COMPLICITY IN HUMAN RIGHTS VIOLATIONS: A RESPONSIBLE BUSINESS APPROACH TO SUPPLIERS

By: Margaret Jungk
The Human Rights & Business Project
This Working Paper is the result of discussions with select company members of the Confederation of Danish Industries, who were assembled in a series of meetings by the Human Rights & Business Project to discuss one of the most complex human rights problems facing companies today: complicity in human rights violations committed by suppliers. The resulting framework is intended to serve as general guidance for companies, both Danish and foreign, wishing to develop more formal due diligence policies on supply-side complicity, or to enlarge on existing policies from an objective, ethically balanced, perspective.

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The Danish business ABC inc. procures goods from 860 companies abroad, including 830 suppliers, 18 subsidiaries, 2 service contractors, and 2 joint-venture operations, each with 5 partners. Over half of these operations are conducted in countries where human rights standards are considerably lower than Denmark’s.

Question
What responsibility should ABC take for the human rights practices of these suppliers?

Facing the Problem

How should Danish companies conduct business with international supply partners who do not have the same standards of human rights?

More specifically, how much responsibility should they be taking for the practices of these other companies, and what does that responsibility mean in terms of day-to-day conduct?

Danish companies recognize their duty not only to be good human rights actors themselves, but also to make sure that they act responsibly with regard to human rights issues raised in the context of their suppliers.

But exactly what that responsibility entails in practice is ambiguous and the subject of a rather disparate debate. There is currently no consensus among businesses, states, human rights groups, or consumers (or indeed, within any of these groups) as to the responsibilities that companies should have for their suppliers abroad. The law is also not developed in this area, leaving companies to traverse the minefield of morality and public expectations unaided.

The issue is made more complicated by substantial practical difficulties. As in the case presented above, there may be so many businesses on the supply-side—often with a varying relationship to the Danish company, such as subsidiaries or joint-venture partners—that it is impossible to check all of them without compromising the company’s day-to-day operation. However, against these pragmatic constraints must be balanced the ethical imperative to retain some degree of responsibility for suppliers whose operations are connected to Danish companies.

Can a compromise ever be found between these practical constraints and ethical ideals? We think it can. This Working Paper introduces a framework based on sound ethical principles which is capable of being applied to every business-supplier relationship, even if it invol-
A number of different international suppliers. The first part of the paper deals with the principles behind the framework, which were the subject of detailed consideration by select company members of the Confederation of Danish Industries. In the second part of the paper, a concrete framework is presented for monitoring and addressing supply side violations. The framework was applied in workshops with company members of the Confederation of Danish Industries to ensure that it is relevant and do-able in a business context. In the final part of the paper, the framework is applied to the case study of the fictitious Danish Company ABC presented at the outset.

**Back to Basics**

Four basic principles are established as a reliable method of identifying one actor’s responsibility for the actions of another.

- The enabling principle
- The causality principle
- The severity principle
- The power principle

Though the power principle is unsuitable for use in a business context, the other three can be adapted from their academic origins into a firm and consistent basis for establishing company responsibility for supply-side partners abroad. We will review what each of the principles means separately first, and then show how they can be used together to build finite, concrete guidelines.

**The Two Modifiers of Responsibility: intent and reasonable foreseeability**

The responsibility of an original party for a second party's violations may vary depending on two factors: the original party’s intent, and its ability to foresee and consequently avoid the violations. In the business context, the first is relevant if the business intentionally sought out, or encouraged, a supplier to commit a human rights violation - for example, a company which takes on a supplier, in the full knowledge that the supplier will deny its workers breaks in order to fulfill the order in a shorter time. Though such practices are not unknown, most Danish companies do not set out with the intention to encourage, or benefit from, exploitative practices in this way and the framework therefore largely ignores the concept of intent in this context. The concept of reasonable foreseeability, in contrast, is held to apply if, in all the circumstances, a business could reasonably foresee a significant possibility that the supplier was engaging in human rights violations, but still chose to use the supplier. It would apply, for example, to a company which undertakes business with a supplier known informally as having a long and well-established history of engaging in human rights violations, but does not take any formal steps to verify this. Again, we recognize that most Danish companies would try to avoid such a situation and therefore build the framework on the presumption that the original company had no way of reasonably foreseeing that the supplier was engaged in human rights violations.
The Enabling Principle: empowering gives rise to responsibility

This enabling, or ‘empowerment principle’ as it is sometimes called, is easy to understand - if one business enables or empowers another to do anything which violates human rights, the original business has some degree of responsibility for the violations.

