Note

The "Sullivan-Plus" Principles: A Cure for Silent Complicity by Corporate Actors

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I. INTRODUCTION

The brutal annexation of Crimea by Russia caused uproar in the international community. Attempts to remedy the situation have failed, Crimea has become part of Russia, and world cartographers, such as Google Maps, have been left with a struggle on how to make 'everyone' happy drafting by politically neutral maps.[1] How is it that in the twenty-first century, in the midst of one state invading another, powerful actors like corporations can remain silently neutral, hesitating to give the aggressor state a proper label?[2]

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1. *See* Alex Hern, *Google Maps Russia Claims Crimea for the Federation*, THE GUARDIAN (Apr. 22, 2014, 11:55 AM), http://www.theguardian.com/technology/2014/apr/22/google-maps-russia-crimea-federation. Google, with its offices in 60 countries and services in 130 languages, depicts the territory of Ukraine differently for various users. *Id.* Ukrainians visiting google.com.ua enjoy seeing Ukraine's territory as it was before the annexation. *Id.* Russian visitors will find "a very different picture." *Id.* Crimea is not part of Ukraine and shares a border with it. *Id.* International visitors will discover that Crimea separated from mainland Ukraine is a disputed territory and does not either belong to Ukraine or Russia. *Id.* A spokesperson commented that, "Google maps makes every effort to depict disputed regions and features objectively." *Id.*

2. The twenty-first century is the era of "corporate capitalism." *See* Upendra D. Acharya, *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, 54 B.C. L. REV. 937, 938 (2013). It is characterized by the presence of two actors: international corporations and states. *Id.* at 955. The former are the primary actors and the latter are secondary. *Id.* Corporations are super-hegemons powerful enough to influence

This Note seeks to explain the approach the international community should take and the role international corporations can play in the enforcement of international law. Part II describes the concept of complicity in its broadest form, including its moral and criminal law dimensions, in the context of human rights violations. It also lays out the history of past corporate involvement in resisting international law violations by foreign states. Part II also analyzes the actions taken by corporate actors in response to the annexation of the Crimean peninsula by Russia. Part III then introduces a novel concept of complicity covering its philosophical and criminal law dimensions. It also offers a new approach that addresses corporate silent complicity through imposing a minimum positive duty to raise concerns about human rights and international law violations, and enforcing it with the "Sullivan-Plus" Principles. Furthermore, considering the nature and interests of corporations, as well as the uniqueness of the silent complicity concept, this Note suggests that effective enforcement of the "Sullivan-Plus" Principles might be obtained through home-state actions that account for corporate characteristics embedded in corporate nature. Finally, this Note recognizes that the basic values of the rule of law will prevail in the world only through a consistent promotion and support by corporate actors.

II. COMPLICITY

A. SILENT COMPLICITY

There is an ongoing debate on whether corporations should bear responsibility for human rights violations, and if they should, then to what extent. As of today, corporations are subject to international soft law regulations that are voluntary in nature and unenforceable in practice.[3] However, victims of human

state actors in their decisions on the international stage and in domestic affairs. *See id.* at 969. States are mere agents of corporate capitalism. *See id. See also* Adam Taylor, *Crimea Has Joined the Ranks of the World's "Gray Areas." Here Are the Others on that List*, WASH. POST (Mar. 22, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/03/22/crimea-has-joined-the-ranks-of-the-worlds-gray-areas-here-are-the-others-on-that-list/.

3. *See* INTERNATIONAL CORPORATE LEGAL RESPONSIBILITY 234–35 (Stephen Tully ed., 2012). The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises is one of the universally applicable codes requiring multinational corporations to respect human rights and adhere to some labor standards. The OECD considers

rights violations may seek remedies under some states' national laws.[4] Also, the International Criminal Court (ICC) may be a venue for victims of human rights abuses by corporations, in which case, corporate actors, rather than corporations, may be held liable for "egregious human rights abuses."[5] Although the states bear primary responsibility for protecting human rights and states' roles cannot be substituted for corporations, corporate actors are subject to public scrutiny in their international affairs.[6] The existence of questions regarding the role of corporations in conflict prevention or resolution efforts, their relationship to oppressive regimes, and their roles in the success of oppressive regimes shows the growing expectations within the international community from international

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complaints by injured parties and may issue recommendations for some remedial measures to be taken, but the recommendation is not binding. *Id.* at 235. Although the guidelines have been criticized as "toothless," they are nevertheless "noteworthy" as a "dispute resolution mechanism" at the international level. *Id.* Another universally applicable code is the United Nations Global Compact, which is a voluntary initiative that encourages corporations to sign and adopt the ten principles into their daily operations producing annual reports on their implementation. *Id.* at 234. The strongest remedy for non-compliance is designation as an "inactive" participant. *Id.* at 235. The main criticism addresses the lack of enforcement of the principles. *Id.* at 234. Finally, the most recent creation of the United Nations, the Guiding Principles of 2011, proposed by U.N. Special Representative for Business and Human Rights John Ruggie and endorsed by the U.N. Human Rights Council in June 2011, advances principles based on three pillars: "Respect, Protect, and Remedy." *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights*, U.N. NEWS CENTRE (June 16, 2011), http://www.un.org/apps/news/story.asp?NewsID =38742#.VkfE99-rQb0. Under these principles, states bear a duty to protect human rights, and corporations bear a responsibility to respect human rights. *Id.* The states are also supposed to provide remedial measures through "effective domestic mechanisms." John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Ruggie Principles]; *see also* David Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*, 23 MINN. J. INT'L L. 135, 169 (2014) (discussing U.N. efforts in addressing the role of international corporations and arguing that because there is no specific mechanism of enforcement, businesses are unlikely to abide by the principles).

4. Jennifer M. Green, *The Rule of Law at a Crossroad: Enforcing Corporate Responsibility in International Investment Through the Alien Tort Statute*, 35 U. PA. J. INT'L L. 1085, 1096 (2014). Along with the United States, the national laws of England, Australia, Argentina, Colombia, and Ghana provide a forum for victims of corporate human rights abuses. *Id.*

5. *See* INTERNATIONAL CORPORATE LEGAL RESPONSIBILITY, *supra* note 3, at 245.

