the future of international law. Complicity goes to the heart of our attempts to live decently in a world that is characterized by, first, great interconnectedness born of globalization, and second, enormous dysfunction. Complicity is especially important as a legal and ethical concept that delineates how we

as individuals, businesses, and states should comport ourselves to lead decent lives in this very imperfect interconnected world. And because our points of connection are likely to intensify with the technological advance that drives globalization, complicity is likely to take on a new importance for international law moving forward.

Fourth, I believe that just having these sorts of discussions about complicity is a net gain for the world. In her book *On Violence*, Hannah Arendt points out that the absence of a robust pacifist discourse in the world bodes ill for the ways in which we are likely to use force. By the same token, the absence of a robust discourse about complicity undermines our chances of living decent lives in the world as presently constituted. For that reason, discussions about complicity are to be welcomed, even and perhaps especially, where they involve differences of opinion, deep skepticism, and outright critique.

Fifth, there is a real need for discussions among international lawyers about the ways in which complicity functions across the different sub-fields of the discipline, as we have done I think for the first time in this panel today. What's interesting about the role of complicity across the Alien Tort Statute litigation, within international criminal justice, in business and human rights, as well as to some extent at least, in the public international law rules governing state responsibility is the extent to which international criminal law has been used as the benchmark that permeates all understandings. As I will mention in just a moment, it's not evident to me that international criminal law should be used in this way, or that complicity should mean the same thing across all the sub-components of public international law we are discussing today.

So with these contextual points established, let me move to the second part of my presentation, where I discuss the role of complicity in business and human rights in particular.

To begin, I want to spoil the plot a little by suggesting that complicity should be disaggregated across all of these different fields such that it means something much more permissive of accountability in business and human rights. Although I think this is an area of great importance for future research, my tentative thoughts at this stage are that international law should present a tiered wall of complicity that involves a hierarchy between the different types of standards that are attuned to the conceptual pre-commitments of the fields they operate in. I'll concretize what I mean

by speaking to you about the history of complicity in business and human rights in particular

In the year 2003, the UN Sub-Commission on the Human Rights adopted the Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regards to Human Rights. These draft norms did not meet with a great deal of approval thereafter, and in 2005 Professor John Ruggie was appointed as Special Representative to the Secretary-General of the United Nations to move forward with a quite different approach to these issues. As things transpired, Professor Ruggie abandoned the Draft Norms and began anew, in part because of differences of opinion about complicity. I'd like to offer a slightly divergent view about the way complicity should function in business and human rights that I think charts a third possible way.

Let me start with the idea of a "sphere of influence." Spheres of influence were a key component of the understanding of complicity announced in the Draft Norms. As originally conceived, the concept served two functions: first, it established the circumstances whereby corporations would be responsible for their contributions to downstream human rights violations others carried out with their help. A corporation wouldn't be responsible for all remote consequences of their actions, only those consequences that were in their sphere of influence. Second, this idea of spheres of influence delimited the relationship between corporations and states, with human rights law continuing to view the latter as its primary guarantors.

In rejecting the Draft Norms because of their use of this notion of spheres of influence in its concept of complicity, Professor Ruggie rightly pointed out that spheres of influence had no legal pedigree. But when one looks to the legal concept that actually does this work in the law of complicity, i.e. the term that does have legal pedigree, it turns out that it is so complicated as to be unworkable as a guide for everyday businesses, and ultimately, that spheres of influence may be a fairly good proxy for what the real legal standard is. In reality, the question is whether businesses make substantial causal contributions to human rights violations, and that question is complicated by the fact that an overdetermined causal contribution, namely one where there are multiple sufficient causes for a harm, must be sufficient as a basis for responsibility. The intricacies of this relation have troubled philosophers since Hume.

Instead of getting into this complexity, spheres of influence would seem to be a fairly workable approximation of the core issues in the theory of causation. In this sense, the standard within the Draft Norms is arguably well suited to business and human rights as a practical enterprise.

Relatedly, the mental element required for complicity in business and human rights was initially understood as being knowledge. This knowledge standard drew heavily on a particular reading of international criminal law, but again Ruggie rightly pointed out that there are numerous competing mental elements for complicity depending on where one looks. In many international courts and tribunals, knowledge is actually interpreted as recklessness. In civil law jurisdictions there is a concept of *dolus eventualis*, which is significantly more permissive of these sorts of cases than is knowledge. In some jurisdictions there are references to purpose as a mental element for complicity, and finally it's possible to think of the mental element as dynamic in the sense that it mirrors the mental elements required in the crime with which the accomplice will be prosecuted, which differ from crime to crime. In my view, this is the situation with the ICC Statute.

What do we make, then, of this great diversity in mental element standards for complicity? Well, I just want to seize on the ICC standard to highlight how a transposition of international criminal law into international human rights law simply can't work as seamlessly as people seem to have supposed. If one accepts my interpretation that complicity in the ICC Statute involves (at least) two mental elements, purpose initially going to the form of assistance and then a second set of mental elements that derive from the crime with which the accomplice is charged, then this standard does not easily fit within international human rights law, which very seldom announces mental elements in the context of human rights norms businesses may become complicit in. In other words, the structural differences between criminal law and human rights law mean that complicity can’t just be copied and pasted between systems.

In any event, which mental element for complicity should we choose in the business and human rights context? In my view, the answer should be none of the above. In my opinion the mental element for complicity in business and human rights should be negligence. While negligence would be too low a standard for criminal responsibility, it seems appropriate in the business and human rights context because it ties responsibility for human rights to a failure to perform the due diligence requirements that businesses already have to carry out for their shareholders. In other words,

people often ask me about the fact that a business *should* have known that they were engaging or furthering human rights violations, whereupon I tell them that should have known means negligence and that generally negligence is insufficient for criminal responsibility. But why should it not be appropriate as a gateway to compensation to those affected by corporate implication in human rights violations?

Those, then, are my reflections on complicity in business and human rights and their place within a variegated, tiered system in public international law. As I say, one would think that international law would do well to get its house in order on issues of complicity given the relative shift from direct violation of international law precepts to the ways in which individuals, businesses, and states will increasingly be complicit in international law violations. Nevertheless, even if a coherent system of complicity never emerges across international law as a whole, the mere fact that we are discussing the topic improves our chances of leading ethically decent lives in this our very imperfect world.

My kind thanks to the organizers for the invitation to speak today.