What form does enabling take in the business context?
Enabling in the business context essentially comes down to money, because the very existence of another company, and therefore its ability to act (and consequently, to violate human rights), is ultimately dependent upon its financial status.

To what extent does enabling make a company responsible?
The degree of responsibility of the company can vary according to the degree to which it empowered the supplier. The first step is to determine the extent to which the first financially supports the second.

The easiest way to determine this is to base it on a straightforward percentage of the revenue that the company generates for its supplier. The simplest calculations are based on the percentage of the supplier’s total output, in terms of goods or services, which is purchased by the company. Most suppliers receiving under 30% of their annual revenue from another company could survive without that company’s business, whereas at 50%, the supplier is more dependent on the other’s business, and by extension, more
‘empowered’ by it. Therefore the suggested levels, as shown in the previous graph, are as follows:

- **“No responsibility” (no enabling)**
  the company’s contribution to the monetary intake of its supplier is less than 30% of the supplier’s annual revenue.

- **“Partial responsibility” (partial enabling)**
  31% to 49% of the supplier’s revenue.

- **“Full responsibility” (full enabling)**
  over 50%, or a level where it can safely be assumed that the supplier would not be able to continue without the company’s business.

**Note:** The supplier’s annual revenue should always be calculated in relation to the level of the individual business unit only, not in relation to any larger holding companies. The important factor to take into account is the point at which enabling occurs as seen in the following examples:

  a) If a supplier in Bangladesh is part of a larger American company, consider only the percentage of the revenue in relation to that particular Bangladeshi branch, not the American firm. It is this revenue which enables that smaller Bangladeshi branch to survive (and by extension, to continue to perpetrate any human rights abuses), rather than be closed down by the larger American firm.

  b) In the case of a joint-venture partnership supplying the company, start with the level of financial investment the company has in the joint-venture, and calculate its proportion to the break-even point of that particular operation, rather than the part relative to the total revenue of the larger business partners. Obviously, the controlling partner, or any company holding more than 50% of the shares has full responsibility to ensure that the operations are compliant with human rights.

  c) A company is fully responsible for its subsidiaries, because it is enabling these subsidiaries to exist. So subsidiaries automatically fall in the full responsibility category, even if the subsidiary is largely financially independent and providing the company with few, or no, goods.

*Such calculations are based on establishing the percentage of business the supplier has with the Danish company from the perspective of that supplier rather than the Danish company. This can be difficult to calculate and concessions on the accuracy of the calculation will have to be made in relation to the accessibility of information on the supplier’s annual turnover.* Nonetheless, it is far better to make the concession there, than to make it in relation to the very formula upon which the calculation is based. Unfortunately, the few companies which currently have a policy on responsibility for suppliers calculate from the perspective of the company itself rather than its supplier. For example, responsibility will more often be accepted for a supplier constituting over 40% of the company’s business, than for a supplier with over 40% of its revenue generated by the company. While the former may be convenient for the company involved, and contribute to the appearance of responsible business practices, it does not give anything approaching a true picture of responsibility in terms of the actual facilitation of the supplier’s misconduct. Only the latter calculation is relevant in this regard.
The causality principle gives responsibility to one party if it causes another to commit human rights violations or gives rise to an occasion involving the violation of human rights. The uncomfortable news for businesses is that such a causal connection is potentially established every time the company does any business, though the degree of connection varies from case to case as follows:

- **“Full responsibility”** (full causal connection)
  Where the violation committed by the supplier is in direct relation to the company's order or business: for example, if a company contracted a supplier to manufacture a plastic toy exclusively for its range of toy products, and the supplier made these without the proper safety equipment which subsequently damage the health of the employees. Another type of full casual connection is through the activities of sub-contractors, who have been hired to undertake a particular service for a company, such a transporting the products from the factory to the company. Any violation committed during that undertaking would constitute a full causal connection. Indeed, any violations committed in relation to any work which is outsourced by a company constitutes a full causal connection, with full responsibility.

