



# Deconstructing Engagement



Corporate Self-Regulation in Conflict Zones –  
Implications for Human Rights  
and Canadian Public Policy

Georgette Gagnon  
Audrey Macklin  
Penelope Simons



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Relationships in Transition

A Strategic Joint Initiative of the Social Sciences and Humanities Research Council  
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## Executive Summary

### A. Scope of Paper

Human rights implications of the activities of transnational corporations (TNCs) and other business enterprises in conflict zones, “failed states” and repressive regimes have drawn increased public attention, concern and scrutiny in recent years. Concurrently, a new sense of urgency has emerged in public dialogue and debate about regulation by states of extraterritorial corporate conduct and the role of corporate self-regulation in addressing fundamental human rights concerns.

This paper examines the existing governance gap in the accountability of TNCs for violations of international human rights and humanitarian law associated with their extraterritorial operations. It assesses the adequacy of efforts at self-regulation that entail the development and implementation of voluntary standards and self-assessment and verification techniques. The examination is provided with context by a case study analysis of Talisman Energy’s operations in Sudan and through a comparative assessment of international and corporate self-regulation regimes. The paper advocates state accountability for the regulation of TNCs operating in conflict zones and proposes a comprehensive Canadian regulatory regime capable of addressing the “governance gap”.

### B. Case Study – Talisman Energy’s Sudan Operations

The case study demonstrates that self-regulation by Talisman Energy of its operations in the context of Sudan’s civil war proved ineffective in ensuring “the company supports and promotes international standards of respect for human rights within its sphere of influence, is not complicit in human rights abuses and strives to ensure a fair share of benefits to stakeholders affected by its activities” as stipulated in the voluntary International Code of Ethics for Canadian Business (ICECB). Numerous credible reports have found that oil development in Upper Nile has exacerbated civil conflict and assisted the war aims of the Government of Sudan, facilitating violations of human rights by government forces, government-backed forces and rebel groups.

The human rights situation in the oil region steadily deteriorated during Talisman’s presence. Forced displacement of indigenous populations and attacks on civilian settlements by government and pro-government forces increased. The company benefited from human rights violations committed by the government as systematic displacement carried out by government and pro-government forces enhanced security for its oil operations. Talisman Energy was unable to influence the government to allocate oil revenues for social development. Government and pro-government forces continued to use oil facilities and infrastructure for military and human rights abusing purposes.

Talisman and its GNPOC partners were unable to effectively monitor military use of oil installations or to alter the government's conduct in this regard. Talisman's claim that it served as a positive influence on the Government of Sudan and its policies is not supported by the facts; rather, the evidence suggests that the company was unable to achieve constructive engagement.

The company's efforts to regulate its conduct in Sudan and its retention of PricewaterhouseCoopers to verify its compliance with the ICECB also failed to ensure that the company's operations did not contribute to human rights violations. The company's 2000 and 2001 Corporate Social Responsibility Reports were not independent and demonstrated a lack of expertise in international human rights law, standards and practices. The reports failed to deal directly with generally accepted facts on critical human rights issues such as forced displacement from areas of oil development, indiscriminate attacks on civilians and intensified conflict related to oil development.

The case study shows there is little prospect of local regulation by the Government of Sudan of the activities of foreign oil companies. The willingness of a corporation's home state – Canada, in the case of Talisman – to exercise regulatory power is also complicated by the presumed absence of any legal obligation toward extra-territorial non-citizens, i.e. Sudanese inhabitants of the oil zone.

### C. Sources of Corporate Obligation – The “Governance Gap”

#### 1. *International Legal Accountability*

Transnational corporations that operate outside of their home state jurisdiction in zones of conflict are not accountable under international law or in most home state jurisdictions for complicity in human rights abuses. Nor are corporations accountable for any detrimental impacts of their extraterritorial operations on human rights. International law imposes no direct obligations on TNCs to respect and ensure respect for human rights within their sphere of influence. Similarly, home states have no international legal duty to ensure that their corporate nationals engaged in extraterritorial activities are not complicit in, or perpetrators of, violations of international human rights and humanitarian law.

#### 2. *National Legal Accountability*

At a national level, the patchwork of legal mechanisms available to governments and private actors provides limited capacity to effectively modify or challenge corporate behaviour. The resulting regulatory void permits TNCs active in conflict zones to disregard international human rights and humanitarian law standards with minimal legal repercussions.

#### D. Self-Regulation - Voluntary Instruments, Reporting and Verification Practices

Our analysis of models of self-regulation developed by international organizations and companies raises serious concerns about the adequacy and effectiveness of those models to address fundamental human rights issues. First, few of the corporate and international instruments surveyed deal sufficiently with human rights concerns. Only the United Nations *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (the “UN Human Rights Responsibilities”) and the *Global Compact* examine, in any detail, the issue of corporate complicity in human rights abuses and only the former provides for reporting and independent monitoring of compliance. The UN Human Rights Responsibilities also covers other provisions regarding security. The US/UK *Voluntary Principles on Security and Human Rights* (the “Voluntary Principles”) offer some innovative features such as requirements and guidelines for the conduct of human rights related risk assessments. The Voluntary Principles included input from the extractive industry in their development and enjoy the support of major TNCs. Only the UN Human Rights Responsibilities is drafted in mandatory language and provides for potentially robust enforcement infrastructure and compliance mechanisms. Of these codes, the UN Human Rights Responsibilities offers the most effective model for voluntary regulation of corporate conduct regarding human rights. This instrument, however, remains largely unrecognized and unacknowledged by the TNC community.

On social or human rights performance reporting, the multi-stakeholder long-term project of the Global Reporting Initiative entitled *The 2002 Sustainability Reporting Guidelines* falls short in several significant respects. First, the guidelines do not provide indicators specific to particular operating sites or the operating environment of a particular company. Second, the lack of development of human rights indicators, even at this early stage, is unsatisfactory. This gap permits reporting companies to avoid addressing key human rights issues related to their activities and still be able to claim that their reports are “in accordance” with the Guidelines. Lastly, independent verification is not required for a report to be considered prepared “in accordance” with the Guidelines.

The current TNC practice of social or human rights performance reporting and verification raises important issues about the credibility of these processes. Without accepted international and national standards on human rights reporting methodologies and processes, corporations may collect and report information as they see fit. They can promote a rosy view of corporate activity, leaving even industry leaders in this area open to the criticism of “greenwashing”. Equally, current verification practices can also be criticized for their lack of credible mandates, verification methodologies, transparency of process and absence of auditor independence and expertise.



#### E. State Interest in Regulating Extraterritorial Corporate Activity

States possess both authority and capacity under international law to exercise their jurisdiction to prescribe and adjudicate on the extraterritorial activities of their corporate citizens. States can extend both their civil and criminal law to corporate nationals or to their nationals controlling such corporations. States also have a legal duty to the international community to protect certain fundamental rights as well as a legal interest to prevent and punish the perpetrators of those human rights violations subject to universal jurisdiction.

#### F. Emerging Duty to Regulate Extraterritorial Conduct

Developments in international law point to an emerging legal obligation or, at the very least, a moral obligation on the part of states to ensure that their nationals do not commit, participate in, or profit from, the commission of human rights abuses either directly or indirectly. Several industrialized states have begun to consider and enact legislation on social and environmental reporting of extraterritorial activity and more comprehensive regulation of the extraterritorial conduct of TNCs that may be indicative of an emerging state practice of regulation in this area.

#### G. Canada's Interest in Regulation

Canadian human security policy reflects support for the evolving responsibility of states to protect vulnerable populations. Three of five policy priorities, articulated in Canada's foreign policy on human security, arguably support the concept of effective regulation of the extraterritorial activities of corporations in conflict zones that threaten human security or support directly or indirectly, violations of international human rights and humanitarian law. Canada also has a reputational interest in effectively regulating its national corporations having taken a leading role in the international promotion of human security.

The Canadian government's self-stated inability to sanction Talisman Energy, in view of the findings of the government-commissioned Harker Report (and numerous subsequent independent reports) that oil development in Sudan in which a Canadian company was involved contributed to grave violations of international human rights and humanitarian law, point to the need to develop specific mechanisms to address such conduct.

## H. Policy Recommendations

### 1. *Norms*

We recommend the legislated adoption of a mandatory code of conduct applicable to TNC activity in conflict zones.

#### a) *Content:*

- Transnational corporations and other business enterprises operating in conflict zones shall be responsible for ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not benefit from such abuses.
- Companies operating in conflict zones shall neither commit, nor be complicit in violations of international human rights or humanitarian law.
- Security arrangements for transnational corporations and other business enterprises operating in conflict zones shall observe international human rights norms as well as the laws and professional standards of the country in which they operate.
- Companies intending to set up operations in conflict zones shall undertake an independent risk assessment that includes the human rights and humanitarian consequences of their proposed activities.
- Companies intending to set up operations in conflict zones shall assume responsibility for securing the consent and co-operation of the host country in facilitating independent risk assessment and any ongoing monitoring subsequent to investment.

### 2. *Definitions*

#### a) *Conflict Zone*

There are a number of definitions of the term "conflict zone". It is not necessary for the purposes of this paper to choose between alternative approaches. Such definitions should be available for scrutiny, be reasonably capable of neutral application and, implicitly or explicitly, attend to the human rights and humanitarian implications of conflict. We do, however, recommend reliance on the Country Indicators for Foreign Policy as a means of identifying risk of conflict in a given state.

#### b) *Complicity*

We recommend the following definition of complicity, which is based on Canadian jurisprudence and international law:

Complicity by a TNC in the commission of acts by a perpetrator contrary to the Code of Conduct consists of one or more of the following:

- Acts or omissions that provide material assistance in circumstances where the TNC knew or ought to have known that its acts or omissions would provide such assistance.
- Acts or omissions that abet the perpetrator in circumstances where the TNC knew or ought to have known that its acts or omissions would encourage the perpetrator.
- Where a TNC enters into a commercial relationship with one or more parties in a conflict zone, and any of those parties commits acts in violation of the Code in furtherance of that commercial undertaking, the TNC is complicit if it knew or ought to have known that the commission of the acts would be a probable consequence of carrying out the commercial undertaking with that party.

### 3. *Monitoring*

#### a) *Monitoring Body*

We recommend the establishment of a Working Group or Agency comprised of representatives nominated from industry, non-governmental organizations and international non-governmental organizations that focus on human rights and/or Corporate Social Responsibility (CSR). The establishment, mandate and terms of reference of the Working Group would be set out in the appropriate statutory instrument. Existing regulatory regimes for environmental protection and assessment across Canada offer potential mechanisms upon which an effective impact assessment and evaluation regime could be modeled. The Working Group would be affiliated with the federal government and would be jointly funded by TNCs and the federal government through a mechanism that guarantees the independence of the Working Group from any individual TNC.

Prior to a TNC's investment in a conflict zone, the Working Group would review the TNC's risk assessment. It would also have the capacity to investigate the claims made by conducting research or commissioning its own fact-finding team. The TNC would bear responsibility for obtaining the consent of the host government to the presence of independent monitors. Based on the information it receives, the Working Group would recommend in favour of or against investment or suggest revisions of the project to mitigate potential negative effects and facilitate positive effects. It would subsequently produce a final report. All documents submitted to and produced by the Working Group would be publicly available.

b) *Risk Assessment Criteria*

We recommend that the criteria set out in the US/UK *Voluntary Principles on Security and Human Rights* be adopted for risk assessments. A risk assessment under the Code should consider:

- Security risks to, and by, the company;
- Potential for violence, especially in the area of company operations;
- Human rights records of public security forces, paramilitaries, local and national law enforcement, the reputation of private security organizations and the capacity of these entities to respond to situations of violence in a lawful manner;
- Rule of law;
- Conflict analysis that would identify and understand the root causes of existing conflicts, level of adherence to human rights and international humanitarian standards by key actors;
- Equipment transfers from the company to security forces that may use the equipment in a rights abusing manner.

c) *Continuous Monitoring*

We recommend two options for on-going monitoring:

- Self-reporting by the TNC to be reviewed and verified by the Working Group; or,
- Monitoring by a team of experts commissioned by the Working Group.

The results of the monitoring would be publicly available. The Working Group would assess the results of the monitoring and determine the extent to which the TNC's performance is in compliance with the Code of Conduct, and, where appropriate, make recommendations on how the TNC could bring its conduct into compliance. We anticipate that the precise form and frequency of monitoring would vary with context.

4. *Consequences of Non-Compliance*

Participation in the pre-investment review process could be secured by various mechanisms including a licensing or certification requirement and/or sanctions for non-participation. We recommend the following changes or additions to facilitative, incentive and coercive legal mechanisms to ensure compliance with the Code of Conduct:

- The imposition of disclosure requirements across the full range of “socially responsible investment” criteria. These should include disclosure of Working Group reports (pre-investment risk assessments, Working Group evaluations and on-going monitoring reports) to, at a minimum, all present and prospective shareholders and fund members. Disclosure could also be a pre-requisite to listing on any Canadian stock exchange.
- The amendment of the *Income Tax Act of Canada* to deny corporations the benefit of deducting taxes paid to foreign jurisdictions in either of two circumstances:
  - where the Canadian government has annulled a tax treaty with the foreign jurisdiction in question on human rights grounds; or,
  - upon the recommendation of the Working Group.
- The imposition of an obligation on Export Development Canada to explicitly tie the availability of its full range of trade finance services to the findings and recommendations of the Working Group regarding the impact of TNC investment and/or continued activity on human rights and humanitarian standards in a conflict zone.
- The amendment of the *Special Economic Measures Act* to clarify its ability to prohibit certain business activities or investment in a particular state.
- The creation of specific criminal offences and/or private causes of action should be considered within three years of the introduction of the measures discussed above.
- Legislation that protects whistleblower employees who disclose information they have reasonable cause to believe shows that a human rights violation, criminal offence, illegal act, miscarriage of justice, environmental damage or human health or safety risk exists, or will likely occur.

## A. Introduction

Human rights implications of the activities of transnational corporations (TNCs) and other business enterprises in conflict zones, “failed states” and repressive regimes have drawn increased public attention, concern and scrutiny in recent years. Concurrently, a new sense of urgency has emerged in public dialogue and debate about regulation by states of extraterritorial corporate conduct and the role of corporate self-regulation in addressing fundamental human rights concerns.

Corporations operating transnationally pose an array of theoretical, normative and regulatory challenges to an international human rights system based on territorially restricted duties and enforcement mechanisms. International law imposes human rights obligations on states to respect and ensure respect for human rights within their territorial jurisdiction but does not currently require TNCs to respect and ensure respect for human rights. The reluctance of the international community to impose international human rights obligations on non-state actors can be contrasted with the increasingly robust assertion of economic, trade and investment rights on behalf of national and transnational corporate enterprises under the *aegis* of the WTO and regional, supra-national trade institutions.

Problems with regulation often arise about foreign direct investment in developing states, since “[m]any host countries in the developing world ... lack technical capacities, physical and institutional infrastructure and, often, political will to provide environmental and social oversight of business”.<sup>1</sup> Where TNCs set up foreign operations in sites of weak, non-existent or corrupt governance structures, the prospect of local regulation is even more remote.

In conflict zones, where host state governments are unable or unwilling to prevent or stop grave violations of international human rights or humanitarian law, or are themselves the perpetrators of the abuses, TNCs are more likely to be implicated in the violations. This is particularly the situation where TNCs are involved in joint venture or other business relationships with host state governments.<sup>2</sup> Royal Dutch/Shell in Nigeria, British Petroleum in Colombia, Unocal, Total and Premier Oil in Burma (Myanmar) and Talisman Energy in Sudan, are cases in point. While most corporations prefer to engage in democratic states that are economically and politically stable, those involved in the extractive industry are more constrained by the

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<sup>1</sup> The California Global Corporate Accountability Project, *Beyond Good Deeds: Case Studies and a New Policy Agenda for Corporate Accountability*, a collaboration of the Nautilus Institute for Security and Sustainable Development, the Natural Heritage Institute, and Human Rights Advocates, July 2002, at xiv. Also cited at <http://www.n-h.org/Projects/PeopleGlobalResources/CorpAccount/FINAL%20PUBLIC%20POLICY%20REPORT4.pdf> (visited August 30, 2002).

<sup>2</sup> International Council on Human Rights Policy Report, *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies*, February 2002, Versoix, Switzerland at 141 [hereinafter, “Beyond Voluntarism”].

location of resources.<sup>3</sup> This poses a problem for countries such as Canada with an economy that relies heavily on primary resource-based industry.

The willingness of the corporation's home state to exercise its regulatory power is complicated by a number of factors. These include the absence of an international legal obligation on states to protect the human rights of extra-territorial non-citizens and the existence of political disincentives to adopt measures that might detrimentally affect the global competitiveness of corporate citizens. States also tend to focus on constructive engagement as the main policy goal, and many doubt the efficacy of any regulatory instruments that states might deploy. This situation is reflected in the patchwork of inadequate national legislative mechanisms available to governments and private actors to challenge TNC conduct.

The lack of international and domestic legal obligation on TNCs and the lack of international legal obligation on states to regulate the extraterritorial activities of corporate nationals result in a regulatory void or 'governance gap'. The outcome is that corporations that operate outside of their national jurisdictions may commit, aid or abet, or be complicit in violations of international human rights or humanitarian law with impunity.

The self-regulation models that have been developed over the last three decades in response to this regulatory void often do not set out clear standards, "fail to meet human rights standards, or lack implementation measures and independent audits".<sup>4</sup> The voluntary nature of these models means that corporations can not only choose and define their responsibilities, but may deviate from those responsibilities in cases where the "principles clash with other, more powerful commercial interests".<sup>5</sup> The privatization of human rights responsibilities by entities and individuals with conflicting commercial interests and inadequate knowledge of human rights raises questions about the efficacy of voluntary self-regulation efforts to address fundamental human rights concerns, and the capacity of private entities and individuals to "self-regulate" in the public interest.

This paper examines the existing governance gap and the adequacy of self-regulation efforts that entail the development and implementation of voluntary standards, self-assessment and verification techniques. It considers the implications of the privatization of securing compliance with, and the monitoring of, human rights obligations. Our examination is provided with context by a case study analysis of

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<sup>3</sup> Human Rights Principles for Transnational Corporations and Other Business Enterprises, Introduction, U.N. Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/ Add.1 (February 2002 for discussion in July/August 2002), at 3, cited at <http://www1.umn.edu/humanrts/introduction05-01-02final> (visited November 18, 2002) [hereinafter, UN Human Rights Responsibilities, Introduction].

<sup>4</sup> United Nations Development Programme Report, *Human Development Report*, 2000 at 80 and cited at <http://hdr.undp.org/reports/global/2000/en/> (visited November 26, 2002).

<sup>5</sup> Beyond Voluntarism, *supra* note 2 at 8.

Talisman Energy's operations in Sudan and through a comparative assessment of international and corporate self-regulation regimes. The study focuses, in particular, on TNC activity in zones of conflict because, in our view such situations threaten human security in the most fundamental way. As noted in a recently released report on voluntary regimes "[w]hile there is no hierarchy of rights, abuses that attack the immediate physical survival of people – such as arbitrary killings, torture, enforced disappearances, forced displacement, deliberate starvation or denial of medical care – require swifter and stronger action".<sup>6</sup>

Finally, we advocate state accountability for regulating the activities of TNCs operating in conflict zones. We give content to accountability by developing a Canadian regulatory regime capable of addressing the 'governance gap'. In so doing, we neutralize at least one putative justification for inaction, namely the lack of a practicable model that defines norms, establishes a monitoring mechanism, and stipulates consequences for non-compliance. Ultimately, this exercise confirms that the main obstacle to state action in regulating corporate activity in conflict zones lies not in the impossibility of "technical legal solutions to the question of corporate responsibility for human rights violations", but rather in finding the "political will ... to put them in place".<sup>7</sup>

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<sup>6</sup> *Ibid.*, at 141.

<sup>7</sup> Peter T. Muchlinski, "Human Rights and Multinationals: Is There a Problem?" (2001) 77 *International Affairs* 31 at 47.





## B. Case Study

### 1. Introduction

This case study describes and places into context oil development and the operations of Talisman Energy in Sudan, a conflict zone. The study outlines and assesses the company's voluntary efforts to regulate its conduct in the environment of a civil war through implementation of the International Code of Ethics for Canadian Business (ICECB) and other activities. The impact of shareholder activism on the company's conduct is also analyzed.

### 2. Origins of the Conflict in Sudan

On May 16, 2002, Sudan marked the 19<sup>th</sup> anniversary of its second civil war, which rages on. The war is the product of a deep-rooted conflict that first manifested itself in rebellion at independence in 1956. A primary cause of the conflict was and remains the political and economic marginalization of the three southern provinces of Sudan: Upper Nile, Bahr-el-Ghazal and Equatoria.<sup>8</sup> Several forces propel the war, mainly disputes over religion, resources (oil, water and land), governance and self-determination. The dispute between south and north is exacerbated by cultural differences: almost all northerners are Muslims and a majority is Arab; most southerners are non-Arab and non-Muslim and many are Christian. Over the last decade, the war has evolved from a largely north-south conflict between the government in Khartoum and the Sudan People's Liberation Movement/Army (SPLM/A), a southern-based rebel group, into a contest for power that involves groups from across the nation.<sup>9</sup> Since the coup that brought General Al-Bashir and the National Islamic Front to power in 1989, political and military organizations from Sudan's north, east and west, in addition to southern groups, have been involved in armed and unarmed opposition to the government.<sup>10</sup>

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<sup>8</sup> International Crisis Group Report (ICG), *God, Oil and Country: Changing the Logic of War in Sudan*, (Brussels: International Crisis Group Press, 2002) at 91-114 [hereinafter "ICG Report"].

<sup>9</sup> *Ibid.*, at 92.

<sup>10</sup> *Ibid.*, at 6.

### 3. War in Sudan

Since the start of the current civil war in 1983, over two million people have been killed, several hundred thousand people have starved to death and over three million people have been displaced.<sup>11</sup> Official state reports, media reports, reports of the United Nations (in particular, of successive UN Special Rapporteurs on the Situation of Human Rights in Sudan) and reports of non-governmental organizations have documented hundreds of indiscriminate aerial attacks on civilians by government forces, the use of famine as a weapon of war, large-scale forcible displacement of civilians and government support for pro-government militias engaged in a slave trade.<sup>12</sup> Rebel forces have been reported to indiscriminately attack civilian populations, divert and restrict access to humanitarian assistance and forcibly recruit soldiers.<sup>13</sup> All parties to the conflict to one degree or another are responsible for human rights abuses and violations of international humanitarian law. Government forces have superior weaponry; they are the only party with access to combat aircraft including Antonov cargo planes used as bombers, helicopter gunships and MiG fighter jets.

### 4. Role of Oil Development in the Conflict

Oil development and the sharing of revenues from oil production has long played a critical role in the conflict. Most of the areas of on-stream and potential oil production are in southern Sudan or in areas of the north near the north-south border. Control of oil areas in the south and along the north-south border is thus of great strategic importance and has been a continuing source of conflict between the government and southern-based rebel groups.

The Greater Nile Petroleum Operating Company (GNPOC) that owns the concession to develop and explore several oil blocks operates the largest of the current on-stream oil concessions in Sudan. Partnership in GNPOC at the end of 2002 was

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<sup>11</sup> See G. Kebbede, "South Sudan: A War Torn and Divided Region" in G. Kebbede, ed., *Sudan's Predicament: Civil War, Displacement and Ecological Degradation* (Brookfield USA & Sydney: Ashgate, 1999) 44 at 49.

<sup>12</sup> ICG Report, *supra* note 8 at XI. On slavery in Sudan, see the Report of the International Eminent Persons Group entitled *Slavery, Abduction and Forced Servitude in Sudan* released by the US State Department Bureau of African Affairs on May 22, 2002 at <http://www.state.gov/p/af/rls/rpt/10445.htm>. On the use of starvation and famine as a weapon of war, see International Crisis Group Africa Report No. 54, *Ending Starvation as a Weapon of War in Sudan* at [http://www.crisisweb.org/projects/africa/sudan/reports/A400820\\_14112002.pdf](http://www.crisisweb.org/projects/africa/sudan/reports/A400820_14112002.pdf) (visited November 27, 2002) and Human Rights Watch Report, *Famine in Sudan 1998: The Human Rights Causes*, cited at <http://www.hrw.org/reports/1999/sudan/> (visited November 27, 2002).

<sup>13</sup> ICG Report, *supra* note 8 at XII.

divided among the China National Petroleum Company (CNPC) with a 40 percent interest, Petronas Carigali (the national petroleum company of Malaysia) with 30 percent, Talisman Energy with 25 percent and Sudapet (the Sudan state petroleum company) with five percent.<sup>14</sup> Talisman Energy (Talisman) is one of Canada's largest independent gas and oil producer with assets valued at \$8.4 billion. The company also owned a 25 per cent interest in the 1,500 km pipeline from the oil fields to Port Sudan on the Red Sea.<sup>15</sup>

The greater part of the concession in which Talisman has an interest is located in Western Upper Nile in southern Sudan (referred to by the government as Unity State). This is an area inhabited for several centuries by Nuer and Dinka groups and contested between the government and the SPLM/A since 1983.

The main administrative centre in Western Upper Nile is Bentiu. Other centres including Pariang, Wangkei and Mayom are trading posts and garrison towns inhabited by government officials, merchants and military personnel, with a shifting, partly seasonal population of local people. Historically, there has been minimal economic development in Western Upper Nile, and the area has been politically marginalized. Like the rest of southern Sudan, it is outside the central riverain Arab polity that dominates the modern Sudanese state; until the discovery of oil it was viewed by the riverain political and economic elites as a peripheral region, mainly as a source of human labour.

Most of the rural areas in the Talisman concession have been outside the control of the government since 1983. Those areas have been administered successively by two rebel movements, the SPLM/A and the former South Sudan Independence Movement/Army (SSIM/A), now disbanded. Today, control of the non-government areas of the concession rests primarily with commanders aligned with the SPLM/A.

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<sup>14</sup> On October 30, 2002, Talisman Energy Inc announced that it (together with its subsidiaries) "had entered into a definitive agreement for the sale of its indirectly held interest in the Greater Nile Oil Project in Sudan to ONGC Videsh Limited, a subsidiary of Oil and Natural Gas Corporation Limited, India's national oil company. The aggregate amount to be realized by Talisman from the transaction, including interest and other closing adjustments, is anticipated to be approximately US\$758 million (C\$1.2 billion). It expects the sale to be completed by December 31, 2002. The completion of the transaction is subject to certain conditions, primarily relating to obtaining consents from the Government of Sudan and the other consortium members and to the waiver or expiry of rights of first refusal. Talisman has had preliminary discussions with the Government of Sudan about the proposed sale and believes that the required consents will be obtained." *Talisman to Sell Sudan Assets for C\$1.2 Billion*, Talisman News, cited at <http://micro.newswire.ca/releases/October2002/30/c6739.html/60728-0>.

<sup>15</sup> See <http://www.talisman-energy.com/operating/Sudan.html> (visited January 7, 2002, no longer posted).

## 5. Conflict and Oil Development in Western Upper Nile

Since the 1970's, political and military developments in Sudan and in Western Upper Nile in particular have highlighted the central role of oil in the conflict. The Addis Ababa Peace Agreement of 1972 that ended the first civil war promised regional autonomy in the south<sup>16</sup> and enhanced the legislative powers of the Southern People's Regional Assembly over economic matters pertaining to the south.<sup>17</sup> In 1974, however, after Chevron and Total discovered huge oil deposits in the Western Upper Nile and Sobat valley regions in the south, Khartoum did not respond when the southern regional government claimed direct revenues from the mineral wealth exploited in its territories.<sup>18</sup>

Several factors, including oil, led to a collapse of regional autonomy and a resumption of the war. The Sudan government instituted a policy to seize oil resources and stated "if the south advanced economically, southerners would be tempted to secede."<sup>19</sup> Dissolution of the autonomous southern region and re-division of the South into three regions, Bahr El-Ghazal, Equatoria and Upper Nile, imposition of Sharia law, and the attempt to redefine the boundary between Upper Nile and Kordofan to include more of the oil fields in the North led to renewed conflict.<sup>20</sup> In 1983, rebel army officers formed the Sudan Peoples' Liberation Army (SPLA) in Ethiopia under the leadership of Dr. John Garang de Mabior, still its leader today.

In February 1984, a detachment of Anyanya II, a Nuer rebel group, killed three expatriate Chevron employees near Bentiu. Chevron immediately terminated its

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<sup>16</sup> This Act was entrenched, as an organic law, in the Sudan Permanent Constitution 1973. For example, Article 8 of this Constitution provides, "The South self-government rule should be established under the *Self-Government Act* of 1972 as a principal Act not to be subjected to any amendment save by those provided by the Act itself". The *Self-Government Act*, Sudan Laws, Vol. 6, Attorney General Office, the Official Gazette, Khartoum, the Sudan Permanent Constitution of 1973, Sudan General Gazette, the Attorney General Office, Khartoum. Adila Abusharaf, "Transnational Litigation of Local Oil Pollution Damages: A Study of Environmental Tort Claims by Ecuatorian, Nigerian and Sudanese Oil Communities Against Multinational Oil Companies before the Courts of the United States, the United Kingdom and Canada" Doctoral Thesis, University of Toronto, Faculty of Law 2000, at 262-271. The *Self-Government Act* of 1972 has been translated by Dr. Abusharaf and the sections herein referring to the discussion of that Act are reproduced from Dr. Abusharaf's thesis.

<sup>17</sup> Articles 7, 8, 9 of *Self-Government Act*, *ibid.*

<sup>18</sup> G. Lako, *Southern Sudan: The Foundation of a War Economy* (Frankfurt, New York: Peter Lang, 1993) at 41-42.

<sup>19</sup> Discussion and Views, *Sudan Now Magazine* (Feb. 7, 1978) at 35.

<sup>20</sup> Abusharaf, *supra* note 16 at 265.

operations and withdrew from Sudan stating that operating in the middle of a civil war was an undue risk.<sup>21</sup>

In 1993, small-scale oil exploration resumed and several foreign oil companies including Arakis Energy Company of Canada began to operate in the south.<sup>22</sup> In March 1997, the China National Petroleum Corporation, Malaysia Petronas and Sudan State Petroleum entered into a joint venture and established the GNPOC consortium, in which Arakis obtained 25 per cent of the shares.<sup>23</sup> GNPOC agreed to build a pipeline that would transport oil from the Unity and Heglig fields to Port Sudan and oil tankers on the Red Sea. These companies did not have the technical expertise or financial resources to take oil development to an operational and revenue-generating stage. In 1997, the United States government implemented sanctions against Sudan that prevented any US citizen from doing business with the Government of Sudan. This effectively ruled out American participation in Sudan's oil development and enabled the entry of non-American companies on favourable terms. In October 1998, Talisman bought Arakis' 25 per cent share in the GNPOC joint venture for approximately \$277 million.<sup>24</sup> Talisman operated in Sudan through its subsidiary Talisman Greater Nile BV.<sup>25</sup> Talisman stated that it invested in Sudan because of a significant hydrocarbon profile, attractive fiscal terms, limited competition due to low oil prices, the international nature of the project in relation to its sizable capital commitment and a short lead-time to production.<sup>26</sup>

In the mid 1990s, the Sudan government proposed an oil revenue sharing formula that gave 40 per cent to the local authority in the area of oil production, 35 per cent to

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<sup>21</sup> Sudan is Stepping Up Pressure on Chevron Corporation" *Wall Street Journal*, New York, (Nov. 1, 1994).

<sup>22</sup> Oil reserves discovered from El-Wihada and Heglig Fields are estimated at 800 million barrels. Current production is estimated 150,000 bbls/d a quantity representing five times the domestic consumption of less than 30,000 bbls/d. Oil revenues are expected to save the government around \$40 million spent yearly in oil imports. See "Economy Sudan: Islamic Regime Launches Oil Exports," cited at <http://www.sudan.net/wwwboard/news/94429.html> (visited January 20, 2002).

<sup>23</sup> M. Bendi, "Sudan Oil and Gas Industry," cited at <http://mbendi.co.za/indy/oilg/af/su/p0005.htm#20> (visited August 29, 2002).

<sup>24</sup> Talisman advanced US \$21,828,822 to Arakis under its Credit Agreement with Arakis dated Aug. 17, 1998. The agreement was entered into in conjunction with the arrangement that Talisman had with Arakis providing for the acquisition by Talisman of all issued common shares of Arakis. The advance was made for the purpose of satisfying a funding obligation of Sudan State Petroleum in respect of its oil exploration and development project in Sudan. See Talisman Investment Information at <http://www.talisman-energy.com> (visited January 19, 2002).

<sup>25</sup> Talisman Energy Inc., Corporate Social Responsibility Report (CSR) 2000, cited at [http://www.talisman-energy.com/pdfs/csr2000\\_report.pdf](http://www.talisman-energy.com/pdfs/csr2000_report.pdf) (visited January 12, 2002) [hereinafter, "Talisman's CSR Report 2000"].

<sup>26</sup> Talisman paper on the Sudan, "Sudan Greater Nile Oil Project (Calgary: Talisman, 1998) at 10.

the southern government, and 25 per cent to the central government.<sup>27</sup> Most southern opposition groups were dissatisfied with the government's formula. They demanded that 75 to 90 per cent of total oil revenues should go to the south on the basis that the area was underdeveloped and required a larger proportion of oil money to ensure parity with the rest of Sudan.<sup>28</sup> In 1997, several southern-based Nuer rebel groups, but not the SPLM/A, signed the Khartoum Peace Agreement. In signing, these groups indicated their acceptance of the government's formula for distribution of oil revenue,<sup>29</sup> stating "this was the only way to get at least some share of the oil revenues."<sup>30</sup>

The Khartoum Peace Agreement, however, did not bring peace, did not result in a distribution of oil revenues to southern areas and broke down in 1999 when the government failed to implement it.<sup>31</sup> For a short period from 1997 to 1999, the Agreement did allow the extension of government authority into some of the rural areas of the GNPOC concession, enabling expansion of oil development in the concession and completion of the pipeline from the oil fields north to Port Sudan. This permitted the government and the oil companies to present Western Upper Nile to investors as a zone of peace under government control. It was during this period that Talisman acquired its investment in Western Upper Nile. Since 1999, however, this region has been the key theatre of war.

The political and military situation that Talisman entered into in October 1998 was complex and volatile (detailed in the following paragraphs). In spite of the short-lived Khartoum Peace Agreement, the government was having no success against its principal military opposition, the SPLM/A that had declared Talisman's oil installations legitimate military targets. A risk assessment covering the situation in Upper Nile at that time would have raised many questions about the viability of the Khartoum Peace Agreement, security in the oil region and the central role of oil development in the war. There is no indication in Talisman's corporate documentation that the company undertook such a risk assessment prior to or following its investment in Sudan or had an independent risk assessment done.

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<sup>27</sup> "Oil and Civil War: National Wealth Shares" (Oct. 22, 1999), cited at <http://www.Sudannet.com> (visited Jan. 28, 2002).

<sup>28</sup> Abel Alier, "Controversy in Sudan over Sharing Oil Revenues," Paper presented at the 4<sup>th</sup> International Sudan Studies Conference, The American University, Cairo, Egypt, (Oct. 10-12 1999) at 5-7. Abusharaf, *supra* note 16 at 269-270.

<sup>29</sup> Other signatories were the late Commander Kerbino Kuanyin defecting from the SPLA Bahr El-Gazal Group; Theophilus Lotti for the Equatorial Defence force; Kawac Makwei for the South Sudan Independent Group; Samuel Bol for the Union of Sudanese African Parties; and Thon Arok defecting from the SPLA/Bor Group. S. Gabb, "The Civil War and Peace Process in Sudan: A Brief Account" Sudan Foundation, Peace File No. 13, London, at 5.

<sup>30</sup> The SPLM/A took the view that the government mainly supported Riek Machar to deepen fratricidal ethnic fighting rather than intending to respond to the SSIM claims. *Ibid.*, at 7.

<sup>31</sup> Abusharaf, *supra* note 16 at 271.

## 6. War in the Oil Development Region and Violations of Human Rights

Since 1983, the Sudan government has pursued a divide and rule strategy to promote conflict among southern groups. This has been periodically effective: war and subsequent famine during the 1990s weakened southern resistance, divided the SPLM/A, led to the emergence of local warlords, split the south along ethnic lines and destroyed much of the region's assets.<sup>32</sup> The government's military strategy has included support to proxy forces - Baggara Arab militias from the north and pro-government Nuer groups in the south. According to Gagnon and Ryle, "(f)or the government, supply to militias is a counter-insurgency strategy aimed at limiting support for anti-government rebel forces by depopulating the countryside and driving southern populations that are deemed to be actually or potentially sympathetic to rebel movements into government garrison towns, to the government controlled north or further south, away from strategic areas."<sup>33</sup>

In Western Upper Nile, the strategy acquired new focus with the advent of active oil exploitation in the late 1990s and the consequent greater need to control and secure the areas around the pipeline, roads and rigs.<sup>34</sup> This was necessary because the Khartoum Peace Agreement did not include the SPLM/A, which had declared Talisman's operations a legitimate military target in 1998. After the Agreement broke down, a realignment of forces occurred in the Nuer areas that began to fight each other over control and protection of the oilfields.<sup>35</sup> This situation prompted an alteration in the Government of Sudan's military strategy that continues to this day, more violent and more territorially focused, involving coordinated attacks on civilian settlements in which aerial bombardment and raids by helicopter gunships are followed by ground attacks from government-backed militias and government troops. These ground forces burn villages and crops, loot livestock and kill and abduct people - mainly women and children.<sup>36</sup> Areas close to the oil installations have been a particular target from 1999 on. It is evident that counter-insurgency and oil development have converged since 1999. The result has been an intensification of the conflict, an extension of the conflict zone, increased human displacement and magnified parallel conflict among rival rebel groups.<sup>37</sup>

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<sup>32</sup> ICG Report, *supra* note 8 at XII.

<sup>33</sup> G. Gagnon and J. Ryle, *Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile Sudan*, October 2001, at 15 cited at <http://www.ideaionconferences.com/sudanreport2001/SudanReportfinal101101.pdf> [hereinafter "Gagnon and Ryle Report"].

<sup>34</sup> *Ibid.*, at 17.

<sup>35</sup> "Sudan Assistant President Ready to Resign over Peace Deal" *Agence France Presse*, August 14, 1999, Lexis Nexis International Library.

<sup>36</sup> Gagnon and Ryle Report, *supra* note 33 at 17.