6. *See* Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 339 (2001).

corporate actors.[7] As a result, a notion of corporate complicity has appeared.[8]

Corporate complicity in human rights violations has been the center of attention in recent years.[9] There are different approaches to understanding complicity. Some, when addressing complicity in the legal context, interpret the term by relying on the developments of the concept in international criminal law. Others, when addressing complicity in the non-legal context, rely on social condemnation of indirect involvement in human rights abuses.[10] In this context, complicity describes an indirect involvement of companies in human rights abuses.[11]

Complicity can be divided into three categories: direct complicity, beneficial complicity, and silent complicity.[12] Direct complicity occurs when a company intentionally participates in human rights violations by another party without necessarily intending to harm, but with knowledge of foreseeable harmful effects.[13] Beneficial complicity requires that a company knowingly benefits from human rights violations.[14] So violations of human rights by another actor with the purpose of benefiting a company would result in beneficial complicity for the company.[15]

Silent complicity is a company's failure to raise concerns about human rights violations with the appropriate authorities

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7. *Id.* at 339–40.

8. *Id.* at 340.

9. *See generally* John Ruggie, *Clarifying the Concepts of "Sphere of Influence" and "Complicity,"* Hum. Rts. Council, U.N. Doc. A/HRC/8/16 (May 15, 2008) [hereinafter *Complicity*].

10. *Id.* Others criticize the concept in its entirety due to its "definitional anarchy." *See* KLAUS M. LEISINGER, ON CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS 14 (2006) ("In the common law world alone, offences of complicity come in a kaleidoscope of different shapes and titles: aiding, abetting, counselling, procuring, inciting, facilitating, conspiring . . . the list is endless and mind-boggling.").

11. *See Complicity*, *supra* note 9, ¶ 27.

12. Clapham & Jerbi, *supra* note 6, at 341–42.

13. *See id.* at 342 (analyzing the scope of complicity on the examples of the cases addressed by the International Criminal Tribunal for Rwanda and Yugoslavia). A company can be found directly complicit if, for example, it assists with or promotes "relocation of people in circumstances that would constitute a violation of international human rights." *Id.*

14. *Id.* at 346.

15. *See id.* at 347. "Violations committed by security forces such as the suppression of peaceful protest against business activities or use of repressive measures while guarding company facilities are often cited in the context." *Id.*

or to use its influence to bring about change.[16] As a Chair of the Amnesty International (UK) Business Group states, "[s]ilence or inaction will be seen to provide comfort to oppression and may be adjudged complicity . . . . Silence is not neutrality. To do nothing is not an option."[17] Silent complicity is about the moral dimension of corporate obligations when operating in a society.[18] Though the scope is not strictly defined,[19] the limits may vary depending on the company and on the country, with one set of guidelines calling for corporate actors to[20]:

> Raise human rights concerns with government authorities either unilaterally or collectively with other companies. Senior managers should be prepared to speak out where abuses persist and quiet diplomacy has failed. In developing policies and practices with regard to human rights, companies need to delineate clearly the boundaries of their responsibilities, their willingness to become involved in advocacy and exert influence. This clarifies the extent of assumed responsibilities and makes it possible to monitor progress against objectives and targets.[21]

Therefore, the scope of silent complicity is broad enough to require more than mere quiet diplomacy to clear the company of silent complicity.[22]

Along with the theory of silent complicity, a bystander theory has slowly evolved in international law. Although a bystander approach has not been explicitly related to silent complicity as applied to corporations, both frameworks approach the issue from a similar angle. Passive observers or, in other words, bystanders, while part of a "lively scholastic debate" in different disciplines,[23] are mostly neglected in the legal

16. *See id.* at 347–48.

17. *Id.* at 348.

18. *See id.*

19. *E.g.*, *id.*

20. *Id.* at 348–49.

21. *Id.* at 349 (quoting PETER FRANKENTAL & FRANCES HOUSE, HUMAN RIGHTS, IS IT ANY OF YOUR BUSINESS? 23 (Amnesty Int'l & the Prince of Wales Bus. Leaders Forum eds., 2000)).

22. *See id.*

23. *See generally* Ron Dudai, *"Rescues for Humanity": Rescuers, Mass Atrocities, and Transitional Justice*, 34 HUMAN RTS. Q. 1, 25–27 (2012) (considering the difficulty of addressing the culpability, roles of, and remedies

community.[24] In the field of international political philosophy, the dominant theory is the permissible exclusivity doctrine.[25] However, Allen Buchanan has introduced a new variation of analysis in which he addresses the extent of the duties of different states towards other states, relying on the theory of positive moral duties rather than the exclusivity doctrine.[26] As a proponent of a bystander approach, he argues that the theory of positive moral duties[27] owed by individual persons to other persons in a state of nature can be applied to the states themselves.[28] Under this theory, the state can balance its national interests with its international interests that require acts of rescue or beneficence.[29] The open question, however, remains the same: "What are the limits of a state's duty to act?"[30]

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for passive bystanders, and offering to acknowledge the example of rescuers as a remedy for society in addressing the passive bystander issue).

24. *See* Jena Martin Amerson, *What's in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1, 10 (2011).

25. *See generally* Luke William Hunt, *The Global Ethics of Helping and Harming*, 36 HUMAN RTS. Q. 798, 799 (2014).

26. *Id.* at 801. Under the permissible exclusivity doctrine, the national interest of the state may always dictate the state's foreign policy. Additionally, the state may disregard any other interests as secondary to pursue the national interest. *Id.*

27. "Positive moral duties may be defined as a state's obligation to take some sort of step or action, rather than merely complying with a negative moral duty to refrain from taking some sort of step or action." *Id.* at 802. Positive moral duties include, but are not limited to: "*rescue*, the duty to aid in emergency situations; *beneficence*, the duty to promote well-being; and *justice*, the duty to bring about a just state of affairs." *Id.* (emphasis in original). These duties are limited and, while they are not cost excessive for institutions, they are burdensome for individuals. For this reason, the burden to act on behalf of human rights should be on institutions rather than individuals. *Id.* at 810.

28. *Id.* at 801.

29. *Id.* at 802. "[E]xclusively pursuing the national interest is not the best way to respect the human rights of foreigners." *Id.* at 805. *See generally id.* at 803–05 (critiquing the permissive exclusivity theory by discarding the fiduciary realist justification (state leaders are obliged to act in ways that maximize national interest) and the instrumental justification (the best result will occur if each state acts in the national interests only)).