- **“Partial responsibility”** (partial causal connection)
  Where the violation occurs in the making of a product or carrying out of a service which is not exclusively intended for the...
company: for example a violation which resulted from one step of a manufacturing process which is used in the production of many products in the supplying factory, including products for the Danish company. This partial connection gives rise to partial responsibility.

- **“No responsibility” (no causal connection)**
  Where the violation occurring in the supplier is through the manufacture of another business’s products and has nothing to do with the purchase order of the Danish company. It is recognized that a company cannot be held responsible for checking every aspect of its supplier’s operations. It is possible, however, that in this situation, responsibility for the violations might still come under the first principle of enabling, if the supplier conducts most of its business with the Danish company.
The severity principle refers to violations so severe that responsibility arises from their very nature, without any need to establish enabling or a causal connection. For example, genocide is a violation deemed so severe that all states have immediate responsibility to take action to stop it, whether or not there is any connection with the perpetrators or the victims. It is recognized that the value of the lives involved is so fundamental, and consequently the impending loss of life so severe, that action of some kind is imperative. The severity principle has manifestations in most national legal systems as well, and at the international level was recognized by the International Court of Justice in the Barcelona Traction, Light and Power Co Case: Belgium v Spain (1970), which found that some violations are ‘by their very nature’ the obligations of all states ... ‘such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’.

This principle, in common with the two previously considered, has a range of effects. The distinction usually drawn is between ‘fundamental’ human rights, human rights ‘principles’ and human rights ‘standards’. Although widely used, there are no authoritative distinctions between, or universally accepted definitions of, the three terms. Moreover, since all three terms are used interchangeably in popular discourse there is often little indication of their relative standing. The following examples, tailored to a business context, should give a general indication of the differences between them.
• **Fundamental Human Rights**

These should always be of concern to a business, and as such, are represented at the upper right hand corner of the diagram, indicating full responsibility. The fundamental human rights are sometimes referred to as *peremptory norms, or non-derogable rights* in the language of international law. These rights are higher than all other forms of law so any treaties or laws which are made in violation of these are automatically considered null and void (Article 53, *Vienna Convention on the Law of Treaties* (1969)). The government is never allowed to derogate from them, even in times of national emergency threatening the very existence of the state.

They are not comprehensively defined but are all of those elements which preserve the life, security and dignity of the human person. For example, freedom from torture or other inhumane, degrading forms of treatment or punishment, freedom from slavery, and genocide, arbitrary deprivation of life. They can be contrasted with rights such as the right to peaceful assembly and association, and the right to vote which, though important, the state can sometimes abrogate. A state at war, for example, does not have the obligation under international law to hold an election, but it must not torture or enslave even captured enemy combatants.

The fundamental rights, which have their manifestations in the business context as well as the political, preclude any company activities which involve:

- the use of slave labour (including forced, indentured, or compulsory labour)
- any harsh or inhumane treatment or punishment of employees
- the use of child labour in activities which are dangerous to the moral or physical well-being and development of the child
- the use of labour in unsafe or unhealthy work environments, where employees have not been fully informed of the potential dangers and where all reasonable protective measures have not been undertaken
- the exploitation of employees who are hired for full-time work at less than a living wage

A business must ensure that none of its suppliers, contractors or joint-venture partners are in violation of these rights, regardless of whether or not any responsibility already exists under either the enabling or the causality principle.

• **Human Rights Principles**

Human rights principles are the basic tenets upon which the details of human rights law are based: for example the principle of the right to a fair trial or, in the business context, the principles of freedom of association and the right to collective bargaining in the workplace. In the example below, these three principles are shown in contrast to their associated standards.
• **Human Rights Standards**
  These are the detailed means by which the human rights principles are expressed and implemented in individual situations. Standards can more often be subject to variation than principles, but the important thing to remember is that human rights principles can sometimes be upheld even when the standard is not. For example the right to form unions is designed to uphold the principle of freedom of association and collective bargaining but is not recognized by some states. Though unions are the preferred, and most widely accepted *standard* set in relation to the *principles* of freedom of association and collective bargaining, it is possible that these two principles can be fulfilled through some other type of collective workers organization. Similarly, the principle of the right to a fair trial is typically associated with the *standard* that defendants have the right to legal counsel. In most national legal systems the two go hand in hand, but it is possible to conduct a fair trial in which the defendant represents him/herself.

