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## Silence as Complicity: Elements of a Corporate Duty to Speak Out Against the Violation of Human Rights

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The vast majority of corporate rights violations,” as Stephen Kobrin observes, “involve complicity, aiding and abetting violations by another actor, most often the host government.” Kobrin’s claim certainly seems plausible. In an increasingly interconnected world our actions affect the lives of others in ever more profound ways. Thus, increasingly we may contribute to harm without being aware of it, or at least without intending to do so. It is in the very nature of complicity that it falls “outside the paradigm of individual, intentional wrongdoing.” The problem deepens if we are not merely looking at the actions of individuals, but at those of organizations that operate globally and on a large scale, such as multinational corporations. Corporations may become complicit in human rights violations although they are not doing anything wrong in a conventional sense or engaging in any unlawful conduct; they may simply be going about their business. This contributes to the pervasiveness of corporate complicity and renders it notoriously hard to grasp and, not least, to condemn. The very nature of wrongdoing is changing in the process of today’s globalization. The changing nature of wrongdoing in the global age must be followed by our rethinking of the parameters of moral responsibility. The fact that corporations often contribute to wrongdoings in the course of their “regular” business conduct rather than by engaging in some specific, overt and deliberate harmful activity, poses new challenges to our

moral intuition and our natural sense of justice. This is why cases of corporate complicity are in a sense symptomatic for our time; they require us to rethink some of the certainties of the Westphalian age and to come up with new normative visions and concepts to deal with the new problems with which we are faced in a transnational world. The aim of this paper then is to assess under what

conditions it is plausible to speak of corporations as silently complicit in human rights abuses and thus under what circumstances such a positive duty to speak out can be assumed.

### SILENT COMPLICITY AND THE MORAL DUTY TO HELP PROTECT

Corporate complicity is commonly defined as “aiding and abetting” in the violation of human rights committed by a third party. Aiding and abetting is to be interpreted broadly; it includes not merely direct involvement of corporations, but also various forms of indirect facilitation. Thus, corporate complicity can be categorized by

the nature of its contribution to the wrongdoing in play. The literature on the topic commonly refers to four different forms of complicity: direct complicity, indirect complicity, beneficial complicity and silent complicity. While direct complicity implies direct involvement of the corporation in a human rights abuse, indirect complicity involves mere facilitation, that is, an indirect contribution to the general ability of a perpetrator to commit human rights violations. There is increasing agreement that the scope of complicity may extend beyond active assistance given to a primary perpetrator. Cases of beneficial complicity, for example, do not require an active contribution by the corporation, but merely that the corporation directly or indirectly benefits from the violation of human rights. In the case of silent complicity, even “merely” standing by while human rights are violated is increasingly perceived as a form of complicity. In contrast to other, more “conventional”

forms

of complicity, silent and in most cases also beneficial complicity are not established by a corporation's active contribution, but by its passive stance toward the violation of human rights. Knowingly looking the other way while the most basic rights of human beings are trampled underfoot by a host government can constitute not merely indifference, but actual support. In such cases, silence can have a potentially legitimizing or encouraging effect on a perpetrator, which in turn grounds the accusation of silent complicity. For John M. Kline, silent complicity "suggests that 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." Hence, moral blame in cases of silent complicity is not attached to certain harmful actions conducted by the corporation, but to its failure to give assistance to those in need when it is in a position to do so. In short, the main difference between silent complicity and most other forms of complicity is that its moral basis is not commission, but omission. The normative implications of this insight are

far-reaching. Omission denotes a failure to act in response to wrongdoing. Thus, rather than to merely passively refrain from specific harmful actions, the agent in danger of becoming silently complicit is under a moral obligation to confront and possibly counteract the wrongdoing. If silence renders companies complicit, speaking out to help protect the victims is what is required to diffuse such allegations. The claim that a corporation is silently complicit in human rights violations, as Wigger and Bomann-Larsen conclude, implies that it is guilty of omitting to fulfill an actual positive duty.

In sum, there are two constitutive requirements

that need to be fulfilled in order for an agent to be guilty of silent complicity: first, the agent must have failed to speak out and help protect the victims. I will call this the "omission requirement." Second, the omission of this positive duty must have a legitimizing or encouraging effect on the human rights violation and the perpetrator who is committing it. I will call this the "legitimation requirement." This, in turn, raises the question: under what conditions can corporations indeed be said to be silently complicit in a host government's human rights abuse? That is, under what circumstances or conditions can these two requirements plausibly be said to be fulfilled? In what follows I will assess both requirements separately. The "omission requirement," I will argue, hinges on one general and two qualified conditions, while the "legitimation requirement" depends on a fourth condition.