30. *Id.* at 808. The extent of positive duties remains an important issue because protection of basic human rights involves cost. *Id.* According to Buchanan, individuals alone cannot bring a substantial change to the area of human rights, so democratic institutions and states should lead and determine the boundaries of the demands of promoting human rights. *Id.* at 809. Further, the limit of the duties should be based on the theory of the "collective principle of beneficence." *Id.* at 810. The crucial factor in the world's failure to comply with its duties to help others is the failure of the majority to comply with their duties. *Id.* Therefore, the duty of every state is to be limited to its "fair share of

Despite a rich philosophical-theoretical basis of the bystander issue, sociology is actually the field that provided the initial framework for understanding this theory with regard to corporations. Though the complex and multifaceted concept of a bystander was originally applied to individuals, it can be applicable to corporations with a few alterations.[31] The first line of analysis in this application includes a bystander's behavior.[32] A typical bystander's action is guided by three factors: diffusion of responsibility,[33] bystander awareness and personal responsibility,[34] and the setting in which the action takes place.[35] Diffusion of responsibility, as applied to corporations, involves the same conditions as a group of individuals who, relying on other group members, fail to act.[36] The difference between an individual and a corporate bystander is that a corporation is already an entity consisting of multiple individuals and, therefore, is predisposed to a bystander role

collective responsibility." *Id.* Buchanan also delineates particular rules and two exceptions to them in the framework of the collective responsibility concept. *Id.* at 810–11. The rules require state action to optimize human rights and, simultaneously, provide that failure to comply by one state does not require a complying state to sacrifice its resources in attempt to provide help to the fullest extent as if both states acted. *Id.* at 810. Although Buchanan provides somewhat helpful guiding principles, he also recognizes his failure to determine a relative measurement such as "excessive cost." *Id.* at 811.

31. Amerson, *supra* note 24, at 12.

32. *Id.*

33. Under the theory of diffusion of responsibility, bystanders fail to act if they are part of a large group of people because they believe someone else will take action, rendering their involvement unnecessary. *Id.* at 13.

34. According to sociological studies, an individual is more likely to act if he or she is able to personally relate to and experience a sense of personal responsibility for a particular event. *Id.* at 14.

35. Sociological studies suggest individuals are more likely to act in less structured social situations, meaning situations that are not explicitly or implicitly guided by some set of rules, and therefore, "the weaker the situational constraints on the varieties of acceptable behavior, the stronger should be the tendency of bystanders to offer assistance in an emergency." *Id.* (quoting William Howard & William D. Crano, *Effects of Sex, Conversation, Location, and Size of Observer Group on Bystander Intervention in a High Risk Situation*, 37 SOCIOMETRY 491, 494 (1974)).

36. The failure of corporate action is attributed to factors such as the corporation's size, its structure, and the priorities of the tasks within separate departments. An international corporation with numerous offices around the world is likely to shift responsibility for different violations from one office to another and every corporate office has multiple departments with overlapping responsibilities regarding human rights. Furthermore, all corporate departments bear responsibilities for other tasks, which tend to be more focused on profits than human rights, so when profit interests are weighed against human rights interests, the former nearly always outweighs the later. *Id.*

from the outset.[37] Corporations can avoid being a bystander, however, if there is some kind of positive social reassurance that can lead to the change of the behavior of the corporation.[38] As for the setting where the action takes place, corporations' actions differ substantially from those of an individual.[39] As opposed to an individual, corporations operating under the conditions of minimum restrictions are likely to act solely in their best interests, leaving no possibility of self-sacrifice.[40] Under a legal line of analysis, individual bystanders are not subject to liability because the law does not require an individual to intervene or to prevent harm at risk to oneself.[41] A duty of altruism stops where the sacrifice of personal welfare begins.[42] Corporations, by nature, are not apt to being altruistic—their principal goal is "maximizing shareholders' profits."[43]

Finally, under the philosophical analysis of the bystander concept,[44] corporations as bystanders are enormously powerful actors[45] and are especially influenced by the specific conditions that encourage the creation of bystanders. Due to their power and influence, corporate bystanders grant an immense amount of legitimacy to violators of human rights,[46] and because of corporations' power and influence, they could be an important factor in the outcome if they decide to intervene.[47] Moreover, due to their bureaucratic structure, corporations tend to be more likely than individuals to take a position of inaction that encourages the occurrence of some evil in society.[48]

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37. *Id.*

38. *Id.* at 14.

39. *Id.* at 15.

40. *Id.*

41. *Id.* at 16.

42. *Id.*

43. *Id.* (citing Shane M. Shelley, *Entrenched Managers & Corporate Social Responsibility*, 111 PENN. ST. L. REV. 107, 109 (2006)).

44. *Id.* at 17.

45. Under the modern approach to the bystander concept, failure to act is considered to make a difference in the underlying action in any given situation and the inaction is likely to send a message to both the victim and the perpetrator. *Id.* at 18.

46. *Id.* at 19.

47. *Id.* The author sees the bystander concept as a possible framework for imposing liability on corporate actors under international law, even though she recognizes the concept as "amorphous." *Id.*

48. Some scholars hypothesize that for some social evil (e.g., the Holocaust) to occur, three conditions must be satisfied: an authorized official must order the evil to take place, the orders must be institutionalized and formalized by law, and the victims must be "dehumanized." *Id.* at 18.

It is possible to differentiate between the three levels of corporate bystander involvement.[49] In the first level, a bystander as a passive actor involves a situation in which a corporation is "completely divorced" from the human rights violations taking place.[50] In the second, a bystander as an active participant involves corporations whose acts lead to human rights violations.[51] Third, passive employees are viewed as "bystanders" to an active corporate bystander.[52] The bystander defense is a powerful weapon in the hands of corporate actors, which renders other mechanisms of regulating corporate actors ineffective.[53]

B. COMPLICITY IN SOFT LAW

Soft law is an actual source of law for corporate complicity.[54] The most recent pronouncement of the United Nations addressing duties of state and corporate actors are the Guiding Principles. Particularly, Guiding Principle 13 imposes responsibility on business enterprises.[55] Principle 13, section (a) stipulates the responsibility of business enterprises is to "avoid *contributing* to adverse human rights impacts through their own activities, and address such impacts when they occur."[56] Section (b) provides that enterprises are to "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts*."[57]

The Commentary to the Principles sheds further light on the level of responsibility that companies bear under the Principles. Responsibilities are imposed for adverse human rights impacts that result from their own activities or their business relationships with other parties.[58] Furthermore, the activities

49. *Id.* at 22.

50. *See id.* at 23 (describing the concept of bystander involvement using the example of Bolivia and Exxon Mobil).

51. *See id.* at 26–28 (discussing an active corporation as a bystander using the example of Ken Wiwa and Shell).

52. *See id.* at 29 (explaining the principle based on a Shell company).

53. *Id.* at 32.

54. INTERNATIONAL CORPORATE LEGAL RESPONSIBILITY, *supra* note 3, at 235.

55. Ruggie Principles, *supra* note 3, at 14.

56. *Id.* (emphasis added).

57. *Id.* (emphasis added).