<sup>37</sup> Fighting among rebel groups in the South has played into the hands of government apologists who seek to portray the South as mired in tribalism and ethnic division. This portrayal ignores,



Security reports of Operation Lifeline Sudan, the United Nations-led emergency relief operation, for the first seven months of 2001 recorded 195 incidents of aerial bombardment in south Sudan as a whole, a significant increase on 1999, when there were 65 confirmed bombings. The increase in bombings has also been noted in reports from Sudan Focal Point and in US congressional testimony by Roger Winter, former Director of the Office of U.S. Foreign Disaster Assistance (OFDA). These authorities have documented a further increase in bombings in the latter part of 2001 and early 2002. Most of these bombings involve attacks on civilian communities and relief and aid centers. Gagnon and Ryle reported a significant new development in the period 2000-1 – a higher number of direct attacks on civilians by the armed forces of the government of Sudan.<sup>38</sup>

#### 7. Impact of Talisman's Investment in Sudan

Talisman's entry into oil development in Sudan had a dramatic effect. Less than a year after Talisman's arrival in Upper Nile, development of the Heglig and Unity fields had advanced considerably with the completion of a 1,500-kilometer underground pipeline to Khartoum and the Red Sea, a terminal built for oil tankers at Port Sudan and the first crude oil exported.<sup>39</sup> Talisman's investment in Sudan proved to be highly profitable due to high production capacity, expansion and the tie-in of new wells.<sup>40</sup>

The development of the oil sector in Sudan in the late 1990s arguably led by Talisman also had a significant impact on the country's economic viability. The negative economic trend of the previous two decades was partially reversed.<sup>41</sup> The El-Jaili refinery processes around 50,000 bbls/d for domestic consumption, which means that Sudan is now self-sufficient and free of import bills that reached US\$250 million/year in 1999.<sup>42</sup> Oil resources transformed Sudan from an economic basket

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however, the role of the government in accentuating and exacerbating these divisions through its policy of divide and rule using tribal militias. When apologists for the Government of Sudan, including representatives of oil companies operating in Western Upper Nile, ascribe displacement to "faction fighting" or "tribal conflict" they neglect two important factors: the government's material support (weapons and ammunition) for certain of these factions and, since 1999, the growing incidence of direct government military action against settlements in the oil area.

<sup>38</sup> Gagnon and Ryle Report Summary, *supra* note 33 at 2.

<sup>39</sup> This information is also cited at <http://www.talisman-energy.com> (visited January 11, 2002).

<sup>40</sup> *Ibid.*

<sup>41</sup> ICG Report, *supra* note 8 at 101.

<sup>42</sup> *Ibid.*

<sup>42</sup> *Ibid.*, at 102.

case into a promising oil exporter, although U.S. sanctions imposed at the end of 1997 remain in place prohibiting American investment in the oil sector.<sup>43</sup>

Since Talisman came on the scene, other western companies have become involved in oil development in Sudan, notably the Swedish company Lundin Oil, part of another consortium that operates a concession. Lundin has invested in construction to access its operational area in Block 5A, but unlike Talisman its wells are exploratory and have yet to come on stream primarily due to continuing insecurity and fighting in Block 5A.<sup>44</sup> Royal Dutch/Shell, a junior partner in Chevron's Sudan venture, has a marketing agreement with GNPOC but is not involved in oil extraction. TotalFinaElf has the largest concession in the South, 20,000 km<sup>2</sup> located mainly in Central Upper Nile, in Block 5, but is not currently active there.

Conventional estimates of oil reserves in Sudan are more than 800 million barrels but some projections are as high as four billion barrels. Production is currently over 240,000 bbls/d, and is expected to double by 2005.<sup>45</sup> The key to increased production will be whether TotalFinaElf will be able to explore for oil in areas currently either too unstable or controlled by rebel forces.<sup>46</sup> Other oil firms considering investment in Sudan's oil fields include Austria's OMVA Ktiengesellschaft, Qatar's Gulf Petroleum, Russia's Slavenft and ONGC Videsh Limited, a subsidiary of the Oil and Natural Gas Company Limited of India slated to purchase Talisman's operations in Sudan in early 2003.<sup>47</sup> Oil service companies currently operating in Sudan are from the Netherlands, Canada, Germany and the UK.

Government oil revenues are expected to grow with increased production and further encouragement of investment. The government accrued US \$500 million in 2000 and expected US \$800 million in 2001.<sup>48</sup> Since it no longer needs to purchase oil from the spot market, Khartoum has more resources available for other purposes, including the purchase of arms.<sup>49</sup>

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<sup>43</sup> *Ibid.*, at 101.

<sup>44</sup> Lundin's operations on Block 5A remained suspended as of the date of this paper. On July 24, 2002, Lundin's Chair stated: "We hope the [Machakos Peace] discussions will lead to a full and sustainable peace agreement that will allow us to resume operations," Lundin statement, "Sudan Peace Process," dated July 24, 2002, cited at [http://www.lundin-petroleum.com/Documents/pr\\_sudan\\_27-07-02\\_e.html](http://www.lundin-petroleum.com/Documents/pr_sudan_27-07-02_e.html) (visited November 4, 2002).

<sup>45</sup> AP, Sudan says oil output to double to 500,000 barrels by 2004, (August 31, 2002).

<sup>46</sup> ICG Report, *supra* note 8 at 101.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, at 102.

<sup>49</sup> *Ibid.* In 2001, the Sudan government acquired from Russia twelve attack helicopters and twenty-two armoured vehicles, among other weapons. See U.N. Register of Conventional Arms, 2001, Addendum 1," (United Nations: New York, September 24, 2002), UN Document Number A/57/221/Add1.

## 8. Opposition to Talisman's Investment in Sudan

Opposition to investment in Sudan's oil fields has come from several camps: rebel and anti-government forces; human rights groups and non-governmental organizations; and, to a lesser degree, other states and governments.

Talisman's predecessor Arakis received serious threats and warnings from the SPLM/A and SSIM (a rebel group).<sup>50</sup> These groups claimed that Arakis' operations in Sudan lent legitimacy to a regime condemned by the United Nations (UN) for condoning slavery, indiscriminately bombing civilians, killing political opponents and forcing an extreme form of Islam on all Sudanese.<sup>51</sup> When Talisman acquired the operations of Arakis, its investment was opposed by the SPLM/A, the SPDF (a rebel group) and northern opposition troops of the NDA on the basis that oil revenues from GNPOC's operations would strengthen the military capabilities of the government.<sup>52</sup>

On September 20, 1999, the SPLM/A and the NDA claimed responsibility for an explosion that ruptured Talisman's oil pipeline near the northeastern Sudanese town of Atbara.<sup>53</sup> They stated that Talisman neither urged the Sudanese government to continue a dialogue with rebel forces nor dissuaded the government from using oil revenues for military purposes.<sup>54</sup> Talisman's 2000 Annual Report cited an incident of sabotage on the pipeline in January 2000 that resulted in minor production interruption for several days.<sup>55</sup> In 2001, there were at least five recorded attacks on oil installations in Western Upper Nile by the SPLM/A. The announcements of these attacks were played down in official statements by the government and Talisman.<sup>56</sup>

International and national human rights groups have long been critical of the Sudan government and have condemned it for grave violations of human rights.<sup>57</sup> Human rights organizations and others (including several UN Special Rapporteurs on the Situation of Human Rights in Sudan) have also argued that there is a

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<sup>50</sup> "Fueling the Fire, an Eight Part Special Report" at I cited at <http://www.canoe.ca/slavetrail/part8.html>.

<sup>51</sup> *Ibid.*

<sup>52</sup> "Fighting in Sudan Threatens Oil Project," *Globe & Mail* (Feb. 14, 1998), A13.

<sup>53</sup> "Explosion Ruptures Talisman Oil Pipeline in Sudan", cited at <http://www.Sudan.net/wwwboard/news/98457.html>.

<sup>54</sup> *Ibid.*

<sup>55</sup> Talisman Annual Report 2000, cited at <http://www.talisman-energy.com/pdfs/tlm2000ar.pdf> at 34 (visited February 24, 2002)

<sup>56</sup> Gagnon and Ryle Report, *supra* note 33 at 28.

<sup>57</sup> See UN Special Reports on Human Rights Situation in Sudan (1999), prepared by Leonardo Franco, Special Rapporteur, A/54/467, cited at <http://www.hri.ca/fortherecord1999/documentation/genassembly/a-54-467.htm>.

connection between oil development in Sudan and violations of human rights.<sup>58</sup> Oil operations, in the view of these authorities, contribute to increased conflict and abuses of the laws of armed conflict by all parties to the conflict. Many outside observers and Sudanese, particularly southern Sudanese, maintain that oil development in current conditions is an obstacle to a just and peaceful resolution of the war. Oil raises the stakes in the conflict (in terms of the control of natural resources and sharing of oil revenues) and accentuates the disputed issue of the legitimacy of the government and of rebel authorities in the contested area. It is argued that in the current situation, oil development and the associated presence of foreign oil companies is damaging to the people of the oil areas. The companies effectively assist the government's war effort, facilitating violations of human rights by government forces and militias, making the prospect of peace less likely.

## 9. Human Rights Issues

Human rights issues related to oil development in Sudan center on four key concerns.<sup>59</sup> First, forced displacement of indigenous populations (Nuer and Dinka) from areas of oil development and associated human rights abuses (including attacks on civilian settlements) to provide security for the oil operations has occurred and continues. Second, security arrangements and the use of oil infrastructure and facilities by government forces and pro-government militias for military purposes, often leads to human rights abuses. Third, oil revenues accruing to the government intensify the ongoing civil war rather than benefit the Sudanese people. Oil revenues are linked to increases in military expenditures and no mechanisms (legal or political) exist for the sharing of revenues with southerners. Fourth, there is no independent, expert, on the ground, continuous monitoring of the human rights situation in areas of oil development.

### a) *Forced Displacement*

Information from the World Food Program and other organizations provides a considered estimate of 204,000 people internally displaced from Western Upper Nile/Unity State between mid-1998 and February 2001.<sup>60</sup> The Canadian Assessment Mission to Sudan (the Harker Mission) found in 1999 that "there has been, and probably still is, major displacement of civilian populations related to oil extraction. Sudan is a place of extraordinary suffering and continuing human rights

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<sup>58</sup> See the Statement by the Special Rapporteur on the Situation of Human Rights in Sudan, Gerhardt Baum to the Third Committee of the UN (New York, 6 November 2002) at <http://www.unhcr.ch/hurricane/hurricane/nsf/newsroom> (visited November 27, 2002).

<sup>59</sup> See Gagnon and Ryle, *supra* note 33 at 6.

<sup>60</sup> *Ibid.*, at 4.

violations, even though some forward progress can be recorded, and the oil operations in which a Canadian company is involved add more suffering".<sup>61</sup> Forced displacement from Western Upper Nile connected to oil development continued unabated in late 2001 and 2002.<sup>62</sup> Operation Lifeline Sudan sources documented an increasing number of ground attacks with consequent displacement during this period.

b) *Security for Oil Development and the Military Use of Oil Facilities*

The Harker Mission concluded "oilfield security has brought displacement, pacification, and insecurity to the eastern part of Unity State/Western Upper Nile".<sup>63</sup> The Harker Mission also found in December 1999 that helicopter gunships and Antonov bombers of the Government of Sudan had armed and re-fueled at Heglig (a government garrison town that is the center of Talisman's oil operations in Sudan) and from there attacked civilians.<sup>64</sup> Following this finding, Talisman acknowledged formally that its Heglig airstrip had been used for military purposes. In January 2000, the company stated that it had received undertakings from the Government of Sudan that military use of the Heglig airstrip would be limited to defensive purposes. However, in its Corporate Social Responsibility Report released in April 2001, Talisman reported that in spite of what it described as its advocacy efforts regarding the use of oil infrastructure for offensive military purposes, "there were at least four instances of non-defensive usage of the Heglig airstrip in 2000." Researchers Gagnon and Ryle concluded that the incidence of military usage had been considerably higher and that it had continued. The pattern of military usage was one of intentional targeting by gunships of settlements – without regard to whether they were occupied by civilians or combatants – in non-government controlled areas in and around the concession.<sup>65</sup> Gagnon and Ryle determined that at least two of the government's helicopter gunships had operated from the oil facilities in Heglig.

Numerous credible reports have documented the use of infrastructure and roads, built by GNPOC, for military purposes.

c) *Distribution of Oil Revenues*

Sudan's oil revenues were projected to be 38.5 percent of Sudan's total income in 2001, up from 7.6 percent of a lower 1999 income.<sup>66</sup> Those revenues are fungible in the sense that they cannot be clearly isolated or separated out from other sources of

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<sup>61</sup> Canadian Assessment Mission, *Report on Human Security in Sudan*, Minister of Foreign Affairs, Ottawa, January 2000 at 68-69 [hereinafter "Harker Report"].

<sup>62</sup> Gagnon and Ryle, *supra* note 33 at 4; Medecins Sans Frontieres, "Violence, Health and Access to Aid in Unity State/Western Upper Nile", April 2002, at 13-15.

<sup>63</sup> Harker Report, *supra* note 61 at 69.

<sup>64</sup> *Ibid.*, at 70.

<sup>65</sup> See discussion at Gagnon and Ryle Report, *supra* note 33 at 19-21.

<sup>66</sup> *Ibid.*, at 35.

government revenue. It is clear, however, that oil revenues received by the government are linked to increases in military expenditure. There is no evidence that significant economic or other benefits (increased expenditure on social services) from oil development are accruing to indigenous communities in Western Upper Nile. There is no independent verification of claims that the government of Sudan is using oil revenues to assist the civilian population in Talisman's concession or in Sudan in general.

Oil revenues have correlated with visible increases in government military expenditure. Significant indications exist of an increase in defence spending, both in absolute terms and in proportion to total expenditure. According to IMF reports (based on figures provided by the Government of Sudan), between 1999 and 2001, cash military expenditures (exclusive of domestic security expenditures) were projected to increase by 50 percent: in 1999, defence expenditures were 62.2 billion dinars (US \$242 million) and in 2001, were projected to be 93.2 billion dinars (US\$362.2 million), an increase of US\$120.6 million, or 50 per cent.<sup>67</sup> These figures do not support a statement made by Abdul Rahim Hamdi, Chair of the Government Committee for the Allocation of Oil Revenue, to Talisman financial analysts in November 1999 that military spending accounted for 15-18 per cent of the government budget and that defence spending would not increase.<sup>68</sup>

Credible reports have found that the Government of Sudan recently established, with Chinese assistance, three assembly plants for small arms and ammunition at locations near Khartoum. There are also credible reports of new missile technology being deployed by government forces in the south during 2001. The contribution of oil revenues to the establishment of an arms manufacturing capability has been acknowledged by several Government of Sudan officials (although this has been denied by other government spokespersons).<sup>69</sup>

d) *Human Rights Monitoring Program*

No long-term, international, independent, large-scale, expert, on-the-ground, field-based monitoring regime of the effects of the war and oil development exists in Sudan. One-off research and monitoring projects have provided essential information but are of limited value; a long-term, continuing program is required. Such a program could monitor the response from non-government forces and violations of human rights in the conflict on all sides. It would provide a real-time response to incidents of war and offer the possibility of preventing and/or providing early warning of abuses. To be effective, the monitors would need to have free access to and freedom of movement within government-controlled and non-government controlled areas.

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<sup>67</sup> Gagnon and Ryle Report, *supra* note 33 at 36.

<sup>68</sup> *Ibid.*

<sup>69</sup> Gagnon and Ryle Report, *supra* note 33 at 37.

Successive UN Special Rapporteurs on Human Rights in Sudan, non-governmental and human rights organizations and several states and governments have consistently called on Sudan to permit independent human rights monitoring in the oil region. The government has refused indicating that such monitoring is not needed.

#### 10. Shareholder Action

As reports documenting continued and increased violations of human rights in Talisman's concession surfaced, human rights groups and some shareholders stated, "Talisman has refused to acknowledge mounting evidence that its operations were heightening conflict and contributing to human rights abuses."<sup>70</sup>

Canadian public sector pension funds including the Canada Pension Plan and American shareholders hold Talisman shares.<sup>71</sup> The controversy over Talisman's investment in Sudan had affected the company's stock price.<sup>72</sup> In reaction to investment in Sudan, shareholder pressure on behalf of some shareholders has taken two forms, divestment of company stocks and shareholder activism.

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<sup>70</sup> See the joint complaint by the Taskforce for Churches and Corporate Responsibility (TCCR) and Inter-Church Coalition Group of Africa "Oil Against Humanity and Canada" Urgent Action Bulletin, cited at <http://www.africanpolicy.org/docs99.1999> (visited March 10, 2002). See also Craig Forcese, "Militarized Commerce in Sudan's Oilfields: Lessons for Canadian Foreign Policy" (2001) 8 *Canadian Foreign Policy* 37 at 46.

<sup>71</sup> Canadian church shareholders are: the Daly Foundation (Sisters of Service), the Evangelical Lutheran Church in Canada, Fonds Esther Blondin (Sisters of Sainte Anne, Montreal), the Jesuits of Upper Canada, the Presbyterian Church in Canada, the Grandin Provident Trust, the Missionary Oblates - Grandin Province, Scarborough Foreign Mission Society, the Sisters of Saint Ann (Victoria), the United Church of Canada, and the Ursuline Sisters (Chatham). American shareholders are the Christian Brothers Investment Services Inc. of New York and the General Board of Pension and Health Benefits of the United Methodist Church (both members of the Interfaith Center for Corporate Responsibility), the New York City Employees Retirement System and the New York State Common Retirement Fund. See their Special Report: *Talisman Divestment Campaign Western Capital Aids Genocidal War Effort in Sudan, Spurs Human Rights Violations*, cited at <http://www.anti-slavery.org/oil/camp.overview1.html> [hereinafter "Divestment Campaign Report"].

<sup>72</sup> Countless media and business observers have documented the impact of Talisman's Sudan operations on its share price. Talisman CEO, Dr. Jim Buckee in a statement announcing the company's proposed sale of its Sudan's investment to India's state-owned oil company on October 30, 2002 noted; "Talisman's shares have continued to be discounted based on perceived political risk in-country and in North America to a degree that was unacceptable for 12% of our production. Shareholders have told me they were tired of continually having to monitor and analyze events relating to Sudan, cited at <http://micro.newswire.ca/releases/October2002/30/c6739.html/60728-0>.

a) *Shareholder Activism*

Twelve church and religious groups from Canada and the United States, all Talisman shareholders, submitted a shareholder proposal at the 2000 Annual General Meeting asking the company to respond to criticism of its Sudan operations.<sup>73</sup> The proposal called on Talisman's Board of Directors to: issue within 180 days an independently verified report on the company's compliance with the International Code of Ethics for Canadian Business and with internationally accepted standards of human rights, including steps taken by the company to ensure, to the extent feasible, that revenues received by the Sudanese government from the company's involvement in the GNPOC are not being used to finance the government's war efforts; provide shareholders with a summary of the report and make the full report available to shareholders and the public, upon request; and, in consultation with an independent third party, develop and implement procedures for monitoring the company's compliance with the International Code of Ethics for Canadian Business and with internationally accepted standards of human rights, and issue annually to shareholders an independently verified report on the company's compliance.

The shareholder proposal received an unprecedented 27% support, but a larger majority passed a Talisman management proposal calling for an independently verified report in one year rather than six months. The management proposal reduced the focus on human rights compliance and eliminated reference to the use of oil revenues.<sup>74</sup>

In 2001, church shareholders did not submit a shareholder proposal on the basis they had yet to see the results of the company's 2000 Corporate Social Responsibility Report, and because some had sold their shares. Church representatives stated they were taking a different course, pressing Talisman privately and in the media to voluntarily withdraw from the investment in Sudan.

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<sup>73</sup> Craig Forcese, *Putting Conscience into Commerce* (Ottawa: International Center for Human Rights and Democratic Development, 1996) at 63.

<sup>74</sup> Under the *Canadian Business Corporation Act* (CBCA), shareholders entitled to vote may submit to management a proposal giving notice of any matter they wish to be discussed at the meeting. Where a corporation is obliged to send out a management proxy circular, the shareholder proposal must be included in the mail-out, along with a supporting statement of up to 200 words. Until recently, in some instances, management was not required to include the proposal in its mail-out. These circumstances were set out in section 137 (5) of the CBCA if "it clearly appears that the proposal is submitted by shareholder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporation or its directors...or primarily for the purposes of promoting general economic, political, racial, religious, social or similar circumstances." R.S.C. 1985, c. C44. These provisions have now been amended to eliminate this right of exclusion. See *infra* at 66.



b) *Divestment Campaign*

Divestment – in which investors de-list shares of certain companies from their portfolios – is used as a tool to discourage companies from investing with hostile regimes. Several major American mutual funds and institutional investors have reacted to what the U.S. Congress termed a "genocidal war" in Sudan by divesting shares in Talisman.

The American Anti-Slavery Group also outlined demands to "correct" the current involvement of Western capital interests in Sudan.<sup>75</sup> The Group demanded that Talisman pull out of Sudan and denounce Sudan government policies of genocide and enslavement. The Group argued that until Talisman leaves Sudan, a divestment campaign should be undertaken to protest the company's financial support to the Sudanese regime.

Some groups have proposed that the US government introduce capital market sanctions legislation that would restrict access to capital traded on US stock exchanges for companies operating in Sudan. Opposition to capital market sanctions within the U.S., led by Wall Street lobbying firms and the Bush administration, has also been vigorous. Following the September 11, 2001, terrorism events, the government of Sudan offered its co-operation in the "war against terrorism."<sup>76</sup> In response, the U.S. Congress decided to hold off action on capital market sanctions for six months to give Khartoum time to make progress on terrorism, human rights and peace agendas.<sup>77</sup> On October 21, 2002, US President George W. Bush signed into law H.R. 5531, the Sudan Peace Act. The Act passed the U.S. House of Representatives on October 7, 2002 by a vote of 359-8. The Senate passed the same language by unanimous consent on October 9, 2002.<sup>78</sup>

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<sup>75</sup> Divestment Campaign Report, *supra* note 71.

<sup>76</sup> ICG Report, *supra* note 8 at 24.

<sup>77</sup> *Ibid.*, at XIII.

<sup>78</sup> The Sudan Peace Act seeks to facilitate a comprehensive solution to the war in Sudan based on the Declaration of Principles of July 20, 1994 and the Machakos Protocol of July 2002 and commends the efforts of the President's Special Envoy for Peace in Sudan, Senator Danforth, and his team. It calls for: multilateralization of economic and diplomatic tools to compel Sudan to enter into a good faith peace process; support for democratic development in areas of Sudan outside government control; continued support for people-to-people reconciliation in non-government-controlled areas; strengthening of humanitarian relief mechanisms; and multilateral cooperation toward these ends. The Act also condemns violations of human rights on all sides of the conflict; the government's human rights record; the slave trade; government use of militia and other forces to support slave raiding; and aerial bombardment of civilian targets. The U.S. President must certify within six months of enactment, and each 6 months thereafter, that the Sudan Government and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue. If, under this provision, the President certifies that the government has not engaged in good faith negotiations or has unreasonably interfered with

## 11. Canadian Government Response

In response to Talisman's investment in Sudan, the Canadian government has taken minimal action to address issues related to the company's conduct and operations in Sudan. In mid-1999, the Canadian government urged the company to adopt the International Code of Ethics for Canadian Business (ICECB). On October, 23, 1999, then U.S. Secretary of State Madeleine Albright "expressed anger" over Canadian oil investment in Sudan, prompting Ottawa to announce a new "Sudan policy".<sup>79</sup> Then Minister of Foreign Affairs Lloyd Axworthy announced that, before taking further action, he would send a fact-finding mission to Sudan to investigate whether oil development was exacerbating Sudan's civil war and contributing to violations of human rights.<sup>80</sup> In response to the report of this investigation mission (the Harker Mission), Minister Axworthy announced in February 2000, a series of measures that critics argued did little or nothing to address problems caused by Talisman's presence in Sudan.<sup>81</sup> The Minister did not recommend sanctions and stated that the *Special Economic Measures Act* was not available to the Canadian government in the absence of a "multilateral decision" to impose sanctions against Sudan.<sup>82</sup> Mr. Axworthy stated, "Canada does not encourage private sector activity in Sudan. I expect Talisman, which has chosen to operate in this difficult environment, to nonetheless live up to the fundamental values of Canadians in conducting its business activities ... Talisman must ... ensure that their operations do not lead to an increase in tensions or otherwise contribute to the conflict."<sup>83</sup>

Minister Axworthy's statement proposed that Talisman should observe a number of conditions. These included effective implementation of the ICECB and public encouragement of the Government of Sudan to invite independent experts to

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humanitarian efforts, the Act states that the President, after consultation with the Congress, shall implement the following measures:

- Seek a UN Security Council resolution for an arms embargo on the Sudanese government;
- Instruct U.S. executive directors to vote against and actively oppose loans, credits, and guarantees by international financial institutions;
- Take all necessary and appropriate steps to deny Sudan government access to oil revenues in order to ensure that the funds are not used for military purposes;
- Consider downgrading or suspending diplomatic relations;

If the Sudan People's Liberation Movement is found not to be negotiating in good faith, none of the above provisions shall apply to the Sudanese Government. See <http://www.state.gov/r/pa/prs/ps/2002/14531.htm> (visited November 26, 2002).

<sup>79</sup> Forcese, *supra* note 70 at 44.

<sup>80</sup> C. Cattaneo, "Talisman Shaken as Ottawa Talks Sanctions" *National Post* (Oct. 27, 1999) F7 and "Ottawa Gets Tough with Oil Firm over Sudan" *Globe & Mail* (Oct. 27, 1999), A13.

<sup>81</sup> Forcese, *supra* note 70 at 45.

<sup>82</sup> *Ibid.* For a detailed discussion of political and legal considerations of sanctions in the Canadian context and the Special Economic Measures Act, see Forcese, *supra* note 70 at 47-51.

<sup>83</sup> *Ibid.*, 46.

investigate the human rights situation in the oil regions, with particular attention to allegations of forced removals of communities. The company was asked to initiate discussion with the Government of Sudan and independent experts on verifiable ways in which petroleum export revenue could be reserved for humanitarian and development purposes and shared equitably by all regions of Sudan. Minister Axworthy also called on Talisman to publicly urge the Government of Sudan to recommit itself to a meaningful and accelerated peace process in the context of recommendations of the Inter-Governmental Authority on Development (IGAD)<sup>84</sup> and to work with non-governmental organizations to engage with the private sector in alleviating human sufferings and reporting of abusive practices in Sudan.<sup>85</sup>

Since 2000, Canada has made no public statements concerning Talisman's presence in Sudan. In Canada's speech to the UN General Assembly in November 2001, the government stated that it continued to be gravely concerned with the ongoing conflict and that it "continues to be concerned about possible linkages between the development of Sudan's natural resource sectors and the continuation of the conflict. In this regard, we urge business enterprises to carefully assess their activities in Sudan to ensure that they are not directly or indirectly involved in actions that could increase the suffering of the civilian population."<sup>86</sup> The official position of the Canadian government on Sudan prioritizes settlement of the civil war through the IGAD Peace Process. In current DFAIT position documents, Ottawa validates the occurrence of "frequent attacks against the civilian population" and "human rights abuses by all parties to the civil war," and states that it "does not promote commercial activity in the Sudan."<sup>87</sup> The government's July 2002 public statement on Sudan welcomed a breakthrough in the peace talks.<sup>88</sup>

On issues of corporate social responsibility, Canadian government policy favours the use of voluntary codes of conduct and self-regulation.

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<sup>84</sup> IGAD comprises Djibouti, Eritrea, Ethiopia, Kenya, Uganda and Sudan.

<sup>85</sup> DFAIT news release, "Canada Announces Support to Sudan Peace Process," (Oct. 26, 1999) cited at <http://webapps.dfait-maeci.gc.ca/minpub/ListPublications.asp?PubTypeID=100001&Year=1999>.

<sup>86</sup> UNGA 56 3<sup>rd</sup>, UN website.

<sup>87</sup> Canada-Sudan Relations, cited at <http://www.dfait-maeci.gc.ca/africa/sudan-canada-en.asp> (visited Aug. 29, 2002).

<sup>88</sup> DFAIT news release, "Canada Welcomes Breakthrough in Sudan Peace Talks" July 24, 2002 cited at <http://webapps.dfaitmaeci.gc.ca/minpub/ListPublications.asp?PubTypeID=100001&Year=2002&Language=E> (visited Aug. 29, 2002).

12. Talisman Energy's Response and Efforts at Self-Regulation:  
Adoption of the International Code of Ethics for Canadian Business and  
'Verification' Procedures

a) *Constructive Engagement*

Since Talisman entered Sudan, the company has maintained that its presence has a moderating influence on government policy and that it provides services for local people in the areas where it operates. Talisman has taken a high-profile stand defending its role in Sudan, asserting that it is a force for good, it supports human rights and the beneficial effect of its presence in the oil development area. Responding to concerns of human rights groups about the negative impact of its partnership with the government, Talisman has argued that its presence in Sudan encouraged Khartoum to embrace democracy, and stated that its "constructive engagement" would significantly help regional development and national prosperity.<sup>89</sup> Talisman also expressed its assurance to the Canadian government that it would intensify its efforts to initiate a peace agreement between the warring parties.<sup>90</sup>

b) *Adoption of the International Code of Ethics for Canadian Business*

In December 1999 while the Harker Mission was in Sudan, the company announced that it was "pleased to adopt the International Code of Ethics for Canadian Business (ICECB) which is in accordance with our long standing policies of business conduct."<sup>91</sup> Under this code, Talisman committed itself to support and promote international standards of respect for human rights within its sphere of influence and to not be complicit in human rights abuses. The company also committed to strive to ensure a fair share of benefits to stakeholders affected by its activities; and, to ensure consistency with universally accepted labour standards including non-discrimination in employment.<sup>92</sup> The ICECB is voluntary and has no binding legal effect (a full discussion of the ICECB appears later in this paper).

In March 2000, Talisman set up a Corporate Social Responsibility Group to implement the ICECB and develop a set of "Sudan Operating Principles". The Group reported to the Vice-President of Legal and Corporate Projects, who reported to the President and Chief Executive Officer. Corporate social responsibility reviews and

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<sup>89</sup> Cattaneo, *supra* note 80 at F7 and Talisman Annual Report 2000, cited at <http://www.talisman-energy.com> *supra* note 55 at 6

<sup>90</sup> *Ibid.*

<sup>91</sup> Talisman press release: "Talisman Adopts International Code of Ethics for Canadian Business" (Calgary, Dec. 10, 1999).

<sup>92</sup> Also known as the Can Oxy Code for key sponsor the former Canadian Occidental Petroleum, the ICECB was developed in 1997 by a group of multinational Canadian companies and the University of Ottawa Human Rights Research and Education Centre. See <http://www.cdp-hrc.uottawa.ca/globalization/busethics/codeint.html> (visited Aug. 29, 2002).

updates on Sudan were to be provided to the Board of Directors twice a year.<sup>93</sup> Talisman's Corporate Social Responsibility program included implementing and monitoring compliance with the ICECB; preparing an externally-audited corporate responsibility report on Talisman's operations in Sudan; assisting in the development and management of community development programs in Sudan; and, managing stakeholder engagement processes.<sup>94</sup>

In May 2000, at the company's Annual General Meeting (AGM), a management resolution, approved by a majority of shareholders asked the Board of Directors "to cause the company, in consultation with an independent third party, to develop and implement procedures for monitoring the company's compliance with the ICECB, including the human rights provisions thereof, with respect to the operations of the company and its subsidiary in Sudan; to cause to be prepared annually an independently verified report on the company's compliance with the ICECB with respect to such operations and to provide a summary of each such report to the shareholders in conjunction with the company's normal annual reporting to shareholders; and to make a full report available to shareholders and the public upon request."<sup>95</sup>

c) *Sudan Operating Principles*

In September 2000, Talisman approved its Sudan Operating Principles.<sup>96</sup> To give the ICECB "operational reality," Talisman with the advice of

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<sup>93</sup> Talisman CSR Report 2000, *supra* note 25.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> At <http://www.talisman-energy.com/socialresponsibility/governance/sudan.html> (visited Aug. 29, 2002). The Sudan Operating Principles are as follows:

1. Talisman is committed to addressing human rights concerns arising from Talisman and GNPOC operations.
2. Talisman supports the principles of the Universal Declaration of Human Rights within Sudan.
3. Talisman will promote that local communities receive long-term economic, social, and environmental benefits from our operations.
4. Talisman will create meaningful employment opportunities for local people within the Talisman and GNPOC operations.
5. Talisman will exercise its corporate influence to promote a fair distribution of the economic benefits of the GNPOC operations.
6. Talisman is committed to providing training and education for its local employees to improve their employment skills and abilities.
7. Talisman is committed to operating in accordance with all applicable laws and international conventions regarding employee rights.
8. Talisman is committed to ensuring the fair and equitable treatment of employees and to providing a mechanism for the discussion and resolution of employee grievances and concerns.
9. Talisman is committed to carrying out all business activities in accordance with its Policy on Business Conduct.
10. Talisman is committed to its corporate Health, Safety and Environmental Policy.
11. Talisman will promote local community health benefits and environmental protection.
12. Talisman is committed to engaging with its stakeholders regarding its operations in Sudan.

PricewaterhouseCoopers (PwC) Calgary office and the Ethics Group of the Faculty of Management at the University of Calgary assembled the framework of Sudan Operating Principles. Within the framework, each operating principle was addressed by specific objectives and performance indicators set against a timeline of target dates.<sup>97</sup> The framework also describes the company's view of its sphere of influence, reflecting Talisman's operation as part of a joint venture. The objectives within the framework were described as falling into three different categories: direct control; GNPOC control (less influence), and advocacy.<sup>98</sup>

### 13. Talisman Energy's Corporate Social Responsibility Reports 2000 and 2001

Talisman released its first Corporate Social Responsibility Report for 2000 (2000 CSR Report) at its May 2001 AGM, and its second (2001 CSR Report) at its May 2002 AGM. The company retained PwC to verify those elements of the 2000 and 2001 CSR Reports it deemed "capable of objective independent verification," and stated that "the unverified portions of this Report generally relate to background information or the company's beliefs, opinions or intentions where verification is not always possible."<sup>99</sup> PwC included, in each report, a description of its relationship with Talisman, its role in auditing the claims in the reports, and its verification procedures.

Talisman characterized the 2000 CSR Report as "not a broad overall assessment of the company's presence in Sudan. Rather it describes how the company has interpreted the Code through the Principles which Talisman has adopted ... in many cases [it] does not yet extend to verifying the outcomes of the policies and procedures introduced."<sup>100</sup>

A review and assessment of these two reports reveals a number of problems and inadequacies that call into question the company's efforts to operationalize the ICECB, to comply with its provisions and the verification activities undertaken by PwC.

#### a) *Stakeholder Consultation and Access*

The 2000 and 2001 CSR Reports describe Talisman's ongoing dialogue with stakeholders, including local stakeholders in Sudan. The reports do not indicate in detail the stakeholders with whom it consulted. No contacts are documented with

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<sup>97</sup> PricewaterhouseCoopers, Verification of Talisman Energy's Corporate Social Responsibility Report 2000, an outline of the nature and scope of the verification work. See Talisman's CSR Report 2000, *supra* note 25 at 10.

<sup>98</sup> *Ibid.*, at 2.

<sup>99</sup> Talisman Energy Inc., Corporate Social Responsibility Report 2001, cited at [http://www.talisman-energy.com/pdfs/csr2001\\_report.pdf](http://www.talisman-energy.com/pdfs/csr2001_report.pdf) at 9 [hereinafter "Talisman's CSR Report 2001"].

<sup>100</sup> *Ibid.*, at 7.

members of indigenous population in and around the GNPOC concession area, persons located in both government and SPLM/A-controlled areas, and displaced persons inside and outside Sudan. Instead, the reports emphasize contacts with stakeholder open houses in Khartoum that would be difficult (and impossible) for all stakeholders to attend and where assurance of candid comment would be a challenge. As a result, the company has left itself open to criticism that its stakeholder consultations were skewed toward those who would provide it with favourable opinion for obvious reasons.

The section of the 2001 CSR Report dealing with human rights includes a candid admission by the company that it has failed to constructively engage the government to “allow unrestricted and unfettered access to humanitarian aid organizations and human rights investigators within the GNPOC concession area.” This statement calls into question the assertion by Talisman president Dr. Jim Buckee, in the company’s 2001 Annual Report, that “We are a voice for peace, constructive engagement and human rights (in Sudan).”<sup>101</sup>

The 2001 CSR Report states that Talisman facilitated trips to the oil area for independent observers. However, the company provides no evidence that it is anything but selective in this facilitation: only one such observer, the UN Special Rapporteur, is identified. Other observers and media outlets that unsuccessfully sought company and government support for independent observation and investigation of Talisman’s operations, particularly Gagnon and Ryle in 2001, go unmentioned.

The 2001 CSR Report also opens with an “independent opinion” article by the policy director of Control Risks Group commenting on the risks of doing business in areas of conflict. While the article’s content is reasonably balanced, the author’s independence must be questioned given Talisman’s use of Control Risks Group as a consultant prior to its entry into Colombia.

*b) Lack of Due Diligence*

The most prominent shortcoming of the 2001 CSR Report (and of the 2000 CSR Report it succeeded) is the failure to mention the long-standing policy of the government to displace the civilian population in and around the oil areas to secure and protect oil development. The company acknowledged displacement related to conflict and famine but does not accept the evidence that most displacement in the concession has been caused by oil development. The omission to make reference to the well-documented and long-term relationship between oil development and the war demonstrates that the company has failed to recognize and address a key reality

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<sup>101</sup> Talisman Energy Inc., Annual Report 2001 at 2, cited at <http://www.talisman-energy.com/pdfs/tlm2001ar.pdf>.

about the situation in which it is operating. This failure greatly undermines the credibility of Talisman's efforts "to support and promote international standards of respect for human rights within its sphere of influence and to not be complicit in human rights abuses."

The reports also demonstrate a lack of knowledge of the history and ethnography of the Western Upper Nile area. For example, the reports contain incorrect references to the indigenous population as "nomads" rather than transhumant pastoralists. A lack of due diligence is evidence in the failure to conduct primary research for the reports (including verification interviews) in the non-government controlled areas in and around the Talisman/GNPOC concession areas and/or operating areas, where the majority of the inhabitants of Western Upper Nile are located, many as a result of displacement caused by oil development and conflict.

More importantly, at no point in either the 2000 or 2001 CSR Reports does Talisman specify circumstances under which its standards and conditions would require it to suspend its operations or withdraw from Sudan. The company appears content to operate with no such performance benchmark.

c) *Human Rights Issues*

Here it is worthwhile to reiterate the main human rights issues related to Talisman's operations in Sudan (detailed in preceding paragraphs). These are forced displacement of indigenous populations from the oil development region, security for oil operations and military use of oil infrastructure, distribution of oil revenues and human rights monitoring. Talisman's efforts to address these issues in its Corporate Social Responsibility Reports 2000 and 2001 are analyzed below.

It is clear from both reports that the company has not conducted a human rights impact assessment or sought an independent assessment of the human rights and humanitarian consequences of its operations. There is no discussion of any risks posed to the inhabitants of the oil region by the company's oil operations or of the impact and effects that its operations might have on the conduct of the war.

The 2000 CSR Report stated, "We are committed to addressing human rights concerns arising from Talisman and operations...We work to ensure that local communities receive long term, sustainable benefits from our operations."<sup>102</sup> The report, however, contains only one mention of human rights.

The 2001 CSR Report improves on Talisman's 2000 report by addressing a broader range of dimensions of its activities and recognizing certain pivotal human rights issues that, a year earlier, it did not acknowledge. These issues - military use of GNPOC oil infrastructure and government use of oil revenues for military

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<sup>102</sup> See Talisman's CSR Report 2000, *supra* note 25 at 6.



expenditures – are categorized as “Dilemmas” in the 2001 Report.<sup>103</sup> Each is given a lengthy and descriptive “talking-point” treatment, notably absent PWC validation, and the company does not make a definitive statement of its position on the issue, propose a resolution, or indicate a desired direction.