In sum, violations of fundamental rights give rise to full responsibility. Violations of principles are placed at the middle level, meaning a business should take on board greater responsibility in relation to such violations by business suppliers, due to the greater severity. In contrast standards give rise to an even lesser responsibility because their violations are relatively less severe.
The power to effect change is a central part of most ethical responsibility arguments, underpinned by a fundamental assumption that with the power to effect change for the better comes a responsibility to do so. And again, this power is measured at a number of levels, depending on the relative position of the players.

In the business context, power is measured in terms of wealth (profits and turnover) and size (resources and employees at the company’s disposal). According to the power principle, the bigger and wealthier a company is, the more responsibility it has to ensure good human rights practices in its suppliers. Simply put, a larger and more powerful business has the power to force observation of human rights on a weaker supplier.

How is the power principle applied?
The principle is easily applied in the business context. Full responsibility occurs where there is a substantial difference in size, such as suppliers who are at least ten times smaller. Continuing to apply this correlation would mean that partial responsibility will occur when the supplier is five times smaller, but where there is parity of size there is no responsibility.

Why is it not considered as a viable principle in this context?
On first consideration the power principle appears reasonable, and indeed, many larger companies have been the subject of consu-
mer/NGO campaigns for breaching it. But flaws become apparent when the principle is applied to smaller companies who clearly should not escape responsibility simply because their relative size gives them less power. Customers would never accept that a smaller business have poorer quality control standards than a larger one, simply because it had less leverage or power over its supplier. Indeed, the ultimate leverage/power can be exercised by all companies, regardless of size: that is, the threat to withdraw business if sub-standard practices are found, be they poor product quality standards or human rights violations.
Application of the Three Principles of Responsibility for a Company Human Rights Policy on Suppliers

Having considered company responsibility in theory, we can now apply that theory to the original case study - the Danish company ABC inc, to see how it can establish a good, ethically solid, and practical supply-side human rights policy in spite of the large numbers of suppliers, subsidiaries, service contractors and joint-venture operations involved.

At an operational level, responsibility (and, by extension, a responsible business policy) means two things. The first is diligence, using good monitoring practices to avoid human rights violations in the first place. The second is the responsibility to undertake corrective action when violations are found. Below we review the monitoring and mitigation practices that should be used in relation to suppliers falling within the ‘full’, ‘partial’, and ‘no’ responsibility categories under the 3 principles considered above.

<table>
<thead>
<tr>
<th>EMPOWERMENT</th>
<th>CASUALITY</th>
<th>SEVERITY</th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>no responsibility</td>
</tr>
<tr>
<td></td>
<td></td>
<td>partial responsibility</td>
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<tr>
<td></td>
<td></td>
<td>full responsibility</td>
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</tbody>
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<table>
<thead>
<tr>
<th>TYPE OF VIOLATION</th>
<th>PRODUCT’S CONNECTION TO VIOLATION</th>
<th>% OF SUPPLIER’S REVENUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>human rights principles</td>
<td>partly for company</td>
<td>31-49%</td>
</tr>
<tr>
<td>fundamental human rights principles</td>
<td>exclusively for company</td>
<td>OVER 50%</td>
</tr>
<tr>
<td>human rights standard</td>
<td>not for company</td>
<td>UNDER 30%</td>
</tr>
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Company Policy on Human Rights Monitoring

The company monitoring policy should be directed at those suppliers falling within the full responsibility category, shown at the shaded far right-hand side of the diagram. Due to the difference in the connection which gives rise to the responsibility, the suggested monitoring mechanisms differ for each principle, as described below.