58. *Id.* at 15.

covered are both actions and omissions; and "business relationships" are the relationships between companies and their business partners, "entities in [their] value chain," and any other state or non-state actors, which are in direct relation to the business operations conducted by a particular company, services provided, or products supplied.[59] Under the Guiding Principles, business responsibilities can be met through introduction and implementation of its activities, policies, and processes that are narrowly tailored to its type of business.[60]

Although the Principles do not create any responsibility under the bystander framework, they tackle one of the possible elements of bystander liability—relationship.[61] In the bystander rhetoric, there are three actors involved: the victim, the aggressor, and the witness. The relationship is the core of the bystander theory and can bring corporations under some sort of responsibility.[62] The Guiding Principles of Principle 13 address the relationship as a basis for responsibility by stipulating that corporations are encouraged to prevent or mitigate human rights abuses committed by the parties in the direct relationship with a particular corporate actor.[63] Perhaps, the relationship between a state and corporation has a special role in the bystander framework.[64] If this relationship is acknowledged in the bystander framework, it could prevent accruing of the benefits by corporations as a result of a state's oppressive

59. *Id.* at 14.

60. Sabine Michalowski, *Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those That Trigger Corporate Complicity Liability*, 50 TEX. INT'L L.J. 456 (2015). *See* Ruggie Principles, *supra* note 3, at 15–16 (explaining Principle 15 and its interpretation in the Commentary).

61. An effective accountability framework should not be based on either an overt action or complicity, but rather on relationships. *See* Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871, 923 (2012).

62. *Id.*

63. *Id.*

64. *Id.* at 926. Although Ruggie explicitly mentions a state and corporation's relationship, it is not sufficiently emphasized. The author suggests that the unequal power relationship between a state and corporation results in the willingness of the state, impressed by the corporation's wealth and power, to accommodate its requests. Therefore, the accountability based on the relationship will preclude any of them from hiding from responsibility. This approach is supposed to incentivize corporate compliance with human rights and proactive vigilance by corporations. *Id.* at 926–28.

conduct.[65] Because corporations are powerful actors in the international arena that "demand a seat at the table for all international dealings that might affect their bottom line,"—they must be required to comply with some duties as well.[66] Additionally, although the Guiding Principles do offer some guidance and standards, they do not address the existing "governance gaps" because of their aspirational nature.[67]

C. COMPLICITY UNDER THE ATS AND *AD HOC* INTERNATIONAL CRIMINAL TRIBUNAL STANDARDS

The corporate complicity issue in the legal context is explicitly addressed in the U.S. Alien Tort Statute (ATS),[68] which has been a critical method of addressing corporate complicity in the world.[69] Although the U.S. Supreme Court decision in *Kiobel* substantially limited foreigners' access to U.S. courts,[70] the analysis of the cases brought under the ATS provides some guidance for deciding what constitutes lawful business activities and at what point those activities "trigger complicity liability for human rights violations committed by a business partner."[71] Nevertheless, the most debated question in this context remains: what business activities create complicity liability?[72]

Under the ATS, it is not enough to simply do business with an actor violating international law to warrant complicity liability. No liability will be imposed for just "declining to boycott

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65. *Id.* at 928. The relationship framework will therefore diminish human rights abuses that are linked to corporate activity. "Knowing that their relationships with potentially responsible actors, including States, could be *significant enough* to result in liability, [corporations] will be incentivized" to guard against such relationships. *Id.* at 929. (emphasis added).

66. *Id.* at 928–29.

67. *Id.* at 931.

68. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2015).

69. Michalowski, *supra* note 60, at 406.

70. *Id.* at 406–07. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013). *See generally* Green, supra note 4, at 1097–1109 (reviewing the U.S. Supreme Court decision in *Kiobel* and its ramifications).

71. Michalowski, *supra* note 60, at 407. Under the ATS, not every association with a bad actor gives rise to complicity liability. The legal issue of complicity liability under the ATS is complex enough to involve political and ideological considerations. *Id.* at 405.

72. *Id.*

a pariah state or to shun a war criminal."[73] Complicity under the ATS involves the consideration of mens rea and actus reus. Courts differ in their requirements of mens rea: according to some courts, knowledge is the appropriate standard; and to others, purpose. The mens rea application depends on the particular act of assistance, whether it is commercial or business related.[74] Notably, ad hoc international criminal tribunals are strongly influenced by the standards applied in ATS cases.[75] In order for the actor (directors of corporations rather than corporations themselves) to be liable, there must be an act of assistance with a substantial effect on the commission of the crime, supported by mens rea.[76]

Although courts disagree about applying different standards when dealing with aiding and abetting claims involving corporate actors, there is no disagreement that if a corporation is involved in ordinary business transactions or other lawful acts, even though knowing that these activities might provide assistance in gross human rights violations or crimes, without more, the corporation is not liable for aiding and abetting in commission of the crime by another actor.[77]

D. ADDRESSING SILENT COMPLICITY

In most instances where national governments in different countries throughout the world undermine the principles of justice, fairness, and human rights, activists in the United States try to effectively respond by introducing voluntary codes of conduct for American companies operating under those governments. Some codes of conduct, such as the Sullivan Principles and the MacBride Principles, address issues concerning labor standards; others, such as the Slepak

73. *Id.* at 410.

74. *Id.* at 429. *See generally id.* at 443 (discussing courts' different approaches to determine the requisite standard for complicity liability).

75. *Id.* at 430.

76. *Id. See generally id.* at 431–35 (explaining the standard's strictness and its similarity to the one under the ATS).

77. *Id.* at 443.

Principles,[78] the Miller Principles,[79] the Maquiladora Standards of Conduct,[80] as well as the Levi Strauss and Company's Business Partner Terms of Engagement,[81] cover a broader set of issues.[82] The effectiveness of these principles is better analyzed using the Sullivan Principles and the MacBride Principles because they have been in existence for a substantial amount of

78. The Slepak Principles, created by human rights activist and member of the original Moscow Helsinki Group, Vladimir Slepak, were a set of guidelines for private companies doing business in the USSR. The Principles became an important part of a movement in the United States in the 1980s towards introducing new business codes of conduct. Jorge F. Perez-Lopez, *Promoting International Respect for Worker Rights Through Business Codes of Conduct*, 17 FORDHAM INT'L L.J. 1, 12–13 (1994). The Principles were intended to continue the movement toward liberalization of the Soviet Union, to strengthen ties between Soviet consumers and American companies, to provide political stability to businesses adhering to the Principles, and to avoid complicity in human rights violations by the Soviet government. The Slepak Principles were not intended to become legislation requiring Soviet adherence, rather they were intended as "a sobering reminder that human rights abuses continue in the Soviet Union." Benjamin Waldman, *Slepak Principles Proposed for Business*, NJC BULL. 3 (July–Aug. 1989), http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=649748. The Slepak Principles were not mandates and were similar to, and encouraged by, the Sullivan Principles. *See The Slepak Principles Go to Washington*, 1 SLEPAK REP. 1, 8 (Aug. 1989).