#### ASSESSING THE "OMISSION

#### REQUIREMENT": ELEMENTS OF A POSITIVE DUTY TO SPEAK OUT AGAINST THE VIOLATION OF HUMAN RIGHTS

A first important distinction that needs to be drawn in order to assess the "omission requirement" is the one between negative and positive duties. A negative duty is a duty to do no harm, while a positive duty is a duty to assist or "help persons in [acute] distress." Thus, a negative duty is a duty not to make a situation worse, while a positive duty is a duty to improve a given state of affairs. Negative duties are commonly seen as stricter than positive ones, which is at the root of the controversy surrounding any argument that assigns positive duties to corporations. The distinction between negative and positive

duties is not to be confused with the one between passive and active duties. Passive duties

command us to merely abstain from certain (harmful) activities while active duties require us to actively perform specific actions. Negative duties can be active or passive. Doing no harm may be as simple as abstaining from actively hurting someone (passive), but, depending on the situation, it may also require to actively eliminate risks or dangers to others, such as cutting the tree in one's yard that threatens to fall onto the sidewalk. Passive duties are always negative, since passively abstaining from specific actions is obligatory only if those actions are harmful to others (or, in some cases, to oneself). As a consequence, positive duties are always active. The duty to speak out against human rights violations is a positive duty. That is to say, it is a duty to speak out to help protect the victims. It is from this perspective that commonly the duty to speak out is not perceived merely as a duty to make a statement, but as a broader duty to address the issue with the appropriate authorities. Generally, for there to be a passive negative duty to do no harm, only one condition needs to be fulfilled, which is that an agent has some level of autonomy to act. It is against this background that the passive negative duty to do no harm is of general nature and of universal reach; it applies to everyone at the same time and to the same extent. I will refer to this as the criterion of voluntariness. Second, for a negative duty to become active there must be a morally significant connection between the respective agent and the human rights violation. In contrast to passive duties, active duties (negative or positive) are specific and dependent on the context and situation; they apply to particular agents to varying degrees and extent. However, for active duties to apply to some agents but not to others, there must be something that specifically links those agents to the human rights violations at stake. I will call this the connection criterion. For there to be a positive duty to help protect, these two conditions must be complemented with a third one; a positive duty to improve a given state of affairs presupposes that a duty-bearer has the power to exert influence on the situation in a positive way. Thus, I will refer to this as the criterion of influence/power. The first two conditions aim at the non-violation of human rights, which means that they can be justified on a deontological basis. The third condition, however, aims at the improvement of a given situation. Thus, its justification or plausibility requires at least some sensitivity to consequences

(not, however, consequentialism). Let us analyze all three conditions in some more detail.

**Voluntariness:** Passive negative duties apply to

all responsible individuals at all times and to the same extent; we all have the same duty to abstain from harming others. For any rational, adult human being this responsibility can only be mitigated or eliminated if the action causing harm is not freely chosen or if the harmful consequences are not foreseeable. Thus, moral responsibility, as opposed to mere causal responsibility, depends on autonomous and thus voluntary or intentional action. We can only be held morally responsible for actions we freely and willingly choose, but not for those over which we have no control or which we are forced to commit.

**Connection:** For there to be an active negative

duty, voluntariness must be combined with connection. As pointed out earlier, silence turns into complicity only if, based on the perception of implicit endorsement or approval, it has a legitimizing or encouraging effect on the wrongdoing. This, it seems, presupposes a significant connection between the agent and the human rights violation. After all, the very claim that agents have an active duty to disassociate themselves from a particular human rights violation or its perpetrator already implies that there is an actual connection that links them to the violation in a morally relevant way. The crucial question is what qualifies connections as morally significant in this context of silent complicity. Generally, we can distinguish between two categories of connec-

tions: an agent can either be actively connected or passively connected to the violation. Active connection essentially means actual involvement, that is, the agent actively contributes to the violation of human rights committed by the primary perpetrator. However, such cases of active involvement belong to the category of direct complicity, which establishes a passive negative obligation to do no harm. In such cases, active involvement or contribution to the human rights violation is the problem, rather than the agent's silence. Hence, the connections that are relevant for silent complicity are of the passive kind. Influence/Power: While voluntariness and connection are necessary conditions for there to be a moral obligation for a company to speak out against human rights abuse, they merely establish a negative obligation for the company, that is, an obligation to disassociate itself from the perpetrator and its harmful actions. However, on their own, these two conditions are insufficient to establish a positive duty to speak out to help protect the victims. For the company to have a positive obligation to speak out, it must be in a position to exert pressure or influence for the purpose of improving the situation of the victims. Legitimization