A one-paragraph sub-section of the 2001 CSR Report titled “Advocacy” states Talisman senior management pursued a dialogue with government and diplomatic actors about human rights in Sudan in 2001, encouraging compliance with the Universal Declaration of Human Rights.<sup>104</sup> However, fulfilment of the provisions of the UN’s 1966 International Covenant on Civil and Political Rights (ICCPR), more recent, complex and relevant to the situation in Sudan, is not cited by the company as an objective in its program of advocacy. Notably, Talisman identifies in this sub-section “the bombing of civilians” as one issue it has raised in its discussions with the government, the single time in the report that the company makes reference to this widely-reported war crime committed on numerous occasions by its government partner.

d) *Forced Displacement of Civilian Populations from the Oil Region*

In addressing displacement, the 2000 CSR Report acknowledged the right of all persons in the concession and along the pipeline whose land use had been impaired by GNPOC operations to receive fair and just compensation. The report mentioned that GNPOC had compensated some people affected by its operations, but added that the process of identifying people and the provision of fair compensation had not been well documented. The report noted that Talisman intended to work with GNPOC to establish a more effective and verifiable process for assessing paying compensation to people whose homes or crops are affected by GNPOC activities.<sup>105</sup> Talisman also stated that it negotiated the compensation issue with the Ministry of Energy and Mining. The report noted that the Ministry had assured Talisman that its Pipeline Compensation Committee paid thousands of people, but some persons due compensation could not be found. GNPOC funded this committee and \$2,761,952 was paid for eligible compensation cases.<sup>106</sup> No further details were provided and there is no mention of compensation to persons forcibly displaced outside the concession. The 2000 CSR Report contains no reference to the fact of forced displacement at all.

The 2001 CSR Report relates that Talisman developed a procedure for performing and documenting a land reconnaissance assessment baseline study before expanding its operations, for purposes of providing compensation. However, the

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<sup>103</sup> Talisman’s CSR Report 2001, *supra* note 99 at 18.

<sup>104</sup> *The Universal Declaration of Human Rights*, G. A. Res. 217 (III), U.N. Doc. A/810 (1948).

<sup>105</sup> See Talisman’s CSR Report 2000, *supra* note 25 at 17.

<sup>106</sup> *Ibid.*

company does not acknowledge that potential subject areas may already have been cleared by the government, rendering the conclusions of such a study irrelevant. The report does not specify when or if Talisman proposes to implement the study procedure.

A sub-section of the 2001 CSR Report dealing with displacement separates “oil related displacement” and “conflict, famine and drought related displacement,” denying any linkages between the two. The company clearly does not accept the abundance of evidence that oil development has exacerbated the conflict. It further appears to view famine as a natural phenomenon independent from conflict, rather than acknowledging that control of food supplies, whether indigenous or provided through relief programs, is a much-used and well-documented weapon of war.

The 2001 CSR Report says Talisman has dedicated “a significant amount of human and financial resources” to investigating scorched earth policies and oil related displacement from the GNPOC operating area. To this end, it describes visits by its human rights field coordinator to unnamed villages in the concession area where persons were interviewed about their displacement experiences – but offers no detail of what was reported. It describes conflict, famine and drought related displacement that forced large numbers of people to flee to the edge of the GNPOC oilfield area (Pariang, Bentiu, Rubkona) to escape inter-factional fighting in areas further south. In relating these incidents, the report does not acknowledge widespread reports that government bombing and gunship attacks by government forces were part of the conflict, or that inter-factional fighting has been used strategically by the government in a divide and rule process, with certain factional forces favoured and supported to achieve military objectives.

e) *Security for Oil Development and Military Use of Oil Infrastructure*

In the 2000 CSR Report, Talisman said it prepared a draft agreement on the provision of security in the oilfields for advocacy with GNPOC and the government.<sup>107</sup> The report noted “the government of Sudan military has primary responsibility for the security of oil development and the operations of GNPOC and other oil companies and namely that in the context of an internal conflict.”<sup>108</sup> The company stated that although it was the government’s responsibility to protect the company’s property and personnel, the Sudan Operating Principles placed some obligations on the government to ensure that all security forces. This included providing security for oil development and compliance with the United Nations Code of Conduct for Law Enforcement Officials, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the GNPOC Code of Ethics as expressed in the draft agreement. Under the agreement, GNPOC retained its right

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<sup>107</sup> *Ibid.*, at 15.

<sup>108</sup> *Ibid.*

to investigate any reported violation of the terms of the agreement or any use of force within the GNPOC operational area, and to publicly disclose the results of such investigations.<sup>109</sup>

Further evidence of Talisman's inability to extract a progressive response from the government is provided in the 2001 CSR Report in the sub-section dealing with Security Force Activities. The company details its drafting of a proposed agreement between the government and GNPOC that would see security forces operating in the oil areas follow international policing codes and principles and the GNPOC Code of Ethics, with GNPOC granted the right but not the obligation to investigate and report on violations of the agreement. The company claims to have consulted with an "internationally recognized human rights organization" in the development process, but declines to name the organization. The report admits, however, that Talisman was unable to persuade its government partner to adopt the agreement, with Khartoum again claiming sovereignty. This situation, however, is not deemed an ongoing "Dilemma" by Talisman, and no specific course of future action or timeline is promised, beyond endeavoring "to progress our advocacy efforts."

On the military use of oilfield infrastructure, the 2000 CSR Report stated that pursuant to the concession agreements, the government legally owned the oilfield infrastructure and it was not subject to Talisman's control. The report noted that the use of oilfield infrastructure for non-defensive military purposes was of great concern, a concern that Talisman had shared with its GNPOC partners and the government.<sup>110</sup> Talisman stated that it had asked the government to refrain from any taking offensive activity that directly or indirectly used property or assets owned, leased or operated by GNPOC. The report said Talisman defined "defensive security" support as that which would assist those forces legitimately deployed within the concession area to protect personnel and property and which, in achieving those objectives, would use a proportionate level of force. "Offensive" activity was defined as anything outside the parameters defined as defensive.<sup>111</sup> As mentioned earlier in this paper, Talisman conceded that at least four instances of non-defensive usage of the Heglig airstrip in 2000.<sup>112</sup> The company noted that on these occasions helicopters or planes landed on the airstrip for reasons Talisman could not link to oilfield security and their presence was considered non-defensive by Talisman. The company reported it had consistently requested incidents of this kind not occur.

The characteristic use of helicopter gunships as described earlier in this paper, where civilians, including women and children, are attacked and killed indiscriminately in their homes, cannot be held to fall under this definition of

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, at 15-16.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

“defensive”. Under the international laws of armed conflict (also referred to as international humanitarian law) applicable in an internal conflict, all parties are required to observe the principles of distinction and proportionality. The principle of distinction prohibits the targeting of civilians. Parties must at all times distinguish between civilians and civilian objects and combatants and military targets and not make civilians the object of attack. The principle of proportionality requires that in attacking military objects, parties must not cause incidental loss of life or injury to civilians or damage to civilian property that is excessive in relation to the concrete and direct military advantage anticipated from the attack. The principle of proportionality is irrelevant to military actions with the primary purpose of spreading terror among the civilian population as these are prohibited. Attacks are defined, under international law, as acts of violence against the adversary, whether in offence or defence. There is no indication that either Talisman or GNPOC made any attempt to properly determine and assess whether any of the attacks on the villages by the government meet these criteria or are legal or illegal under international law.

Taban Deng Gai, the former Governor of Unity State, told an investigation mission in 2001 that Talisman had at the request of the Sudan Minister of Energy and Mining provided funds to the Ministry of Energy and Mining. He alleged that these funds paid through this arms length arrangement had facilitated military operations.<sup>113</sup> This raises the issue whether oil company security arrangements and payments to the government included or contributed to the purchase of helicopter gunships and other equipment or services used for military purposes; and the lack of information around security agreements between the government and oil companies. Details of security agreements between the government and Talisman and any monetary or in-kind payments by Talisman to the government for security or other purposes have not been made public or transparent. Talisman in both the 2000 Annual Report and 2001 CSR Reports does not address this situation.

Securing of oil operations, Talisman stated in its 2000 CSR Report, means protecting oilfield staff and property and facilitating oil development. In Western Upper Nile, this protective strategy developed by the government military to protect oil company personnel and property differs according to the location of the assets it is protecting. In areas close to government garrisons where the government is in control, there have been resettlement projects and some compensation to local communities by the government and GNPOC to facilitate oil development. In other areas, where the government is concerned about threats to oil development from rebel forces and where local inhabitants are considered as possible rebel supporters, they are forcibly and violently dispossessed. Security for oil operations in these areas, as described, involves systematic attacks on civilian settlements.<sup>114</sup> It can be concluded that oil

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<sup>113</sup> Gagnon and Ryle Report, *supra* note 33 at 29.

<sup>114</sup> Harker Report, *supra* note 61 at 72.

companies in partnership with the government of Sudan are clearly implicated in this security policy and become part of a counter-insurgency operation whether they like it or not. Oil facilities are de facto military facilities, the oil fields are the most heavily militarized locations on the conflict zone and oil company property and personnel are considered military targets by rebel forces.<sup>115</sup>

f) *Distribution of Oil Revenues*

Talisman noted in the 2000 CSR Report that it shares the concern of other organizations that oil revenues received by the government contributes to a continuation of the war. The company states that it believes oil revenues should not be used for such purposes.<sup>116</sup> Talisman stated that it had expressed its concern to the government and others, only to be told by Khartoum that the expenditure by a sovereign government of its revenues is an issue the company has no authority to address. The report stated Talisman urged the government to establish a more transparent process of accounting for its expenditure of oil revenues. The report noted that Talisman was willing to disclose revenues obtained by the government from oil operations and stated that the government's entitlement from Talisman's share of production in the year 2000 was valued as \$306,100,000.<sup>117</sup>

Beyond dialogue with Khartoum, Talisman reported that it raised the issue of distribution of revenues in meetings with the government of Canada, European diplomats in Sudan and an international financial institution (not named) involved in Sudan's finances. Talisman claims to have offered assistance to develop a process for transparent reporting of oil revenue expenditure to the governments of Sudan and Canada and an unnamed international financial institution.<sup>118</sup>

The 2001 CSR Report deals with the distribution of oil revenues in a sub-section of an extensive section titled "Community Participation". The company reports that the government has stated in discussions that it uses oil revenues to repay and service its debt, meet shortfalls in operational budgets including salaries, provide regional state support and finance development projects. However, the company admits it has been provided with no substantiating documentation by the government for its claims. The report leaves the questions of "How Much Oil Revenue is Being Generated and How is it Being Used?" as a "Dilemma" for which it offers no definitive answer or plan.

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<sup>115</sup> Gagnon and Ryle Report, *supra* note 33 at 29-30.

<sup>116</sup> Talisman's CSR Report 2000, *supra* note 25 at 28-29.

<sup>117</sup> *Ibid.*, at 28.

<sup>118</sup> *Ibid.*, at 29.

g) *Human Rights Monitoring*

On the protection of human rights, Talisman reported in the 2000 CSR Report that it had extensive dialogue with the governments of Sudan and Canada and discussed with GNPOC the adoption of a Code of Ethics. The report said Talisman also developed a human rights monitoring and investigation program and drafted a manual that claimed to address human rights concerns arising from GNPOC operations. The report noted that Talisman had developed management systems to support the human rights program, based on the Universal Declaration of Human Rights, that was introduced as a pilot project in August 2000. Talisman hired a Human Rights Coordinator to work in conjunction with security staff in overseeing the program. The Field Coordinator had responsibility for actively seeking out information on human right incidents, acting as the main field contact on human rights issues and incidents within GNPOC's sphere of influence, and maintaining a system of documentation and records that provides a clear audit trail. The Coordinator was to submit monthly reports to the company's General Manager in Sudan. Talisman's records show that ten cases were opened in November 2000 to keep files of initial interviews with displaced persons. These include six individuals who had come to Pariang in 2000 from surrounding villages to escape famine, disease or conflict.<sup>119</sup>

This monitoring regime conforms to no recognized international standards. It is not independent or expert and it has not produced a public report. It is not clear whether there has been any monitoring by Talisman's human rights monitor of GNPOC's expansion activities in 2000 and 2001 into Block 4 (Kaikang) of the concession. A major problem with the monitoring regime is that the primary responsibility for monitoring the company's practices lies with Talisman itself. Talisman conducts its own audits to confirm compliance and support continuous improvement of the company's operations.<sup>120</sup> Talisman's Audit Committee is responsible for overseeing the company's internal accounting and financial systems, ensuring these systems are effective in detecting risks and controlling weaknesses.<sup>121</sup> Critics are concerned about the reliability and impartiality of these self-imposed monitoring methods, arguing "independent monitoring largely is inconsistent with auditing by a retained accounting firm."<sup>122</sup>

The human rights section of the CSR 2001 Report offers a substantial treatment of Talisman's Internal Human Rights Monitoring and Incident Investigation Program, but the program proves fraught with weakness. The report is particularly

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<sup>119</sup> *Ibid.*, at 18.

<sup>120</sup> See discussion in Talisman's CSR Report 2001, *supra* note 99 at 32.

<sup>121</sup> *Ibid.*, at 37.

<sup>122</sup> For the discussion of this argument see R. Toftoy, "Now Playing: Corporate Codes of Conduct in the Global Theatre: is Nike Doing it?" (1998) 15 *Ariz. J. Int'l & Comp. L.*, 905 at 915.

inconsistent in its treatment of the issue of displacement and its many complex dimensions. On one hand, displacement is dismissed outright on the basis of Talisman's own conclusions about the findings of the widely-discredited satellite study it commissioned in 2000; a few sentences later, the company claims to have a firm position on displacement that all persons whose land use has been impacted by GNPOC operations in the concession should be compensated. Conflicting statements of this type make it impossible to ascertain what the company believes to be the truth, and thus on what basis it is acting.

The human rights section of the 2001 CSR Report supplies no criteria for the classification of investigation and monitoring reports, for example, as direct, indirect, unrelated, or dealing with physical danger, injury or loss of life; no acknowledged incidents are categorized by way of example to promote understanding of how the investigation program actually functions. The company cites the sharing of its monitoring protocol with the UN Special Rapporteur as an achievement, but then acknowledges it has received no feedback from him. The most significant failure of the human rights program is the company's admission that it has made "little progress towards a key concern expressed by some of our stakeholders, the use of external independent human rights monitors to identify, review and verify the human rights situation in and around the GNPOC concession area." For this, the company blames government "(c)oncerns regarding the perceived infringement of national sovereignty" for hampering its efforts. The use of such monitors is held by most credible international organizations to be the lynchpin of a valid and effective human rights monitoring regime. Yet Talisman's inability to constructively engage its government partner to accept independent monitors is neither verified in the report, nor accorded the "Dilemma" status of other fundamental issues for which it has no answer.

The 2001 CSR Report's sub-section on Human Rights Training itemizes the company's activities in this area in 2001, but raises more questions than it answers. A training program provided to "some" new Talisman employees is reported to have focused on UDHR rather than ICCPR; whether it targeted employees located in Sudan is not made clear. Training for GNPOC staff is also cited but its recipients, the program content and the adequacy of the program are not explained. Members of the GNPOC Management Committee are reported to have received training at one committee meeting in January 2001; their learning was then to have been "cascaded" through the organization by being presented to managers, who were then to have made presentations to their staff. The company states that it has placed human rights reference materials in a "public folder," apparently on Talisman's intranet, to be voluntarily accessed by interested GNPOC employees. Finally, Talisman reports that 16 GNPOC security staff took part in two human rights training courses in 2001,

including a course focused on refugees and IDPs offered by the Pearson Centre in Canada, and a course on “Security Practice and Management” in London, UK.<sup>123</sup>

*h) GNPOC Code of Ethics and Code of Conduct and Ethical Business Conduct*

The 2001 CSR Report summarizes Talisman’s “Ethical Business Conduct” initiatives including creation of a Corporate Responsibility Team within GNPOC in January 2001 to develop operating principles based on the ideals expressed in the GNPOC Code of Ethics.<sup>124</sup> A related initiative, the GNPOC Code of Conduct, was introduced in December 2000, says the report, and a “certificate of compliance” was adopted in January 2001 “to monitor GNPOC business activities and test conformance with this policy”.<sup>125</sup> The terms of the GNPOC Code of Conduct do not appear in the 2001 CSR Report, and no such document is available on Talisman’s website, though a Talisman Policy on Business Conduct has been published by the company<sup>126</sup> that focuses on preventing corruption but includes the ICECB as an attachment and states “it is necessary for all employees to be aware of and abide by the principles embodied in this Code.” A Code of Conduct is referenced in the GNPOC Code of Ethics.

The 2001 CSR Report does not define the legal and contractual authority of the Corporate Responsibility team, the two codes or the certificate of compliance under Sudanese or international law; nor does it identify the composition of the team, the monitoring protocol for the Code of Conduct, the criteria for compliance, or the consequences of non-conformance. By failing to differentiate clearly between the GNPOC Code of Ethics and the GNPOC Code of Conduct initiatives and instead grouping them under the umbrella of “Ethical Business Conduct,” Talisman risks fostering misunderstanding of its efforts to introduce and enforce ethical business practices. Specifically, the grouping may lead a reader to conclude that Talisman has persuaded GNPOC to accept monitoring of compliance with its Code of Ethics (which deals with “maintaining transparent consultation and documentation with all stakeholders,” “conducting business in a way that shall maintain social justice and respect human rights within the sphere of our responsibility and contractual obligations,” and “refraining from availing the company resources for political, tribal and armed conflicts”), when in fact the monitoring regime described relates to enforcement of a Code of Conduct concerned primarily with anti-corruption

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<sup>123</sup> The only so-named course offered by a recognized post-secondary institution and recorded in the public domain in 2001 was a non-human rights related course offered through correspondence by the Open University of Hong Kong.

<sup>124</sup> Cited at <http://www.talisman-energy.com/socialresponsibility/governance/gnpoc.html> (visited Aug. 29, 2002).

<sup>125</sup> Talisman’s CSR Report 2001, *supra* note 99 at 33.

<sup>126</sup> Cited at <http://www.talisman-energy.com/socialresponsibility/governance/businessconduct.html> (visited Aug. 29, 2002).



measures. The 2001 CSR Report comingles and confuses these two important and distinct issue areas, when it should clearly separate and detail the company's efforts to deal with them.

The 2001 CSR Report's detailed section on Ethical Business Conduct fleshes out some of the conflicting statements provided earlier in the report's summary on this area of activity. However, the section remains confusing in its description of Talisman's Policy on Business Conduct and separate Code of Ethics, as well as GNPOC's Policy on Business Conduct and separate Code of Ethics. As is the case in the summary, this section fails to provide clear differentiation between the two policies for each organization. Only through careful scrutiny can a reader determine that GNPOC employees are required to conform to a conduct policy focused on preventing corruption, rather than an ethics code that deals with respecting human rights. Rather than clearly differentiating these activities, the report blends them together, creating confusion and misinterpretation.

For 2002, the 2001 CSR Report states Talisman's objectives are to "encourage GNPOC to review standard contract terms to include a wider ambit of fundamental human rights that are defined in line with fundamental ILO conventions and the UDHR," to "include training regarding the employee grievance policy within annual business conduct courses" and to "translate Talisman Policy on Business Conduct into relevant local languages." Specific objectives and timelines for the implementation of operating principles by GNPOC that reflect its Code of Ethics are not targeted – a significant shortcoming.

i) *Community Development and Employment*

Talisman has built medical facilities and schools and sunk water wells at some locations in the concession. The company's position is that tens of thousands of southern Sudanese have benefited from clean drinking water, education and medicine directly because of Talisman being in Sudan. Talisman claims to have spent approximately CAD\$1 million on 15 development projects, mainly in the North.<sup>127</sup> This is far less than one per cent of Talisman's profits of US\$1,816 million in 2000, which includes US\$183.6 million from its Sudan operations. The 2000 CSR Report describes Talisman's support for community development projects, including construction of well-equipped health clinics at Heglig and Pariang, and roads and schools. It credits Talisman and GNPOC with investing substantial resources in construction projects in the concession.

Reports from inhabitants of the concession, persons displaced from the concession and aid workers indicate that these medical facilities and water wells are not necessarily accessible to the ordinary inhabitants of the area. They are, moreover,

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<sup>127</sup> Talisman's CSR Report 2000, *supra* note 25 at 23.

located in garrison towns, rather than in rural areas. In this sense, the facilities that Talisman has established function as a way station in forced migration from the economically productive rural areas, backing up the government's military displacement campaign. In addition, Talisman's partners in community development projects are organizations affiliated with the Government of Sudan and not independent non-governmental organizations.

The 2001 Report notes an increase in spending on community development projects to CAD\$3 million.<sup>128</sup> The report stated that the company has been unable to spend all the funds due to security issues and other limitations (undefined).

Regarding employment, the Harker Report noted low numbers of Nuer or Dinka employed at the Heglig oilfield. Skilled workers were brought from the north and Sudan security forces scrutinized the hiring process. The Harker Report argued that "if Talisman was serious about being a good corporate citizen, it would agree to an audit of hiring and employment practices carried out by the International Labour Organization, with a view to eliminate discrimination."<sup>129</sup> The Harker Mission also reported that it had received information that eight Nuer men had been killed in August 1999 when they had approached GNPOC seeking work and urged the "Canadian government to call for an independent investigation of this serious allegation."<sup>130</sup> Neither the Canadian government nor Talisman investigated this allegation or called on the Sudan government to investigate the matter.

In the 2001 Report, in a section on "Community Employment", Talisman states that it has a policy to promote the hiring of local people. It notes that 704 (73%) Sudanese nationals are employed out of a total of 971 employees, holding 46% of skilled and 1005 of unskilled positions. Of these national employees, the company notes that 40 (31%) identify themselves as southern Sudanese. This section does not indicate whether the "southern Sudanese" are of Dinka or Nuer ethnicity or are Sudanese from Arab tribes residing in the concession.

#### 14. Talisman Energy's Corporate Social Responsibility Reports and Verification by PricewaterhouseCoopers

##### a) *Mandate and Scope of Verification*

The 2000 CSR Report explained "the verification reflects the stage that Talisman and GNPOC have reached in introducing the ICECB."<sup>131</sup> This qualification narrowed the scope of PwC's role significantly. PwC stated in the 2000 CSR Report

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<sup>128</sup> Talisman CSR Report 2001, *supra* note 99 at 22.

<sup>129</sup> Harker Report, *supra* note 61 at 66-69.

<sup>130</sup> *Ibid.*

<sup>131</sup> Talisman CSR Report 2000, *supra* note 25 at 11.

that its verification concentrated on those objectives under Talisman's direct control, which in most cases had targets set in a shorter timeframe than those outside its direct control. Its task, said PwC, was to gather feedback from a balanced cross section of stakeholders in Canada, Sudan and other areas, to be attributed to a stakeholder group rather than an individual or organization where necessary for reasons of confidentiality and/or personal security.<sup>132</sup> PwC said it did not purport to conduct an in-depth study either of the effects of Talisman's presence in the Sudan or of the impact of oil production on the country. PwC did not undertake as part of its verification of the 2000 CSR Report to visit regions beyond Khartoum, and the oilfields operated by GNPOC in south Sudan. PwC did not issue an opinion on Talisman's compliance with the ICECB and said it was left to readers to make their own judgments based on the information presented.<sup>133</sup>

In its account of the verification procedure PwC said, "There are currently no statutory requirements or generally accepted international standards for the preparation, public reporting and attention of corporate social responsibility reports."<sup>134</sup> Their verification procedure therefore "sought to establish reasonable, rather than absolute, assurance on the statements and data tested."<sup>135</sup>

Examination of the 2000 CSR Report by independent observers and non-governmental organizations shows that the verification process consisted of field visit of unspecified duration, to government-controlled locations only, by an investigator without prior experience in the area or human rights expertise.<sup>136</sup> Although the report claimed to address human rights, economic development and peace building, the authors, both of the report itself and of the verification statements, appeared unacquainted with the basic literature on the ethnography and rural economy of Western Upper Nile and the history of the civil war and oil development (widely available), and seemingly unaware of the decade-long UN relief operation in South Sudan, particularly as it affects the oil areas.<sup>137</sup> The report did not acknowledge that the greater area of the concession is outside government control and that the entire area is suffering the effects of a long-term social and nutritional crisis brought on by conflict between the government and its opponents.<sup>138</sup> It contained no characterization of the terrain and a misleading description of the inhabitants of the regions as "nomads". In addition, the report failed to mention the central role of oil in the current conflict and the long-running peace process.

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> Gagnon and Ryle Report, *supra* note 33 at 4.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

In both the 2000 and 2001 CSR Reports, Talisman's statements and PwC's verification are closely integrated. At no point in either report is a clear description offered of the report writing and editing process that yielded the finished product. The open question is whether Talisman provided PwC with a final non-alterable text of its report and all statements were verified as is, or whether PwC in a collaborative process provided feedback to Talisman that clarified and corrected any statements in the report. In both reports, the process behind PwC's verification process is obscure, particularly respecting the conduct of stakeholder interviews, where, when and to whom the consultants spoke, how such primary research findings were handled, and how decisions were made about what materials to provide to Talisman and to include in the published reports.

Perhaps more than any other area, the 2001 CSR Report's commentary on compensation casts doubt on the validity of PwC's process of verification. Talisman states in this section, and PwC verifies, that the government-administered Pipeline Compensation Committee in 2001 "continued to make compensation payments to claimants that came forward and GNPOC transferred US\$532,336 to the Ministry of Energy and Mining to fund compensation payments administered through this process." This extraordinary statement clearly suggests that a specific number of displaced persons has received specific amounts of compensation. But there is no clear indication of what PwC has actually verified: that Talisman has made this claim, that the government has reported this information to Talisman, or that the information put forward is truthful and substantiated. Nowhere is evidence presented that PwC has conducted primary research with displaced persons to confirm their receipt of compensation payments from the government that has overseen their displacement. In the absence of such due diligence, both the claim and its verification are spurious.

*b) Independence of Verifiers*

A critical analysis of the role of PwC in its audit of the 2001 CSR Report raises several additional key questions. The independence of PwC from Talisman is not established in the report. Rather, a complex and extensive working relationship between the two seems to be entrenched: PwC Calgary helped Talisman draft its operating principles, PwC Ireland was in charge of the stakeholder interviews and PwC UK conducted the audit process. This speaks to a close consulting relationship that calls into question whether PwC's work can reasonably be considered independent, or merely external.

c) *Qualification of Verifiers*

Concurrently, PwC offers no evidence of its qualification to conduct a corporate social responsibility audit, specifically with respect to dealing with the human rights dimensions of a company's activities. The credentials, expert knowledge and field experience of PwC staff assigned to the Talisman audit are unknown. Commentary received from participants in the stakeholder consultations indicates PwC's interviewers were not knowledgeable about specific situations, had no apparent training or expert knowledge in human rights issues or law, and appeared to be concerned primarily with how Talisman appeared and was perceived, rather than with the facts and problems related to its activities.

d) *Transparency*

PwC provides no indication how participants in the stakeholder consultations were selected, or the basis on which the views obtained were deemed to be representative and balanced. The consultancy states that it visited Khartoum, Nairobi and areas in the GNPOC concession, but does not specify which areas. Throughout the consultation process, PwC states it used "independent" translators, but these individuals required government security clearance, raising legitimate questions about their independence. While Talisman included a section on its activities in Colombia in the 2001 CSR Report, PwC did not visit Colombia as part of its validation process and offers no explanation.

PwC indicates it presented the views of stakeholders to Talisman, but the content and form of this presentation is not clear: it is unknown whether the company had the benefit of complete verbatim transcripts of all interviews including the most critical, or whether only a summary of views was provided. PwC's report to Talisman on the stakeholder consultations is not a public document, and the transparency and defensibility of the consultancy's audit process suffers accordingly.

PwC states that it selected comments from stakeholders for the report using "a structured approach," but it is unclear from this description whether quotes were chosen on a representative basis to reflect a segmentation of the stakeholders consulted, to represent the diversity of views expressed, or to correspond with the editorial structure of the report.

A more detailed treatment by PwC of its relationship with Talisman, qualifications and audit procedures would be required to improve the validity of its work in future reports.

## 15. Conclusion – Case Study

The case study demonstrates that self-regulation by Talisman of its operations in the context of Sudan's civil war has proved ineffective in ensuring that "the company supports and promotes international standards of respect for human rights within its sphere of influence is not complicit in human rights abuses and strives to ensure a fair share of benefits to stakeholders affected by its activities." Numerous credible reports have found that oil development in Upper Nile has exacerbated civil conflict and assisted the war aims of the Government of Sudan, facilitating violations of human rights by government forces, government-backed forces and rebel groups.

Since Talisman's entry into Sudan, the human rights situation in the concession has worsened. Forced displacement of indigenous populations and attacks on civilian settlements by government and pro-government forces has increased. The company profits and benefits from human rights violations committed by the government as systematic displacement enhances security for Talisman's oil operations. The government of Sudan continues to fail to provide for equitable distribution of oil revenues and evidence mounts of its use of oil revenues to purchase and manufacture weapons. The presence of Talisman in Sudan appears to have had no influence on the government to deliver on its claim to use oil revenues for social and economic development. Government and pro-government forces continue to use oil facilities and infrastructure for military and human rights abusing purposes. Talisman and its GNPOC partners have been unable to effectively monitor military use of oil installations (acknowledged in the company's 2001 CSR Report), or to influence the government's conduct in this regard. And Talisman's self-stated advocacy efforts have had no discernible impact on government tactics. Any use at all by government forces of oil facilities therefore makes the oil companies complicit in the government's military activities and associated human rights abuses. Talisman's human rights monitoring program is completely inadequate. Talisman's claim that it serves as a positive influence on the Government of Sudan and its policies is not supported by the findings in many reports; the evidence suggests that the company has been unable to achieve constructive engagement.

The company's efforts to regulate its conduct in Sudan and its retention of PwC to verify its compliance with the ICECB has also proved ineffective at ensuring the company's operations do not contribute to human rights violations. The CSR Reports are not independent and fail to deal directly with generally accepted facts on several key issues such as forced displacement and intensified conflict related to oil development.

The case study also shows that there is little prospect of local regulation by Government of Sudan authorities of the activities of foreign oil companies. The willingness of a corporation's state of citizenship – Canada, in the case of Talisman – to exercise regulatory power is complicated by the presumed absence of any legal obligation toward extra-territorial non-citizens, i.e. Sudanese inhabitants of the oil zone. The

voluntary *International Code of Ethics for Canadian Business* that Talisman has committed itself to is not legally binding. The result, as this paper argues, is a governance gap in Canada that permits Canadian companies operating outside their national jurisdiction to commit, aid or abet or be complicit in human rights violations with virtual impunity. One effect of this governance gap is that Canada is not perceived as neutral, either by international organizations working in Sudan or by the Sudanese themselves. Canada is widely perceived as being on the side of the Government of Sudan and of Talisman.<sup>139</sup> The consequences for Canadian foreign policy of this perception are damaging, given that the Sudan government has one of the worst human rights records in the world. Canada's efforts to promote a human security agenda in internationally can also be questioned. This governance gap is discussed in detail in the following section.

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<sup>139</sup> *Ibid.*, at 36.

## C. Sources of Corporate Obligation – The Governance Gap

### 1. Direct Liability of Transnational Corporation under International Law

At present, corporations are not directly accountable at international law for their activities and operations that violate international human rights standards. While an increasingly sophisticated regime of corporate rights is developing under the various free trade agreements such as the WTO, NAFTA and the OECD, none of these agreements link corporate rights or the rights of the states parties to obligations to ensure respect for human rights in the conduct of business. Nor do the mechanisms for enforcing the rights guaranteed under those agreements include complaint processes for private citizens or for groups whose human rights (as distinct from labor or environmental concerns) may be affected by certain business practices. A recent study that surveyed the potential effectiveness of various trade, labour and human rights enforcement mechanisms and procedures in relation to scrutinizing TNCs behaviour found that most procedures were designed to focus on the obligations of states to enforce certain standards.<sup>140</sup> The two mechanisms with mandates to directly examine corporate conduct were found to be ineffectual since they “rely on voluntary cooperation of multinationals”, and neither provide remedies for injured parties nor require public accountability of TNCs.<sup>141</sup>

The Universal Declaration of Human Rights (the “UDHR”) imposes duties on individuals as well as states to respect human rights. Its preamble provides that: “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>142</sup> Article 30 prohibits any interpretation of the UDHR which implies a right on the part of “any State, group or person ... to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms” set out in the Declaration.

However, while some of the UDHR’s provisions have become customary international law and the Declaration as a whole has been endorsed in all human rights treaties, the preamble itself is not legally binding, and the binding nature of Article 30 is uncertain.<sup>143</sup> Therefore, respecting (or under) the UDHR, the best that can be said is that TNCs “have a moral and social obligation” equal to that of other

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<sup>140</sup> Beyond Voluntarism, *supra* note 2 at 77ff.

<sup>141</sup> *Ibid.*, at 117.

<sup>142</sup> UDHR, *supra* note 104.

<sup>143</sup> Under the rules of treaty interpretation, preambles even in treaties are not considered to be legally binding. See Beyond Voluntarism, *supra* note 2 at 60.



members of the international society “to respect the universal rights enshrined in the Declaration”.<sup>144</sup>

None of the range of international human rights treaties impose direct legal obligations on corporations to respect human rights. While certain regional human rights treaties impose civic obligations directly on individuals, the more general duties requiring individuals and non-state actors to respect human rights “are found in preambles or in documents that were not drafted to be legally binding”.<sup>145</sup>

Some writers argue “[t]here is now a growing consensus that MNCs are bound by those few rules applicable to all international actors, plus a continuum of obligations that refer specifically to a corporation’s activity and influence.” Such international rules would include principles of *jus cogens*, “such as the prohibition of slavery and forced labor, genocide, torture, extrajudicial murder, piracy, crimes against humanity, and apartheid.”<sup>146</sup> It is not clear whether this growing consensus has crystallized into customary international law. Companies that transgress these principles might be liable to prosecution in any state under the principle of universal jurisdiction and officers and employees of corporations may be subject to prosecution as individuals in the International Criminal Court (the “ICC”). However, the ICC does not presently have jurisdiction to prosecute corporations.<sup>147</sup> TNCs have been sued under tort laws in various jurisdictions for such violations. But, to date, none have been criminally prosecuted for such offences.<sup>148</sup>

Intergovernmental attempts to regulate the activities of multinational corporations such as ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the “ILO Tripartite Declaration”) and the OECD Guidelines for Multinational Enterprises (the “OECD Guidelines”) refer to the UDHR and set out obligations on corporations to promote and protect human

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<sup>144</sup> A. Clapham, S. Jerbi, “Categories of Corporate Complicity in Human Rights Abuses” (2001) 24 *Hastings Int’l & Comp. L. Rev.* 339 at 340.

<sup>145</sup> Beyond Voluntarism, *supra* note 2 at 72-73.

<sup>146</sup> M. T. Kamminga and S. Zia-Zarifi, “Liability of Multinational Corporations under International Law: An Introduction” in M. T. Kamminga & S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague, London and Boston: Kluwer Law International, 2000) at 8.

<sup>147</sup> See Beyond Voluntarism, *supra* note 2 at 64. France’s proposal that the ICC have jurisdiction over both natural and legal persons was ultimately withdrawn due to a lack of consensus on appropriate formulations of such jurisdiction. See A. Ramasastry, “Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations” (2002) 20 *Berkeley J. Int’l L.* 91 at 155-156.

<sup>148</sup> Ramasastry, *supra* note 147 at 153.

rights. The obligations outlined in these documents, however, are voluntary and not legally binding.<sup>149</sup>

While it may be arguable that corporations acting transnationally have a moral duty to respect human rights such as those set out in the Universal Declaration of Human Rights and *jus cogens* norms, there is currently no clear legal duty to do so. As Barbara Frey remarks, “[i]n terms of international liability, ... TNCs risk little if they are complying with the domestic laws of the countries in which they are doing business.”<sup>150</sup>

## 2. Indirect Liability of Transnational Corporations under International Law – State Responsibility and Human Rights Duties

### a) General International Law

Under general international law states may be held liable in certain circumstances for the acts of private parties.<sup>151</sup> For example, under the rules regarding the treatment of aliens states have been held responsible for failing to exercise due diligence either in preventing injury to non-nationals or in ensuring due process of law.<sup>152</sup>

The International Law Commission’s (the “ILC”) commentary on the recently revised Draft Articles on Responsibility of States notes that a state is only responsible for the acts of private individuals where the state exercised control over the individual.<sup>153</sup> On the other hand, according to the ILC there are circumstances in which, a state would still be “responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects”, thus to exercise

<sup>149</sup> This is specifically noted in the OECD Guidelines. See OECD, “The OECD Guidelines for Multinational Enterprises”, *OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International Investment and Multinational Enterprises, DAF/FE/IME, (2000) 20, Annex 1 at 9 cited at <http://www.oecd.org/EN/document/0,,EN-document-93-3-no-6-18925-0,00.html> (visited December 3, 2002) [hereinafter, “OECD Guidelines Basic Texts”].

<sup>150</sup> Barbara A. Frey, “The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights”, (1997) 6 *Minn.J. Global Trade* 153, at 163.

<sup>151</sup> For a discussion of the issue of state responsibility for the acts of private parties and for human rights violations of TNCs, see Silvia Danailov, “The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations”, (Geneva, October 1998). Cited at: [http://www.humanrights.ch/bildungarbeit/seminare/pdf/000303\\_danailov\\_studie.pdf](http://www.humanrights.ch/bildungarbeit/seminare/pdf/000303_danailov_studie.pdf).

<sup>152</sup> Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford: Clarendon Press, 1983) at 161.

<sup>153</sup> Report of the International Law Commission (53<sup>rd</sup> Session), UN GAOR, 56<sup>th</sup> Sess. Supp. No. 10, UN Doc. A/56/10(SUPP) (2001) reproduced in James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge and New York: Cambridge University Press, 2002) at 91 and 121 [hereinafter: Draft Articles Commentary]. See also *Prosecutor v. Tadic* (1999), Case No. IT-94-1 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), 38 I.L.M. 1518, at 1541, para. 117, cited in Draft Articles Commentary at 111.

due diligence, even though the private actors cannot be considered state agents.<sup>154</sup> The ILC cites the example of the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. In that case Iranian militants seized control of the U.S. Embassy in Tehran and took the diplomatic and consular staff hostage. The International Court of Justice found Iran to be responsible for the acts of the militants on the basis that the authorities did nothing to try to prevent the seizure and subsequently endorsed the actions of the militants.<sup>155</sup> According to the ILC, “a receiving state is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it”.<sup>156</sup>

Regarding the acts of corporations, it would appear that even if the company in question is wholly owned by the state, its acts would not be *prima facie* attributable to that state.<sup>157</sup> “The fact that the State initially established a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.”<sup>158</sup> Rather, for such acts to be attributable to the State, the company must be “empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority”.<sup>159</sup> In addition, the conduct in question must “concern governmental activity and not other private or commercial activity in which the entity may engage”.<sup>160</sup>

The conduct of a corporation involved in private or commercial activity within a state’s territorial jurisdiction, therefore, would not be attributable to the state under general international law unless the state itself fails to exercise due diligence in preventing the effects of such private conduct that violate a state’s international legal obligations. The extraterritorial private or commercial activity of a corporation does not appear to be attributable to a home state even where such conduct would likely violate a state’s international obligations if it took place within the home state. There is no apparent obligation incumbent on a home state to exercise due diligence to prevent the effects of the extraterritorial activities of corporate nationals. Indeed

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<sup>154</sup> *Ibid.*, at 92.