*Monitoring and the Enabling Principle*
Where the supplier is entirely dependent upon the Danish company (as it is with suppliers falling within the full responsibility category of the enabling principle) monitoring should consist of full human rights audits/checks on a regular basis.

This responsibility seems onerous. However, it is unlikely that a small or medium-sized company would have more than a handful of connections so extensive that the supplier was dependent upon its business. This principle will most likely give ABC full responsibility for only 10 of its 860 suppliers (a rough estimate based on previous discussions with a variety of Danish companies with 500 – 1000 suppliers). Moreover, given that there is already a significant business relationship between the Danish company and supplier here, it is likely that the company already has a substantial amount of information, and probably already conducts regular on-site inspection for quality control, environmental management, and other reasons. Checking human rights will be an extra element of these regular audits rather than a completely new practice.

*Monitoring and the Causality Principle*
Under the causality principle the company has the responsibility to monitor only those areas where another plant produces a product or undertakes work specifically for it; thus the audit concentrates on specific areas rather than being a general assessment. As before, there is no single ‘ideal’ way of undertaking such monitoring, but rather a modification of various methods already used is often effective. The product life-cycle assessment is one such tool which can be easily modified to check for a causal connection between a company’s product order and a violation in a supplier. Rather than evaluate every stage of the product’s creation, usage, and disposal, only the first stage of the life-cycle evaluation, examining product materials procurement and manufacturing, would be applied here. Another option – simple yet effective - involves the company’s purchasing agent carrying out human rights checks during routine pre-sourcing investigations.

Similar principles apply to a company concerned with a causal connection to services undertaken by a sub-contractor. For example, ABC has contracted out security services for its facilities in India. It should check those specific service arrangements for compliance with human rights. But ABC does not need to be concerned with the other business undertakings of its security service provider, such as the security company’s business in manufacturing armoured doors. Unless, extremely severe violations are detected under the final monitoring procedure for the severity principle below.

*Monitoring and the Severity Principle*
This principle applies to all suppliers, so this would mean that ABC should monitor all 860 suppliers to ensure that they are not com-
mitting human rights violations. However, the range is limited to the much smaller area of human rights that fall into the full responsibility category under this principle, namely, fundamental human rights.

Monitoring in relation to the severity principle entails two simple procedures as follows:

1. A questionnaire completed by all suppliers or a contractual term incorporated into all contracts. Both the contractual statement and questionnaire should have the ultimate purpose of communicating to the supplier that the company will not accept fundamental human rights violations in the supplier’s operations, and that such violations would affect the business relationship.

2. A human rights risk analysis of areas where fundamental rights violations are most likely to occur is the second procedure. This analysis (generally a desk study) will take into account the major rights violations typical for that sector as well as the political, cultural and legal protections afforded in the state where the supplier is located. For example, ABC works in the agricultural industry, so its risk analysis will alert the company to the likelihood of child labour, a typical violation in that sector, in particular small farms with little mechanization in Asia, where such violations are most likely. This will allow the company to notify its buyers in these areas to be on the look-out for such violations.

The diagram on the next page depicts the suppliers falling within the full responsibility categories of the three principles, and the monitoring practices which are suggested in relation to each.

**Company Policy on Human Rights Corrective Action**

Even the most diligent of companies, with the best monitoring practices and contractual arrangements, will sometimes find themselves associated with a supplier violating human rights. But if and when they are, the next consideration is remedial action.
What are the limits of this responsibility? Clearly, any violation occurring in connection with a supplier fully empowered by the company, and/or where operations have a full causal link, and/or where there are fundamental human rights violations, must be addressed. These are the categories of full responsibility under the principles of enabling, causality and severity, and constitute, what might be called, the threshold of maximum toleration, beyond which remedial action is called for.

Clearly, the minimum duty of a business is to address those abuses by its suppliers which fall within the full responsibility categories. However, a good company will try to go above and beyond that minimum level when possible. The problem remains of striking an equitable and practicable balance between the commercial imperative of continuing to do business and the ethical demands which flow from the human rights abuses of suppliers. Given the number and spread of abuses in the international community, some will have to go unaddressed and uncorrected; businesses need to know where their human rights efforts are best employed. We suggest that after dealing with the full responsibility categories, violations which fall within two or more partial areas of responsibility should be the next most important area of the company's concern and in this sense categories in the middle of the chart - partial responsibility - are a useful starting point.