79. The Miller Principles' objective were to encourage "political freedom and liberalization" in China and Tibet. They, too, were inspired by the Sullivan Principles. Perez-Lopez, *supra* note 78, at 16.

80. The Maquiladora Standards of Conduct were issued by the Coalition for Justice, an organization based on the union between the United States and the Mexican church, human rights, labor, and environmental activists. The standards were primarily based on existing Mexican and U.S. federal laws, as well as ILO labor standards, and were aimed at American international corporations operating in Mexico along the U.S.-Mexico border. *Id.* at 19–20.

81. Levi Strauss & Company's Business Partner Terms of Engagement are an example of a code of conduct directed by a U.S. company at its foreign suppliers and subcontractors. These guidelines were first announced in March 1992 and cover a range of issues varying from employment standards to environmental matters. In the month prior to the announcement, Levi Strauss demonstrated its commitment to its guidelines by cancelling relations with a Saipan company because of its violations of U.S. labor law. *Id.* at 24. These guidelines are still in place and are being improved by the company. *See generally Sustainability: People*, LEVI STRAUSS & CO., http://www.levistrauss.com/sustainability/people (last visited Apr. 9, 2016) (describing current labor standards programs) [hereinafter *Sustainability*]. *See also Levi Strauss & Co. Announces New Terms of Engagement for Its Global Supply Chain*, LEVI STRAUSS & CO., http://www.levistrauss.com/wp-content/uploads/2014/01/Levi-Strauss-Co.-Announces-New-Terms-of-Engagement-for-Its-Global-Supply-Chain-undated.pdf (last visited Apr. 9, 2016) (introducing an amended set of guidelines).

82. *See Sustainability*, *supra* note 81.

time[83] and are more generally applicable.

The Sullivan Principles were drafted and promoted by Reverend Leon Sullivan, the pastor of Zion Baptist Church in Philadelphia and a member of the Board of Directors of General Motors.[84] The main objective was to promote racial equality in the employment practices of U.S. companies working in South Africa,[85] and the Principles have evolved as an effort to combat the apartheid regime. First, Sullivan tried to persuade General Motors to withdraw from South Africa, encouraging a boycott of the oppressive regime. Because the attempt yielded no success,[86] he then decided to introduce the Sullivan Principles amid a "growing question" concerning the correct response for companies within the apartheid regime.[87] The Principles[88] received broad public endorsement and imposed a set of duties[89] on companies as a requirement for their continuing business.[90] Due to growing demands for enforcing the Principles, a minor industry of anti-apartheid NGOs emerged to monitor compliance.[91] By 1984, Sullivan's data reported that only half of the 147 companies that signed the Principles were making good progress, whereas the other half were ignoring them.[92] In fact, half of the American companies present in South Africa did not

83. *See* Perez-Lopez, *supra* note 78, at 5.

84. Henry J. Richardson III, *Reverend Leon Sullivan's Principles, Race, and International Law: A Comment*, 15 TEMP. INT'L & COMP. L.J. 55, 56–57 (2001).

85. Perez-Lopez, *supra* note 78, at 6.

86. Sullivan realized that neither General Motors nor any other American corporation would be likely to agree to end its business operations in South Africa. At the same time, the regime in South Africa was dependent upon resources from those corporations and a social movement would be more effective in encouraging change. Richardson III, *supra* note 84, at 57.

87. The "growing question" at issue is whether Western companies operating in South Africa should have remained in the country while publicly disagreeing with apartheid or have withdrawn as part of a plan of sanctions against the regime. *Id.*

88. *See generally The Global Sullivan Principles*, HEARTLAND INST., https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/6789.pdf (last updated Mar. 3, 1999).

89. Richardson III, *supra* note 84, at 57. The companies were supposed to raise and protect economic welfare of the black workers in South Africa, their families, and their communities. *Id.*

90. *Id.*

91. This was the first time international corporations were subjected to a form of monitoring. *Id.* at 59.

92. *Id.* at 62.

commit to the Principles at all.[93] As public disapproval grew,[94] Sullivan tried to find a middle ground, by introducing an additional Principle for corporations to follow.[95] In 1985, Sullivan directly challenged the South African regime and gave it twenty-four months to abolish apartheid; otherwise, he would support a demand for corporate withdrawal and divestment.[96] As the deadline approached, he provided an additional and final interpretation of the Principles, which broadened the duties of corporations to areas in the public domain.[97] In 1987, after the companies failed to comply with the imposed deadline, Sullivan demanded almost total embargo on trade with South Africa and withdrawal of all companies.[98] The U.S. government took the next step and adopted the Sullivan Principles as the basis of the federal International Anti-Apartheid Sanctions Act of 1986, converting them into federal law governing the United States'

93. *Id.* Progress among British companies, which comprised half of the total foreign investment in South Africa, was even worse. Too many companies did not adopt the Principles in good faith, with the majority using them as a charade. *Id.* The Principles, however, drew public attention to the racist regime in South Africa.

94. Public disapproval caused stock divestment and corporate withdrawal. In addition, the Principles fell under heavy criticism from black leaders in the United States and South Africa. The Free South Africa Movement even threatened to question the moral adequacy of the Principles, characterizing them as "a cheap buyout by corporations who wanted to stay in South Africa and reap apartheid profits." *Id.* at 61.

95. The 7th Principle required that companies work "to eliminate laws and customs that impede social, economic, and political justice." *The Sullivan Principles*, BOSTON U. TRUSTEES, http://www.bu.edu/trustees/boardoftrustees/committees/acsri/principles (last updated Feb. 27, 2016).

96. Richard III, *supra* note 84, at 68.

97. In an interview with the *New York Times*, Sullivan stated:

> Following are the most recent additions, contained in a letter of May 3, 1986 to the companies that have signed the principles: Practice corporate civil disobedience against all apartheid laws and refrain from following the practice, policies and reguglations [sic] pertaining to apartheid. Use your company's financial and legal resources to assist blacks in the equal use of all public and private amenities, such as parks, beaches, schools, hospitals, transportation and housing.

A Conversation with the Rev. Sullivan; Going All-Out Against Apartheid, N.Y. TIMES (July 27, 1986), http://www.nytimes.com/1986/07/27/business/a-conversation-with-the-rev-sullivan-going-all-out-against-apartheid.html?pagewanted=all.