<sup>155</sup> See *Case Concerning United States Diplomatic and Consular Staff in Teheran* (United States of America v. Iran) [1980] I.C.J. Rep. 3 at paras 57, 69-71.

<sup>156</sup> Draft Articles Commentary, *supra* note 153 at 92.

<sup>157</sup> *Ibid.*, at 112.

<sup>158</sup> *Ibid.* The ILC cites the examples of the Workers’ Councils considered in *Schering Corporation v. Islamic Republic of Iran*, (1984) 5 Iran-U.S.C.T.R. 361; *Otis Elevator Co. v. Islamic Republic of Iran*, (1987) 14 Iran-U.S.C.T.R. 283; *Eastman Kodak Co. v. Islamic Republic of Iran*, (1987) 17 Iran-U.S.C.T.R. 153.

<sup>159</sup> Draft Articles Commentary, *supra* note 153 at 100.

<sup>160</sup> *Ibid.*, at 101.

Brownlie notes that absent a specific treaty obligation, states have no duty to control the activities of their nationals outside of their territorial jurisdiction.<sup>161</sup>

b) *International Human Rights Law*

This appears also to be the case under international human rights law. Under these laws, states are required to respect and ensure respect for the human rights of individuals within their territory and subject to their jurisdiction.<sup>162</sup> Traditionally, the human rights of individuals were only protected against the acts of states, their organs, or individuals or entities acting on behalf of the state. However, recent human rights jurisprudence supports the view that states may now be held legally accountable in certain circumstances for the acts of private parties.

In *Velásquez Rodríguez*, the Inter-American Court of Human Rights held that violations of human rights by a private party may entail international legal responsibility of the state in which the act was committed where the state fails to prevent the violation or to punish the perpetrators. The Court stated that:

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>163</sup>

This line of reasoning has also been echoed in the recent jurisprudence of the European Court of Human Rights. In *A v. United Kingdom*, for example, the UK was found to be responsible where a child was severely beaten by his stepfather with a cane and the latter was subsequently acquitted of the charge of assault causing bodily harm on the defence of reasonable chastisement. The European Court of Human Rights found that the U.K. had breached its obligation under Article 3 of the Convention to take measures to ensure that individuals within its jurisdiction were “not subjected to

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<sup>161</sup> Brownlie, *supra* note 152 at 165. See also Ignaz Seidl-Hohenfeldern, *International Economic Law* (Dordrecht, The Netherlands, Boston: Martinus Nijhoff, 1989) at 159-160. Seidl-Hohenfeldern notes that despite the lack of a general rule there may be situations in which a state could be held responsible for the acts of its national corporations: “for example, the export tolerated by the authorities of the home country, of goods, whose sale in the home country is banned on account of health risks” (p. 159).

<sup>162</sup> Article 2(1) of *International Covenant on Civil and Political Rights* (ICCPR) (1966) at (1967) 61 I.L.M. 368. See also article 2(1) of *International Covenant of Economic Social and Cultural Rights* (ICESCR) G.A. Res. 2200, U.N. Doc. A/6316 (1966).

<sup>163</sup> *Velásquez Rodríguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C), No. 4, at para. 172, 28 I.L.M. 291 at 325.

torture or inhumane or degrading treatment or punishment, including such ill-treatment administered by private individuals".<sup>164</sup> In some human rights forums states have also been held responsible for the extraterritorial acts of their organs or agents.<sup>165</sup> However, the responsibility to exercise due diligence to protect individuals from the acts of private parties has not so far been extended to responsibility for acts occurring outside a state's territorial jurisdiction.

It appears that although states are in certain circumstances liable for the acts or conduct of private actors, a state is not necessarily liable for extraterritorial acts of its national corporations under either general international law or international human rights law. Nor does the state have a duty to exercise due diligence to prevent or punish its national corporations for commission of human rights violations outside its territorial jurisdiction.

### 3. State Legislation

No state has yet enacted specific legislation to regulate the extraterritorial activities of corporate nationals where such activities may have a detrimental effect on the human rights of individuals in host states. Legislatures in the U.K., the U.S.<sup>166</sup>

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<sup>164</sup> *A. v. United Kingdom*, (1998) 21 E.H.R.R. 611 at 629. See also *X and Y v. The Netherlands*, (1985) 91 E.C.H.R. Series A.

<sup>165</sup> See for example, *Delia Saldias de Lopez v. Uruguay*, UN HRC, 13<sup>th</sup> Sess., Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 (1984), at 88, paras. 12.1-12.2; *Loizidou v. Turkey* (1995), 310 Eur. Ct. H.R. (Ser. A) (Preliminary Objections), at para. 62; *Loizidou v. Turkey* (1996), 1996-VI Eur. Ct. H.R. 2216 (Merits), at para. 57; and *Coard et al. v. US* (1999), Inter-Am. Comm. H.R. No. 109/99, at para. 37, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106 Doc. 6 rev at para 37, cited in Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001) at 361-363.

<sup>166</sup> The US Corporate Code of Conduct Act was introduced in August of 2001 and if adopted, it would require US nationals (including their subsidiaries, affiliates, joint ventures, partners, and licensees) who employ more than 20 persons in a foreign country to implement and monitor the code of conduct set out in the bill "with respect to the employment of those persons". The wording suggests that the code applies to employment practices although the principles set out in the code are much broader. The human rights provisions are minimal, requiring simply that companies "[c]omply with minimum international human rights standards" (Sec 3(6)). "Minimum international human rights standards" are defined as those standards set out in the UDHR, the International Covenant on Civil and Political Rights, the Torture and Genocide Conventions and the two Slavery Conventions (Sec. 3(c)(3)). There is no elaboration of steps a company should take to comply with these obligations. In addition, the monitoring envisioned by the bill is not independent. Companies are required to implement and monitor their own compliance with the code of conduct "through a self-financing program internal to the business that is designed to prevent and detect conduct that is not in compliance". (Sec. 3(b)(8)).

The reporting requirements only capture companies that contract with the government or receive foreign trade and investment assistance. Such companies must submit an annual report to each of the Secretaries of Commerce, Labor and State and the Administrator of Environmental Protection

and Australia<sup>167</sup> are currently considering draft legislation that would require accountability for some aspects of overseas corporate activity. While the prospects of

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Agency. The report must describe the company's monitoring program and how it is implemented, as well as progress towards compliance, and would be publicly available. A compilation of such reports is required to be submitted jointly to Congress by the specified departments and agencies (Sec. 7).

The strength of the bill lies in the compliance mechanisms. Incentive to comply is three pronged. First, preference in the award of contracts and the provision of foreign trade and investment assistance by the US government will only be given to corporations with appropriate codes of conducts (Sec. 4). This includes the provision of financial and investment assistance to exporters under the Overseas Private Investment Corporation (OPIC). Second, the penalty for non-compliance may be a loss of preference and of assistance by US government agencies (Sec. 6). Finally, individuals can bring petitions of complaint that would lead to a public investigation process and determination by the "appropriate Federal official". The "appropriate Federal official" is defined as one of the Secretaries of Commerce, Labor and State or the Administrator of Environmental protection Agency. The Secretaries of Commerce, Labor and State and the Administrator of Environmental Protection Agency may establish a Special Committee to make recommendations on petitions. The members of a Special Committee are required to "have the necessary expertise relevant to the issues raised in any petition to be considered" (Sec. 5). The Federal official and any member of a special committee are entitled, but not required, to seek advice from external experts.

In addition to the investigation process, the Act provides for liability for damages and a civil cause of action to any individual (this appears to include non-nationals) aggrieved by violation of the Act (Sec. 8(2)). U.S., Bill H.R. 2782, Corporate Code of Conduct Act, 107<sup>th</sup> Cong., 2001, cited at <http://www.theorator.com/bills107/hr2782.html> (visited August 12, 2002)

<sup>167</sup> The Australian Corporate Code of Conduct Bill is the weakest of the three. It seeks to impose environmental, human rights, health and safety and employment standards on "Australian corporations or related corporations which employ more than 100 persons in a foreign country" (Sec. 3). Extraterritorial application of the Act is specifically provided for (Sec. 4). The human rights standards are minimal and mainly refer to human rights issues related to non-discrimination and equality of opportunity in employment (Sec. 10). They do not address issues of complicity in grave violations of human rights although the employment standards prohibit forced and child labour (Sec. 9). Companies are required submit a Code of Conduct Compliance Report to the Australian Securities and Investments Commission (Sec. 14) which in turn files an annual report on the Act to Parliament (Sec. 15). Reporting requirements appear to be less rigorous than those set out in the U.K. and are more broadly applicable than those set out in the U.S. legislation. A report must include among other things, a statement of corporate social, ethical and environmental policies, a statement of contravention of standards of the host state where the company operates and an independent auditing of environmental impacts (Sec. 14). Although the definition of environment includes "the social, economic and cultural aspects" of a location or ecosystem (Art. 6), it is not clear that an environmental impact assessment would include a human rights assessment. There is also no requirement that the reports be independently verified and there is no clarification of what is meant by "independent" for the purposes of the environmental audit.

Failure to comply with the law may lead to civil penalty (Sec. 16). In addition the bill provides a civil cause of action for any person "whether resident in Australia or elsewhere", who suffers loss or injury as a result of violation of this law. Remedies prescribed by the bill include injunctive relief and compensation (Sec. 17). See Australia, Bill 00163, Corporate Code of Conduct Bill, Senate 2002, cited at <http://search.apf.gov.au/search/ParlInfo.ASP?action=browse&Path=Legislation/Current+Bills+by+Title.&Start=1&m3k#top> (visited in August 12, 2002).

these bills becoming law do not appear to be promising,<sup>168</sup> the fact that such laws are being drafted, read and debated may represent emerging state practice in support of unilateral regulation of TNC extraterritorial conduct.<sup>169</sup>

a) *United Kingdom*

The U.K. Corporate Responsibility Bill,<sup>170</sup> introduced in the House of Commons on June 12, 2002 and subsequently withdrawn, is the most detailed of the three bills covering not only reporting requirements but also expanded directors' duties and liability as a means to ensure compliance. The bill applies to all UK registered companies wherever they operate and companies operating in the UK (including their subsidiaries) with "an annual turnover of £5 million". On human rights, the bill outlines the duty of companies to prepare and publish annual reports on significant

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<sup>168</sup> The U.K. bill was introduced as a private members bill by Labour MP Linda Perlam to the House of Commons on June 12, 2002 and later was withdrawn. A new bill, the Corporate Responsibility (Environmental, Social and Financial Reporting) Bill was tabled on October 15, 2002 and was provisionally scheduled for a 2nd Reading on November 14<sup>th</sup>. However, there is no indication that the bill was debated. See <http://www.publications.parliament.uk>. The U.S. bill was introduced in the House of Representatives by Democrat Congresswoman Cynthia McKinney on August 2, 2001 and has been referred to various House committees and subcommittees. See <http://thomas.loc.gov>. The Democrats introduced the Australian bill. A report by the Parliamentary Joint Statutory Committee on Corporations and Securities found the draft legislation to be "impracticable and unwarranted". See The Parliament of the Commonwealth of Australia, "Report on the Corporate Code of Conduct Bill 2000", Parliamentary Joint Statutory Committee on Corporations and Securities, June 2001 at para. 4.5., cited at [http://www.aph.gov.au/senate/committee/corporations\\_ctte/corp\\_code/codeofconductreport.pdf](http://www.aph.gov.au/senate/committee/corporations_ctte/corp_code/codeofconductreport.pdf). On the human rights provision, the committee found that the clause requiring non-discrimination in employment practices "could be a source of friction with other nations" and that the bill therefore had "the potential to unnecessarily damage Australian foreign relations". See paras. 4.26-4.28. The report also contains a minority report by the Democrats that dissents from the finding of the majority. This latter report states: "I conclude that the Bill cannot proceed without amendment; however, I disagree with rejecting the Bill outright". One of the amendments suggested was that the Bill should "make explicit reference to and require compliance with" the UDHR, ICCPR, ICESCR, the Convention on the Elimination of Racial Discrimination, CEDAW and the Convention on the Rights of the Child. See Senator Andrew Murray: Australian Democrats, "Minority Report on the Corporate Code of Conduct Bill 2000" at paras. 6 and 66 respectively. The authors would like to thank Professor Robert McCorquodale and Stephen Bouwhuis for providing information on the status of the Australian and U.K. Bills.

<sup>169</sup> See discussion *infra* at 111.

<sup>170</sup> Bill 145, Corporate Responsibility Bill (U.K.), 2001-0220 Sess., 2002, cited at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/145/2002145.htm> (visited August 12, 2002). The above description refers to the first Corporate Responsibility Bill, which has been withdrawn. See *supra* note 168. The new bill, Corporate Responsibility ((Environmental, Social and Financial Reporting) Bill, was ordered to be printed as Bill 193 on October 15, 2002, but is not yet available on the website.

social impacts of both operations and proposed activities, and to “take reasonable steps” to make the reports available to stakeholders, oversight bodies or other interested persons.<sup>171</sup> In addition, for proposed major projects, prior to “making a final decision as to the project or the nature of it” companies would be required to consult and respond to stakeholder concerns, and as part of this consultation, produce an environmental, social and financial impact assessment of the proposed project.<sup>172</sup>

There is no requirement to have reports independently audited or verified, although there is provision for public access to background information used in the preparation of a report or assessment.<sup>173</sup> The Bill also requires the Secretary of State to establish a Corporate Responsibility Board, the composition of which must include both stakeholders and persons with expertise and experience in the environmental, social, economic and financial impacts of corporate operations. The Board would have duties to enact guidelines on (among other things) report content, to investigate breaches of compliance and to conduct random audits of companies.<sup>174</sup>

The Bill also imposes duties on directors of companies captured by the legislation to consider the social impacts of operations and proposed operations, the interests of stakeholders, and to minimize any negative impacts, as well as to disclose “relevant training or qualifications” they may have in “social matters”. It makes directors liable for negligence and wilful misconduct in relation to the duties of the company or to the disclosure of information.<sup>175</sup> It provides a variety of remedies for stakeholders including a right of action against the company and directors,<sup>176</sup> as well as penalties for those in breach of the provisions, ranging from fines or imprisonment, to delisting of the company and a requirement to cease operations.<sup>177</sup>

#### b) *Canada*

Canada has no specific legal mechanism for regulating the extra-territorial activities of Canadian companies where such companies are complicit in or benefiting from human rights violations in another state. Nor does the Canadian government require Canadian companies to adhere to a code of conduct that obliges companies to respect human rights or to conduct an independent human rights impact assessment<sup>178</sup>

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<sup>171</sup> *Ibid.*, Section 3.

<sup>172</sup> *Ibid.*, Section 4.

<sup>173</sup> *Ibid.*, Section 5.

<sup>174</sup> *Ibid.*, Section 9.

<sup>175</sup> *Ibid.*, Section 7 and 8.

<sup>176</sup> *Ibid.*, Section 10.

<sup>177</sup> *Ibid.*, Sections 10 and 11.

<sup>178</sup> The Task Force on Internationalization of Norwegian Trade and Industry and the Forum for Development and the Environment has developed a voluntary code of conduct regarding the extraterritorial conduct of Norwegian companies that addresses corporate activity in conflict zones. It requires Norwegian companies to prepare “entry and exit strategies”, including pre-investment



and tie such compliance to tax exemptions or the range of export development services.<sup>179</sup>

Within Canadian law there are a variety of legal mechanisms that, although not an adequate substitute for specific legislation in this regard, could be used to help influence corporate overseas conduct regarding human rights. These include incentive, coercive and facilitative mechanisms. Incentive and coercive mechanisms are those legal mechanisms available to the government that would enable it to induce or compel Canadian companies to improve or change their conduct with respect to human rights in international operations. Facilitative legal mechanisms refer to regulatory measures that enhance the ability of private actors to exercise their market power as consumers and/or shareholders.

(i) *Incentive and Coercive Mechanisms*

A recent study by the Canadian Lawyers Association for International Human Rights (CLAIHR) reviews a variety of incentive and coercive legal mechanisms available to the Canadian government. The most important of these mechanisms are the foreign tax credit provisions of the *Income Tax Act*, Export Development policies and practices the Area Control List under the *Export and Import Permits Act*, the Special Economic Measures Act (SEMA) and the *Crimes Against Humanity and War Crimes Act*.<sup>180</sup>

Incentive mechanisms

The foreign tax credit provisions of the *Income Tax Act*, allow corporations to deduct taxes paid in foreign jurisdictions. CLAIHR found that even in cases where the Canadian Government had annulled tax treaties with certain states on human rights grounds, Canadian corporations were still allowed to continue to deduct taxes paid to those states under these provisions.<sup>181</sup> In addition, it noted that no rule

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risk assessments. Strong disclosure requirements are also outlined. The “Guidelines Concerning Human Rights and Environment for Norwegian Companies Abroad”, cited at <http://www.milli.no/~forum/dokumenter/guidelines.rtf>. (visited August 12, 2002)

<sup>179</sup> The Dutch Government has recently taken the initiative to tie compliance with the OECD Guidelines with the availability of certain export development credits. See *infra* at 111. As noted above the proposed US legislation ties compliance to preference in government procurement contracts and provision of foreign trade and investment assistance. See *supra* note 166.

<sup>180</sup> *Crimes Against Humanity and War Crimes Act* 2000, c. 24. CLAIHR’s study was completed at the time of first reading of the proposed legislation that underwent a number of minor changes before it was passed.

<sup>181</sup> CLAIHR, Backgrounder: Options Available to the Government of Canada in Responding to Canadian Corporate Complicity with Human Rights Abuses (2000) at 11, cited at <http://www.claihr.org/business/corpcomp.pdf> (visited February 7, 2002) [hereinafter “CLAIHR, Complicity Backgrounder”].

currently exists to prevent corporations making business expense deductions with respect to international activities in the calculation of corporate income tax even where the project in question raises serious human rights concerns.<sup>182</sup>

Export Development Canada (EDC) provides trade finance services such as guarantees, political risk insurance, direct loans and lines of credit to support Canadian exporters and investors abroad. Recent legislation now requires those seeking export development assistance from the EDC, to take into account the environmental impact. EDC will conduct an environmental impact review if a transaction is over \$10 million SDRs (about US\$10 million), where the project in question falls within a certain category.<sup>183</sup> Categories are determined according to the potential environmental effect. Such reports must include mitigating measures to alleviate any potentially negative environmental and social impacts. Although “environmental effect” is defined to include project related social impact,<sup>184</sup> there is no language referring to the human rights impact of a project. The EDC now conducts project-level risk assessments “which include where relevant, considerations of human rights and social impacts”.<sup>185</sup> The EDC maintains, however, that it has no legal

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<sup>182</sup> *Ibid.*, 11-12.

<sup>183</sup> According to Pamela Foster of the Halifax Initiative, most projects do not fall into the category requiring full EIAs and there is no required public disclosure of such assessments. Companies conducting EIAs are not required to follow the Environmental Assessment Act methodological requirements, but may choose their own assessment methodology from a list of guidelines that may not require stakeholder consultation. (Telephone Conversation with Pamela Foster, Halifax Initiative, (November 25, 2002). Where stakeholder consultation is conducted there is no prescribed methodology that must be followed. (See Export Development Canada, EDC’s *Environmental Review Directive* (2001), Annex 3, p. 10), cited at [http://www.edc.ca/corpinfo/csr/environment/Environmental\\_Review\\_Directive\\_e.pdf](http://www.edc.ca/corpinfo/csr/environment/Environmental_Review_Directive_e.pdf). (visited March 10, 2002). According to representatives of the EDC, specifying a for stakeholder consultation methodology is unnecessary. Corporations are expected to follow best practices in this area and the EDC claims that its review of the consultation will determine whether or not it was genuine (Telephone Conversation with Yolanda Banks, Corporate Social Responsibility Advisor, Patrick Doyle, Director, PRAD, Fergal O’Reilly (PRAD), September 18, 2002) [hereinafter, “Telephone conversation with Yolanda Banks et al.”].

<sup>184</sup> “Environmental effect” is defined as “any change to the environment, including any project-related social impact, as a result of the normal construction or operation of the project ...”. See EDC’s Annex 1, *supra* note 183 at 6.

<sup>185</sup> Email from Yolanda Banks, Corporate Social Responsibility Advisor, Export Development Canada, (August 29, 2002).

obligation to specifically assess the human rights impact of a particular project.<sup>186</sup> The agency does not yet have a methodology in place for doing so.<sup>187</sup>

Further, while the EDC relies on the Department of Foreign Affairs and International Trade (“DFAIT”) to indicate potential problem states “where export trade is not appropriate given the local human rights situation”,<sup>188</sup> apart from providing a list of sanctioned countries DFAIT does not prohibit the financing of projects in particular states where human rights may be a matter of concern.<sup>189</sup>

### Coercive Mechanisms

The *Export and Import Permits Act*’s ‘Area Control List’, gives Cabinet the discretion to “establish a list of countries” where it deems “it necessary to control the export of goods”. Corporations who wish to export goods to a state listed on the Area Control List would be required to obtain a ministerial permit.<sup>190</sup> CLAIHR notes that this mechanism “provides the Government of Canada with a fairly flexible means of controlling the transfer of equipment to problematic projects” and that “[j]udicious use of the Act might enable the government to deter Canadian business operations in repressive regimes”. It goes on to state, however, that the effectiveness of using this list is limited since 1) it appears it does not entirely prohibit the diversion of exports, and 2) it will only be effective if used within a certain time frame (i.e. before a particular project is completed).<sup>191</sup>

The *Special Economic Measures Act* (“SEMA”) is currently the most powerful tool available to government to influence the extraterritorial behaviour of Canadian corporations. It allows Cabinet to impose a range of economic sanctions against a state regardless of whether or not a UN Security Council Resolution exists calling for such sanctions and could be used to require a Canadian company to cease operations in a particular state.<sup>192</sup> Such sanctions may be imposed either “in response to a call for

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<sup>186</sup> Email from Yolanda Banks, Corporate Social Responsibility Advisor, Export Development Canada, (September 30, 2002). Pamela Foster noted that the Government of Canada has such a legal obligation, and therefore EDC, as a Crown Corporation, may also have an obligation. See *supra* note 183.

<sup>187</sup> Telephone conversation with Pamela Foster, *supra* note 183. According to representatives of the EDC, the Political Risk Assessment Department (PRAD) is in the process of developing such a methodology. Telephone conversation with Yolanda Banks et al., *supra* note 183.

<sup>188</sup> Email from Yolanda Banks, *supra* note 185.

<sup>189</sup> Telephone conversation with Yolanda Banks et al., *supra* note 183. A representative noted during the conversation that Burma was on the list but that Sudan was not.

<sup>190</sup> CLAIHR, Complicity Background, *supra* note 181 at 16.

<sup>191</sup> *Ibid.*

<sup>192</sup> CLAIHR, Legislative Proposal: Ensuring that the Special Economic Measures Act is a Tool That May Be Used in Responding to Canadian Corporate Complicity with “Grave Breaches of

such measures by an international organization of which Canada is a member, or ... where Cabinet is of the opinion there is, or likely will be, a grave breach of international peace and security likely to lead to a serious international crisis".<sup>193</sup>

As CLAIHR notes, Cabinet has only invoked the Act on two occasions and never pursuant to a determination of an existing or impending breach of international peace and security.<sup>194</sup> In the case of Talisman Energy, sanctions against Sudan under SEMA were threatened but never actually imposed on the basis that: 1) the Act could only be used in the case of a 'grave breach of international peace and security'; and 2) the determination of the existence of such a breach was the responsibility of the UN Security Council.<sup>195</sup> The Department of Foreign Affairs and International Trade (DFAIT) still maintains this position.<sup>196</sup>

A legislative proposal, produced by CLAIHR on behalf of the Canadian Friends of Burma and the Sudan Interagency Reference Group (SIARG), has suggested specific amendments to SEMA and other legislation that would allow the government to use the Act to respond to certain cases of corporate complicity in human rights abuses.<sup>197</sup> To date, no changes have been made to the to Act.<sup>198</sup>

Finally, CLAIHR's study notes that the new<sup>199</sup> *Crimes Against Humanity and War Crimes Act*,<sup>200</sup> may facilitate the prosecution of corporations or its directors, officers and employees, for complicity in "crimes against humanity". The Act, designed primarily to implement the Rome Statute of the International Criminal Court, came into force in October 2000, and has repealed certain provisions of the *Criminal Code of Canada*. It creates a new offence for a civilian in a position of authority ("a superior")<sup>201</sup> who, outside of Canada "fails to exercise control properly over a person under their effective authority and control, and as a result the person commits" genocide, a crime against humanity, a war crime either inside or outside Canada. Subsection 7(6) defines "superior" as "a person in authority other than a military commander". The Act does not, however, as a previous draft of the legislation had proposed,<sup>202</sup> overrule

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Human Rights and Human Security (2000) at 3, cited at <http://www.claihr.org/business/semaprop.pdf>. [hereinafter, "CLAIHR, Legislative Proposal"]

<sup>193</sup> CLAIHR, Complicity Backgrounder, *supra* note 181 at 17.

<sup>194</sup> CLAIHR, Legislative Proposal, *supra* note 192 at 3.

<sup>195</sup> CLAIHR, Complicity Backgrounder, *supra* note 181 at 19.

<sup>196</sup> Interview with Shawna Christianson and Alisa Postner, (Faculty of Law University of Toronto, May 15, 2002) [hereinafter, "Interview with Shawna Christianson"].

<sup>197</sup> CLAIHR, Legislative Proposal, *supra* note 192, Annex A.

<sup>198</sup> Email from Thomas Fetz, Department of Foreign Affairs and International Trade (August 15, 2002).

<sup>199</sup> CLAIHR's study was completed at the time of first reading of the Bill.

<sup>200</sup> Crimes Against Humanity and War Crimes Act, *supra* note 180.

<sup>201</sup> CLAIHR, Complicity Backgrounder, *supra* note 181 at 25.

<sup>202</sup> *Ibid.*

the Supreme Court of Canada decision in *R v. Finta*. In that case the Court held that for certain acts to be considered a crime against humanity, the essential elements of the offence must be “undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.”<sup>203</sup> This narrows the circumstances in which corporations, or their directors, officers or employees will be able to be prosecuted for complicity in crimes against humanity.

Like the previous sections of the *Criminal Code*, the Act also includes a provision making it a criminal offence to conspire, attempt to commit or be an accessory after the fact or to counsel others in relation to the commission of genocide, crimes against humanity or war crimes. CLAIHR notes that the new Act makes it an offence for a person to “possess any property or any proceeds of property” with the knowledge that some or all of the property or proceeds “derived directly or indirectly” from *inter alia* genocide, crimes against humanity or war crimes committed outside of Canada or the commission of an offence under the Act either by a military commander or by a superior.

These mechanisms do provide the government with potential tools with which it could influence the conduct of Canadian corporate actors working in zones of conflict. We contend, however, that even if these laws were amended to influence corporate behaviour, on their own they are not sufficient to protect against corporate complicity in human rights abuses. Both the *Exports and Imports Permit's Act* and SEMA rely on ministerial discretion and therefore on political will. Criminal sanctions only address the issue *ex post facto*. As CLAIHR notes, such sanctions do not effectively address the need to prevent or stop corporate complicity in human rights abuses since they are applicable only once such crimes have been committed.<sup>204</sup> The development of policies, rules and compliance mechanisms specifically directed to the issue of corporate complicity in human rights abuses are required to address the problem.

#### (ii) *Facilitative Mechanisms*

Critics of direct government regulation of TNC extraterritorial activity argue that market pressure should determine and regulate corporate action. However, in order for market pressure to be considered a legitimate form of regulation – and we argue that it is not sufficient – private actors must be able to make informed choices regarding investment. The Canadian Democracy and Corporate Accountability Commission (the “CDCA”) notes that such decisions include those “driven by concerns about a company’s records as a socially responsible firm”.<sup>205</sup>

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<sup>203</sup> *R. v. Finta* [1994] 1 SCR 701, at para 185.

<sup>204</sup> CLAIHR, Complicity Backgrounder, *supra* note 181 at 25.

<sup>205</sup> Canadian Democracy and Corporate Accountability Commission, “The New Balance Sheet: Corporate Profits and Responsibility in the 21<sup>st</sup> Century”, Final Report (January, 2002) at 20 cited

c) *Domestic Disclosure and Corporate Laws*

Compared with other jurisdictions, Canada has few legal mechanisms that enhance the ability of private actors to challenge the conduct of TNCs in this regard. Australia and the U.K., for example, have introduced amendments to their pension fund laws that allow pension fund managers greater latitude to adopt socially responsible investment (SRI) policies without violating their fiduciary duty to maximize financial gain for fund members. These amendments have also introduced transparency provisions that require disclosure of the extent to which “social environmental and ethical considerations are taken into account in the selection, retention and realisation of investments”.<sup>206</sup> These provisions provide investors with the means to exert market pressure on fund managers. Canada has no such legislation.<sup>207</sup>

Canada is lagging behind equally in the area of mandatory disclosure requirements for corporations on social and environmental performance. Several European states, including Denmark, Holland and most recently France, have passed legislation requiring corporations to report on social and environmental issues.<sup>208</sup> As noted by the CDCA, Canadian corporate laws do not require corporations to report

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at <http://www.corporate-accountability.ca/index.htm> (visited Nov. 27, 2002) [hereinafter, “The New Balance Sheet”].

<sup>206</sup> See for example U.K., *Occupational Pension Schemes (Investment) Regulations* (1996), Section 11A cited at <http://www.hmsso.gov.uk/si/si1999/19991849.htm> and the Australian *Financial Services Reform Act* (2001), Article 1013DA(1)(1) cited at <http://scaleplus.law.gov.au/html/pasteact/3/3474/pdf/FinanServReform01.pdf>. The latter Act is broader than the U.K. Act in that it explicitly includes labour standards in the list of social, environmental and ethical standards. The Australian legislation also addresses the problem of SRI standards by giving the Australian Securities and Investment Commission the power to develop mandatory guidelines. See Article 1013D. Germany and France have introduced similar legislation. See “The New Balance Sheet”, *supra* note 205 at 18. In addition, draft legislation in Belgium will require private sector pension fund managers to file annual reports with the governments stipulating whether they take SRI criteria into account. See <http://cdv-oca.be/fr/atwpijl.htm>.

<sup>207</sup> “The New Balance Sheet”, *supra* note 205 at 18.

<sup>208</sup> “Need for New Law on Companies’ Green Reporting: Big Business Scorns PM’s Call for Green Reporting”, Press Release, Friends of the Earth, April 4, 2002 cited at <http://www.foe.co.uk/pubsinfo/infoteam/pressrel/2002/20020404113656.html> (visited November 24, 2002). France’s new law, *les nouvelles regulations économique* (NRE) is a revamped corporate law that includes provisions requiring disclosure on “social and environmental issues, including human rights, local impacts and dialogue with stakeholders”. However, some shortcomings in these provisions have been noted such as the ambiguity as to whether the new regulations require companies to report on international operations or simply its domestic operations. See William Baue, “New French Reporting Law Mandates Corporate Social and Environmental Reporting”, SocialFunds.com, Corporate Governance and Public Policy Articles, March 14, 2002 cited at <http://socialfunds.com/news/article.cgi/article798.html> (visited November 24, 2002).

on their human rights policies or performance.<sup>209</sup> Securities laws and regulations require such disclosure only where it is deemed by management that such issues have or “would reasonably be expected to have a significant impact on the market price or value” of the securities in question. Materiality “varies depending on context and is strongly influenced by the size of the firm, its profits and assets, and similar considerations”.<sup>210</sup>

Canada has recently amended the *Canada Business Corporations Act* to expand the power of shareholders to bring resolutions relating to ethical issues. As of November 24, 2001, directors of companies incorporated under the Act may no longer exclude a shareholder resolution from being circulated and voted on at an annual general meeting on the grounds that it pertains “primarily to general economic, political, racial, religious, social or similar causes”.<sup>211</sup> The Act also now allows such resolutions to be brought by beneficial shareholders. While these changes have improved the potential for shareholder activism in a substantive way, there are technical aspects to the amendments that have rendered its use by beneficial shareholders problematic.<sup>212</sup> As well, without disclosure requirements these provisions will only aid activist shareholders with the time and resources to research corporate conduct in this area.

Some corporations including Talisman choose to voluntarily disclose information on corporate social and environmental performance. As will be discussed in the next section, however, there are currently no domestic generally accepted reporting standards that set out appropriate principles, processes and methodologies for social performance reporting or social auditing.<sup>213</sup> This leaves room for corporations and their social auditors to produce reports that may not address significant human rights issues related to corporate overseas activity and to provide a misleading appearance of social responsibility. Current social auditing or verification practices are also a concern due to the lack of generally accepted social auditing standards, issues of transparency and independence and auditor expertise.

The U.S. has recently passed new legislation that aims to improve the accuracy and reliability of corporate disclosures made pursuant to the securities laws. Among other provisions, the Sarbanes-Oxley Act of 2002 introduces more stringent conflict of interest rules for auditors and the establishment of a body to monitor auditing

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<sup>209</sup> “The New Balance Sheet”, *supra* note 205 at 16.

<sup>210</sup> *Ibid.*

<sup>211</sup> *An Act to amend the Canada Business Corporations Act and the Canada Cooperatives Act and to amend other Acts in Consequence*, S.C. 2001, c. 14, s-s 59(3).

<sup>212</sup> Comments on Regulatory Impact Analysis Statement for Bill S-11 (CBCA), Letter from Gil Yaron, Director of Law and Policy, Shareholder Association for Research and Education, to Robert Weist, Director, Compliance Branch, Corporations Directorate, Industry Canada, March 22, 2002.

<sup>213</sup> The Canadian Institute of Chartered Accountants is developing the Canadian Performance Reporting Initiative to provide such guidelines. See “The New Balance Sheet”, *supra* note 205 at 12.

practice.<sup>214</sup> Canada has not enacted such legislation but the Canadian Institute of Chartered Accountants has recently released draft legislation that proposes new conflict of interest rules for auditors. Commentators argue, however, that the proposed regulations do not go far enough and are not as tough as the recently enacted US legislation on this issue.<sup>215</sup>

Canada also has no laws to protect employees who discover and disclose information of human rights violations related to the extraterritorial activities of Canadian corporations. The U.K. has recently enacted the *Public Interest Disclosure Act* (1998)<sup>216</sup> that aims to protect whistleblower employees who disclose information that they have reasonable cause to believe or shows that, *inter alia*, a criminal offence, illegal act, miscarriage of justice, environmental damage or human health or safety risk has, is or will likely occur.<sup>217</sup> It outlines rules of disclosure and exceptions for areas like national security.<sup>218</sup> Employees who are victimized for whistle blowing are entitled to bring a claim to a special tribunal where they may be awarded compensation.<sup>219</sup>

#### d) *Litigation*

Class actions brought against parent companies of foreign subsidiaries for violations or complicity in human rights are another means by which private parties may attempt to challenge TNC conduct. These types of suits have been brought in Canada, the U.K., Australia and the U.S. Neither Canada, nor the U.K. or Australia, has specific legislation that facilitates such actions. The United States Alien Torts Claims Act (the "ACTA"),<sup>220</sup> on the other hand, offers a distinctive cause of action applicable to victims of grave human rights abuses perpetrated by foreign regimes. ACTA specifically grants federal jurisdiction over suits by aliens for torts that violate international law, even against non-resident defendants (so long as there is a basis for asserting personal or general jurisdiction).<sup>221</sup> The original jurisdiction under the Act was expanded by the *Filartiga* case<sup>222</sup> to allow foreign victims of human rights abuses to

<sup>214</sup> The Act became law July 30, 2002, Public Law 107-204. Text of the legislation cited at <http://thomas.loc.gov/cgi-bin/query/D?c107:1:/temp/~c107yN9Gaq:e0> (visited Nov. 27, 2002).

<sup>215</sup> J. McFarland, "Audit Rules Must be Tougher to Satisfy Investors", *Globe & Mail* (September 7, 2002) B7.

<sup>216</sup> *Public Disclosure Act* (U.K.) 1998 cited at <http://www.hms.gov.uk/acts/acts1998/80023--a.htm#1>.

<sup>217</sup> *Ibid.*, at section 1.

<sup>218</sup> *Ibid.*, at section 11.

<sup>219</sup> *Ibid.*, at section 3. Many jurisdictions in the U.S. also provide such protection. See "The New Balance Sheet", *supra* note, 205, at 25.

<sup>220</sup> 28 U.S.C.A. Section 1350 (1994).

<sup>221</sup> B. Stephens & M. Ratner, *International Human Rights Litigation in U.S. Courts* (New York: Transnational Publishers Inc., 1996) at 7-8.

<sup>222</sup> 630 F. 2d 876 (2d. Cir. 1980). Congress endorsed the broad interpretation of the ATCA in the *Filartiga* line of cases by establishing a modern basis for a cause of action for some human rights



sue foreign state actors in U.S. courts for torts such as torture and cruel, inhumane or degrading treatment.<sup>223</sup> Subsequent jurisprudence expanded the jurisdiction to include the acts of private parties.<sup>224</sup> Most recently, TNCs that have operated in partnership with repressive regimes have been targeted by ACTA litigation. The basis of claim against the TNCs turns on alleged complicity in human rights abuses and/or violations of humanitarian law. Talisman Energy has recently joined the ranks of Shell, Exxon, Mobil and Royal Dutch Shell as defendants in ACTA actions.<sup>225</sup>

Some writers argue that this type of litigation provides a potential legal avenue for enforcing socially responsible behaviour on TNCs active in developing countries.<sup>226</sup> However, even under ACTA the effectiveness of these claims to deter such corporate conduct is questionable. The complex structure of TNCs and the fact that the claims involve acts of both sovereign and private actors together with often insurmountable jurisdictional hurdles renders this mechanism difficult to use. Also, decisions of courts in different states are not consistent.<sup>227</sup> Another difficulty is in establishing

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victims by enacting the *Torture Victim Protection Act* of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C.A., section 1350 (1994)).

<sup>223</sup> *Paul v. Avril*, 901 F. Supp. 330 at 335 (S.D.Fla. 1994).

<sup>224</sup> *Kadic v. Karadzic*, 70 F.3d 232 at 239 (2nd Cir. 1995).