Requirement: The legitimization requirement consists of two elements. First, an agent's silence must imply implicit endorsement of the human rights violation. Second, this implied endorsement must serve to legitimize or encourage the violation. The implied endorsement derives from the combination of voluntariness, connection, and power as discussed above. Hence, an agent who is connected to the human rights violation and would be in a sufficiently powerful position to speak out against it can be perceived as endorsing it, if she chooses not to speak out. In order for an agent's implied endorsement to add legitimacy to the incident, her stance on the issue must carry some weight in the public perception. For this to be the case, the agent must be of a certain status or standing. This may involve high social regard and prestige. It may imply that the agent is representative of society or a relevant subset thereof.

INNOCENT BYSTANDER OR SILENTLY COMPLICIT?:

THE EXECUTION OF KEN SARO-WIWA AND SHELL'S "ECOLOGICAL WAR" IN THE NIGER DELTA

On Tuesday, 31 October 1995, Nigerian playwright and minority-rights activist Ken Saro-Wiwa, along with eight of his followers, were sentenced to death by a specially convened, "hand-picked" tribunal of the Abacha regime in Nigeria for inciting the murder of four conservative, pro-government Ogoni chiefs. The four Ogoni chiefs were rounded up and killed by a rioting mob on 21 May 1994. On 10 November 1995, just ten days after the sentence was passed, Saro-Wiwa and his friends were executed while the world watched in outrage.

At the time of his arrest, Ken Saro-Wiwa and

his activist group "Movement for the Survival of the Ogoni People" (MOSOP) were spearheading widespread protests against exploitation and environmental degradation by oil companies in the Ogoni land. Protests against the environmental destruction caused by oil companies had been growing throughout the Niger Delta since the 1970s. When the protests grew bigger and more numerous in the early 1990s, the government started to repress them violently—often at the specific request of Shell. Growing tension between Shell and the indigenous people in the Niger Delta led to increasing numbers of increasingly violent protests. The most devastating of these protests occurred in January 1993, when, at the dawn of the UN Year of Indigenous Peoples, the largest peaceful rally against oil companies to that point in time was silenced violently by government forces, resulting in the destruction of 27 villages, displacing 80,000 Ogoni villagers, and leaving some 2000 people dead. As the struggle evolved, the Ogoni people became the "vanguard movement for adequate compensation and ecological self-determination" in the Niger Delta and

Shell became the symbol of their oppression. Saro-Wiwa was the driving force behind the Ogoni movement; “No other person in Nigeria,” as one member of the Nigerian Civil Liberties Organisation put it, “can get 100,000 people on the streets.” The murder of the four chiefs provided the Nigerian government with an opportunity to arrest Saro-Wiwa and eight other leaders of his organization. The charges against Saro-Wiwa and his colleagues were anything but uncontroversial. It was even suggested that the Nigerian government itself was involved in provoking the murders as a justification for stronger military presence in the region. Not only was Saro-Wiwa “miles away” when the murders took place, but he was, in fact, under military escort. Key witnesses admitted that they had been bribed to provide false evidence and the tribunal, which was controlled by the military, was denounced as illegitimate by the international community due to blatant violations of international fair trial standards and a lack of respect for due process. The British government condemned the trial as “judicial murder.” The international protests did not remain limited to the Nigerian government. Shell too came under attack for idly standing by while the tragedy unfolded. Shell was accused of not using its influence in Nigeria to stop the execution, the torturing of protesters, and the violent crack-down of demonstrations. In other words, Shell was seen as being silently complicit by violating a positive duty to help protect them against the human rights violations of the Abacha junta. Our analysis now provides a tool with which to assess the validity of this claim. For Shell to be silently complicit, the two qualified conditions underlying the omission requirement (i.e., connection and influence/power) as well as the status condition underlying the legitimization requirement all need to have been met.