To illustrate: ABC has recently discovered that one of its suppliers in Bangladesh is not supplying its workers with masks in its grain
storage facilities. The inhalation of grain dust is not life-threatening, but it can impair health, and as such, constitutes a violation of a principle (falling within the partial responsibility category of the severity principle). ABC purchases tractor engines from the supplier, not grain, so it has no causal connection to the violations. But ABC's order for tractor engines is substantial, and comprises about 35% of the supplier's annual sales. Thus, there is a partial empowering connection as well. Given this partial responsibility in relation to two principles, ABC has a greater obligation to exert pressure over its Bangladeshi supplier to improve practices.

**What should be done if a violation cannot be corrected immediately, or not at all?**

The initial instinct might simply be to cease using the supplier, particularly if the violation falls within the full responsibility category. However, suppliers are often working in challenging human rights environments themselves, facing both political and cultural barriers when trying to institute good practices. A supplier in Vietnam, for instance, would find it difficult to fulfill the rights of workers to collective bargaining when the government has put anti-union regulations in place, and a supplier in Saudi Arabia would face fierce cultural challenges trying to pursue an equal opportunities employment policy for women. Dropping a supplier as soon as it is found to be in violation does not serve the overall goal - the formation of a strategy which persuades suppliers to be compliant with human rights so far as is possible given the restrictions of their circumstances. Even in situations in which the human rights violation is not endemic to an outside cultural or political source, but rather is arising from within the company itself, the goal is still to encourage and persuade, through maintaining contact, rather than dropping the bad supplier.

Is there any situation in which business relations should be stopped altogether rather than working with the supplier for continuous improvement?

We only recommend dropping the supplier if it shows the following:

1. A violation of the fundamental rights in the list above, or of a similarly severe nature, *which was done knowingly*. This is simply a company with extremely poor practices which is ‘criminal’, rather than just ‘criminally negligent’.

2. An unwillingness to engage with the Danish company on human rights issues, either through refusing to respond or by denying access. The company will not be able to work towards its goal of continuous improvement under such conditions.

3. No inclination or ability to improve even after the Danish company directly works with the supplier on human rights improvements. They should be left for this just as they would for producing consistently bad quality products for the company.

**Getting the Focus Right**

In recent years Danish companies have increasingly started to recognize the importance of being responsible for the human rights practices of their suppliers. That recognition is not just in response to public pressure, rather it is also an understanding that a ‘good’
product, doesn't just refer to the quality, but also to the way in which it was made.

The framework above is designed to offer pragmatic guidance for companies, both Danish and foreign, to use as a consistent starting point for auditing their suppliers and for determining when they have a responsibility to act against human rights violations found in their supply chain. It has been designed to take into account both ethical concerns and commercial realities such as the limited time and resources available and the scale and complexity of companies’ international supply chains. It can be used either as the starting point for a company with no formal policy or to inform and enlarge on existing policies from an objective, ethically balanced, perspective.
This is the fourth in a series of working papers offered by the Human Rights & Business Project of the Danish Institute for Human Rights (DIHR), the Confederation of Danish Industries (DI), the Danish Industrialization Fund (IFU), the Danish Union Confederation (LO), and the Danish Foreign Ministry (Danida). The organizations joined forces in 1999 to form the Human Rights & Business Project, with the aim of clarifying the boundaries of human rights responsibilities for companies. Danish businesses play an active role in the research of the Project through serving as case-studies and providing constructive feedback on the results.

General information and queries concerning the Project or its working papers should be directed to:

**The Human Rights & Business Department**  
The Danish Institute for Human Rights  
Wilders Plads 8H, DK-1403 Copenhagen K, Denmark  
Phone: +45 32 69 88 88; Fax: +45 32 69 88 00.  
Email: business@humanrights.dk

The text of this and other working papers on human rights and business can be obtained from the Human Rights & Business Project website: [www.humanrightsbusiness.org](http://www.humanrightsbusiness.org)