<sup>225</sup> A class action lawsuit under ACTA has been filed against Talisman by the Presbyterian Church of Sudan, and other individuals in the US District Court for the Southern District of New York. The plaintiffs allege that Talisman “deliberately and intentionally facilitated, conspired in or aided and abetted in the use of Sudanese armed forces in a brutal ethnic cleansing campaign against a civilian population ... for the purpose of enhancing its ability to explore and extract oil from areas of southern Sudan by creating a *cordon sanitaire* surrounding Talisman’s concessions”. The statement of claim states that the ongoing military campaign that “has resulted in massive civilian displacement, the burning of villages, churches and crops, and the murder and enslavement of innocent civilians” and that the campaign is only possible because the Government of Sudan has been able to mobilize using “infrastructure, such as roads and airfields, constructed and maintained by Talisman”. See Civil Action No. 01 CV 998 Class action cited at <http://www.iabolish.com/classaction/default.htm>. In February of 2002, the plaintiffs filed an amended statement of claim in order to join the Government of Sudan as a co-defendant. The amended claim cites a Government of Sudan communiqué dated May 7, 1999 that allegedly shows that Talisman had requested the government’s forces to “conduct cleaning up operations” in all villages from Heglig to Pariang. The plaintiffs allege that this request took place immediately prior to the major offensive launched by the government forces and government backed militia in Ruweng County that was documented by the 1999 report of the UN Special Rapporteur on Sudan and the Canadian Harker Report. See “Amended Complaint Filed in Talisman Suit”, February 25, 2002 cited at <http://www.iabolish.com/news/global/2002/talisman02-25-02.htm>. See also Edward Alden, “Sudanese File Suit against Canadian Oil Group” *Financial Times*, Friday, March 22, 2002, cited at <http://www.mafhoum.com/press3/91E15.htm> (visited November 29, 2002).

<sup>226</sup> See H. Ward, “Foreign Direct Liability: A New Weapon in the Performance Armory?” (2000) 14 *Accountability Quarterly Issue* 3.

<sup>227</sup> In *Wiwa*, the Second Circuit court held that it had general jurisdiction over the defendant, Royal Dutch Shell on the basis that it was not merely listed on the New York Stock Exchange but

corporate complicity where the TNC in question has knowledge and/or benefited from the alleged violations, but did not actually assist the perpetrators in the commission of the acts.<sup>228</sup> This means that many of these cases will never be heard on their merits. At present “[m]ost of these suits are still pending at various levels of discovery and appeal, with no clear judicial trend evident as to whether any or all of them will proceed to trial”.<sup>229</sup>

Allowing such claims to be brought in home state courts may help to deter multinationals from investing in states with poor human rights reputations or encourage them to adopt human rights policies and codes. In the absence of specific legislation that sets a minimum standard of conduct on TNCs to respect human rights, this type of litigation provides only an *ad hoc* remedy after human rights violations have occurred.

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maintained an investor relations office in New York which cost \$45,000 a month and went well beyond those types of securities-related actions that do not confer general jurisdiction. This finding was upheld on Appeal. See 226 F.3d 88 (2d Cir. 2000), cert. denied, 69 U.S.L.W. 3628 (U.S. Mar. 26, 2001) at 97-98. However, in *Unocal*, Central District Court of California dismissed the plaintiff's claim against the French oil company Total S.A., even though Total relied on several subsidiaries to conduct and expand Total's downstream activities, performing a function akin to Shell's agent in New York, albeit on a grander scale. The Court found that these contacts were insufficient to establish specific or general jurisdiction over the defendant. See *Doe I v. Unocal*, 27f. Supp. 2d 1174 (C.D. Cal. 1998) aff'd 248 f.3d 915 (9<sup>th</sup> Cir. 2001).

<sup>228</sup> In *Unocal* the Burmese plaintiffs filed a claim under ACTA alleging that in the construction of the Yadana pipeline, Burmese government forces, carrying out the goals of, and funded by, the joint venture MOGE (made up of Unocal, Total S.A., the state-owned oil company and the government of Burma known as the State Law and Order Restoration Council (SLORC)) had forcefully relocated the plaintiffs from their villages, confiscated their property, forced them to work without wages, sexually assaulted them, and killed or tortured those who protested. The District Court found that the acts represented serious human rights violations justifying jurisdiction under the Act. The claim was held to be actionable against Unocal even in circumstances where no joint action could be taken against the other parties (Total S.A., the Burmese government, and the joint venture, MOGE) for tortious activities. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) 889-90. However, the Court ultimately granted the defendants' motion for a summary judgment to dismiss the plaintiffs' federal claims on the basis that Unocal's mere knowledge of the violations was not sufficient to establish liability under international law without supporting evidence that it had actually assisted the Burmese government in the commission of the human rights violations. (See *Doe v. Unocal Corp.*, 110F.Supp.2d 1294 (9<sup>th</sup> Cir. 2000) at 1304). The U.S. Court of Appeals for the Ninth Circuit partially reversed and partially affirmed this decision on September 18, 2002. The Court of Appeal found that there were “genuine issues of material fact whether Unocal's conduct met the *actus reus* and *mens rea* requirements for liability under the ACTA” for aiding and abetting forced labour, murder and rape. The Court affirmed the District Court's grant of Unocal's motion for summary judgment on the claims of torture, holding that the record did not contain sufficient evidence to support these claims. *Doe v. Unocal Corp.* 248 F.3d 915 (9<sup>th</sup> Cir. 2002).

<sup>229</sup> P. Waldman, “Unocal Will Stand Trial over Myanmar Venture”, *The Wall Street Journal* (June 11, 2002) cited at <http://www.laborrights.org/press/venture061102.htm>.

e. *Consumer and Investor Campaigns*

Increased media attention, consumer boycotts and other public campaigns, as well as shareholders and investors have sometimes put pressure on TNCs and home state governments to take action in cases where such corporations are implicated in violations of human rights committed by host states. One writer suggests that “[e]ffective mobilization of international consumer pressure can substitute for regulation” even though such a process lacks the “accountability and transparency that normally accompany the formation of laws”.<sup>230</sup>

Apart from concerns regarding transparency and accountability, the effectiveness of these campaigns often depends on the ability of under-funded non-governmental initiatives to mobilize either public or shareholder support and to successfully sustain media attention. In addition, this kind of pressure on corporations may be ineffectual where end products are not associated with particular companies. As noted by Oxfam Australia:

Firms involved in offshore mining and extractive industries are one example. ... these firms sell their product into global commodities markets and in most cases the end product manufactured with the firm’s mined resource does not identify the firm to the consumer. Generally speaking, such firms do not risk plummeting turnover due to poor brand reputation suffered as a result of poor environmental or human rights standards.<sup>231</sup>

While some campaigns have been very effective in the short term in challenging TNC behaviour, they are an *ad hoc* and ultimately unsustainable remedy. Talisman’s recently announced sale of its Sudan assets is not, in our view, an example of the effectiveness of such campaigns. Although Talisman was pressured to sell its Sudan’s assets, the campaign has ultimately not had any significant impact on Talisman’s corporate culture. As Michael Janzi Research Associates notes, the company continues to “refuse to acknowledge its role in Sudan’s human rights abuses” and has taken “no meaningful action to redress” these violations.<sup>232</sup> Further, there is no indication that following their withdrawal from Sudan, their human rights conduct will improve in relation to their recent investment in Colombia.<sup>233</sup>

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<sup>230</sup> Dinah Shelton, “Protecting Human Rights in a Globalized World” (2002) 25 *BCICLR* 273 at 317.

<sup>231</sup> “Submission to the Joint Parliamentary Committee on Securities and Corporations inquiry into the Corporate Code of Conduct Bill 2000”, Oxfam Community Aid Abroad (December, 2000) at 5, cited at <http://www.caa.org.au/campaigns/submissios/corporate> (visited November 18, 2002).

<sup>232</sup> “Talisman to Withdraw from Sudan”, What’s New in Social Investment – an e-letter of the Social Investment Organization, November 2002 Issue, cited at <http://www.socialinvestment.ca/nw1102-3.htm> (visited November 25, 2002).

<sup>233</sup> William Baue, “Talisman Leaves Sudan but Remains on Social Investment Nix List”, SocialFunds.com, November 19, 2002, cited at <http://socialfunds.com/news/article.cgi/article971.html> (visited November 24, 2002).

#### 4. Conclusion – Sources of Corporate Obligation

The foregoing discussion illustrates that the patchwork of legal mechanisms available to governments and private actors at the national level provides limited capacity to effectively modify or challenge corporate behaviour. The regulatory void that results from the lack of both domestic and international legal obligation on TNCs, and the lack of domestic obligation on states to regulate the extraterritorial activities of corporate nationals, permits TNCs active in conflict zones to disregard international human rights and humanitarian law standards with minimal legal repercussions.



## D. Self-Regulation

In the absence of international or national accountability of TNCs for complicity in or the commission of violations of international human rights and humanitarian law, corporations, governments and even NGOs have attempted to address the regulatory void, with different motives, by developing voluntary standards. Corporations have tended to develop codes of conduct and in some cases verification procedures to preserve or enhance their reputation or to stave off possible future state regulation.<sup>234</sup> Governments have also responded by adopting this softer, flexible approach of regulating corporate conduct abroad. Rather than legislate, many home states of TNCs have encouraged and/or participated in the development of voluntary codes of conduct and have required or encouraged their national corporations to adopt such codes.<sup>235</sup>

Voluntary codes have also been developed and promoted by NGOs as a practical way of addressing human rights, and in particular labour rights, concerns in an atmosphere that has been characterized by increasing liberalization and a “growing hostility of governments and business to statutory forms of regulation”.<sup>236</sup> In light of the increasing economic and political power of TNCs, NGOs began to view these companies as a means of solving some of these pressing issues.<sup>237</sup>

Despite the growing number of voluntary codes and other self-regulatory practices of social reporting and verification, their effect in regulating extraterritorial corporate activity and in solving the related human rights issues has been highly inadequate.<sup>238</sup>

### 1. Voluntary Codes

One of the key problems with voluntary initiatives as a means to protect human rights is that the content of these instruments varies substantially between corporations or industries, and the majority of corporate-developed codes deal very minimally with the issue of human rights abuses.<sup>239</sup> A recent study of North American corporation-developed codes of conduct found that while the largest

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<sup>234</sup> *Voluntary Codes: A Guide for Their Development and Use*, Government of Canada, March 1998. Cited in Christopher Avery, “Business and Human Rights in a Time of Change”, Amnesty International (2000), at 48-49.

<sup>235</sup> See for example, Craig Forcese, *Commerce with a Conscience? Human Rights and Corporate Codes of Conduct*, International Centre for Human Rights and Democratic Development (1997) at 11.

<sup>236</sup> Ruth Mayne, “Regulating TNCs: The Role of Voluntary and Governmental Approaches” in Sol Picciotto and Ruth Mayne (eds), *Regulating International Business: Beyond Liberalization* (Houndmills, Basingstoke: Macmillan Press Ltd. and New York: St. Martins Press, 1999), at 239-240.

<sup>237</sup> *Ibid.*

<sup>238</sup> Beyond Voluntarism, *supra* note 2 at 7.

<sup>239</sup> Avery, *supra* note 234 at 48.

Canadian corporations “like many of their US counterparts, are beginning to consider human rights issues in their international practices”, a majority of large Canadian companies active internationally did not “have codes containing reference to even the most basic human rights standards”. Additionally, most codes of conduct did not provide for independent monitoring.<sup>240</sup> The report came to similar conclusions regarding US corporate codes relating to international activity and noted that the findings “replicate those identified with respect to domestic codes of conduct” of US and Canadian companies.<sup>241</sup>

a) *Content*

(i) *Corporate Codes*

Our comparison of the voluntary codes and policies of four internationally active oil companies, including Talisman, is illustrative of the lack of consistency between, and the inadequacy of, human rights commitments by TNCs. None of the codes or policies makes a clear statement of obligation on the part of the company to be bound by international human rights standards, and each company displays a slightly different level of commitment to respect human rights.<sup>242</sup>

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<sup>240</sup> Forcese, *supra* note 235 at 43.

<sup>241</sup> *Ibid.*, at 30.

<sup>242</sup> BP’s policy on ethical conduct asserts the company’s belief that “promotion and protection of all human rights is a legitimate concern of business”. It further states that the company respects the rule of law. The meaning this latter commitment, however, does not appear to include the international rule of law. The policy expectations section of the document states: “We will respect the law in the countries and communities in which we operate”. It further notes that BP “supports” the principles set forth in the UDHR, the ILO Tripartite Declaration and the OECD Guidelines, that it will not employ child or forced labour, and that it will evaluate the likely impact of its presence and activities before making major investments. See “Commitment to Ethical Conduct”, *BP’s Business Policies*, June 2000. Summary cited at [http://www.bp.com/company\\_overview/business\\_pol/ethical\\_conduct/index.asp](http://www.bp.com/company_overview/business_pol/ethical_conduct/index.asp) (visited September 1, 2002) [hereinafter, “BP’s Business Policies”]. In another document prepared for employees, BP does commit itself to adhering to human rights principles. It states: “It is the responsibility of States to defend the human rights of their population. As a company, we have a responsibility to *contribute* to the promotion of human rights and to *consider* the impact of our operations. We will ensure that we adhere to the principles of human rights within our operations and in those areas under our control.” See *Finding Your Way Through the Maze: Ethical Conduct Policy: Guidelines on Business Conduct*, BP, November 2000, 9 (emphasis added). It should be noted that this document also sets out specific requirements for employees in terms of what they must consider in order to ensure that the company does not contribute to, or is not complicit in human rights violations. Shell’s Statement of General Business Principles, on the other hand, declares that its responsibilities include the responsibility “to observe the laws of the countries in which they operate, to express support for fundamental human rights in line with the legitimate role of

For example, Talisman Energy's business policy and Sudan Operating Principles outline its commitment to human rights. The company states that it must "comply with all relevant laws and regulations in all jurisdictions in which it conducts business". It also states that it endorses the ICECB and "has undertaken to use its best efforts to ensure that Talisman's operations reflect the principles embodied therein".<sup>243</sup> Under its Sudan Operating Principles<sup>244</sup> it commits to operating in accordance with international conventions on employee rights but makes no such commitment with respect to international human rights. Rather, the company states that it "will promote that local communities receive long-term economic, social, and environmental benefits from [its] operations" and commits "to addressing human rights concerns arising from Talisman and GNPOC operations". At the same time, however, it undertakes to merely support "the principles of the Universal Declaration of Human Rights within Sudan".<sup>245</sup>

Premier Oil's Corporate Social Responsibility Policy is made up of twelve principles, which include commitments to:

"assess the social, economic, health, human rights and environmental impacts of any new activity or project prior to its commencement, on an ongoing basis and before decommissioning a facility or leaving a site";

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business ...". "Statement of General Business Principles", Royal Dutch/Shell Group of Companies, 1977, *Governance in Shell*, 2<sup>nd</sup> ed., 2002 (CD Compilation) at 5. This is not a clear statement of obligation to observe or be bound by international human rights standards and a "Management Primer" which discusses the role of business with respect to human rights also does not make a specific statement in this regard. Other statements on the company's website do appear to suggest that corporations are responsible for certain international human rights standards: "The Universal Declaration of Human Rights is aimed primarily at governments. Our challenge is to determine the specific responsibilities of Shell companies and provide managers with the necessary tools to meet their obligations." See "Our Approach to Human Rights" [http://www.shell.com/home/Framework?siteId=royal-en&FC1=&FC2=&FC4=&FC5=&FC3=/royal-en/html/iwgen/Issues/human\\_rights/our\\_approach\\_to\\_human\\_rights.html](http://www.shell.com/home/Framework?siteId=royal-en&FC1=&FC2=&FC4=&FC5=&FC3=/royal-en/html/iwgen/Issues/human_rights/our_approach_to_human_rights.html) (visited November 30, 2002). In its 2001 report, "People, Planet and Profits", Shell states that its "responsibilities to human rights" include employee rights, security, community rights, national rights and advocacy. See "People, Planet and Profits" at 10-11 cited at [http://www.shell.com/home/Framework?siteId=royal-en&FC1=&FC2=&FC4=&FC5=&FC3=/royal-en/html/iwgen/shell\\_report\\_2001/shell\\_report\\_2001\\_downloads.html](http://www.shell.com/home/Framework?siteId=royal-en&FC1=&FC2=&FC4=&FC5=&FC3=/royal-en/html/iwgen/shell_report_2001/shell_report_2001_downloads.html) (visited November 30, 2002) [hereinafter the "Shell 2001 Report"].

<sup>243</sup> Policy on Business Conduct, Talisman Energy cited at [http://www.talisman-energy.com/socialresponsibility/governance/business\\_conduct.html](http://www.talisman-energy.com/socialresponsibility/governance/business_conduct.html) (visited November 28, 2002).

<sup>244</sup> See Case Study, *supra* note 96.

<sup>245</sup> *Ibid.*



“develop, design and operate facilities and monitor activities, taking due account of the findings of social, economic health, human rights and environmental impact assessments”; and,

“undertake regular social audits and assessments of compliance with respect to [Premier Oil’s] social responsibility principles and human rights policy across the company” which will be “independently evaluated and verified, and communicated to the Board and to all ... stakeholder groups”.<sup>246</sup>

In addition, the company’s human rights policy refers to the fundamental rights set out in the UDHR and the labour rights listed in core ILO Conventions. While the company does not state that it is bound by those rights, it does make a clear commitment to *protect* and *promote* these rights in its business operations and with its business and local community partners. It also states that the company will “use its legitimate influence to promote the protection of human rights outside [its] areas of operation”.<sup>247</sup>

(ii) *International Codes*

The fact that TNCs may also sign on to, or endorse, voluntary international instruments<sup>248</sup> does not necessarily improve the standards of accountability. The deficiencies noted above are also reflected in many of the internationally developed codes, guidelines and benchmarks. Of the instruments surveyed,<sup>249</sup> which include two industry-developed codes relating to extraterritorial corporate activity, only the UN Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the “UN Human Rights Responsibilities”) provides a comprehensive set of principles that sufficiently addresses potential human rights

<sup>246</sup> Premier Oil – Social Performance Report 2001 at 4, cited at <http://www.premier-oil.com/asp/pdf/PO-SP-Final.pdf> [hereinafter “Premier Oil’s Report”].

<sup>247</sup> *Ibid* at 5 (emphasis added).

<sup>248</sup> As noted in the case study, Talisman has signed on to the ICECB. Both BP and Shell have endorsed the Voluntary Principles and appear to have taken steps to implement these guidelines. However, in the case of BP it is unclear how effectively such principles have been implemented in business practice. The Ernst & Young verification statement noted an “awareness of BP’s commitment to the Voluntary Principles on Security and Human Rights” at two sites visited but also that “actions related to this commitment had been taken although these were not always formally documented” and that more “work could be done to improve the understanding of this commitment at the other sites” visited. See *Environmental and Social Review*, British Petroleum, 2001, at 15, cited at <http://www.bp.com/downloads/1115/es.pdf> (visited September 1, 2002) [hereinafter “BP’s 2001 Report”].

<sup>249</sup> OECD Guidelines *supra* note 149, the Global Compact, the UN draft Responsibilities for Transnational Corporations and Other Business Enterprises with regard to Human Rights, the Voluntary Principles on Security and Human Rights, the Global Sullivan Principles and the International Code of Ethics for Canadian Business.

concerns with respect to the overseas activities of TNCs. It is the only set of principles that is drafted in mandatory language, and that creates a direct and unambiguous obligation on the part of TNCs to respect international human rights standards. TNCs are required “to respect, ensure respect for, prevent abuses of, and promote human rights recognized in international as well as national law”, within their sphere of activity and influence.<sup>250</sup> These principles also provide a far-reaching definition of TNCs<sup>251</sup> and include a prohibition on the commission of, complicity in or benefiting from violations of international humanitarian law and fundamental human rights.<sup>252</sup> The principles contain rules and provisions on the conduct of public and private security forces,<sup>253</sup> and an obligation to “respect civil, cultural, economic, political and social rights”<sup>254</sup> including, among other things, the right to development, and the rights of local populations and indigenous communities.<sup>255</sup> Provisions on implementation, monitoring and reporting requirements, as well as the requirement to conduct human rights impact assessments are also included in the principles.<sup>256</sup>

The human rights provisions of the OECD Guidelines are significantly weaker. TNCs are merely encouraged to “[r]espect human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.<sup>257</sup> Additionally, international law appears to play a secondary role in

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<sup>250</sup> Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. U.N. Doc. E/CN.4/Sub.2/2002/13, Article 1, cited at <http://www.business-humanrights.org/Draft-UN-Human-Rights-Responsibilities-of-Business-Aug-2002.htm> (visited September 8, 2002) [hereinafter, “UN Human Rights Responsibilities”].

<sup>251</sup> *Ibid.*, Article 19.

<sup>252</sup> *Ibid.*, Article 3.

<sup>253</sup> *Ibid.*, Article 4.

<sup>254</sup> *Ibid.*, Article 12.

<sup>255</sup> Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises With Commentary on the Principles, U.N. Doc. E/CN.4/Sub.2/2002/XX/Add.2, E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2 (February 2002 for discussion in July/August 2002), Article 10, Commentary paras. b and c. [hereinafter, UN Human Rights Responsibilities with Commentary].

<sup>256</sup> UN Human Rights Responsibilities, Articles 15-16.

<sup>257</sup> The OECD Guidelines Basic Texts *supra* note 149, Annex 1, II, at 11. A subsequent document released by the OECD in October, 2001 purports to clarify these obligations, noting that, while human rights are primarily the responsibility of governments, it is acknowledged that corporations do play a role when corporate conduct “intersects” with human rights. In these circumstances, TNC’s are “encouraged” to respect the human rights not only of employees but also the human rights of others individuals who are affected by the corporations activities. Such respect must be “consistent with the host governments international obligations and commitments”. The document further notes that in this regard, the UDHR and “other human rights obligations” of governments concerned are of particular relevance. Apart from the reference to the host states’ international obligations and the UDHR there is no further clarification as to what “respecting human rights” means and how a company can ensure that it is complying with these obligations. Nor do the Guidelines deal with the problem of the human rights issues raised where national

the Guidelines. While the host state government's right to "prescribe the conditions" under which TNCs within their jurisdiction must operate is subject to international law,<sup>258</sup> the Guidelines make it clear that TNCs are subject first and foremost to local laws.<sup>259</sup> The OECD points out that the strength of the Guidelines compared with other instruments lies in the fact that the Guidelines are grounded in an intergovernmental process, that is, they establish a framework for international co-operation through the creation of National Contact Points (NCPs) and an ongoing process of annual meetings.<sup>260</sup> Only thirty-three states adhere to the Guidelines, none of which would be classified as developing nations. Efforts to bring on board non-members appear to have yielded poor results so far.<sup>261</sup>

The Voluntary Principles on Security and Human Rights (the "Voluntary Principles") are more narrowly focused than the UN Human Rights Responsibilities. They provide guidelines for the protection of corporate assets by public and private security while ensuring respect for human rights, and cover similar ground to that of the UN Responsibilities in this area. While there are innovative features in this code, these principles are voluntary and couched in permissive language. Unlike the UN instrument which makes international law the binding standard, companies signing on to the Voluntary Principles "recognize a commitment" to obey the laws of the host state, but are only required to be "*mindful* of the highest applicable international standards" and to "promote" rather than *ensure* "the observance of applicable international law enforcement principles".<sup>262</sup> The main advantage of these principles is

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military or private security forces are engaged by corporations (or consortiums of which corporations are members) to protect corporate facilities in the host state. See the OECD, "The OECD Guidelines for Multinational Enterprises: Text Commentary and Clarifications", Working Party on the OECD Guidelines for Multinational Enterprises, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International Investment and Multinational Enterprises, DAF/IME/WPG(2000)15/FINAL, at 12 [hereinafter, "OECD Guidelines Text Commentary"].

<sup>258</sup> The OECD Guidelines Basic Texts *supra* note 149 at 9.

<sup>259</sup> OECD Guidelines Text Commentary, *supra* note 257 at 12.

<sup>260</sup> OECD, "OECD Guidelines for Multinational Enterprises: Focus: Global Instruments for Corporate Responsibility", Annual Report 2001 at 59, cited at <http://www1.oecd.org/publications/e-book/2101171e.pdf> (visited November 24, 2002) [hereinafter "OECD Guidelines Annual Report"].

<sup>261</sup> See OECD Directorate for Financial, Fiscal and Enterprise Affairs, "OECD Proceedings: Non-Member Economies and the OECD Guidelines for Multinational Enterprises" Paris 12 December 2000 at 67 and 70-72 where it notes that only four non-member countries adhere to the Declaration, and only 28 non-members attended the conference. Cited at <http://www.oecd.org/pdf/M00020000/M00020571.pdf> (visited December 3, 2002). The OECD acknowledges the fact that its guidelines are not as well recognised at the international level some of the other global instruments. See OECD Guidelines Annual Report, *supra* note 260 at 56.

<sup>262</sup> Preamble, *Voluntary Principles on Security and Human Rights*. Fact Sheet, Released by the Bureau of Democracy, Human Rights and Labor, U.S. Department of State, (December 20, 2000), cited at [http://www.state.gov/www/global/human\\_rights/001220\\_fsdril\\_principles.html](http://www.state.gov/www/global/human_rights/001220_fsdril_principles.html) (emphasis added).

that they have been developed and endorsed by the U.S. and U.K. governments, a number of major TNCs in the extractive industry and several high profile international NGOs.<sup>263</sup>

The Global Compact's human rights principles are again drafted in permissive language. While they compare favourably in terms of human rights content against the OECD Guidelines, they are less detailed than either the UN Human Rights Responsibilities or the Voluntary Principles (although more broadly focused than the latter). Corporations adhering to the Compact are requested to "support and respect the protection of internationally proclaimed human rights within their sphere of influence; and ... make sure they are not complicit in human rights".<sup>264</sup> These principles are further elaborated on the website. The explanation of Principle 1 originally suggested that, among other things, companies should "prevent the forcible displacement of individuals, groups or communities".<sup>265</sup> The current explanation suggests that companies develop an understanding of international human rights standards, respect domestic law on human rights of host states and develop and implement a human rights policy.<sup>266</sup> The elaboration of Principle 2 includes a definition of three types of complicity: direct, beneficial and silent. It also recommends: that companies respect international guidelines on the use of force; and that corporations providing financial or material support to security forces, should "establish clear safeguards to ensure that these are not then used to violate human rights", as well as ensure that any agreement with security forces is publicly available and clearly states that the corporation will not condone violations of international human rights law.<sup>267</sup> The UN Human Rights Responsibilities and the Voluntary Principles provide much more specific guidelines on the use of public and private security forces.

The Global Sullivan Principles and the International Code of Ethics for Canadian Business (the "ICECB") are the weakest of the instruments surveyed. Their

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<sup>263</sup> The corporations and organizations which support the principles are Chevron, Texaco, Freeport McMoran, Conoco, Shell, BP, Rio Tinto, Human Rights Watch, Amnesty International, International Alert, Lawyers Committee for Human Rights, Fund for Peace, Council on Economic Priorities, Business for Social Responsibility, The Prince of Wales Business Leaders Forum, and the International Federation of Chemical, Energy, Mine and General Workers' Unions. See Statement by the Governments of the United States of America and the United Kingdom, (December 19, 2000) cited at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/volsupport.htm>.

<sup>264</sup> UN Global Compact, "The Nine Principles". Cited at <http://www.unglobalcompact.org>.

<sup>265</sup> Principle 1, UN Global Compact, cited at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/prin1.htm> (no longer posted).

<sup>266</sup> See Global Compact, *supra* note 264.

<sup>267</sup> *Ibid.* As of November 21, 2002 hundreds of companies had endorsed the Global Compact, including 38 US companies, 19 U.K. companies, 8 Japanese companies and 6 Canadian companies. Talisman is not a participant. The list of participating companies is at <http://www.unglobalcompact.org>.

provisions are broad and aspirational and provide little effective guidance for TNCs. The ICECB is divided into three sections, “Beliefs”, “Values” and “Principles”. It underscores the sovereign right of states to “conduct their own government and legal affairs” while noting that states should comply with their international obligations including those relating to human rights and social justice.<sup>268</sup> Among the values listed are human rights and social justice, along with “[w]ealth maximization for all stakeholders” and “[g]ood relationships with all stakeholders”.<sup>269</sup> Corporations that sign on to the code agree that they will “support and promote the protection of international human rights” within their “sphere of influence” and that they will “not be complicit in human rights abuses”.<sup>270</sup> While the inclusion of the issue of complicity is important, there is no further clarification of the meaning of “complicity”. Furthermore, there are no benchmarks against which corporations could measure activity that supports or promotes the protection of human rights. The code aims to serve as a basis for “the development of operational codes and practices that are consistent with the vision, beliefs, values and principles” by signatory companies.<sup>271</sup>

b) *Implementation and Accountability Provisions*

Another fundamental problem is that many of these instruments lack implementation or accountability mechanisms. They “do not specify any compliance mechanisms at all, whether in terms of benchmarks, internal monitoring, internal or external reporting, or internal or third party verifying”<sup>272</sup> or have effective enforcement infrastructure.

The UN Human Rights Responsibilities provides for both monitoring and implementation. Under Article 15, companies are obliged “[a]s an initial step towards compliance” to “adopt, disseminate and implement internal rules of operation” consistent with the UN Human Rights Responsibilities and to take “other measures fully to implement these [Responsibilities] and to provide at least for the prompt implementation of the protections set forth in these Responsibilities”.<sup>273</sup> This requirement includes providing stakeholders with such rules and implementation procedures in a form that they can understand.<sup>274</sup> Companies are also required to

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<sup>268</sup> See ICECB, *supra* note 92.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.* It is not clear how many companies have adopted the ICECB.

<sup>272</sup> Beyond Good Deeds, *supra* note 1, at 9.

<sup>273</sup> UN Human Rights Responsibilities, *supra* note 250, Article 15.

<sup>274</sup> Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises With Commentary on the Principles, U.N. Doc. E/CN.4/Sub.2/2002/XX/Add.2, E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2 (February 2002 for discussion in July/August 2002) Article 15, Commentary para. a., cited at <http://www1.umn.edu/humanrts/Principles>

provide training for managers, other personnel and representatives with respect to practices regarding the Responsibilities, but only “to the extent of their resources and capabilities”.<sup>275</sup> In addition, Article 15 requires TNCs “to apply and incorporate these principles in their contracts or other arrangements and dealings with contractors, sub-contractors, suppliers and licensees”.<sup>276</sup>

The Responsibilities also envisage transparent, independent “monitoring” of the implementation “by monitoring by national, international, governmental, and/or nongovernmental mechanisms”.<sup>277</sup> Monitoring is not defined in the Responsibilities and the relevant provisions of the commentary appear to require *ad hoc* rather than systematic monitoring of the activities of corporations. No clear distinction is made between monitoring of the implementation of the Responsibilities and monitoring of compliance with the Responsibilities.

The OECD Guidelines do have some implementation mechanisms and infrastructure that might be used to make TNCs more accountable. Implementation of the Guidelines is the responsibility of NCPs and to a lesser extent the Committee on International Investment and Multinational Enterprises (the “CIME”). Governments that have adopted the Guidelines are required by a binding Council Decision to set up NCPs.<sup>278</sup> NCPs are, therefore, critical since the ultimate responsibility for effectiveness of the guidelines rests with governments.

NCPs are expected to function in a visible, transparent and accountable manner. They are required “to further the effectiveness of the Guidelines” by promoting, raising the awareness of, and responding to inquiries about the Guidelines, by gathering information on national experiences with the Guidelines and reporting annually to the CIME as well as by assisting TNCs with implementation in a consultative, non-adversarial manner where problems arise.<sup>279</sup> Information with respect to such consultations can be kept confidential where “preserving confidentiality would be in the best interests of effective implementation of the Guidelines”.<sup>280</sup> One commentator points out that “due to the voluntary nature of company participation in consideration of ‘specific instances’ [of corporate non-compliance], National Contact Points are reluctant to alienate companies by

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[WithCommentary5final.html](#) (visited December 13, 2002) [hereinafter, UN Human Rights Responsibilities with Commentary].

<sup>275</sup> *Ibid.*, para. b.

<sup>276</sup> UN Human Rights Responsibilities, *supra* note 250, Article 15.

<sup>277</sup> *Ibid.*, Article 16.

<sup>278</sup> OECD, “The OECD Guidelines for Multinational Enterprises and Global Instruments for Corporate Responsibility: Background and Issues Paper”, Directorate for Financial, Fiscal and Enterprise Affairs (May 16, 2001) at 3, cited at <http://www.oecd.org/pdf/M00003000/M00003658.pdf> (visited December 3, 2002).

<sup>279</sup> OECD Guidelines Basic Texts, *supra* note 149 at 27-8.

<sup>280</sup> *Ibid.*, at 28.

aggressively publicising clear cases of wrongdoing”.<sup>281</sup> The Annual Report also referred to only a handful of cases of non-compliance being dealt with by NCPs worldwide, and no names and facts were disclosed.<sup>282</sup> Again, the small number of state parties that have adopted the Guidelines render this process less effective. Where concerns arise about corporate behaviour in a state that does not adhere to the Guidelines, “the matter may be raised with the NCP of the country where the [TNC] is based”.<sup>283</sup> However, any investigation by the home state NCP might be hampered by a non-cooperative host state particularly if the latter is implicated in the complaint.

Unfortunately, the structure and activity level of NCPs and the discretion for implementation of these objectives and duties are left largely to individual governments.<sup>284</sup> Critics of the Guidelines argue that “[t]oo many NCPs are still dormant and/or fail to consult with trade unions and other interested parties”.<sup>285</sup> Some NGOs have recommended that an effectiveness review of the guidelines, and of each NCP, be conducted on a regular basis, by the CIME, the overseeing body.<sup>286</sup>

The Guidelines do provide a process that allows members of the public, NGOs and governments to raise issues about the conduct of corporations that are active transnationally.<sup>287</sup> However, “decisions are not enforced in any way and the fact that the identity of the company is kept confidential means there is no public scrutiny” so that the “procedure has little immediate impact on the behaviour of specific companies”.<sup>288</sup> While the NCP can refer issues to the CIME, the latter cannot judge or disclose particular information.<sup>289</sup> Thus, it is unclear what the benefit of the procedure is in terms of raising the standards of corporate conduct.

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<sup>281</sup> Anne-Christine Habbard, “The Integration of Human Rights in Corporate Principles” in the OECD Guidelines Annual Report, *supra* note 260 at 102.

<sup>282</sup> “Summary of the Report of the Chair of the Meeting on the Activities of National Contact Points”, in OECD Guidelines Annual Report, *supra* note 260 at 16.

<sup>283</sup> See Government of Canada, “OECD Guidelines for Multinational Enterprises: The Role of the National Contact Point in Helping to Resolve Issues,” cited at [http://www.ncp-pcn.gc.ca/national\\_contact-en.asp](http://www.ncp-pcn.gc.ca/national_contact-en.asp) (visited December 3, 2002).

<sup>284</sup> NCPs can be a single government official or a government office that is headed by a government official. It may also be structured as an intergovernmental association with representatives from business, unions etc. See OECD Guidelines Basic Texts, *supra* note 149 at 27-28.

<sup>285</sup> “TUAC Survey of the Functioning of National Contact Points”, in OECD Guidelines Annual Report *supra* note 260 at 40.

<sup>286</sup> “NGO Statement on the OECD Guidelines for Multinational Enterprises” in *Ibid.* at 47.

<sup>287</sup> Beyond Voluntarism, *supra* note 2 at 101. See also OECD Guidelines Basic Texts, *supra* note 149, subpara. I(B)(3)(b) at 27.

<sup>288</sup> Beyond Voluntarism, *supra* note 2 at 101.

<sup>289</sup> OECD Guidelines Annual Report, *supra* note 260 at 101.



## 15. Social Reporting

### a) *Voluntary Reporting Standards*

Of the corporate codes reviewed, only Premier Oil's policy clearly commits to "regular social audits and assessments of compliance" of human rights performance.<sup>290</sup> Some of the international instruments discussed above have reporting requirements. However, the stringency and ultimate effectiveness of these requirements vary significantly. For example, under the Global Compact, an adhering corporation is "expected to publish in its annual report (or similar corporate report) a description of the ways in which it is supporting the Global Compact and its nine principles".<sup>291</sup>

UN Responsibilities reporting provisions are more rigorous than those discussed above. Article 16 requires TNCs to conduct periodic self-assessment of their human rights impact.<sup>292</sup> In fulfilling this obligation companies are obliged to assess their compliance with the Responsibilities, "taking into account comments from stakeholders and any applicable emerging standards", and to make such assessment

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<sup>290</sup> Premier Oil's Report, *supra* note 246 at 4. BP does not commit to reporting on its ethical conduct policies, although it does so for its health, safety and environmental policies. It also states that it has a number of "risk management and assurance processes across all [its] business policies". See BP's *Business Policies*, *supra* note 242. Shell makes a generic statement that its companies "have comprehensive corporate information programmes and provide full relevant information about their activities to legitimately interested parties, subject to overriding considerations of business confidentiality and cost". See Shell's *Business Principles*, *supra* note 242.

<sup>291</sup> See "How to Participate in the Global Compact", UN Global Compact, *supra* note 266. Similarly, the Global Sullivan Principles require endorser "to document and share experiences in bringing social responsibility to life". A reporting form is provided to corporations. The background information notes that the "reports are not intended to be burdensome" and "are designed to be easily completed by all types and sizes of organizations". All reports are apparently posted on the website and are reviewed in order to highlight any noteworthy efforts made by adhering companies. See Global Sullivan Principles Update, October 2001: A periodic report on the activities of the Global Sullivan Principles of Social Responsibility, at 2 cited at <http://globalsullivanprinciples.org/gspnewsletter1001.PDF> (visited May 9, 2002). Under the OECD Guidelines corporations are "encouraged" to apply "high quality standards for the disclosure non-financial information including environmental and social reporting" only where such standards exist. There is no suggestion of what such standards should be. However, the Guidelines do note that where such standards exist and are applied they should be reported. The Guidelines set out specific information that should be disclosed, including information with respect to "[m]aterial foreseeable risk factors", "[m]aterial issues regarding employees and other stakeholders". Again, however, there is no clarification as to what these factors and issues should include. Finally, the voluntary disclosure requirements are subject to an exception that allows corporations in formulating their disclosure policies to take into account "costs, business confidentiality and other competitive concerns". See "The OECD Guidelines *Basic Texts*, *supra* note 149, Annex 1, III, paras. 1-4, at 12.

<sup>292</sup> UN Human Rights Responsibilities, *supra* note 250, Article 16.



available to stakeholders “to the same extent as the annual report”.<sup>293</sup> The background material suggests that self-assessments could be conducted by the company itself or by an independent consultant and the results could be made public so as to increase the transparency and legitimacy of the process. However, it also notes that “the expectation of publicity may discourage adequate disclosure” and suggests that if assessment reports are going to be publicly released, then independent third parties such as expert NGOs, trade unions, labour associations or states may be better candidates to conduct the assessment.<sup>294</sup>

The Global Reporting Initiative’s 2002 Sustainability Guidelines (the “GRI Guidelines”) is a noteworthy attempt to fill the gap in reporting standards. It is a work in progress and the long-term aim of the initiative is to create greater harmonization of reporting approaches that will ultimately become “generally accepted sustainability accounting principles”.<sup>295</sup> The Guidelines, released in August 2002, have been substantially revised since the release of the first set of guidelines in 2000. The GRI also states that it is developing sector supplements and issue supplements that can be used with the guidelines as well as technical protocols on indicator measurement.<sup>296</sup>

While the Guidelines do address many of the fundamental concerns regarding social reporting, as currently drafted they also raise significant concerns. In the first place, GRI reports are designed to be centrally generated and the Guidelines do not provide site-specific indicators that address the particular operating environment of a

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<sup>293</sup> UN Human Rights Responsibilities with Commentary, *supra* note 274, Article 16, Commentary, para. f.