**Connection:** The connection between Shell and

Ken Saro-Wiwa’s and the roughly 2000 other Ogoni deaths is undisputed. The uprising of the Ogoni people was a direct response to Shell’s operations in the Niger Delta; their protests were directly aimed at Shell. In some instances the police forces that put the demonstrations down were requested by Shell. Even when they were not requested, the suppression of large scale protests benefitted Shell and secured the continuation of its operations. In his closing statement to the tribunal, Ken Saro-Wiwa explicitly addressed Shell’s role and connection to the incidence:

I repeat that we all stand before history. I and my colleagues are not the only ones on trial. Shell is on trial here, and it is as well that it is represented by counsel said to be holding a watching brief. The company has, indeed, ducked this particular trial, but its day will surely come and the lessons learned here may prove useful to it, for there is no doubt in my mind that the ecological war the company has waged in the delta will be called to question sooner than later and the crimes of that war be duly punished. The crime of the company’s dirty wars against the Ogoni people will also be punished.

Shell was the main cause for the formation of the

Ogoni protests and was also the main reason for the violent crack down. Shell was, by every definition of the word, linked to the execution of Ken Saro-Wiwa and his friends in a morally significant way.

**Influence/Power:** For Shell to have a positive duty

to help protect and thus to speak out against the trial and to put pressure on the Nigerian government, their connection to the incidence must come with a position of influence or power. While the degree of Shell’s real influence at the time ultimately is subject to speculation, most of the evidence and, as we will see shortly, also Shell’s own assessment of its influence in Nigeria suggest that this condition too was met. Shell’s position in Nigeria was and still is exceptionally

powerful. The military government's power was dependent on the foreign earnings generated by oil and Shell was by far the major oil producer not only in the area but in the whole country. At the time of Saro-Wiwa's execution, Shell produced roughly half of Nigeria's crude oil output. As a result, Shell's power and influence was by any measure considerable. Thus, Andrew Rowell observes that Shell's position in Nigeria was "both powerful and unique." Quoting an anonymous Ogoni activist, he says: "With such an illegitimate political system, each bunch of unelected military rulers that comes into power, simply dances to the tune of this company. . . . Shell is in the position to dictate, because Nigeria is economically and politically weak." Status: At the time of the execution Shell enjoyed

the prestige of a company with global brand recognition. In the mid-1990s, Shell was the world's biggest oil company not owned by a government, it was producing 3 percent of the world's crude oil and 4 percent of its natural gas. It was the world's only private company to rank among the top ten biggest holders of oil and gas reserves. Its influence both in Nigeria and globally was substantial. It was without doubt a company that led, molded, and directed, a company that disrupted old social orders and dictated the pace of daily life in Nigeria and the Niger Delta. The very protests that erupted first in Nigeria against Shell's environmental record and later on an international scale against Shell's way of handling the turmoil in Nigeria underscore Shell's standing relative to society at large. Furthermore, they are a case in point regarding the politicization of corporations and the subsequent call for deliberative public engagement. In light of the worldwide attention that the Shell case received, it seems that it would at least be difficult to argue that the company lacked the status necessary to be implicated with silent complicity. Based on such assessments there certainly is

a case to be made for Shell's silent complicity in Saro-Wiwa's execution. Many commentators believed and continue to believe that Shell was in a position to speak out against the trial. Saro-Wiwa's brother, Owens Wiwa goes so far as to claim that if Shell "had threatened to withdraw from Nigeria unless Ken was released, he would have been alive today. There is no question of that." Andrew Rowell's conclusions even reach beyond the specific incident around Saro-Wiwa: "[S]uch is the economic strength of the company that few people in Nigeria or Britain doubt that it could have stopped the conflict outright—or at least stopped the use of excessive force against demonstration." Shell was well aware of its powerful position in the country and its potential to turn the events around. In fact, as The Observer reported nine days after Saro-Wiwa's execution, Brian Anderson, who was head of Shell Nigeria at the time, had in fact offered to Owens Wiwa to use Shell's influence with Nigeria's military regime to try to free his brother; however, his offer was conditional on the Ogoni leaders calling off any global protests against Shell. This bargain, irrespective of its questionable ethical quality, was unattainable for Wiwa: "Even if I had wanted to, I didn't have the power to control the international environmental protests."

Shell defended its position of inactivity against the growing public outrage. The company's official position was that it would be "dangerous and wrong" for Shell to "intervene and use its perceived 'influence' to have the judgment overturned." "A commercial

organization like Shell," as they claimed further, "cannot and must never interfere with the legal processes of any sovereign state." A Shell manager reportedly stated in 1996: I am afraid I cannot comment on the issue of the Ogoni 9, the tribunal and the hanging. This country has certain rules and regulations on how trials can take place. Those are the rules of Nigeria. Nigeria makes its rules

and it is not for private companies like us to comment on such processes in the country.