98. Richard III, *supra* note 84, at 68.

international policy.[99]

Despite the fact that the number of companies adhering to the Principles declined sharply over the years as U.S. companies followed a policy of disinvestment,[100] the Sullivan Principles have helped to establish a legal precedent that promotes a new approach to conscious business dealings, regardless of where they operate.[101] They are also an important precedent in establishing U.S. constitutional principles, in this case on racial equality, outside its borders.[102]

The MacBride Principles are a corporate code of conduct created as guidelines for the companies doing business in Northern Ireland.[103] The Principles prescribed implementation of non-discriminatory hiring practices, prohibited violence in the workplace, and required corporations to hire underrepresented applicants.[104] They were a response by Irish human rights activists and their U.S. supporters to the numerous discriminations against Catholics in almost every sphere of their lives.[105] In an attempt to overcome the "Economic Apartheid,"[106] human rights activists tried to pass the MacBride enactments that were pending in legislative bodies in Northern Ireland. The process was slowed down by British government lobbyists who were hired specifically to impede the Principles' enactment.[107] The next step was taken from inside the United States through the adoption of the MacBride Principles in the hope that external pressure would encourage and speed up the social change.[108] The MacBride Principles are embodied in two forms:

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99. *Id.* at 69.

100. Perez-Lopez, *supra* note 78, at 37. Adherence to U.S. law adopted on the basis of the Sullivan Principles had better results. *Id.* at 39. Adherence to the Fair Labor Principles is compulsory for firms employing more than twenty-five employees in South Africa, whereas compliance with the Sullivan Principles was voluntary. The United States penalizes non-compliance with U.S. law by withdrawing government export marketing support, whereas no penalty is imposed for non-adherence to the Sullivan Principles. *Id.* at 40.

101. Richardson III, *supra* note 84, at 70.

102. *Id.*

103. Perez-Lopez, *supra* note 78, at 10.

104. Neil J. Conway, *Investment Responsibility in Northern Ireland: The MacBride Principles of Fair Employment*, 24 LOY. L.A. INT'L & COMP. L. REV. 1, 1 (2002).

105. *Id.* at 9.

106. *Id.* at 8 (quoting OLIVER KEARNEY, THE EQUAL WORKING GROUP, THE DIRECTORY OF DISCRIMINATION 7 (1991)).

107. *Id.* at 9.

108. *Id.* at 10.

(1) statutes requiring U.S. corporations operating in Northern Ireland to adopt and adhere to the MacBride Principles in order for investment of state-managed funds to be available for their corporation; and (2) "contract compliance legislative enactments which require corporations doing business with government entities to agree to implement the MacBride Principles."[109] Additionally, the MacBride campaign tried to prevent discriminatory hiring but maintain corporations in Northern Ireland.[110]

Once again, the United States had established its right to examine labor relationships abroad through control of U.S. companies operating overseas.[111] As a result of this U.S. interference, the British Parliament passed the Fair Employment Act, which was described as a means of tackling "even unintentional or 'indirect' discrimination."[112] Although the MacBride Principles and the corporate actions they prescribe are not a panacea,[113] they are the first step towards fair employment practices and stability in Northern Ireland.[114]

E. ALTERNATIVE MEANS TO ADDRESSING SILENT COMPLICITY

To this day, scholars struggle with the dilemma of finding the most effective means of protecting human rights from direct or indirect violations by international corporations. Some scholars argue that business actors must bear the same obligations towards human rights as states.[115] Others contend that corporations should have a duty to not invest at all in a repressive society, or a duty to ensure that the corporation does not receive any indirect benefit from oppressive government violations.[116] Others believe that given the corporate drive for profits, transforming the voluntary codes into binding law would

109. *Id.* Sixteen states adopted some form of MacBride legislation. As opposed to the Sullivan Principles, the MacBride Principles generally failed to dictate divestment of stock. *Id.*

110. *Id.*

111. *Id.* at 13.

112. Perez-Lopez, *supra* note 78, at 45.

113. *Id.*

114. Conway, *supra* note 104, at 14–15.

115. Anne Peters, *Human Rights and Business Actors*, THE SIXTH BEIJING F. ON HUM. RTS. 1 (Sept. 12–13, 2013).

116. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 503–04 (2001). Ratner believes corporations will be safe by avoiding developing any ties with repressive regimes. *Id.*

not be politically or economically feasible.[117] Instead, national governments should introduce initiatives that would reinforce the value and benefits of voluntary codes.[118] Accordingly, the governments would have to come up with both encouraging legislation ('carrots') and the means of enforcement ('sticks').[119] Only by balancing 'carrots' and 'sticks' are governments likely to be successful.[120] Corruption has been one of the contexts in which the introduction of voluntary codes of conduct has been considered, due to the fertile ground for human rights violations it creates.[121]

In the context of thriving corruption (based on the Russian example), the "Sullivan-Type" approach may be appropriate.[122] De George suggests a cooperative action against corruption in Russia as the most effective means.[123] It should involve public[124] promulgation and adherence to guiding principles by international companies in a united front.[125] Among the major arguments against the adoption of a Sullivan-type code is the lack of vocal support from both Russian society and the international community, as was the case in South Africa.[126] Additionally, as opposed to General Motors in South Africa, which took the initiative in opposing apartheid, no Western company has taken the lead in the Eastern bloc.[127] Nevertheless, De George emphasizes the unique situation in Russia that would

117. Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 398, 390 (2005).

118. *Id.* at 424. Governments can do a better job at making adherence to the codes more attractive. *Id.*

119. *Id.*

120. *Id.*

121. Richard T. De George, *"Sullivan-Type" Principles for U.S. Multinationals in Emerging Economies*, 18 U. PA. J. INT'L ECON. L. 1193, 1206 (1997).

122. *Id.* at 1200.

123. *Id.* at 1203. Due to the strong presence of crime and corruption in Russia, an organized counter force should be the appropriate answer. *Id.* at 1200. It will allow any particular company to avoid the "onus." *Id.* at 1205.

124. Public promulgation would expose the problems of doing business in Russia. Further, it would send a clear message to Russian counterparts that U.S. companies are not prepared to participate in corruption. Finally, engaging in business transactions with honest Russian entrepreneurs would encourage others to follow the example. *Id.* at 1206.

125. *Id.* at 1203. *See generally id.* at 1203–04 (introducing a list of principles that includes norms that are regularly violated in business transactions in Russia).

126. *See id.* at 1208.

127. *See id.* at 1209.

require a special approach rather than following generally applicable principles by U.S. companies in other places.[128]

F. CORPORATE REACTION TO THE ANNEXATION OF CRIMEA

Russia's annexation of Crimea and the reaction of corporate actors are discussed in this Part as part of a new approach for the role of corporations in addressing violations of international law by a host government.