<sup>294</sup> UN Human Rights Responsibilities, Introduction, *supra* note 3 at 13.

<sup>295</sup> Global Reporting Initiative, 2002 Sustainability Reporting Guidelines, at 5 cited at <http://www.globalreporting.org>. (visited November 30, 2002) [hereinafter “GRI Guidelines”]. According to the GRI, the guidelines are intended to provide an external sustainability-reporting framework. As such the guidelines:

- present reporting principles and specific content to guide the preparation of organization-level sustainability reports;
- assist organizations in presenting a balanced and reasonable picture of their economic, environmental, and social performance;
- promote comparability of sustainability reports while taking into account the practical considerations related to disclosing information across a diverse range of organizations many with extensive and geographically dispersed operations;
- support benchmarking and assessment of sustainability performance with respect to codes, performance standards, and voluntary initiatives; and,
- serve as an instrument to facilitate stakeholder engagement. *Ibid.*, at 8.

<sup>296</sup> *Ibid.*, at 10.

company. For full reporting on human rights issues the GRI indicators will have to be supplemented.<sup>297</sup>

Second, while the indicators for human rights reporting have been substantially enhanced from the earlier drafts of the guidelines, the division of indicators into core and additional indicators means that a reporting company could produce a report “in accordance” with the GRI Guidelines that does not include indicators that are of importance to certain stakeholders (although to do so would technically violate the principle of inclusivity).<sup>298</sup> Moreover, current human rights indicators still do not address some very fundamental issues.<sup>299</sup> There are no indicators for reporting specifically on an organization’s relationship with public and/or private security forces, consultations with the host state with respect to public security forces, equipment supplied for security forces use, dual use equipment and the monitoring of such use, local population displacement and compensation practices, and other grievous human rights abuses or violations of international humanitarian law.

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<sup>297</sup> Telephone interview with Dr. Magnus Macfarlane, Fellow at the Corporate Citizenship Unit of the Warwick Business School, University of Warwick, (August 9, 2002) at 22.

<sup>298</sup> Core indicators are defined as those “relevant to most reporting organizations; and of interest to most stakeholders” as determined through an extensive multi-stakeholder consultative process. Additional indicators are those indicators that may represent best practice but are used by few reporting organizations, that provide information that may be significant to stakeholders who are important to the reporting organization, and that are “deemed worthy of further testing for possible consideration as future core indicators”. *Ibid.*, at 12-13. However, although the GRI encourages the inclusion of indicators derived from consultation with stakeholders, as mentioned above, only core indicators are required to be included in a report for it to be considered “in accordance” with the Guidelines. See *Ibid.*, at 13. At present, the core performance indicators for human rights require reporting on the existence and a description of policies, guidelines, and procedures, including monitoring systems/mechanisms and the results of monitoring with respect to: all aspects of human rights relevant to the reporter’s operations (HR1); evidence of consideration of human rights impacts as part of investment procurement and decision-making (HR2); human rights performance of the reporting organization’s supply chain and contractors (HR3); the exclusion of discrimination (HR4); the protection of freedom of association (HR5); child labour as defined by the ILO Convention 138 (HR6); the prevention of forced labour (HR7); impacts on communities affected by the reporting organization’s activities (SO1). Other equally important issues are relegated to the category of additional indicators. These include employee training on corporate human rights policies and indicators regarding employee discipline and grievance practices, human rights training for security personnel, existence of jointly managed community grievance mechanisms, management principles with respect to indigenous peoples and local redistribution of a share of operating revenues. *Ibid.*, at 53-55.

<sup>299</sup> The Guidelines do note that consensus on the selection of social performance indicators is not as well developed as for environmental performance indicators and that the indicators do not yet “address the questions of all potential stakeholders”. *Ibid.*, at 51-52.

b) *Practice of Transnational Corporations*

Recent TNC practice of reporting on human rights performance raises significant concern about the credibility of reported information. A recent study conducted by ERM, a consulting firm found that while “79 of the FTSE100 publish social information on their websites, only 16 use any sort of quantitative data to back up their policy assertions.”<sup>300</sup> While companies claim to be working to become more transparent with respect to their activities and CSR commitments, few have developed transparent and credible social accounting frameworks with procedures and methodologies that ensure the accuracy of human rights related data collection that reveals, among other things, how decisions were made as to what is and what is not reported on.

(i) *Transparency*

The GRI Guidelines requires reporting to be informed by the principles of transparency, inclusiveness, auditability, completeness, relevance, sustainability context, accuracy, neutrality, comparability, clarity and timeliness.<sup>301</sup> The Guidelines state that such principles are “integral to [the GRI’s] reporting framework” and considered to be “equal in weight” to the information elements contained in the “Report Content” section of the guidelines.<sup>302</sup>

The principle of transparency is considered an “overarching principle” and requires that the reporting organization fully and formally disclose the processes, procedures and assumptions underlying the preparation of the report. These would include, for example, the process by which stakeholders were consulted and how these consultations informed the boundaries, scope and content of the report, as well as disclosure of “data collection methods and related internal auditing, and scientific assumptions underlying the presentation of information”.<sup>303</sup>

Of the reports reviewed, only the Premier Oil Report sets out the methodology of the social accounting process. It gives an explanation of which stakeholders were included and why, along with a fairly detailed description of the procedures and processes developed and used for the social accounting which resulted in the Report.<sup>304</sup>

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<sup>300</sup> Cited in Janus, “Core? What a Scorch!” *Ethical Corporation Magazine* (July 2002) at 7.

<sup>301</sup> GRI Guidelines, *supra* note 295 at 22-31

<sup>302</sup> *Ibid.*, at 22.

<sup>303</sup> *Ibid.*, at 24.

<sup>304</sup> Premier Oil’s Report, *supra* note 246 at 11-17. Shell explains at the end of its report where the different types of data (financial, HSE and “remaining data”) are aggregated from but does not describe how qualitative data is collected or interpreted. The only reference specifically to “social data” states that such data “may be affected by local interpretations, cultures and practices, and can be the subject of confidentiality laws”. See The Shell 2001 Report, *supra* note 242 at 48.

The verifier who pointed out a number of significant flaws in the accounting process critically evaluated this process.<sup>305</sup>

(ii) *Situation of TNC Impact within Broader Human Rights Context*

Another key concern with human rights performance reports is that they do not appear to adequately address fundamental human rights issues raised by a company's activity in a particular location or the broader context of the reporting TNC's human rights impact.

The GRI Guidelines require reporting organizations, to place their sustainability performance within the broader context of the effects of such performance on the, local, regional and global economy, environment and social sphere. This obligation is unfortunately diminished, however, by the caveat, "where such context adds significant meaning to the reported information".<sup>306</sup>

The Case Study notes that Talisman's 2000 CSR Report does not mention the fact of forced displacement. As well, the 2001 Report distinguishes between "oil related displacement" and "conflict, famine and drought related displacement". This gives the false impression that the latter is unrelated to oil exploration and development and therefore not a responsibility of the company. Neither report addresses or raises the issue of the contribution of oil exploration and extraction to an exacerbation of the conflict. The reports do not discuss in detail whether revenues from oil extraction have contributed to the Government of Sudan's ability to wage war against its own people, despite evidence put forward in numerous credible reports supporting these conclusions.

Similarly, Premier Oil's report, does not in any way question the appropriateness of its investment in Myanmar and its relationship with a brutally repressive government with a record of grave human rights violations associated with extractive industry operations. Nor does it even mention the issue of political repression in Myanmar, which as the verifier notes, would "unavoidably" have restricted the stakeholder consultation.<sup>307</sup>

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<sup>305</sup> Some of the criticisms of the social accounting process noted by the verifier include the following: a Premier Oil employer was used as a translator; lack of a formal method for selecting interviewees; the interviewees in a particular location were beneficiaries of Premier Oil community development programmes and did not include either any of those individuals who had participated in a demonstration or any fishermen "whose fishing grounds were allegedly disrupted by the construction" of the oil platform and were not sufficiently representative of the population in the area. See "Pilot Social Audit Verification and Evaluation", Premier Oil's Report, *supra* note 246 at 67 and 69.

<sup>306</sup> GRI Guidelines, *supra* note 295, 27-28.

<sup>307</sup> Premier Oil's Report *supra* note 246 at 70.

Even among those companies that are considered forerunners in the area of corporate social responsibility, reports do not always give sufficient information about the context of a human rights situation or steps taken by these corporations with respect to their human rights performance. For example, Shell's 2001 Report, like its previous reports, sets out its policy on security and human rights and the number of security incidents that have occurred in its various operations. The policy is fairly clear and according to the report appears to be well implemented. Shell's report indicates that "[i]n 2001, 16 countries reported significant security incidents – including war and civil unrest in four countries" and that "in two countries, our armed security contractors do not yet operate fully in line with our guidelines; efforts are being made to correct this situation". It also notes that "[i]n nine countries, armed government forces operate in line with the Group Security Guidelines on the use of force and in one country there are plans to align the government forces with the Shell standard". However, there is no further elaboration of the security incidents cited, the political context in which they took place or how the company dealt with them. The only information that has been verified by KPMG and PwC is the data on the types of armed security personnel employed and the number of countries in which the different types of armed personnel are used.<sup>308</sup>

Only Shell and BP address, albeit briefly, the issue of withdrawal of investment where the company is unable to abide by its principles. According to Shell's 2001 report, "[h]uman rights are taken into account when considering entering or re-entering countries." The report states that Shell abides by UN sanctions but in situations where "there are differences of international opinion", the company makes a decision based on whether it can be a "force for good". Shell gives two criteria for entry or withdrawal: economic considerations and the ability to abide by its Business Principles.<sup>309</sup> Again there is no further elaboration on this point or an explanation of what circumstances might require such withdrawal. BP makes a similar statement: "[w]hether we continue to operate in a country with serious human rights issues will be determined in light of our ability to fulfil our policy commitments in our own activities and to act as a force for good over the long term".<sup>310</sup> Like Shell, BP does not set out any further criteria or specific examples of situations that would require such withdrawal.

### (iii) *Neutrality of Reported Information*

Under the GRI Guidelines, the reporting principle of neutrality requires that sustainability reports "avoid bias in selection and presentation of information" and

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<sup>308</sup> The Shell 2001 Report, *supra* note 242 at 11, 36-38.

<sup>309</sup> *Ibid.*, at 11.

<sup>310</sup> BP's Business Policies, *supra* note 242.

“strive to provide a balanced account of the reporting organisation’s performance”. The report should be a “fair and factual presentation” of the company’s performance.

This means presenting an account that includes both favourable and unfavourable results, free from intentional tilt, under-, or overstatement of the organisation’s performance. The report should focus on neutral sharing of the facts for the users to interpret.<sup>311</sup>

A report should not consist of “selections, omissions, or presentation formats that are intended to influence a decision or judgment by the user”.<sup>312</sup> For example, graphics used in a report should not “inadvertently lead readers to incorrect interpretations of data and results”.<sup>313</sup>

Reporting formats differ from corporation to corporation. Both Shell and BP produce a review of overall social and environmental corporate activity. Shell notes that its report is “produced within the broad framework of the GRI guidelines”,<sup>314</sup> while BP produced a separate GRI report with links to examples on its website. BP also produces more in-depth location reports of selected operations. Talisman’s and Premier Oil’s reports, on the other hand, focus on particular operations which have come under public scrutiny.

There is a clear tendency in all the reports examined to put a positive spin on corporate performance and progress, notwithstanding the sporadic disclosure of corporate weaknesses or problems. In both the Talisman and Premier Oil reports, quotes and/or pictures are strategically placed or selected in order to give support to claims made or positive impressions.<sup>315</sup> Indeed, the Premier Oil verifier remarks that “the exclusively positive nature of the enlarged and highlighted comments accompanying the report’s photographs exhibit an explicit selection bias.”<sup>316</sup>

### 3. Verification

As with social reporting, “verification” of social reports or social accounting frameworks is a fast growing area. The terminology itself has not yet been clarified. For the purposes of this study, the term verification is interchangeable with social auditing and distinguished from monitoring. A leading academic in the area of

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<sup>311</sup> GRI Guidelines, *supra* note 295 at 29.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.*, at 34.

<sup>314</sup> The Shell 2001 Report, *supra* note 242 at 48.

<sup>315</sup> See Talisman’s CSR Report 2001 *supra* note 99 at 15 where selected quotes of Canadian and European politicians and a diplomat are used in the section on human rights that appear to support a more positive view of Talisman’s and the consortium’s activity in Sudan.

<sup>316</sup> Premier Oil’s Report, *supra* note 246 at 71.

verification or social accounting processes maintains that verification of social performance should include more than verifying the accuracy of data and claims made by the reporting company. It should also include and evaluation of the accounting framework and whether the appropriate mechanisms and methodologies were used in producing the information and the report.<sup>317</sup>

a) *Voluntary Verification Standards*

There are currently no accepted universal standards for verification or social auditing of human performance reports. The OECD notes that “transparency and effectiveness of non-financial disclosure may be enhanced by independent verification” and that techniques for such verification are emerging.<sup>318</sup> There is, however, no description of what qualifies as independent verification or how it should be conducted. According to one expert, for verification to be credible it must be independent, ongoing, institutional, indigenous, trusted, knowledgeable and transparent.<sup>319</sup>

An early draft of the UN Human Rights Responsibilities included a requirement that assessment reports of compliance with the Responsibilities be periodically verified with input from stakeholders.<sup>320</sup> The requirement of verification has been completely dropped in the current draft although the background material refers to verification as part of the process of implementation of the Responsibilities. The drafters appear to take a broad view of verification as an *ad hoc* non-formalized process that can be accomplished through dissemination of a social performance report,<sup>321</sup> or a social audit process.<sup>322</sup>

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<sup>317</sup> Telephone Interview with Magnus Macfarlane, *supra* note 297 at 1-2.

<sup>318</sup> OECD, “The OECD Guidelines for Multinational Enterprises: Text Commentary and Clarifications”, Working Party on the OECD Guidelines for Multinational Enterprises, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International Investment and Multinational Enterprises, DAF/IME/WPG(2000)15/FINAL, p. 16,

<sup>319</sup> E. Bernard, “Ensuring Monitoring is not Co-opted,” (1997) 7 *New Solutions* at 10-12, cited in Avery, *supra* note 234 at 51.

<sup>320</sup> Draft Fundamental Human Rights Principles for Business Enterprises, Addendum 1, U.N. Doc. E/CN.4/Sub.2/2002/X/Add.1, E/CN.4/Sub.2/2002/WG2/WP.1/Add.1 (Draft for Discussion November 2001), Article 19, cited at <http://www1.umn.edu/humanrts/links/principles11-18-2001.htm> (visited March 18, 2002).

<sup>321</sup> See UN Human Rights Responsibilities Introduction, *supra* note 3 at 13. Paragraph 40 states that verification would take place “through dissemination and by other means” and goes on to note that companies could publish the assessments as part of the annual report or be requested to send it “to a State agency, industry or trade association, some nongovernmental clearing house, or an international institution”.

<sup>322</sup> *Ibid.*, at 14, para. 42.

The GRI provides draft guidelines for non-financial audit processes. It emphasizes the importance of the reports being credible to stakeholders for them to be of any use to the reporting organizations.<sup>323</sup> It recommends that reports also set out the policies and internal practices of the reporting company that “enhance the credibility and quality” of the report, as well as the policy and current practice with respect to independent verification of the report.<sup>324</sup> Independent verification, however, is not required for a report to be considered prepared “in accordance” with the Guidelines. The GRI defines independent assurance as:

... a structured and comprehensive process of collecting and evaluating evidence on a subject matter (the sustainability report) that is the responsibility of another party (distinct from management of the reporting organisation), against identified suitable criteria. As a result of the process, assurance providers express a conclusion that provides the intended user/stakeholder with a stated level of assurance about whether the subject matter (the sustainability report) conforms in all material respects with identified criteria. Independent competent experts who maintain an attitude of “professional scepticism” perform the assurance process.<sup>325</sup>

The current guidelines for verification are set out in Annex 4. The wording suggests that they are meant to provide guidance to companies “considering the use of assurance processes as a means to enhance the credibility of their sustainability reports”, and not necessarily meant to be stringently applied if the verification process is to be considered legitimate.<sup>326</sup> Pursuant to the Guidelines, reporting organizations should clarify with the independent assurance providers whether:

- the subject matter of report in question is appropriately defined, all categories of stakeholders have been recognized, the company has determined stakeholder expectations regarding the reporting process, the scope of information to be verified is clearly defined and whether “omissions of significant information covered by such processes are to be explained”;
- there are appropriate criteria to evaluate the quality of the evidence, there is adequate evidence that would support the information reported and that the reporting principles have been followed;

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<sup>323</sup> GRI Guidelines, *supra* note 295 at 17.

<sup>324</sup> *Ibid.*, at 18.

<sup>325</sup> *Ibid.*, at 18, note 3.

<sup>326</sup> *Ibid.*, at 76.



- management control systems are fully supported and consistent in their operation; and,
- there has been stakeholder consultation on the usefulness and credibility of both the report and the verification process.<sup>327</sup>

These considerations are less stringent than those in the preceding draft of the Guidelines.<sup>328</sup>

The Guidelines also set out considerations for the selection of independent assurance providers, directors' responsibilities with respect to independent assurance and the content of verification reports. Regarding the responsibilities of directors, the Guidelines suggest, among other things that the directors agree to publish the full verification report. The GRI also suggests that verification reports "be clearly identified as separate from the sustainability report text", that the scope and objective be clearly stated. Unfortunately, the Guidelines only recommend that the verifier provide a *brief* rather than an in depth description of the processes used for obtaining the qualitative and quantitative evidence which support the conclusions in the verification report.<sup>329</sup>

b) *Practice of Transnational Corporations*

While some TNCs have engaged NGOs or academics to verify social accounting reports and processes, most appear to hire large private consulting/auditing firms to verify social performance reports and to thus enhance report credibility. However, the credibility of these "audit" type processes conducted by private consulting/auditing firms is itself questionable, particularly in the wake of the Enron and Worldcom scandals.

(i) *Mandate*

With no universal verification standards or requirements, mandates for verification of social reports are determined by the company and differ considerably in scope.<sup>330</sup> This means that fundamental human rights issues will not be addressed except at the discretion of the reporting TNC and are unlikely to be raised by verifiers in the report disclosed to the public.

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<sup>327</sup> *Ibid.*, at 77.

<sup>328</sup> See GRI, Draft 2002 Sustainability Reporting Guidelines, at 65-66.

<sup>329</sup> GRI Guidelines, *supra* note 295 at 78-79.

<sup>330</sup> The variation in scope of social auditing processes is also the result of the lack of standards for conducting a social audit. As Doug Johnston notes: "part of the challenge is there is no standard methodology for these sorts of reports. As a result, the scope of verification can in general, vary considerably, and may in some cases rely on information solely provided by management with little or no site visit activities, with associated varying levels in the assurance provided. Telephone Interview with Doug Johnston, Ernst & Young, London, (June 5<sup>th</sup>, 2002) at 10.

As noted in the Case Study, the mandate for PwC's verification of the Talisman CSR Reports was very narrow. For the 2001 Report, PwC states that it had been requested "to audit and review certain statements and data" in the Report "relating to ... the policies and processes within Talisman and, where covered by the framework, within GNPOC with regard to the Sudan operations" and to conduct stakeholder consultation. PwC's verification statement does not discuss or critique Talisman's reporting methodology but merely notes whether or not the contents of the report "are supported by appropriate underlying evidence at Head Office level and local operations level".<sup>331</sup> Nor is there an explanation of what constitutes "appropriate underlying evidence".

Ernst & Young, in verifying BP's Environmental and Social Review does not conduct stakeholder consultations at particular sites to determine whether the location issues have been adequately assessed. Rather, it verifies the business processes that underpin the issues covered in the report in order to substantiate its contents. The verifier visits a sample of sites each year to review the local business processes that cover the issues in the report and the processes for gathering relevant performance data. This involves reviewing local processes for identifying the appropriate focus of social and environmental activities, reviewing and tracking progress and reporting performance internally and externally.<sup>332</sup> Another company conducts stakeholder consultation. Although BP does claim that its stakeholder views will be independently verified, the consultation processes and methodologies do not appear to have been publicly evaluated or the results of such evaluation verified.<sup>333</sup>

Premier Oil's pilot social accounting and verification project involved a much more comprehensive auditing of the social accounting process than that of the private consulting/auditing firms. The verification mandate was quite broad. Its terms of reference were:

To verify selectively the stated competence of the auditors and evaluate the appropriateness of their stated competence in relation to the proposed tasks of designing the social audit framework and conducting the social review.

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<sup>331</sup> Talisman CSR Report 2001, *supra* note 99 at 7.

<sup>332</sup> Telephone interview with Doug Johnston, *supra* note 330 at 13.

<sup>333</sup> One commentator who worked as a consultant for BP conducting stakeholder consultation noted the lack of process in relation to the stakeholder consultation. "They had no methodological guidelines, no framework, in essence nothing ... just simply a brief consultation with their stakeholders. And [they did] a selective editing job afterwards ... there were no criteria governing what they included or what they excluded from the report". Telephone Interview with Dr. Magnus Macfarlane, *supra* note 297, at 32-33.

To verify selectively the stated process used to design the social audit framework and evaluate the quality and scope of this process against relevant AA 1000 process standards for social auditing ...

To verify selectively the stated process recommended and/or used to conduct the social performance review ... and evaluate the quality of this process against relevant AA 1000 process standards for social auditing ....

Because the verifier reviewed and critiqued the methodologies and processes used to generate the report and exposed the flaws in the process and report, it injected a large amount of transparency and credibility into the process, notwithstanding the inadequacies of the reporting process.

(ii) *Transparency*

As with social reporting, the transparency of procedures and methodologies for gathering and verifying information is fundamental to the credibility and legitimacy of the verification process. Apart from Premier Oil's report, the verification reports examined provide little detail, if any, of verification methodology. As noted in the Case Study, PwC does not disclose how stakeholders were selected for consultation or give much detail on how the consultation process was conducted apart from a questionable claim that "independent" translators were used.

Similarly, Ernst & Young states that, among other things, such as reviewing documents and discussing the non-financial policies with management, that it will, [t]est evidence supporting the Review's data, statements and assertions at a sample of BP's sites.<sup>334</sup> There is no indication in its statement of the process for testing such evidence.

Again, the Premier Oil's Report differs in this respect. The methodology of the social accounting process and the verification are set out in some detail.<sup>335</sup>

(iii) *Independence*

Independence of verifiers is another important problem that emerges from a review of current verification practices. Private consulting/auditing firms often provide a range of services to clients that compromise their independence. The GRI-suggested criteria for selecting verifiers include, determining "an assurance provider's degree of independence and freedom from bias, influence, and conflicts of interest" and ensuring that such provider has "not been involved in the design, development or

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<sup>334</sup> BP's 2001 Report, *supra* note 248 at 24.

<sup>335</sup> Premier Oil's Report, *supra* note 246 at 12-17. See also 63 where the verifier elaborates on the verification methodology used.

implementation of the organisation's sustainability monitoring and reporting systems or assisted in compiling the sustainability report".<sup>336</sup>

As noted in the Case Study, PwC not only conducted the stakeholder consultations and the audit process but also advised Talisman on the design and implementation of its CSR policies and processes.<sup>337</sup> Ernst & Young is the financial auditor for BP and also verifies their Environmental and Social Report. While the firm does provide the service of writing reports for some clients, it does not, as a matter of principle, verify the reports it writes.<sup>338</sup>

Premier Oil's verification by the Corporate Citizenship Unit of Warwick Business School, University is also open to question on this issue. Premier Oil retained a member of the Corporate Citizenship Unit as an advisor "on human rights and corporate social responsibility principles and targets" and in relation to the development of performance indicators and management tools for the evaluation of stakeholder feedback.<sup>339</sup>

#### (iv) *Qualification of Verifiers*

A 1996 US Department of Labor study of American textile companies revealed that where monitors were used to ensure compliance of supplier factories with corporate codes of conduct, while they had technical expertise in production and quality control they were "relatively untrained with regard to the implementation of labor standards".<sup>340</sup> A recent analysis of PwC monitoring methods in the inspection of labour standards in overseas textile factories found serious flaws in PwC monitoring methodology,<sup>341</sup> raising the issue of the competence of private consulting/auditing firms to conduct such monitoring.

Similar concerns arise with respect to the competence of private consulting/auditing firms to verify a corporation's social performance where international human rights standards and issues are in question. Avery argues that

<sup>336</sup> GRI Guidelines, *supra* note 295 at 77-78.

<sup>337</sup> Talisman CSR Report 2000, *supra* note 25 at 10.

<sup>338</sup> Telephone Interview with Doug Johnston, *supra* note 330 at 7.

<sup>339</sup> Premier Oil's Report, *supra* note 246 at 10. The verification was designed and conducted by Dr. Magnus Macfarlane. Dr. Macfarlane stated that the independence issue was very much debated in the pilot phase and that there was strict agreement that there would be no interference by those involved in the advisory role to Premier in the verification process development or results. However, he noted that it had been decided that in the next accounting and auditing cycle, the verification would be conducted by a third party now that the methodologies and process had been developed.

<sup>340</sup> US Department of Labor, *The Apparel Industry and Codes of Conduct: A Solution to the International Child Labour Problem?* (1996), p. 107, cited in Forcese *supra* note 235 at 27.

<sup>341</sup> See D. O'Rourke, "Monitoring the Monitors: A Critique of PricewaterhouseCoopers (PwC) Labour Monitoring (2000), cited at <http://web.mit.edu/dorourke/www/PDF/pwc.pdf>.

these firms may have a useful role to play regarding such verification “particularly in terms of ensuring that the process is correct and thorough, and that standards are applied uniformly”. He points out, however, that such firms “do not have a level of expertise and experience in social issues that would enable them to be the primary assessor” in any verification of human rights issues.<sup>342</sup>

The GRI recommends that verifiers have both an “ability to balance the consideration of the interests of different stakeholders” and the collective or individual competence necessary “to meet the objectives of the assurance assignment” and that they can demonstrate this “through an appropriate level of experience and professional judgment”.<sup>343</sup> The Guidelines give no further guidance as to what the “appropriate level of experience” should be.

As noted in the Case Study, there is no indication of the qualification of the members of the PwC audit teams to conduct interviews on the human rights dimension of Talisman’s activities in Sudan. PwC declined numerous requests from this paper’s authors for an interview and the authors were unable to clarify this issue. Interviews with other practitioners conducting verifications of social and human rights performance reports reveal that in most cases verification teams have little or no human rights training or expertise in human rights investigation.<sup>344</sup>

#### 4. Conclusion – Self-Regulation

The preceding analysis identifies significant concerns about the adequacy and effectiveness of voluntary self-regulation regimes as a means to ensure that TNCs respect human rights in their extraterritorial activities. First, the format of the variety of internationally generated voluntary instruments surveyed varies from a list of broad principles to more specific standards with implementation requirements and voluntary follow-up measures. Few of the instruments, like corporation-developed codes, deal sufficiently with human rights issues. Only the UN Human Rights Responsibilities and the Global Compact address in any detail the issue of complicity in human rights abuses and only the former provides for effective reporting and independent monitoring of compliance.

The Voluntary Principles offer some innovative features such as requirements and guidelines for the conduct of human rights related risk assessments.<sup>345</sup> The UN

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<sup>342</sup> Avery, *supra* note 234 at 58.

<sup>343</sup> GRI Guidelines, *supra* note 295 at 78.

<sup>344</sup> Premier Oil, however, hired an academic, Dr. Magnus Macfarlane with expertise in verification methodology and social impact assessments to conduct a social audit of their report and the social accounting framework. Telephone Interview with Dr. Magnus Macfarlane, *supra* note 297, at 32-33.

<sup>345</sup> Voluntary Principles, *supra* note 262, Section 1.

Human Rights Responsibilities also cover other provisions regarding security. The Voluntary Principles, however, have the advantage of having had extractive industry input into their development and hence enjoy the support of major TNCs. All but the UN Human Rights Responsibilities are drafted in permissive language and none but the former have effective compliance mechanisms. Of these codes the UN Human Rights Responsibilities provides the most effective model for corporate conduct with respect to human rights. Unfortunately, although there is some indication that these principles may become a declaration of the UN Sub-Commission on the Promotion and Protection of Human Rights late next year, and efforts are underway in the UN to gain the support of business and states for the principles, this instrument currently remains largely unrecognized or unacknowledged by both states and the TNC community.<sup>346</sup>

In light of the gross inadequacy of most codes and policies, these voluntary regimes do not provide effective regulation TNC extraterritorial conduct regarding human rights and thus do not fill the “governance gap”. Rather, as Frey observes, it is “a company’s goodwill, business culture, and knowledge of best practices [that] largely determine how it chooses to respond to human rights violations affecting its employees or other stakeholders”.<sup>347</sup>

On the issue of social or human rights performance reporting, the GRI Guidelines are, on the whole, a very encouraging development. They have the legitimacy in the business and NGO communities due to widespread consultation on the development of the Guidelines with multiple stakeholders, and show a developing stringency of disclosure standards that offers real potential in the future. Nonetheless, it must be noted that the first board of directors of the GRI is heavily populated with representatives from business without corresponding numbers of NGOs or academics.<sup>348</sup> The Guidelines also have several significant shortcomings. First, they do not provide indicators specific to a particular operating site or the operating environment of a particular company. Second, the lack of development of human rights indicators is unsatisfactory as it allows reporting companies to avoid addressing fundamental human rights issues related to their activities and still claim

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<sup>346</sup> David Weissbrodt noted that so far only Switzerland and Algeria had expressed support for the principles. The US-based Business for Social Responsibility and London-based International Business Leaders Forum have endorsed the principles along with Novatis. Professor David Weissbrodt is a member of the UN Sub-Commission on the Promotion and Protection of Human Rights and has been spearheading the development of the UN Human Rights Responsibilities. E-mail from David Weissbrodt, (November 26, 2002).

<sup>347</sup> Frey, *supra* note 150, at 180. See also Kimberly Gregalis Granatino, “Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability” (1999) 23 *Suffolk Transnat’l. L. Rev.* 191, note 113 and p. 222.

<sup>348</sup> See Global Reporting Initiative, “Global Reporting Initiative Announces First Board of Directors” from GRI website at <http://www.globalreporting.org/News/PR/Board24-01-02.htm> (visited March 6, 2002).

that their report is “in accordance” with the Guidelines. Finally, independent verification is not required for a report to be considered prepared “in accordance” with the Guidelines.

TNC practice in social performance reporting and verification raises important issues of credibility. Without accepted international and national standards on reporting methodologies and processes, corporations may collect and report information as they see fit, while promoting a rosy view of corporate activity, leaving even industry leaders in this area open to the criticism of “greenwashing”.<sup>349</sup> Equally, current verification practices can also be criticized because they lack credible mandates, verification methodologies, transparency of process, auditor independence and auditor expertise.

There is no doubt that voluntary self-regulation can serve a useful purpose.<sup>350</sup> Indeed the trend of self-regulation in this area may help in developing consensus in the business community and among states for international regulation of TNC conduct. The existing self-regulation regimes in these areas, however, are at best minimalist and at worst completely inadequate for the protection of fundamental human rights. To be more effective in protecting fundamental human rights, the provisions must create specific, well-defined mandatory human rights obligations applicable to corporate activity and must address reporting of compliance and independent verification and monitoring of corporate conduct.

TNCs are not equipped to design such regimes or to verify their own conduct. They have neither the expertise nor the requisite public interest. Nor can TNCs be expected to follow voluntary obligations where such obligations conflict with “the incentive to make a profit and remain competitive”.<sup>351</sup>

Ultimately, this issue must be addressed more formally both through international and domestic law. TNCs should be directly legally accountable for their

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<sup>349</sup> The California Global Corporate Accountability Project notes that “[g]reenwashing takes many forms: sweeping claims of improvements without quantitative data; selective data that highlight improvements in one area ... while ignoring other crucial areas”. See *Beyond Good Deeds*, *supra* note 1 at 16.

<sup>350</sup> A Canadian Government study notes that some of the benefits of voluntary codes include their use in furthering “public policy objectives through non-regulatory means”, complementing and expanding traditional regulatory regimes as well as avoiding “jurisdictional and constitutional obstacles that are part of legislative development”. See Industry Canada, and the Regulatory Affairs Division, Treasury Board Secretariat, Government of Canada, “Voluntary Codes: A Guide for Their Development and Use”, A joint initiative of the Office of Consumer Affairs (1998) at 5. The same study also notes that such codes can be disadvantageous for corporations in that they create an “uneven playing field” where those companies that comply with the code are penalized by the fact that non-complying companies get a “free ride”.

<sup>351</sup> Erin Elizabeth Macek, “Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights” (2002) 11 *Minn. J. Global Trade* 101 at 124.

part in violations of at least the most fundamental human rights. As Mayne argues voluntary initiatives “should not be a substitute for binding forms of government and intergovernmental regulation”.<sup>352</sup> The primary responsibility for the protection of international human rights still lies with states and it is arguable that “democratic law-making is the only legitimate means of arriving at basic standards of accountability”.<sup>353</sup> The home states of these corporations should not be permitted to abdicate this responsibility solely on the basis that the violations occur outside their territorial jurisdiction.

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<sup>352</sup> Mayne, *supra* note 236, at 236.

<sup>353</sup> “The New Balance Sheet”, *supra* note 205 at 14.





### E. State Interest in Regulating Extraterritorial Corporate Activity

We have found that there is no legal duty on the part of home states to regulate the extraterritorial conduct of their corporations. Similarly, there is no rule of international law preventing states from regulating such conduct. States have extensive authority and capacity under international law to exercise their jurisdiction to prescribe and adjudicate respecting the extraterritorial activities of their national corporations. The US Foreign Corrupt Practices Act is one example.<sup>354</sup> States can also extend both their civil and criminal law to national corporations or their nationals controlling such corporations.<sup>355</sup> This can occur so long as the exercise of such jurisdiction does not interfere with the jurisdiction of another state.<sup>356</sup> Where the same act may be regulated by two states, as a general rule, such jurisdiction is considered to be concurrent rather than exclusive,<sup>357</sup> and principles exist to resolve conflicts of jurisdiction.<sup>358</sup> No conflict of jurisdiction would exist if a home state were to regulate the human rights conduct of its national corporations in cases where the host state was either unable or unwilling to exercise its jurisdiction to protect the human rights of individuals within its territory, or where the host state perpetrates such violations and is aided directly, indirectly or acts with the complicity of a foreign corporation. In spite of the obvious regulatory gap and the capacity to regulate such extraterritorial conduct, states have for the most part been reluctant to do so. One writer suggests that this reluctance may stem from a fear of “the potential costs to diplomatic cooperation or access to markets, investment sites, and raw materials”.<sup>359</sup>

Apart from this capacity and authority to regulate, it is also arguable that states have a legal interest in regulating international corporate conduct that violates fundamental human rights standards. Certain rules of international human rights law, including the prohibitions against genocide, slavery, racial discrimination,<sup>360</sup>

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<sup>354</sup> 15 U.S.C. §§ 78dd-1 to -2 (Supp. 1999).

<sup>355</sup> See F. A. Mann, *Further Studies in International Law*, (Oxford: Clarendon Press, 1990) at 4, where he states: “Since in the present world sovereignty is undoubtedly territorial in character, in assessing the extent of jurisdiction the starting point must necessarily be its territoriality such as it was developed over the centuries and defined by the Huber-Stroyan maxims: as a rule jurisdiction extends (and is limited) to everybody and everything within the sovereign’s territory and to his nationals wherever they may be”.

<sup>356</sup> See the *Lotus* case, PCIJ Reports, Series A, No. 10 (1927) at 18-19.

<sup>357</sup> F.A. Mann, *Studies in International Law* (Oxford: Clarendon Press, 1973) at 3.

<sup>358</sup> See for example the Restatement (Third) of the Foreign Relations Law of the United States §403 (1987) [hereinafter, “U.S. Restatement”].

<sup>359</sup> Kenneth A. Rodman, “Think Globally, Punish Locally”, (1998) 12 *Ethics and International Affairs* 19 at 20.

<sup>360</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase*, [1970] I.C.J. Rep. 3, at para. 34.

torture<sup>361</sup> and the right to self-determination,<sup>362</sup> are considered to be obligations *erga omnes*. This means that these obligations are owed not just between states but by every state to the international community as a whole. All states therefore are deemed “to have a legal interest in their protection”.<sup>363</sup> According to the ILC, such interest implies that all states may invoke the responsibility of another state for breaches of such obligations.<sup>364</sup>

If all states have a legal interest in protecting *erga omnes* obligations, they also have a legal interest in preventing and punishing violations of these norms. International law gives states universal jurisdiction to prosecute persons who commit or are complicit in grave violations of fundamental norms including genocide, war crimes, crimes against humanity,<sup>365</sup> and torture.<sup>366</sup> Together, then, the legal duty owed by a home state to the international community to protect *erga omnes* obligations and the legal interest in preventing and punishing violations of those norms that are subject to universal jurisdiction may justify the imposition of a international legal duty on states to regulate at least the most egregious extraterritorial conduct of corporate nationals.

Another principle that may justify the imposition of a duty, under international law, on a home state to regulate the extraterritorial conduct of its national is similar, although not identical, to the principle of subsidiarity under the law of the European Union.<sup>367</sup> Such a principle would impose a duty to regulate on the state that has the greatest capacity to exercise effective legal control over a particular corporate actor. In the case of TNCs that are nationals of industrialized states it is clear that such states

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<sup>361</sup> The U.S. Restatement also includes among other things, the prohibitions against “murder or causing the disappearance of individuals and torture or other cruel, inhuman, or degrading treatment or punishment” as obligations *erga omnes*. U.S. Restatement, *supra* note 358, at §702 and Comment, para. o.

<sup>362</sup> East Timor case (*Portugal v. Australia*) [1995] I.C.J. Rep. 90, at 102, para. 29, cited in Draft Articles Commentary, *supra* note 153 at 242.

<sup>363</sup> Barcelona Traction, *supra* note 360 at para. 33.

<sup>364</sup> Draft Articles Commentary *supra* note 153 at 245, 270.

<sup>365</sup> Regarding universal jurisdiction for genocide and war crimes see the Convention on the Prevention and Punishment of the Crime of Genocide, December 9 1948, 78 U.N.T.S. 277 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. See also *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985). In that case the U.S. Court of Appeals stated: “This “universality principle” is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses” (at 582 para. 404).

<sup>366</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10 1984, 1465 U.N.T.S. 85 23 I.L.M. 1027 (1984), as modified, 24 ILM 535 (1985).

<sup>367</sup> For a recent and comprehensive discussion of the principle of subsidiarity under the EU law, see Gráinne de Búrca, “Reappraising Subsidiarity’s Significance after Amsterdam” Harvard Jean Monnet Working Paper 7/99 (Harvard Law School, 1999), cited at <http://www.jeanmonnetprogram.org/papers/99/990701.html> (visited December 30, 2002).

have the effective capacity to regulate and enforce such regulation in addition to having access to the key assets of impugned corporations.