As Russia annexed Crimea, the entire world held its breath—except corporations. The most influential and known companies in the region such as Adidas, Coca-Cola, and McDonald's continued pursuit of their profits. McDonald's withdrew its restaurants from Crimea without providing any reasons, but instead expressed hope to be able to return soon.[129] One of the official reasons for withdrawal was economic motivation, rather than political.[130] This is not surprising since McDonald's operates more than 400 restaurants in Russia and was the first international fast food chain to open in the country.[131] As for Adidas and Coca-Cola, both companies experienced declines in profits in the region.[132]

III. ANALYSIS

Corporations are recognized as one of the most powerful actors on the international stage,[133] and their presence could be result-determinative in conflicts across the world. However, corporations are also money-making machines and primarily

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128. Because Russia is a nuclear power, it is especially dangerous for the country to be subject to corruption and crime. *Id.* at 1210.

129. *See McDonald's Leaves Crimea After Russian Annexation*, NEWSWEEK (Apr. 4, 2014), http://www.newsweek.com/mcdonalds-leaves-crimea-after-russian-annexation-244291.

130. *See* Natalia Zinets, *UPDATE 5-McDonald's Quits Crimea as Fears of Trade Clash Grow*, REUTERS (Apr. 4, 2014), http://www.reuters.com/article/ukraine-crisis-mcdonalds-idUSL5N0MW18J20140404.

131. *See id.*

132. *See* Julia Kollewe, *Russia Tensions with West over Ukraine Hit Coca-Cola Bottler and Adidas*, THE GUARDIAN (Aug. 7, 2014), http://www.theguardian.com/business/2014/aug/07/russia-import-ban-coca-cola-bottler. *See also* Jack Ewing, *Adidas Issues Profit Warning Tied to Ukraine Crisis*, N.Y. TIMES B2 (July 31, 2014).

133. Acharya, *supra* note 2, at 969.

profit-oriented.[134] Therefore, a special approach should be taken to include corporations in shaping today's world structure.

A. WHAT IS "COMPLICITY"?

Complicity should encompass not only the criminal or philosophical aspect, but rather unify both. The approach would include the notions of silent complicity and bystander liability into the general framework of complicity and address the moral issues arising out of those concepts in a serious and adequate manner. Just because there is no legal doctrine to support the imposition of responsibility, this does not mean that guilt based on silent compliance is totally absent.[135]

Being an unmoving bystander is arguably one of the most dangerous types of complicity. In general, bystanders' silence and inaction can easily signal approval to the perpetrators and the victim.[136] When the bystanders are corporations with enormous power and influence, they send an even stronger message to the perpetrators and victims, expressing their complacency of the violation and disregard for international norms as something of "no big importance."[137] To make matters worse, the lack of regulations is creating a fertile ground for silently complicit corporate actors,[138] which thrive under such circumstances and continue to send messages by their inactions. Unfortunately, the theories of silent complicity and bystander liability are not supported in either criminal sources of complicity[139] or soft law regulations.[140] The ATS and ad hoc tribunals' cases agree that corporations are not likely to find themselves in trouble by simply continuing legitimate business practices while knowing that some egregious human rights violations are involved.[141] Therefore, the criminal law sources of corporate responsibility implicitly disavow legal liability for silent complicity.

The most recent source of soft law that imposes duties on corporate actors is the Guiding Principles, which focus on

134. *See* Amerson, *supra* note 24, at 14.
135. Amerson, *supra* note 61, at 931.
136. *See* Amerson, *supra* note 24, at 18.
137. *See id.* at 19.
138. *See id.*
139. *See* Michalowski, *supra* note 60, at 443.
140. *See* Ruggie Principles, *supra* note 3, at 14.
141. *See* Michalowski, *supra* note 60, at 443.

beneficial complicity. Section (b) of Principle 13 requires that business enterprises "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts*."[142] The Commentary further supports the proposition that responsibility may be imposed on corporations if human rights violations are the result of their relationships with others. Moreover, the activities are supposed to be "directly linked to its business operations, products or services," which implies that the required mens rea for the purposes of the beneficial complicity is knowledge. The beneficial complicity is the closest form of complicity addressed by the Principles and silent complicity seems to fall outside the scope of the Principles. Therefore, the debate over either silent complicity or the bystander theory as applied to corporations is at an early stage; namely, silent complicity is neither in criminal law, nor soft law.

The lack of attention to the issue, the involvement of powerful actors, and the message sent to the world by being silently complicit creates a strong undermining effect on the values behind human rights and international law. This can be remedied by involving corporate actors within the silent complicity theory.

B. WHAT IS THE DUTY AND WHY IMPOSE IT?

In order to create any type of responsibility, some kind of duty needs to be imposed. It is the first step in raising a comprehensive issue of silent complicity for debate. Corporations, just as states, should bear positive duties to voice their stance in situations of international law violations. These duties are moral obligations that require strong corporate actors to stand with the entire world in promoting respect for human rights and international law. Because the duties of corporations would require some limited action or reaction, there is no need to establish the limits for those duties for purposes of establishing this framework as opposed to the case with the states.[143] In other words, to avoid silent complicity, corporations would have to "raise concerns about human rights"[144] and

142. *See* Ruggie Principles, *supra* note 3 (emphasis added).
143. *See* Hunt, *supra* note 25, at 808.
144. Clapham & Jerbi, *supra* note 6, at 347.

international law violations. Rather than establishing limits, there would be a floor—a minimum action for corporate actors in response to human rights and international law violations.

Examples of such minimum steps could be exercised through promotion campaigns with the use of posters, hand-outs, advertisements, and public expressions of commitment to human rights, international law values, and peace. 'Human rights' and 'peace' can be included in famous brand names, such as Coca-Cola, Adidas, McDonald's, and others. Corporations, being popular brands, can have an especially strong impact on society and the entire world by committing to the values and promoting them in their daily dealings. There is no need in organizing protests or similar actions, it is sufficient to voice—somehow indicate—disapproval of human rights and international law violations. By disagreeing with the acts against generally accepted values and norms embodied in human rights and international law, a corporation may exemplify a strong commitment to respect and the seriousness of the human rights issue. It is demonstrative that international norms have essential and genuine values in modern societies rather than a mere pretense created by the West.

The imposition and exercise of the positive duty to raise concerns about human rights and international law violations would send a strong message to violators and victims; it would unite all essential actors (states, NGOs, international organizations, and business entities) in pursuance of the international values. It would also unite societies and encourage positive social change from the bottom of the system—the people. This approach would encourage the creation of a popular culture that promotes respect for human rights and international law. Corporations could play a critical role in the battle for the rule of law because those who love their brands, products, and services are more likely to listen to what the providers of those goods and services have to say. At this point, self-relatedness[145] would come into play, which would lead to actions by ordinary people. They would be able to relate to those whose rights are abused, and they would be empowered to react to those abuses as influenced by corporate values of the corporations of which they are customers.