The principle of subsidiarity based on effective capacity is consistent with the theory that human rights do not merely impose obligations on states to protect those within their territorial jurisdiction. Rather, international human rights law imposes duties on both primary and secondary addressees. The international human rights regime imposes a primary responsibility on states to protect human rights of individuals within their territorial jurisdiction. Where that state is either systematically violating such rights or unable or unwilling to prevent such violations, the duty may fall on secondary addressees to take action.

... a morally justified right does not just disappear, or cease to direct behavior, when it is systematically violated. In such a case, the right's capacity to generate obligations may shift so as to increase the responsibilities of the secondary addressees. In addition to their standing obligations to encourage and assist, these addressees may now have obligations or responsibilities to use diplomatic and economic means to pressure the country to cease its violations. ...

These responsibilities may also derive from special ties. ... In an increasingly interdependent world, where cooperation for mutual benefit is widespread, countries can acquire responsibilities to assist their "partners" in developing institutions and capacities needed to uphold human rights. Special ties can give one country the role of secondary addressee in relation to rights in other countries.<sup>368</sup>

It is arguable that a special tie might also be generated by economic investment or even home state foreign policy aimed at the promotion and protection of human rights.

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<sup>368</sup> James W. Nickel, "How Human Rights Generate Duties to Protect and Provide", (1993) 15 *Hum. Rts. Q.* 77 at 85.



## F. Emerging Duty to Regulate Extraterritorial Corporate Conduct

### 1. Emerging Norms

Whether or not a theoretical justification exists for the imposition of an international legal duty on home states to regulate extraterritorial corporate activity regarding human rights, there are developments in international law that may point to an emerging duty on home states in this regard.

First, as noted above, while traditionally international human rights law has been directed against state behaviour, recent developments in human rights jurisprudence reveal that states can be held liable under international human rights law for failing to adequately protect individuals against certain acts of other private individuals. These decisions suggest “some private activities are a legitimate area for international concern”.<sup>369</sup> To date, such responsibility has been imputed to the state where such acts occur within that state’s territorial jurisdiction.

Second, the territorial limitation on a state’s human rights obligations has been challenged within the context of the longstanding debate regarding the use of force to intervene in a state to prevent or stop widespread violations of fundamental human rights. While traditionally intervention in another state for this purpose was seen as an interference in the domestic affairs of the sovereign state and a breach of sovereignty, industrialized states and their academics now maintain that the development of human rights norms and international humanitarian law has modified the traditional concept of sovereignty, and that the protection of human rights is now also a matter of international concern.<sup>370</sup>

This notion is reflected in the practice of the Security Council, which, over the last decade, has classified grave humanitarian crises as threats to international peace and security even where such crises were purely domestic in nature.<sup>371</sup> This has enabled the authorization of international military action to respond to such crises. It is now widely recognized among international legal scholars that the Security Council has the right (although not a duty) to authorize collective military intervention in a

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<sup>369</sup> Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, (2001) 11 *YJL* 443 at 470.

<sup>370</sup> See Robert McCorquodale and Raul Pangalangan, “Pushing Back the Limitations of Territorial Boundaries” (2001) 12 *EJIL* 867 at 881, who argue that “[t]he vast array of international human rights treaties and other documents testify to this development”.

<sup>371</sup> Catherine Guicherd “International Law and the War in Kosovo”, (1999) 41 *Survival* 19 at 22-3. See also Mary Ellen O’Connell, “The UN, NATO, and International Law After Kosovo” (2000) 22 *Hum. Rts. Q.* 57 at 68-69.

state to prevent or stop widespread violations of human rights perpetrated by the target state or where that state is unwilling or unable to prevent them.<sup>372</sup>

Some international relations theorists challenge the traditional idea that sovereign boundaries delimit both a state's legal and moral obligations. Wheeler, for example, disputes the realist and pluralist notions that states have moral obligations only to protect their own citizens and that respect for sovereignty is to fundamental international order and stability, notwithstanding the illegitimate internal actions of states. For Wheeler, sovereign boundaries are merely theoretical constructs.

Once it is accepted that there is nothing natural or given about sovereignty as the outer limit of our moral responsibilities, it becomes possible to argue for a change in our moral horizons ....<sup>373</sup>

He argues that governments have an obligation to protect human rights at home and abroad even if such protection entails military intervention.<sup>374</sup>

In addition to the legal right on the part of the Security Council to authorize military intervention for humanitarian purposes, the notion that states also have a moral obligation to protect vulnerable populations in other countries from human rights abuses is reflected in international legal scholarship and state practice. Following the unauthorized military intervention in Kosovo, NATO and some of its member states justified the bombing campaign as a moral duty.<sup>375</sup> Many legal

<sup>372</sup> Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, (Philadelphia: University of Pennsylvania Press, 1996) at 287-8. See also Ruth Gordon, "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti" (1996) 31 *Texas International Law Journal* 43 at 48; Christopher Greenwood, "Is there a right of Humanitarian Intervention" (1993) 49 *The World Today* 34 40; Guicherd, *supra* note 371 at 22; O'Connell, *supra* note 371 at 67-9; Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2<sup>nd</sup> ed.) (Irvington-on-Hudson, NY: Transnational Publishers Inc., (1997) at 225. See also the Danish Institute of International Affairs Report, *Humanitarian Intervention: Legal and Political Aspects*, Submitted to the Minister of Foreign Affairs, Denmark, December 7, 1999 at 64.

<sup>373</sup> Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, (New York: Oxford University Press, 2000) at 39.

<sup>374</sup> Even pluralists like Michael Walzer argue that although there is no international consensus on human rights norms, there is a minimal universal moral code of which genocide is a breach. See Michael Waltzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2<sup>nd</sup> ed. (New York: Basic Books, 1992) at 106.

<sup>375</sup> At the initiation of the bombing campaign, NATO Secretary-General, Javier Solana stated that "[t]his military action is intended to support the political aims of the international community... We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo... We have a moral duty to do so. The responsibility is on our shoulders and we will fulfil it." "Press Statement by Dr. Javier Solana, Secretary General of NATO", NATO Press Release No. 40 (23, March 1999) cited at <http://www.nato.int/docu/pr/1999/p99-040e.htm>. See also the U.K. House of Commons Select Committee Report, which states at para. 137, "we conclude that NATO's military action, if of dubious legality in the current state of international law, was justified

academics also maintain that despite the illegality of the NATO campaign under international law, a moral obligation existed to take such action due to the widespread violations of human rights.<sup>376</sup> Military intervention to prevent or stop violations of human rights, these academics argue, could be *legitimate* even if technically illegal if conducted according to certain criteria.<sup>377</sup>

These developments demonstrate that human rights are, at least in the view of industrialized states, a matter of international concern. There may be a moral obligation, or even a moral right, on the part of states to take action where fundamental human rights are being violated on a large scale. If states can legitimately be concerned and have a right to take collective action under the auspices of the UN, and have a moral obligation to take such action with or without the sanction of the Security Council, it can be argued that from a moral perspective, states may also have a concomitant obligation to ensure that their nationals do not commit or participate in, or profit from the commission of such abuses either directly or indirectly. As Wheeler notes, "states committed to these principles – 'good international citizens' – are not required to sacrifice vital interests in defence of human rights, but they are required to forsake narrow commercial and political advantage when it conflicts with human rights".<sup>378</sup>

The emergence of such an obligation is supported by the recent findings of the International Commission on Intervention and State Sovereignty (ICISS).<sup>379</sup> In its report of December 15, 2001, ICISS identified an emerging responsibility on states to protect vulnerable populations when major harm to civilians is occurring or is imminent and where the state in which such harm is taking place or apprehended, is

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on moral grounds." United Kingdom House of Commons Select Committee on Foreign Affairs Fourth Report 2000, May 23 cited at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfa/28/2813.htm#a34>. Antonio Cassese argues that there was a strong and widespread sense among states that the use of force by NATO in Kosovo was a moral necessity despite the fact that it was not authorized by the Security Council. Antonio Cassese, "A Follow-up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*" (1999) 10 *EJIL* 791 at 798.

<sup>376</sup> Richard Falk, "Kosovo, World Order, and the Future of International Law" (1999) 93 *AJIL* 847 at 854; Antonio Cassese, "Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 *EJIL* 23 at 25; Guicherd, *supra* note 360 at 19.

<sup>377</sup> Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 *EJIL* 1 at 6; Cassese, *supra* note 376 at 25-26; Christine Chinkin, "Kosovo: A 'Good' or 'Bad' War?" (1999) 93 *AJIL* 841 at 842-3 and 853; Guicherd, *supra* note 371 at 19. See also The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000) at 176 and 186.

<sup>378</sup> Wheeler, *supra* note 373 at 49.

<sup>379</sup> ICISS was established by the Canadian Government in response to UN Secretary-General, Kofi Annan's challenge to the international community to develop consensus on how to respond to massive violations of international human rights and humanitarian law. The Commission received funding from the Canadian Government and several international foundations.



either the perpetrator or is unable or unwilling to stop or prevent it.<sup>380</sup> In these circumstances, “intervention for human protection purposes, including military intervention in extreme cases, is supportable”.<sup>381</sup> According to ICISS, this principle of responsibility, although not yet customary international law, is based on “growing state and regional organization practice as well as Security Council precedent”.<sup>382</sup> The “responsibility to protect” encompasses the responsibilities to “prevent”, to “react” and to “rebuild”. The “responsibility to prevent” includes “a commitment to helping local efforts to address both the root causes of problems and their more immediate triggers”.<sup>383</sup> The report cites the “withdrawal of investment” as one example of direct economic prevention measures that could be taken.<sup>384</sup>

It is arguable that this state responsibility to protect and thus to prevent implies a duty on the part of home states to regulate corporate activity abroad to ensure that corporations are not participating either directly or indirectly in human rights abuses that could lead to or are part of a large-scale crisis situation. This duty is particularly relevant where corporations are active in conflict zones and in a partnership or joint enterprise with the government of the host state. In these circumstances, where the host government is a party to the conflict, is using public security forces to protect the joint venture interests and installations, or is using profits/revenue from the joint enterprise for military or human rights abusing purposes and is known to be perpetrating human rights abuses, it is likely that the corporation is involved either directly or indirectly, or complicit in these abuses.

In such situations in particular, a right or “a responsibility” to intervene makes no sense without a concomitant duty to prevent corporate nationals from directly or

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<sup>380</sup> It is interesting to note that the human rights and humanitarian law violations taking place in the oil exploration and extraction area of South Sudan (Western Upper Nile) fall within the Commission’s definition of circumstances that would justify military intervention for human protection purposes. These include, “large scale loss of life ... with genocidal intent or not, which is the product of ... deliberate state action...” These circumstances are further defined and specifically include, *inter alia*, “the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee; and the systematic rape for political purposes of women of a particular group (either as a form of terrorism, or as a means of changing the ethnic composition of that group)”. In addition, “large-scale” is not quantified and “military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing”. See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission International Commission on Intervention and State Sovereignty*, (December, 2001) at 32-33.

<sup>381</sup> *Ibid.*, at 16. In its consultations, the Commission found a general acceptance, even among “states where there was the strongest opposition to infringements on sovereignty”, that there were “limited exceptions” to Article 2.4 of the Charter. See *Ibid.*, at 31.

<sup>382</sup> *Ibid.*, at 16.

<sup>383</sup> *Ibid.*, at 19.

<sup>384</sup> *Ibid.*, at 24.

indirectly aiding in the continuation or exacerbation of the situation. Indeed, the Commission makes it clear that the responsibility to prevent must be “fully discharged” in order to justify military intervention.<sup>385</sup>

At the very least, it would appear that there is shift in international thought that may eventually lead to the formal legal recognition of an obligation on the part of states to regulate the extraterritorial conduct of their corporate nationals, where such corporations are active in zones of conflict and directly or indirectly contributing to the exacerbation of a dire human rights situation.

## 2. Emerging State Practice

The regulatory measures enacted by Denmark, Holland and France requiring mandatory disclosure of social and environmental issues relating to extraterritorial business activity may be indicative of emerging state practice in support of a norm requiring regulation of overseas business conduct. As mentioned above, the Dutch government has also recently passed a measure linking compliance with the OECD Guidelines to the availability of government subsidies related to “international trade promotion, investment and export credit insurance”.<sup>386</sup> In addition, Belgium has drafted legislation that would create a label for products manufactured in compliance with international labour standards.<sup>387</sup>

The U.K., U.S. and Australian bills discussed above that more broadly target the extraterritorial activities of corporate nationals may also point toward an evolving state practice. While these bills in their current form may never become law, it is both encouraging and notable that corporate accountability for extraterritorial activities is being contemplated at this level. In the U.K. over 230 cross party Members of Parliament have endorsed the principles set out in the draft U.K. legislation<sup>388</sup> and the U.K. government is currently considering the possibility of regulating private security companies that operate overseas.<sup>389</sup>

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<sup>385</sup> *Ibid.*, at 36.

<sup>386</sup> Susan Ariel Aaronson and James Reeves, “The European Response to Public Demands for Global Corporate Responsibility, National Policy Association (February 5, 2002) at 32, cited at [http://www.multinationalguidelines.org/csr/boeckler\\_report.htm](http://www.multinationalguidelines.org/csr/boeckler_report.htm) (visited November 26, 2002).

<sup>387</sup> The legislation is currently being reviewed by the European Commission to ensure it is in compliance with international trade laws and EU trade policy. *Ibid.*, at 46.

<sup>388</sup> “15 October 2002: Corporate Responsibility Bill debated in Parliament”, Latest News, CORE, cited at <http://www.foe.co.uk/campaigns/corporates/core/news> (visited November 26, 2002). The U.K. bill is being promoted by a coalition of high profile NGOs known as the Corporate Responsibility Coalition (CORE).

<sup>389</sup> In February 2002, the U.K. Foreign Office released the “Green Paper on Private Military Companies: Options for Regulation” for the purposes of discussion. The document addresses the issue of private military service providers (PMS) who provide a range of such services including

The European Union has indicated a willingness to address corporate accountability for extraterritorial activities. While the European Parliament and the European Commission have recently endorsed a voluntary approach to corporate social responsibility ("CSR") issues, both bodies have also left the door open to future regulation. The preamble of a European Parliamentary resolution on CSR, passed in May of this year, notes that although there is consensus that initially a voluntary approach is necessary this does not remove "the possibility of regulation where appropriate".<sup>390</sup> The European Commission's July 16, 2002 White Paper specifically states that voluntary codes of conduct "are complementary to national, EU and international legislation ... and not a substitute [for] them".<sup>391</sup>

The above-noted resolution calls on the European Commission, among other things, to propose mandatory social and environmental reporting and independent verification,<sup>392</sup> and to mainstream CSR principles "in all areas of Community competence, [including] company law ... financial market legislation [and] trade policy".<sup>393</sup> It also calls on the Commission "to link incentives for voluntary standards with public sector financial support".<sup>394</sup> The Commission's White Paper notes that the Commission has already proposed amendments to two corporate law directives that would require the inclusion of non-financial information in annual reports. It also makes a commitment on the part of the Commission to "fully integrate" CSR principles into E.U. policies.<sup>395</sup> In addition, the White Paper proposes the establishment of a European Union Multi-Stakeholder Forum to promote "transparency and convergence of CSR practices and instruments". The Forum would be chaired by the Commission and would include the participation of developing countries. Among other things, the Forum would consider and agree to

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mercenary forces abroad. The report identifies a number of problems with PMS's such as the lack of accountability and the potential for human rights abuses and outlines regulatory options for these companies ranging from a ban on military activity abroad to a voluntary code of conduct. See Private Military Companies: Options for Regulation, February 12, 2002, cited at <http://files.fco.gov.uk/und/hc577.pdf>.

<sup>390</sup> European Parliament, "Corporate Social Responsibility", European Parliament Resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility (COM(2001) 336-C5-0161/2002-2002/2069(COS)), P5\_TA(2002)0278, Preamble, para. J [hereinafter, "European Parliament Resolution"].

<sup>391</sup> Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development (Brussels, July 2002) COM(2002) 347 final at para. 5.1 [hereinafter "Commission White Paper"].

<sup>392</sup> European Parliament Resolution *supra* note 390 at paras 6 and 8, cited at [http://www.smallbusinesseurope.org/Issues/Corporate%20Social%20Responsibility/1032789826/Parliament\\_resolution](http://www.smallbusinesseurope.org/Issues/Corporate%20Social%20Responsibility/1032789826/Parliament_resolution) (visited December 16, 2002).

<sup>393</sup> *Ibid.*, at para. 25.

<sup>394</sup> *Ibid.*, at para. 27.

<sup>395</sup> Commission White Paper, *supra* note 391 at note 5 and para. 7 respectively.

the development of guidelines for social reporting, assessment and auditing.<sup>396</sup> The Commission's final report on this issue will not be released until 2004.<sup>397</sup>

These various initiatives, be they laws, bills, policy commitments or calls for action show, if not emerging state practice in support of a norm of regulation, a growing recognition at the governmental level of the need for unilateral regulatory action by states to hold TNCs accountable for their extraterritorial activities.

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<sup>396</sup> *Ibid.*, para. 6.

<sup>397</sup> "European White Paper Steers Clear of Regulation", News Alert, Ethical Performance in association with EQ Management, July 16, 2002, cited at <http://www.cleanclothes.org/codes/02-07-16.htm> (visited November 26, 2002).



## G. Canada's Interest in Regulation

Canada's long history of interest in the promotion and protection human rights and its foreign policy focus on human security reflects support for the evolving duty of states to protect vulnerable populations:

By broadening the focus to include the security of people, human security encompasses a spectrum of approaches to the problem of violent conflict, from preventive initiatives and people-centred conflict resolution and peace-building activities to – in extreme cases, where other efforts have failed – intervention to protect populations at great risk. ...

For Canada, human security means freedom from pervasive threats to people's rights, safety or lives.<sup>398</sup>

At least three of five foreign policy priorities, articulated in Canada's foreign policy on human security, arguably support the concept of effective regulation of the extraterritorial activities of corporations in conflict zones that threaten human security or support directly or indirectly, grave violations of international human rights and humanitarian law. These policy priorities include, the protection of civilians, conflict prevention, and governance and accountability. The priority of *protecting of civilians* refers to "building international will and strengthening norms and capacity to reduce the human costs of armed conflict". The policy priority of *conflict prevention* purports to consist of "strengthening the capacity of the international community to prevent or resolve conflict, and building local or indigenous capacity to manage conflict without violence". Finally, and most significantly, *governance and accountability* is said to be "concerned with fostering improved accountability of public and private sector in terms of establishing norms of democracy and human rights".<sup>399</sup>

The government of Canada has a reputational interest in the effective regulation of its national corporations active in conflict zones to ensure respect for human rights. It has taken a leading role in the international community in promoting the notion of human security, and together with the Norwegian government, has created a "human security network" of states and NGOs supportive of this idea.<sup>400</sup>

A recent study of government support of corporate social responsibility initiatives by Canadian Business for Social Responsibility found that compared with other states, such as the U.K, Denmark and the Netherlands, Canada is "lagging ... in terms of having a strategic focus or demonstrated commitment to CSR". The U.K.,

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<sup>398</sup> Government of Canada, *Freedom From Fear: Canada's Foreign Policy for Human Security*, Department of Foreign Affairs and International Trade, (2000) at 2-3.

<sup>399</sup> *Ibid.*, at 3.

<sup>400</sup> Roland Paris, "Human Security: Paradigm Shift or Hot Air?" (2001) 26 *International Security* at 87.

Denmark and the Netherlands are seen as leaders in this area and treat corporate social responsibility as a competitive advantage and have taken important steps to “bring positive attention and a ‘buzz’ to CSR across the private and public sectors”. The study notes “while corporate social responsibility is increasingly on the formal and informal agendas of government, Canadian efforts are fragmented at best and lack a broad national framework”.<sup>401</sup>

Interviews with Canadian government representatives responsible for CSR confirmed that although several departments are working on the issue, there is no formal centralized initiative. The Canadian government sees CSR as a market and industry-led matter and views itself as a facilitator in this process whose role is to provide information, bring people together and disseminate best practices.<sup>402</sup> Despite Canada’s self-stated inability to sanction Talisman following the findings of the government-commissioned Harker Report and the subsequent failure of Talisman’s self-regulation regime, the government is not currently developing any legal tools to deal with such situations of corporate complicity in human rights abuses and is continuing to promote a voluntary approach.<sup>403</sup>

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<sup>401</sup> Canadian Business for Social Responsibility, “Government and Corporate Social Responsibility: An Overview of Selected Canadian, European and International Practices” (April, 2001) at 5.

<sup>402</sup> Interview with Shawna Christianson *supra* note 196.

<sup>403</sup> *Ibid.*

## H. Policy Recommendations

The foregoing has established a governance gap in relation to the human rights impact of Canadian corporate citizens operating in conflict zones. We contend that there is an emerging ethical obligation on Canada to ensure that its corporate citizens do not commit, condone, or become complicit in violations of international human rights and humanitarian law, and that Canada has a legal and political interest in regulating such activity. We have argued that the existing patchwork of self-regulation, voluntary codes, consumer and investor-driven 'shaming' campaigns, and private auditing do not generate a consistent, adequate or even predictable level of adherence by corporations to ethical practices in their international operations. These claims inform the content of our proposals.

A viable policy response to the concerns raised must contain at least three elements:

- Normative prescriptions (rules/standards/code of conduct)
- Monitoring mechanism
- Consequences for non-compliance

Opponents of home state regulation of corporate citizens' foreign activities typically cite the inadequacy of individual state action. The general version of this complaint is that national regulation will hamper the international competitiveness of corporate citizens relative to TNCs based in other countries, whose international operations are unconstrained by normative limits on what they may do. In light of the 'prisoner's dilemma' nature of compliance, critics insist that only co-ordinated action at the global level can achieve the objective of ensuring that all TNCs respect human rights regardless of the locus of the home and host state. The specific version of this complaint arises in reaction to the position taken by various critics that Talisman Energy ought to have exited Sudan. The typical rejoinder Talisman's departure would only lead to its quick replacement by another company with even less regard for human rights and the welfare of the civilian population.

In response to the latter contention, several points merit attention. First, the foregoing case study of Sudan demonstrates that Talisman Energy's presence in Sudan did not, in fact, confer meaningful benefits on the people. Talisman's alleged advocacy of human rights to the Government of Sudan did not yield a diminution in the bombing, displacement or general abuse of the civilian population. Southern Sudanese are still not employed by GNPOC, and the airstrip at Heglig is still used for bombing sorties. Charitable and community work cannot excuse ongoing wrongful conduct. The benefits of the development-related initiatives undertaken by Talisman are tainted: For example, the clinic set up at Heglig remains inaccessible to those Nuer and Dinka who live in the surrounding area and are most in need. The



school in Pariang educates Dinka children in Arabic rather than their native language, thereby contributing to the suppression and erasure of Dinka culture.

Secondly, at an ethical level, it is surely a weak defense to a charge of complicity in wrongdoing to claim that if the accomplice desists, someone else will take its place. This argument is particularly spurious where the complicitous party reaps enormous profit from their involvement<sup>404</sup>.

Thirdly, the authors do not contend that action undertaken by a home state toward an individual corporate citizen is sufficient in and of itself, although it may certainly make a positive difference. Of equal or greater importance is the precedent it sets. Other states, the international community, and civil society can adopt, adapt and build upon a national template.

The ripple effects of action taken by a home state within the confines of its jurisdiction also buttress our response to the more general assertion that all efforts should be directed to global action. Ideally, the international community, whether through the UN, the WTO, the ILO, or some other supra-national institution should formulate, monitor and enforce international standards. Various proposals for international regulation, usually involving the participation of TNCs and NGOs exist in the literature. We support these initiatives, but do not believe that they preclude (or must precede) action at the national level. Indeed, we take the view that activism on all jurisdictional levels - national, regional, transnational and international -- and between a variety of sectors - business, civil society, governments - can be mutually reinforcing. The combined synergy and cross-fertilization of ideas, as described by Anne-Marie Slaughter<sup>405</sup> and others, may ultimately do more to catalyze the emergence of a harmonized global regime than investing all efforts into a single strategy. We see our project as contributing to the emergence of 'global governance' of corporate social responsibility, as described by Meyer and Stefanova:

Global governance is political management at the global level of a given area of human existence in the absence of global government. It is global governance, not global government, because there is no

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<sup>404</sup> The New Balance Sheet, *supra* note 205 grasps the nettle of international competitiveness directly: [W]e do not accept the economic-competitiveness argument as a compelling justification for inaction in the case of those companies operating overseas who may be insulated from the key market pressures that prompt CSR and continue to act improperly in generating economic returns. We strongly believe that the 'rules of the game' must at least include those basic rights enshrined in international human-rights law that Canadians and the vast bulk of other countries agree codify the precepts essential to human dignity. To conclude otherwise is to accept that investors' rights to projects have precedence over the fundamental guarantees that international human-rights treaties provide to all" (at 15).

<sup>405</sup> See, e.g., Ann-Marie Slaughter, "The Accountability of Government Networks", (2001) 8 *Indiana J Global Legal Studies*, 347; "Judicial Globalization", (2000), 40 *Va. J. Int'l L.* 1103.

World State that can impose its rules and values on sovereign nation-states or renegade [TNCs]. ...While theorists of global governance (GG) acknowledge the continued importance and power of nation-states, they also stress the rising influence of nonstate actors such as NGOs, transborder interest groups, transnational epistemic communities, and so forth. Through an interactive and multilayered process, GG is an exercise in managing an issue such as corporate social responsibility via the combined (and often conflicting) efforts of actors at the transnational, international, regional, national, subnational, and individual levels of analysis.<sup>406</sup>

In formulating our proposals, we borrow freely from ideas and strategies developed in other jurisdictions, not only because of their inherent value, but because the adoption of standards already in circulation facilitates their diffusion to yet other sites of governance, thereby enhancing the possibility of convergence and harmonization. Similarly, we seek to involve actors whose constituencies and influence extend beyond Canada, in the hope that they too will become agents of transmission horizontally across borders, and vertically across ascending levels of authority. We endorse the position that the Canadian government, in tandem with the exercise of authority within its sole jurisdiction, also work collaboratively and co-operatively with like-minded states, NGOs and corporate actors to develop and implement transnational strategies. As Morton Winston recently wrote,

The current corporate social responsibility movement may one day lead to the adoption of globally enforceable legal standards that bind [TNCs] to their social and environmental responsibilities. But for this to happen, TNCs and NGOs will need to continue to learn from their current encounters and negotiations and cooperate in placing corporate social accountability on the political agenda of nation states.<sup>407</sup>

It is also worth noting that in its latest Introduction to the UN Human Rights Responsibilities,<sup>408</sup> the UN Sessional Working Group on the working methods and activities of transnational corporations commented that the principles they were drafting might serve as “a model for legislation or administrative provisions with regard to the activities of each transnational corporation or other business having a statutory seat in that country...”<sup>409</sup>

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<sup>406</sup> William H. Meyer & Boyka Stefanova, “Human Rights, the UN Global Compact, and Global Governance”, (2001) 34 *Cornell Int’l LJ* 501 at 515.

<sup>407</sup> Morton Winston, “NGO Strategies for Promoting Corporate Social Responsibility”, (2002) 16 *Ethics & International Affairs* 71.

<sup>408</sup> UN Human Rights Responsibilities, Introduction, *supra* note 3.

<sup>409</sup> *Ibid.*, at para. 48.

Finally, we reiterate that our study is confined to the specific human rights and humanitarian law concerns arising from the operation of Canadian corporate citizens in conflict zones. At present, a wealth of literature addresses core labour rights and environmental harms. Obviously, the rights of workers to be free from exploitation and environmental protection overlap with the sphere of rights demarcated as human rights. Nevertheless, we choose to focus here on the violations most often affecting civilian populations in conflict zones: violence, death, displacement, deprivation of food, medicine, subsistence, etc. These are fundamental norms of international human rights and humanitarian law to which most states are bound either as a matter of treaty obligation and/or customary international law. As such, they are perceived as more universal and less contentious than labour and environmental rights: We presume a general consensus that it is unacceptable for any natural person, corporation or state to engage in, condone, or be complicit in, the violation of these basic rules of international law. We infer from this that the pursuit of profit can legitimately be subordinated to observance of these norms, although the indicators of culpability in a given case may prove controversial.

Canada is particularly well situated to deal with this issue for two reasons. First, the Human Security Agenda promulgated in the late 1990s by then Foreign Minister Lloyd Axworthy explicitly acknowledges the impact of corporate entities on human security (positively and negatively), and the responsibility of the Canadian government to address the issue. Secondly, to the extent that the Canadian economy remains resource-based, Canadian companies may be disproportionately represented in resource extraction ventures abroad. And, as Prof. David Weissbrodt notes in a paper prepared for the UN Sub-Commission on the Promotion and Protection of Human Rights, "[e]xtraction industries in particular tend to be associated with serious human rights problems, mainly because they may not be able to select their locality and may feel compelled to work closely with repressive host Governments".<sup>410</sup> Therefore, it seems appropriate for Canadian policy makers to take the lead in developing principles and practices to address the human rights implications of corporate citizens operating overseas in conflict zones.

Finally, to enhance the conceptual portability of our scheme, we incorporate principles and standards devised transnationally, and encourage the participation of actors who already operate within transnational networks.

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<sup>410</sup> David Weissbrodt, "Principles Relating to the Human Rights Conduct of Companies (Working Paper), UN Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, Sessional Working Group on the Working Methods and Activities of Transnational Corporations, 25 May 2000, E/CN.4/Sub.2/2000/WG.2/WP.1, para. 3.

## 1. Norms

Our approach to setting out rules in legislation governing corporate behaviour in conflict zones presupposes one normative hierarchy: fundamental human rights and humanitarian law rank above profit-seeking. We do not argue that the two are necessarily inimical, or will inevitably collide. However, if and when they do, the latter must cede to the former. That is to say, profit-seeking activity in conflict zones is constrained by the obligation to respect fundamental human rights and humanitarian law. One of our concerns about companies such as Talisman Energy is that they implicitly reverse the normative priority, and treat compliance with human rights and humanitarian law as compelling only up to the point where it potentially interferes with profit maximization. This is the best way to understand their rejoinder that minority status within the GNPOC Consortium limits their influence, and therefore their responsibility. The obvious response is that Talisman should divest if it cannot persuade its partners to desist from violating fundamental human rights and humanitarian law in the course of operating the joint commercial enterprise.

### a) *Mandatory Versus Voluntary*

Corporations wish to avert the prospect of state regulation in the field of corporate social responsibility. Part of their motivation for developing codes of conduct, signing on to existing codes, and participating in self-reporting initiatives has been to pre-empt the incursion of the state. However, for the reasons set out earlier, voluntary codes have proved inadequate.

The legislated code we propose is limited in scope to human rights and humanitarian obligations specific to the treatment of civilians in zones of armed conflict. We do not address other issues that also fall under the rubric of corporate social responsibility (CSR), such as environmental and labour rights. Scholars and advocates concerned with CSR tend to assume that corporate resistance to enforceable legal standards is the same across the range of topics, given the attendant loss of freedom to the corporation. Nevertheless, we tentatively anticipate a weaker basis for objection to mandatory codes in respect of corporate conduct in conflict zones. Deplorable though it may be, there is a business case to be made for setting up in a jurisdiction that imposes few or no environmental or labour restrictions. It enhances, or is believed to enhance, profitability, at least in the short run<sup>411</sup>. That is part of the reason that TNCs set up shop in the South.

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<sup>411</sup> The Canadian Democracy and Corporate Accountability Commission reports that the empirical evidence tends to indicate a positive correlation between CSR and corporate profitability. However, the Commission also notes “there are instances in which lasting competitive advantage can clearly be obtained through irresponsible behaviour. In fact, a minority of Canadian CEOs surveyed ... in a 2000 survey openly acknowledged that they would not hesitate to do business with

Conversely, political instability and armed conflict are undesirable from a corporate perspective. Most companies operating in conflict zones are engaged in resource extraction, and simply go where the resources are. There is no business case to be made for engagement or complicity in violation of human rights and humanitarian law, at least not one that any business would dare to make publicly. Apart from invoking a generalized aversion to state regulation *per se*, it is difficult to mount a compelling argument against legislated, mandatory, legally enforceable rules prohibiting corporations operating in conflict zones from committing, or being complicit in, violations of fundamental human rights and humanitarian law.

b) *Content*

The following basic principles are culled from various sources, including intergovernmental organizations (IGOs), civil society, and voluntary codes devised by and for corporations. We have deliberately kept them simple and confined their scope to duties to avoid harm. While a strong case may be made for positive obligations, such as a duty to contribute to economic and social development, we believe it is better to begin with modest goals. Where pertinent, we cite the sources whose text we have adopted or adapted:

- Transnational corporations and other business enterprises operating in conflict zones shall be responsible for ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not benefit from these abuses.<sup>412</sup>
- Companies operating in conflict zones shall neither commit, nor be complicit in violations of international human rights or humanitarian law.<sup>413</sup>
- Security arrangements for transnational corporations and other business enterprises operating in conflict zones shall observe international human rights norms as well as the laws and professional standards of the country in which they operate.<sup>414</sup>

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a reprehensible regime if the payoffs were significant and the negative consequences minimal". See "The New Balance Sheet, *supra* note 205 at 11, 12.

<sup>412</sup> UN Human Rights Responsibilities with Commentary, *supra* note 255, Article 1, Commentary para. b. See also UN Human Rights Responsibilities, *supra* note 250, Article 3.

<sup>413</sup> *Ibid.* See also the Global Compact, *supra* note 264, Principle 2 and the ICECB *supra* note 92.

<sup>414</sup> UN Human Rights Responsibilities, *supra* note 250, Article 4.

- Companies intending to set up operations in conflict zones shall undertake an independent risk assessment that includes the human rights and humanitarian consequences of their proposed activities.<sup>415</sup>
- Companies intending to set up operations in conflict zones shall assume responsibility for securing the consent and co-operation of the host country in facilitating independent risk assessment and any ongoing monitoring subsequent to investment.

c) *Definitions*

At least two aspects of the principles require further clarification and precision:

- What is a conflict zone and how is this designation affixed?
- What does complicity mean?

(i) *Conflict Zone*

The term conflict zone is used to describe a region that is experiencing ongoing armed hostilities. There may or may not be an officially declared war. The adversaries may include the military of one or more states, armed militia, irregular forces, rebel insurgents, mercenaries, or even criminal gangs. The conflict may be civil or inter-state in scope. As with virtually all modern warfare, civilian non-combatants are targeted, victimized, and caught in the crossfire. Alex Schmid's *Thesaurus and Glossary of Early Warning and Conflict Prevention Terms* defines conflict as follows:

Conflict is present when two or more parties perceive that their interests are incompatible, express hostile attitudes or ... pursue their interests through actions that damage other parties. These parties may be individuals, small or large groups, and countries. Interests can differ over: i) access to and distribution over *resources* (e.g. territory, money, energy sources, food); ii) control of power and participation in political decision-making; iii) *identity* (cultural, social and political communities); iv) *status*, particularly those embodied in systems of religion, government or ideology.<sup>416</sup>

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<sup>415</sup> See UN Human Rights Responsibilities with Commentary, *supra* note 255, Article 1, Commentary para b and Article 16, Commentary para. h. See also generally the Voluntary Principles, *supra* note 262.

<sup>416</sup> Alex P Schmid, "Thesaurus and Glossary of Early Warning and Conflict Prevention Terms (Abridged)", Forum on Early Warning and Early Response, November 2001, at 11 cited at <http://www.fewer.org/research/index.htm>.

Most contemporary conflicts do not traverse the borders of a state, making Schmid's definition of civil war especially pertinent:

Large-scale armed conflict within one country fought either between the regime in power and challengers or, in failing states with no recognized authority, between warlords or communal groups. There are two basic variants of civil wars: i) when the control of the state is the source of contest; ii) when one part of the population wants to form a new state or join a neighbouring state. Civil wars can be triggered by external factors (proxy wars). Most often they are the result of intra-elite conflicts. Most civil wars involve more than one element of the following: I) Secessionist civil war; ii) Revolutionary guerrilla war; iii) Conflicts between military and civilian authorities (including police vs. military); iv) Criminal gang wars, among themselves and against the state; v) Terrorist campaigns; vi) Religious sects and fundamentalist movements; vii) Genocidal campaigns against, and ethnic cleansing of, minorities; viii) Conflict between the state and (sectors of) society; ix) Conflicts between two peoples or nations for control of one territory; x) Conflicts between factions of parties or armed forces (warlordism); xi) Conflicts between religious groups, ethnic communal groups, linguistic groups, tribes or clans; xii) Wars between nomadic peoples and sedentary people; xiii) Clashes between immigrants and natives.<sup>417</sup>

TNCs routinely commission consultants to evaluate the security risks to investment and operations in potential host countries. In the course of such assessments, TNCs certainly become aware of conflict prior to investment. However, as Ashley Campbell notes, "most corporate risk assessment tools are not explicitly concerned with the reverse flow of risk: the risk of a company aggravating a conflict situation".<sup>418</sup> Indeed, Campbell cites evidence that TNCs engaged in extractive industries have a relatively high tolerance for conflict risk; their presence is also positively correlated with the risk of civil conflict in less developed countries.<sup>419</sup>

We anticipate that the designation of a region as a conflict zone could become tendentious if it is done solely for the purpose of subjecting a given TNC to obligations of the nature described above. Therefore, we commend reliance on the Country Indicators for Foreign Policy (CIFP) database as a means of identifying the risk of conflict in a given country. The CIFP project is operated under the guidance of political scientist David Carment, with the support of the Canadian Department of

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<sup>417</sup> *Ibid.*, at 10.

<sup>418</sup> Ashley Campbell, "The Private Sector and Conflict Prevention Mainstreaming" (2002) Country Indicators for Foreign Policy at 4, cited at <http://www.carleton.ca/cifp/docs/mncsriskassessmentreport12.pdf>.

<sup>419</sup> *Ibid.*, at 6.

Foreign Affairs and International Trade (DFAIT), the International Development Research Council (IDRC) and Canadian International Development Agency (CIDA). The CIFP 'risk index' operates as follows:

CIFP assesses country risk by means of an overall country risk index. The higher the risk index, the greater the assessed risk of conflict that country faces. The risk index consists of the weighted average of nine composite indicators, corresponding to the nine issue areas ...: armed conflict, governance and political instability, militarization, population heterogeneity, demographic stress, economic performance, human development, environmental stress, and international linkages. Each of the nine composite indicators is derived through averaged the individual risk scores for a number of leading indicators within each issue area ...

Leading indicators within each issue area are themselves assessed in terms of three separate scores: the country's performance for a given indicator relative to other countries (global rank score); the direction of change for a given indicator, be it improving, worsening, or remaining level (trend score); and the degree of fluctuation in a country's performance for a given indicator (volatility score).<sup>420</sup>

Each score can be subdivided into low, medium and high risk of conflict. It is not necessary at this stage to determine what score would suffice to bring a country within the range of "conflict zone" for purposes of the code of conduct, though one might expect a rank of medium or high would be appropriate. It is also conceivable that the relative weighting given to the various criteria as well as the calibration of the index as a whole could be modified to emphasize the governance and human rights variables.