Addressing silent complicity is vital in the contemporary globalized world. The only way to create a stable, respectful, and

145. Amerson, *supra* note 24, at 14.

peaceful world is through the unity of some basic values—respect for human rights, international law, and peace.

C. THE "SULLIVAN-PLUS" APPROACH

The "Sullivan-Plus" is a new set of values that encompasses novel concepts of complicity and the interests of the parties to which they would apply. They include the following:

1. Taking a public stance when a host state violates international law;
2. Influencing other companies to take a stance;
3. Working to promote public awareness about international law violations by a host state;
4. Using company resources to promote and educate company's clients and general public about international law violations by a host state;
5. Uniting with other companies in disapproval of host state's international law violations; and
6. Disapproval and company's stance should be shared by all its subsidiaries and entities in all regions of the world in which it operates.

Principle 1 embodies the minimum duty to act—to raise concerns about human rights or international law violations. Principle 2 reflects that the duty should be universally applied to all corporations and that they are encouraged to inform each other to take a stance. Principle 3 is the key principle that promotes the ultimate goal of corporate action—raising public awareness that in the end will become the moving force of change from the bottom—the change coming from the people rather than the government. Principle 4 supports the idea that corporations, being powerful actors, are likely to bring change through spreading their ideas and sharing them with the parties in which they interact. Principle 5 expresses that all corporations should be equally engaged in the process, which is a good way to enhance confidence in their message and to send an even stronger message to the world. Last but not least, Principle 6 is a key factor that urges corporations to be consistent amongst each other regardless of where in the world they themselves, their subsidiaries, or franchisees operate. Only consistent disapproval by all members of the corporate class will bring about the change.

It may be a challenge to implement these principles knowing how independent the major company subsidiaries and franchisees are. However, once the ideas become part of the corporate culture, it should become easier to deal with this issue.

D. IMPLEMENTATION OF THE "SULLIVAN-PLUS" PRINCIPLES

Failure of law or policy usually occurs because of the disregard of interests and nature of the parties involved. Therefore, when applying these principles, corporate interests and nature should be considered. Because corporate interests are profit-oriented and non-responsiveness to voluntary practices is part of corporate nature, the implementation of the "Sullivan-Plus" Principles should be managed in light of those factors.

First, because companies are generally non-responsive to regulations that are voluntary in nature, state governments should consider introducing enforceable policies addressing the issue of human rights and international law violations. Since corporations are profit-driven, governmental 'carrots' and 'sticks'[146] should be directed towards corporate profits. A possible way to do so is to either provide or revoke governmental benefits corporations currently enjoy. For instance, the regulation can provide for denial of export marketing support from the U.S. government as the U.S. government did under the Sullivan Principles[147] or, at the state level, denial of investment of state-managed funds as some state governments did under the MacBride framework.[148] Although withdrawal and complete divestment were means of enforcement of the Sullivan Principles under U.S. policy, they are not the best way of addressing silent complicity. By simply withdrawing from the area, victims would be left alone without any support, whereas the key point of exercising the positive duty to raise concerns about violations would be missing. Even though the message might still be made, society would be left without the power and resources the corporations have and without support of moral convictions the corporations would promote. In addition, the international values that may not be so strong in certain countries will remain the ideas of the West, which is foreign and

146. Murphy, *supra* note 117, at 424.
147. Perez-Lopez, *supra* note 78, at 40.
148. Conway, *supra* note 104, at 10.

strange to the rest of the world. Therefore, withdrawal and divestment are not the most effective means in the case of silent complicity.

E. "SULLIVAN-PLUS" PRINCIPLES AS APPLIED TO UKRAINE

The fact that silent complicity has not been an issue in the Ukrainian-Russian conflict is unsurprising. Corporations, such as Adidas and Coca-Cola, have remained silent and focused on their profits rather than the conflict, which is a predictable behavior because profits are the primary interest of corporations. Because there was no duty to act and no means of enforcement or encouragement of such a minimum action, corporations refrained from any action.

Some companies, such as McDonald's and Google, did try to address the issue, but failed in their attempts. Although McDonald's withdrew from Crimea, the company did not provide any conflict-related reason for its withdrawal.[149] Moreover, it preserved all of its 400 restaurants in Russia.[150] Recognizing that withdrawal and divestment were not the most effective means of addressing silent complicity, it was not necessary in this case. Google Maps, on the other hand, decided to sit on both sides of the table and depicted the current border between Ukraine and Russia inconsistently making it either part of Russia, Ukraine, or disputed territory—depending on where in the world one is viewing Google Maps.[151] By acting in this manner, Google mis-conceptualized the Russian act of aggression as something that can be both right and wrong, since Google Maps supported both the aggressor and the victims of the conflict. Google Maps sent an ambiguous message by acting as a two-faced Janus, which can be even worse than being neutral because such response is likely to fuel even stronger tensions.

When witnessing such ambiguous responses from some corporate actors and silence from others, societies are divided in their values. This division is influenced by corporate actors' support of different theories of the conflict. Demonstrations of unimportance and a lack of concern and more importantly—refraining from promoting and recognizing the importance of

149. *See generally McDonald's Leaves Crimea After Russian Annexation*, *supra* note 129.

150. *See* Zinets, *supra* note 130.

151. Hern, *supra* note 1.

human rights and international law in the non-Western countries—allow division of the ideologies to continue to thrive and create further disagreements between nations.

IV. CONCLUSION

The recognition of a positive duty to react to international law violations is essential to the world and human rights. If we really believe in what we preach, a duty to act in the face of circumstances ranging from silent complicity to direct complicity should be imposed on corporate actors.

A duty to act under the circumstances of silent complicity should be limited to, at a minimum, raising concerns about human rights and international law violations. The "Sullivan-Plus" Principles reflect the rationale behind imposing a duty to act on corporations. Unity and consistency are emphasized under this new approach.

To implement the "Sullivan-Plus" Principles, states should encourage companies to promote international values by either providing them with benefits or withholding them for non-compliance. Divestment and withdrawal from an area is not an effective means of addressing silent complicity, because such a response would make the importance of human rights and international law remain the values of Western culture only and the rest of the world will continue to view them as a pretense for intrusion by the West.

The corporate indifference seen during the conflict between Ukraine and Russia is not unique. Because such powerful actors, like corporations, remain silent or ambiguous in similar situations, the Western message—disapproval of acts that demonstrate a lack of respect for human rights and international law—remains short of its goal. Instead, the message is considered as an insincere attempt to pretend that the basic values of the rule of law matter.