The Country Indicators for Foreign Policy (CIFP) group recently produced a Conflict Risk Assessment Report for Sub-Saharan Africa. It is noteworthy that Sudan was rated as "high risk" for each of six categories of assessment: history of armed conflict; governance and political instability; population heterogeneity; demographic stress; economic performance; human development<sup>421</sup>.

Other definitions also exist for conflict zones. For example, an OECD Working Paper entitled "Multinational Enterprises in Situations of Violent Conflict and

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<sup>420</sup> The various indicators, the weighting and the scoring are described in greater detail in David Carment, "Assessing Country Risk: Creating an Index of Severity" (Background Discussion Paper prepared for CIFP Risk Assessment Template), CFIP (2001) at 8.

<sup>421</sup> Caroline Delany and Sonja Varga, "Conflict Risk Assessment Report: Sub-Saharan Africa", Country Indicators for Foreign Policy, September 2002, cited at [http://www.carleton.ca/cifp/docs/CIFP\\_Conflict\\_Risk\\_Assessment\\_SubSaharan\\_Africa3.pdf](http://www.carleton.ca/cifp/docs/CIFP_Conflict_Risk_Assessment_SubSaharan_Africa3.pdf).



Widespread Human Rights Abuses" (2002) iterates the following quantitative and qualitative indicators for conflict:

- More than 1000 battle deaths in total
- Conflict challenges sovereignty of internationally recognized state
- Conflict involves the state as one of the principal combatants
- Rebels are able to mount an organised military opposition to the state and to inflict significant casualties on the state<sup>422</sup>

It is not necessary for present purposes to definitively choose between alternative approaches. Suffice to say that the definition must be available for scrutiny, reasonably capable of neutral application, and explicitly attend to the human rights and humanitarian implications of conflict.

(ii) *Complicity*

Most TNCs, most of the time, do not directly, deliberately and actively engage in abuses of the host civilian population. Rather, the shadow of moral and potential legal opprobrium is cast upon them through their association with the host state and/or security operatives, who are most frequently the actual perpetrators. The nature of their participation is captured well under the rubric employed by Craig Forcese, namely 'militarized commerce'. The following four scenarios describe the most common linkages between the commercial presence of TNCs in conflict zones and abuses committed upon civilian populations:

- Private security companies and/or state police, military, security services commit violations of human rights and humanitarian law (killing, injury, forced displacement, rape, etc.) in the course of 'securing' the area in and around the commercial project.
- The presence of a commercial project in a given location (especially in the extractive sector) heightens the strategic importance of the region to all parties to the conflict, leading to an exacerbation of the conflict in that area.
- State authorities deploy forced/coerced labour to serve the commercial enterprise.
- Revenue, royalties etc. paid by the TNC to the host government finance military expenditures and infrastructure that are in turn used to perpetuate the conflict and the attendant abuses committed upon the civilian population.

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<sup>422</sup> OECD, Directorate for Financial, Fiscal and Enterprise Affairs, "Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses", Working Papers on International Investment Number 2001-1 (May 2002) Figure 1, notes.

Various commentators have attempted to construct a typology of complicity. For instance, in separate articles, Andrew Clapham and Scott Jerbi, as well as Anita Ramasastry distinguish between direct complicity, indirect complicity, and “silent complicity”,<sup>423</sup> the last of which applies to “mere presence in a country, coupled with complicity through silence or inaction”.<sup>424</sup>

The notion that one may be held liable as an accomplice for acts committed by another is firmly entrenched in the criminal law of common law and civilian jurisdictions alike. Although our regime is predicated on regulation rather than criminalization, the concepts of aiding, abetting and ‘common design/purpose/intention’ developed in the criminal law offer the most sophisticated guidance on the definition of complicity. Rather than re-invent the wheel, we consider it preferable to draw upon and adapt existing concepts.

The Canadian *Criminal Code*<sup>425</sup> is typical of many jurisdictions. It provides that an accomplice may be charged and convicted of the same offence as the principal perpetrator. The relevant provisions read as follows:

- s. 21(1) Everyone is a party to an offence who
  - ... (b) does or omits to do anything for the purpose of aiding any person to commit [the offence];
  - (c) abets any person in committing it
- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

The essential difference between aiding and abetting is that the former deals with material assistance, while the latter addresses encouragement. The common intention provision holds persons liable for the illegal conduct committed by partners in the course of carrying out a shared venture.

Judicial interpretation of s. 21 has refined the scope and meaning of complicity. For instance, liability for aiding does not require that the party who assists must actually desire that the offence be committed. It suffices if the party foresaw commission of the offence as virtually certain.<sup>426</sup> Abetting can be committed through

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<sup>423</sup> Clapham and Jerbi, *supra* note 144.

<sup>424</sup> Ramasastry, *supra* note 147 at 101.

<sup>425</sup> RSC 1985, c. C-46, as am.

<sup>426</sup> *R. v. Hibbert*, [1995] 2 SCR 973.

passive observation, if the context indicates that the conduct of the perpetrator warranted objection, and inaction was intended to convey approval or encouragement.<sup>427</sup> Finally, the 'common intention' provision permits the conviction of an accomplice not only if the accused knew his/her partner would commit a crime, but also if the accused ought to have known the partner would commit a crime. This objective standard is assessed from the standpoint of the reasonable person in the circumstances of the accused.<sup>428</sup>

These concepts of aiding, abetting and common intention are reflected in recent international war crimes jurisprudence. In the International Criminal Tribunal for Rwanda judgment in *Akeyesu*, the Tribunal commented as follows on the meaning of aiding and abetting in international criminal law:

538. The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

539. Moreover, as in all criminal Civil law systems, under Common law, notably English law, generally, the accomplice need not even wish that the principal offence be committed. In the case of National Coal Board v. Gamble, Justice Devlin stated

"an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor."

In 1975, the English House of Lords also upheld this definition of complicity, when it held that willingness to participate in the principal offence did not have to be established. As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.

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548. ...Thus, in the Jefferson and Coney cases, it was held that "The accused [...] only accidentally present [...] must know that his presence is actually encouraging the principal(s)". Similarly, the French Court of Cassation found that,

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<sup>427</sup> *R. v. Dunlop and Sylvester*, [1979] 2 SCR 881.

<sup>428</sup> *R. v. Logan*, [1990] 2 SCR 731.

"A person who, by his mere presence in a group of aggressors provided moral support to the assailants, and fully supported the criminal intent of the group, is liable as an accomplice" [unofficial translation].

The International Criminal Tribunal for the Former Yugoslavia also concluded in the *Tadic* judgment:

"if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it." (Akeyesu 1998, citations omitted)

The recent decision of the US Ninth Circuit Court of Appeal in *Doe I v. Unocal Corp*<sup>429</sup> takes guidance from international precedent, and defines aiding and abetting liability as "knowing practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime" (para. 8). Elsewhere, the judgment clarifies that knowledge may be actual (subjective) or constructive (objective) (para. 13). Thus, in that case, if Unocal knew or a reasonable person would have known that forced labour was used to benefit the joint venture, the requisite fault element would be satisfied.

Taking into account domestic Canadian jurisprudence and the direction of international law, we propose that complicity be defined as follows for purposes of assessing the behaviour of Canadian TNCs operating in conflict zones:

Complicity by a TNC in the commission of acts by a perpetrator contrary to the Code of Conduct consists of one or more of the following:

- Acts or omissions that provide material assistance to the perpetrator in circumstances where the TNC knew or ought to have known that its acts or omissions would provide such assistance.
- Acts or omissions that abet the perpetrator in circumstances where the TNC knew or ought to have known that its acts or omissions would encourage the perpetrator.
- Where a TNC enters into a commercial relationship with one or more parties in a conflict zone, and any of those parties commits acts in violation of the Code in furtherance of that commercial undertaking, the TNC is complicit if it knew or ought to have known that the commission of the acts would be a probable consequence of carrying out the commercial undertaking with that party.

The most significant divergence in the proposed definition from its criminal law antecedents lies in the deployment of an objective standard for each element of aiding,

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<sup>429</sup> *Doe v. Unocal Corp.* 248 F.3d 915 (9th Cir. 2002), *supra* note 228.

abetting and common intention. That is to say, a TNC may be complicit if it knew or *ought to have known* that its actions, inactions, or relationship with the perpetrator would have the prohibited consequence. This extension of responsibility seems legitimate and warranted for two related reasons. First, the concept of complicity is not deployed here for the purpose of attributing criminal liability. Resistance to use of an objective fault standard in criminal law is rooted in the stigma and the punishment of the criminal sanction. Secondly, the concept of complicity is developed in the context of a regulatory regime that requires the active participation of the TNC before and during its activities abroad. TNCs are 'on notice' regarding the Code of Conduct governing its activities, and are thus in a position to inform themselves of their obligations. As the next section will explain, the TNC has monitoring and reporting duties in relation to its compliance with the Code of Conduct, which justifies responsibility not only for what it knows, but what it ought to know if it is fulfilling its monitoring functions properly.

Before leaving the issue of complicity, it is worth noting that the Canadian Lawyers' Association for International Human Rights (CLAIHR) classifies corporate complicity in slightly different terms than the foregoing, focusing on impact *vis a vis* the principal rather than the conduct or intention of the accomplice.<sup>430</sup> One form of complicity increases the human rights abusing activity of the host regime, while the other enhances the human rights abusing capacity of the regime.

In the context of Talisman Energy's presence in Sudan, actions that increased human rights abusing activity include Talisman's presence and participation in a concession run by the northern Government of Sudan and located amidst a Southern population. The exacerbation of the conflict in that particular region, with its attendant dislocation, displacement, and devastation of the local population – often justified in the name of providing 'security' to the oil consortium – was and is directly related to oil development.

Actions by Talisman that increase Sudan's repressive capacity might include the provision of significant revenue to a government which it has conceded that it uses to increase its military strength. More proximate examples include the airstrip at Heglig, ostensibly built to service the oil consortium, but also used by the Government of Sudan for bombing sorties. The same may be said of the military use of various roads built within the oil concession.

We consider a classification based on impact not incompatible with the model of complicity we propose. What it does add, however, is an analytical hint at the difficulty of determining when the assistance provided by the TNC is sufficiently 'material' to warrant the label of complicity. At this point, we simply point out that under the monitoring regime we advocate, the body we create will have considerable latitude to tailor its recommendations to accommodate the facts, inferences and analysis.

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<sup>430</sup> CLAIHR Complicity Backgrounder, *supra* note 181 at 4.

## 2. Monitoring

Our review of the existing literature reveals extensive deliberation on the question of codification, but scant attention to the crucial issue of monitoring. We consider this to constitute a major gap. In the context of human rights and humanitarian norms specifically applicable to conflict zones, it is arguable that monitoring is more important than whether the codes are voluntary or mandatory. The precise content of labour and environmental standards remain the subject of dispute, as TNCs maintain that weak or no regulation are a legitimate trade-off for the benefits conferred by investment in less developed countries. As noted earlier, however, the substance of the norms in relation to conflict zones are relatively uncontroversial: few would defend forced displacement, killing civilians, or forced labour. Some voluntary codes already acknowledge and discourage corporate complicity. The real challenge is to hold corporations to the standards they claim to endorse, and the key to accountability is transparency. It follows from the foregoing that we do not consider self-reporting alone to constitute a meaningful mechanism for advancing transparency, much less accountability.

Neither the OECD Guidelines,<sup>431</sup> The Voluntary Principles,<sup>432</sup> the Global Compact,<sup>433</sup> the Global Sullivan Principles nor the ICECB<sup>434</sup> make provision for independent monitoring or verification in their institutional structure. We consider this to constitute a fatal flaw.

Review of existing CSR auditing practices indicates that most auditing is performed by private accounting firms (KPMG, PricewaterhouseCoopers, etc.) and disclosed through self-reporting (in whole or in part) by the TNC. Experience and the analysis of self-regulation models above reveals several defects in current practice:

- Private consulting/accounting firms are not independent from the TNCs they monitor, thereby compromising the objectivity of their reports.
- Private consulting/accounting firms frequently lack expertise in relevant principles of human rights and humanitarian law, and lack competence in human rights/humanitarian monitoring methodology. The result are reports that are partial, incompetently executed, and unreliable.<sup>435</sup>
- Independent, competent human rights organizations with the requisite expertise and experience are reluctant to provide TNCs with auditing services for fear of jeopardizing their reputations and giving the appearance of co-optation.

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<sup>431</sup> *Supra* note 149.

<sup>432</sup> *Supra* note 262.

<sup>433</sup> *Supra* note 264.

<sup>434</sup> *Supra* note 92.

<sup>435</sup> O'Rourke, *supra* note 341.

- CSR audits are performed after the TNC has already established its enterprise in the conflict zone; the cost of withdrawing is high at this stage and provides a disincentive to rigorous investigation of the human rights and humanitarian cost to the local population.
- TNCs do not necessarily disclose the unabridged audit (see, e.g. Talisman 2002).

a) *Establishment of a Corporate Social Responsibility Working Group/Agency*

The monitoring model we propose is designed to avoid the deficiencies described above, and engage civil society, government and TNCs in a constructive and co-operative working relationship. The first step is the establishment of a Corporate Social Responsibility (CSR) Working Group or Agency. The establishment, mandate and terms of reference of the Working Group would be set out in the appropriate statutory instrument. The CSR Working Group would be a public/private body comprised of representatives nominated from industry, government (DFAIT, Justice, Industry Canada) and both national and international non-governmental organizations (INGOs) that focus on human rights and/or corporate social responsibility. Examples might include Amnesty International, Human Rights Watch, Transparency International, etc. The participation of INGOs is important because of their expertise, and also because they can serve as agents of transmission to other national and transnational jurisdictions that may be seeking mechanisms for addressing the duties of TNCs operating abroad.

The CSR Working Group would be affiliated with the federal government and funded jointly by TNCs and the federal government. One possibility is to levy a small tax on all Canadian TNCs operating in conflict zones. The benefit of this arrangement is that it guarantees the Working Group a measure of independence from any individual TNC. We envision the functions of the Working Group to commence at the pre-investment phase, and continue at regular intervals thereafter should the TNC proceed with investment in a conflict zone. We will describe how the Working Group would function before addressing the issue of how to garner participation in the process and compliance with the Code. Existing regulatory regimes for environmental protection and assessment across Canada offer potential mechanisms upon which an effective impact assessment and evaluation regime could be modeled.

b) *Pre-Investment Risk Assessment*

TNCs typically conduct risk assessments prior to investing abroad in conflict zones. These risk assessments assist the TNC in deciding whether to pursue a given venture. They focus on the potential financial and security risks posed to the corporation, its employees, its investment and its assets. They do not generally examine the risk posed by the corporation to the residents of the host state.

One recent exception arose with Austrian oil and gas group OMV. It commissioned an independent study of the human rights conditions in Sudan prior to making a decision about whether to continue in a consortium with Sweden's Lundin Petroleum, Malaysia's Petronas and Sudan's Sudapet. CEO Wolfgang Ruttnestorfer stated in a July 2002 interview that "We are awaiting the results of our impact study, and on the basis of that we will decide how to proceed. For us, it is important that human rights are respected and this is very much in the foreground".<sup>436</sup>

We propose that any TNC considering investment in a country designated as a 'conflict zone' (see above) be required to include in its risk assessment an analysis of the potential human rights and humanitarian implications of its presence. This idea is promoted in Norway's "Guidelines Concerning Human Rights and Environment for Norwegian Companies Abroad",<sup>437</sup> the UN Human Rights Responsibilities, and the Voluntary Principles.<sup>438</sup> The latter principles directly and explicitly focus on extractive industries, and thus are directly apposite to the concerns of this project. As noted above, the instrument has attracted the signatures of Shell, BP Texaco, Rio Tinto, Freeport McMoran and Conoco (but not Talisman Energy). NGOs that have signed include Amnesty International and Human Rights Watch.<sup>439</sup> The Voluntary Principles state that "accurate, effective risk assessments should consider" the following factors:

- Security risks to and by the company;
- Potential for violence, especially in the area of company operations;
- Human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security organizations and the capacity of the above entities to respond to situations of violence in a lawful manner;
- Rule of law;
- Conflict analysis that would identify and understand the root causes of existing conflicts, level of adherence to human rights and international humanitarian standards by key actors;

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<sup>436</sup> "OMV Studying Human Rights Situation in Sudan", Reuters, 11 July 2002, cited at <http://sudan.net/news/posted/5353.html>.

<sup>437</sup> See *supra* note 178. The Norwegian principles apply broadly, but principles 16-18 expressly deals with "Activities in Disputed and Conflict Areas".

<sup>438</sup> See *supra* note 262.

<sup>439</sup> Washington Post, "Companies Sign Pact on Human Rights", 21 December 2000. Human Rights Watch, "Human Rights Principles for Oil and Mining Companies Welcomed", cited at <http://www.hrw.org/press/2000/12/oil1221.htm>.



- Equipment transfers from the company to security forces that may use the equipment in a rights abusing manner.<sup>440</sup>

We commend the adoption of these criteria into the risk assessment we propose. We expect that the organizational and analytic framework for the risk assessment would be provided by the norms contained in the Code of Conduct as a framework, and would of necessity require investigation into the existing human rights conditions of the host country. The TNC would have the option of approaching the Working Group to commission a team with expertise in human rights and humanitarian law, and familiarity with the region in question, to conduct the assessment. Upon completion, the TNC would submit its risk assessment to the Working Group.

At this stage, the task of the Working Group would be to review the assessment and provide commentary. It may request further particulars, provide guidance on where clarification or additional research is required, conduct its own research, or commission its own fact-finding team. All documents submitted to, and produced by, the Working Group would be publicly available.

We do not anticipate that any and all investment in countries designated as conflict zones will necessarily bring a TNC into breach with the Code of Conduct. For example, Colombia almost certainly constitutes a conflict zone, but it does not necessarily follow that building a hotel in Bogota will have negative repercussions in terms of human rights and humanitarian law. Conversely, there is a discernible positive correlation between investment by extractive industries in conflict zones and escalation of conflict. Thus, a prospective mining project in Colombia would raise more serious concerns and warrant greater scrutiny.

Once the Working Group is satisfied that it possesses sufficient information upon which to base an opinion, it may recommend in favour of the project proceeding, against the project proceeding, or enter into discussions with the TNC about whether and how the project might be revised to mitigate potential negative effects and facilitate positive impacts. The outcome of these discussions would then lead to a final report and recommendations by the Working Group.

#### c) *Continuous Monitoring*

Once a TNC has established itself in a conflict zone, ongoing monitoring of the human rights and humanitarian impacts of its presence becomes necessary. Because the cost of withdrawal provides a disincentive to exposing and acknowledging problems, the likelihood of self-serving reports and the corresponding need for independent monitoring at this stage is particularly salient.

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<sup>440</sup> See Voluntary Principles, *supra* note 262.

An anecdote regarding Talisman Energy illustrates vividly the danger of permitting self-reporting of corporate behaviour to go unchallenged by independent monitors. In early 2000, a Talisman press release described an initiative dubbed "PROJECT CARE", which distributed so-called "Care-Sacs" to needy children in Sudan. (The resemblance of "Care-Sacs" to the well-known "CARE packages" does not seem purely coincidental). In August 2000, in the midst of heavy fighting between Government of Sudan and Southern militia around the oil region, Talisman issued a press release on its corporate website entitled "Talisman and Relief Agencies Work Together". A Talisman spokesman is quoted saying that "We're working alongside the non-governmental agencies as part of a team". The news release then proceeds to outline the nature and extent of the co-operation.

When one of the authors contacted one of the named NGOs in Sudan to inquire as to this alleged collaboration, a worker responded with alarm that neither his organization nor the UN nor any other NGOs knew anything about it. Within days, the UN issued its own press release, entitled "UN Sudan Disclaims Collaboration with Talisman Energy Inc." The press release declared that "contrary to [Talisman's] media propaganda, UN agencies involved in humanitarian relief activities in Unity State, and other areas of Sudan are not working with Talisman, do not have any agreements with them and have not received any funding from them". A group of six NGOs, including CARE, released a public letter disclaiming any past or present relationship with Talisman.

Not only was the press release by Talisman false, but it also put these governmental and non-governmental organizations at risk. Rebel forces had at various times declared that Talisman installations in Sudan were legitimate military targets, owing to Talisman's close relationship with the Government of Sudan. Any perception that humanitarian organizations were partnering with Talisman would taint their neutrality and also put their workers and operations at risk. The false claim of co-operation by Talisman was not merely harmless puffery; the celerity and bluntness of the responses by the UN and the NGOs speaks to the potentially damaging consequences of Talisman's actions. It was merely fortuitous that the press release was brought to the attention of affected parties shortly after its release.

There are at least two options for on-going, independent monitoring. The TNC can self-report and the Working Group can review, comment and critique along the same lines as the mechanism proposed for the pre-investment risk assessment. Alternatively, the monitoring can be performed at the outset by a team of experts commissioned by the Working Group. This monitoring team may be comprised of members from industry, NGOs and private auditing firms, as long as they are demonstrably competent in human rights monitoring and/or knowledgeable about the region.

We consider the latter mechanism to be more time-effective. Although the former appears more cost-effective because the TNC would absorb the full cost of producing the initial report, the additional expense of investigation or on-site verification of the report's contents may ultimately prove as costly as doing the initial monitoring.

The results of the monitoring would be publicly available and open to reply from the TNC and to comment by any other interested party. Based on the findings of fact contained in the monitoring reports and any other input received, the Working Group would deliver its assessment of the extent to which the TNC's performance conforms to the Code of Conduct. Where appropriate, it may also make recommendations about how the TNC can improve fulfillment of its corporate social responsibility.

Finally, the Working Group can also serve as a reactive monitoring site. For example, had Talisman issued a press release like the one described above, the Working Group could have, on its own initiative or in response to external request, investigated the veracity of the claims made by Talisman. Once again, the result of the investigation would be made public.

### 3. Consequences of Non-Compliance

Despite hints to the contrary around the time of the Harker Mission, the Canadian government has never penalized a Canadian TNC in the face of evidence that a TNC operating in a conflict zone is complicit in the violation of human rights and humanitarian law. Canada is not alone in its inaction; no other country has held companies accountable, irrespective of whether the TNC is a party to a voluntary code of conduct. Of course, states that engage in massive violations of human rights have, from time to time, been subject to sanctions by various states, and the United States has long had standing policies prohibiting US (and affiliated) companies from conducting business in countries such as Cuba and Sudan.

The debate over whether and how a home state ought to sanction delinquent TNCs travels roughly the same course as the debate over voluntary versus mandatory codes of conduct. Those who oppose state intervention argue that it will inevitably be heavy-handed, futile, and will preclude a gradual and more effective evolution of self-regulation by TNCs. They also claim that the most potent incentives for change inevitably come not from government, but from the market: consumer boycotts, divestment campaigns, shareholder resolutions, and various other forms of "naming and shaming" inflict a reputational and financial cost on corporations that they will eventually try to avert through corrective behaviour. To the extent that better information enhances the ability of market actors to exercise their influence, enthusiasts of market-based solutions typically place their faith in voluntary reporting initiatives. The transnational Global Reporting Initiative (GRI) is the vanguard of this approach.<sup>441</sup>

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<sup>441</sup> GRI Guidelines, *supra* note 295.

Advocates of the exercise of state power in response to corporate non-compliance remain deeply skeptical of the practical (as opposed to symbolic or public relations) value of any code of conduct that is not backed up by the real threat of penalty. Market-based responses may indeed be salutary; indeed, they are the only initiatives that appear to have had any impact to date. They are, however, *ad hoc* and desultory. They depend on the confluence of various factors, including timing, media attention, dedicated activists with stamina and resources, and an industry amenable to pressure. Talisman presents a difficult case precisely because its product (oil) is fungible and cannot be boycotted by consumers. Market-based pressure orchestrated by civil society may be necessary, critics contend, but it is not sufficient.

Before choosing sides in this debate, it is worth recalling that the government has the means to deploy various legislative strategies in addition to direct sanction in order to secure compliance with a Code of Conduct. These policy instruments may be classified as facilitative, incentive, and coercive. At this stage, we will not repeat our earlier description of the various mechanisms; instead, we focus on ways in which they can be strengthened and rendered more effective.

a) *Facilitative Instruments*

Canada does not impose disclosure requirements comparable to those in the UK, Australia, the U.S., Denmark, Holland and France. There is certainly a strong argument in favour of disclosure requirements across the full range of 'socially responsible investment' criteria (environment, labour, human rights, etc.) Given our focus on militarized commerce, we recommend, at a minimum, disclosure to all present and prospective shareholders and fund members of Working Group reports (pre-investment risk assessment, ongoing monitoring reports, etc.) relating to the TNC and the country of investment. Disclosure could also be a pre-requisite to listing on any Canadian stock exchange. Federal-provincial jurisdictional issues would arise here. In our view, the federal government, given its international legal obligations to protect and promote human rights, should seek the agreement of the provinces in this area.

In light of the recent Enron and Worldcom scandals, the US is expanding its rules regarding companies' duty to disclose material facts. Environmental disclosure requirements already exist, and new conflict of interest rules applicable to auditors have recently been announced. In a development which lends cogency to our proposal for a Working Group, the Securities Exchange Commission also plans to implement an auditor watchdog, presumably to pre-empt future Arthur Andersens. As noted above, the Canadian Institute of Chartered Accountants has released draft legislation on conflict of interest rules for auditors. There is some indication that the proposed legislation does not go far enough in this respect.

Canada should also put in place legislation that protects whistleblower employees who disclose information they have reasonable cause to believe shows that a human rights violation, criminal offence, illegal act, miscarriage of justice, environmental damage or human health or safety risk exists, or will likely occur.

As discussed earlier, Talisman Energy was named as a defendant in an ATCA suit on the basis of its alleged complicity in human rights and humanitarian law violations committed by Government of Sudan security forces. Talisman thus became the target of a form of activism through litigation unavailable in Canada. Nevertheless, we are reluctant to endorse adoption of a statute in the nature of ATCA at this time. First, civil suits of this nature represent an explicit use of the judicial process to obtain an extra-judicial objective, be it public awareness, a change in US foreign policy, or simply judicial 'naming and shaming'. Indeed, none of the famous ATCA cases ever led to a result where defendants were actually ordered to pay (and did pay) damages to successful plaintiffs. Litigation is expensive, slow, and reactive rather than preventive. Finally, the facts and events that support a finding of corporate complicity are not necessarily amenable to the particular forms and standards of proof that traditional litigation demands. In short, litigation is an extraordinarily unwieldy means of advancing the legitimate end of holding TNCs accountable for their conduct abroad.

b) *Incentives*

We propose amending the *Income Tax Act* to deny corporations the benefit of tax deductions, tax credits, or other benefits available in recognition of taxes paid to foreign jurisdictions in either of two circumstances:

- where the Canadian government has annulled a tax treaty with the foreign jurisdiction in question on human rights grounds;
- upon the recommendation of the Working Group.

We also recommend that the Export Development Canada explicitly tie the availability of its full range of trade finance services to the findings and recommendations of the Working Group regarding the impact of TNC investment and/or continued activity on human rights and humanitarian standards in a conflict zone.

c) *Coercion*

In the wake of the Harker Report, lawyers for the Department of Foreign Affairs and International Trade (DFAIT) took the position that the *Special Economic Measures Act* (SEMA) as currently drafted does not permit Cabinet to impose economic and trade sanctions on a Canadian TNC conducting business abroad, even in circumstances where it is complicit in serious human rights and humanitarian

violations. While we find contrary interpretations regarding the scope of SEMA more persuasive,<sup>442</sup> policy makers who are serious about enabling the government to respond meaningfully to the conduct of Canadian TNCs in conflict zones could surely amend SEMA to clarify and ensure its applicability, and its flexibility. That is to say that Cabinet would possess the discretion to select from a wide range of measures, and only in the most extreme case would one expect its deployment to prohibit certain business activities or investment in a particular state. Indeed, assuming that the regime we propose is adopted, we would anticipate that few cases would reach that stage. In any case, the only real obstacle to removing any ambiguity regarding the scope of SEMA – whether through amendment or simply through application by Cabinet -- is the absence of political will.

We are still giving consideration to the potential utility of the criminal law, especially war crimes and crimes against humanity (possibly in tandem with the party provisions in the *Criminal Code*), in sanctioning TNCs whose conduct is particularly egregious. For many of the same reasons that we are unsure of the value of invoking the tort regime in these contexts, we remain sceptical about the criminal law as well. In addition, criminal prosecution for war crimes and crimes against humanity would require the consent of the Attorney General, and once again, the evidentiary and procedural rules governing domestic criminal trials are largely inappropriate to the context in which militarized commerce transpires in conflict zones abroad.

We consider it important for the Canadian government to generate a range of facilitative, incentive and coercive measures to provide the widest latitude for private actors, civil society and the state to bring their influence to bear on the conduct on Canadian TNCs abroad. We also suggest that consideration be given to creating specific criminal offences and/or private causes of action within three years from the establishment of the model and measures proposed in this paper. Coercive measures should be the last resort, and would not be applied except in circumstances where other measures have failed and the TNC persists in engaging in conduct that it knows is considered by an authoritative body (the Working Group) to constitute complicity in the commission of serious violations of human rights and humanitarian law.

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<sup>442</sup> See, for example, CLAIHR Legislative Proposal, *supra* note 192 at para. 9.



## I. Conclusion and Future Directions

Transnational corporations that operate outside of their home state jurisdiction in zones of conflict are probably not accountable under international or national law for complicity in human rights abuses. Nor is it clear that corporations are legally liable under international law or in most domestic jurisdictions for any detrimental impacts on human rights of their extraterritorial activities. International law imposes no direct obligations on TNCs to respect and ensure respect for human rights within their sphere of influence. Similarly, there is no international legal duty on home states to ensure that their corporate nationals are not complicit in, or perpetrators of, violations of international human rights and humanitarian law in host state jurisdictions. The limited range of domestic regulatory mechanisms currently deployed by private actors and by governments, (including the Canadian government), offer little capacity to effectively challenge or change extraterritorial behaviour that violates international human rights standards. The resulting regulatory void permits TNCs active in conflict zones to disregard international human rights and humanitarian law standards with few legal repercussions.

Privatized self-regulation regimes designed to fill the 'governance gap' fail to adequately address fundamental human rights concerns. Our analysis of voluntary mechanisms developed by international and corporate actors shows that few of these instruments, be they codes, policies or principles, deal sufficiently with human rights issues associated with TNC activity in conflict zones. Nor do these models provide effective mechanisms to ensure compliance with the voluntary standards.

The current TNC practice of social performance or human rights performance reporting and verification raises critical questions about the credibility of such processes. Without accepted international and national standards on human rights reporting methodologies and processes, corporations may collect and report information through self-selected non-transparent procedures, while promoting what can be an inaccurate view of corporate impact on human rights in a particular location. Equally, current verification practices can be criticized for their lack of credible mandates, verification methodologies, transparency of process, auditor independence and auditor expertise.

It is our view that it is not in the public interest for corporate entities to frame their own obligations and verify their own conduct in relation to human rights. The implications of this "privatization" of human rights responsibilities and verification and monitoring of compliance with these self-proclaimed obligations are highly problematic. Violations of human rights are likely to continue where obligations to respect human rights conflict with corporate potential to maximize profit. TNCs will continue to profit from such abuses with impunity. Voluntary self-regulation regimes may also facilitate the justification of continued engagement by TNCs in situations where a company's activities have a negative impact on the human rights situation in a



host state. Finally, the public (and shareholders) will likely remain inadequately informed of the actual state of affairs in countries where TNCs operate, including the human rights impact of corporate activity.

The case study of Talisman Energy's operations in Sudan substantiates our conclusions. Voluntary self-regulation by Talisman of its operations in the context of Sudan's civil war failed to ensure that the company was not complicit in, and profiting from, ongoing human rights abuses and violations of international law.

Talisman's announcement in October 2002 of the sale of its Sudan operations cannot be viewed as proof that either consumer/shareholder activist campaigns or self-regulation are an adequate means of governing TNC extraterritorial activity. The campaign waged by human rights organizations about Talisman's presence in Sudan certainly played a significant role in the company's decision to pull out.<sup>443</sup> However, neither the human rights campaign nor the self-regulation regime that Talisman initiated changed the company's official position that it had a positive effect on "the lives of the people of Sudan both now and in the future".<sup>444</sup> Despite overwhelming credible evidence to the contrary, Talisman continues to deny evidence of forced displacement of indigenous civilian populations from in and around the oil concession area.<sup>445</sup> This sustained "wilful blindness" undermines any notion that the activist campaign and Talisman's self-regulation efforts have had any significant impact on the company's culture and management system in a way that is likely to change Talisman's future conduct. It can be assumed that the company will continue to use its self-regulation regime largely as a public relations instrument. Moreover, it is not reasonable or fair and certainly not in the interest of encouraging states to comply with their legal obligations to respect for human rights to rely exclusively on the efforts of civil society to manage this issue. The ability of these diverse organizations and individuals to systematically hold to account all TNCs operating in conflict zones is necessarily constrained by resources, time, personnel and clout or authority.

In the absence of effective self-regulation or international regulation of TNC behaviour regarding the protection of human rights, we argue that the onus falls on home states to ensure that national corporations operate in compliance with norms of international human rights and humanitarian law. Although currently there is no

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<sup>443</sup> As Talisman's CEO, Jim Buckee, stated: "Talisman's shares have continued to be discounted based on perceived political risk in-country and in North America to a degree that was unacceptable for 12% of our production". See "Talisman to Sell Sudan Assets for C\$1.2 Billion", Talisman News, cited at <http://micro.newswire.ca/releases/October2002/30/c6739.html/60728-0>.

<sup>444</sup> *Ibid.*

<sup>445</sup> According to one report, Jim Buckee claims to have made "a pretty serious effort" to visit villages near the oil fields ... and had found nothing to substantiate the critics' claims". Buckee stated in relation to the sale, "It has been quite frustrating, because there's always been a gulf between what we've observed on the ground in Sudan and the publicity we've received in the rest of the world". See Bernard Simon, "A Canadian Oilman Gives In", *New York Times*, November 10, 2002.

legal obligation to do so, states possess authority and capacity under international law to exercise their jurisdiction to prescribe and adjudicate regarding the extraterritorial activities of their national corporations. States can extend both their civil and criminal law to corporate citizens or to their citizens who control such corporations. States also have a legal duty to the international community to protect certain fundamental rights as well as a compelling legal interest to prevent and punish the perpetrators of those human rights violations that are subject to universal jurisdiction. Developments in international law point to an emerging legal obligation or, at the very least, a moral obligation on the part of states to ensure that their nationals do not commit, participate in, or profit from, the commission of human rights abuses either directly or indirectly. Several industrialized states have begun to consider more comprehensive regulations on social and environmental reporting of the extraterritorial activity of TNCs. This trend may indicate an emerging state practice of regulation in this area.

While a global response to this issue may ultimately be more effective than unilateral action by states, this should not preclude, or be a prerequisite for, individual state action. Rather, we believe that action on a variety of jurisdictional levels is required and may help to stimulate the development of a harmonized global regulatory regime.

Canada is particularly well situated to develop and promote a national regulatory regime in light of its leadership role in both promoting the concept of human security and adopting it as a foreign policy priority. The government's self-proclaimed inability to sanction Talisman in view of the findings and recommendations of the government-commissioned Harker Report (and numerous subsequent independent reports) that grave violations of international human rights and humanitarian law were being committed, point to the need to develop specific mechanisms to address such conduct.

Talisman's imminent withdrawal from Sudan does not absolve the Canadian government of the responsibility to act. The Canadian economy relies heavily on resource-based industry and corporations in the extractive industry have less choice about where they can operate. This means that a disproportionate number of Canadian extractive companies may therefore find themselves operating in conflict zones and consequently implicated in human rights abuses. Talisman currently operates in Colombia as does Enbridge, another oil and gas company. Canadian mining companies are also active in the Democratic Republic of Congo and other conflict zones. It is thus appropriate that the Canadian government takes the lead in developing and implementing policies and regulatory mechanisms to address the human rights issues raised by Canadian corporate activity in conflict zones.

The following summarizes the policy recommendations set out in the paper:

# 1. Norms

We recommend the adoption of a legislated, mandatory code of conduct applicable to TNC activity in conflict zones.

## a) *Content:*

- Transnational corporations and other business enterprises operating in conflict zones shall be responsible for ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not benefit from these abuses.
- Companies operating in conflict zones shall neither commit, nor be complicit in violations of international human rights or humanitarian law.
- Security arrangements for transnational corporations and other business enterprises operating in conflict zones shall observe international human rights norms as well as the laws and professional standards of the country in which they operate.
- Companies intending to set up operations in conflict zones shall undertake an independent risk assessment that includes the human rights and humanitarian consequences of their proposed activities.
- Companies intending to set operations in conflict zones shall assume responsibility for securing the consent and co-operation of the host country in facilitating independent risk assessment and any ongoing monitoring subsequent to investment.

## b) *Definitions*

### (i) *Conflict zone*

There are a number of definitions of the term "conflict zone". It is not necessary for the purposes of this paper to choose between alternative approaches. Such definitions should be available for scrutiny, be reasonably capable of neutral application, and implicitly or explicitly attend to the human rights and humanitarian implications of conflict. We do, however, recommend reliance on the Country Indicators for Foreign Policy as a means of identifying risk of conflict in a given state.

(ii) *Complicity*

We recommend the following definition of complicity, which is based on Canadian jurisprudence and international law.

Complicity by a TNC in the commission of acts by a perpetrator contrary to the Code of Conduct consists of one or more of the following:

- Acts or omissions that provide material assistance in circumstances where the TNC knew or ought to have known that its acts or omissions would provide such assistance.
- Acts or omissions that abet the perpetrator in circumstances where the TNC knew or ought to have known that its acts or omissions would encourage the perpetrator.
- Where a TNC enters into a commercial relationship with one or more parties in a conflict zone, and any of those parties commits acts in violation of the Code in furtherance of that commercial undertaking, the TNC is complicit if it knew or ought to have known that the commission of the acts would be a probable consequence of carrying out the commercial undertaking with that party.

2. Monitoring

a) *Monitoring Body*

We recommend the establishment of a Working Group or Agency comprised of representatives nominated from industry, non-governmental organizations and international non-governmental organizations that focus on human rights and/or Corporate Social Responsibility (CSR). The establishment, mandate and terms of reference of the Working Group would be set out in the appropriate statutory instrument. The Working Group would be affiliated with the federal government and would be jointly funded by TNCs and the federal government through a mechanism that guarantees the Working Group independence from any individual TNC. Existing regulatory regimes for environmental protection and assessment across Canada offer potential mechanisms upon which an effective impact assessment and evaluation regime could be modeled.

Prior to a TNC's investment in a conflict zone, the Working Group would review the TNC's risk assessment. It would have the capacity to investigate the claims made by conducting research or commissioning its own fact-finding team. The TNC would be responsible for securing consent by the host government to independent impact assessment prior to investment and ongoing monitoring on a periodic or continuous basis. Based on the information it receives, the Working Group would recommend in favour or against investment or suggest revisions of the project to mitigate potential negative effects and facilitate positive effects. It would subsequently produce a final report. All documents submitted to and produced by the Working Group would be publicly available.

b) *Risk Assessment Criteria*

We recommend that the criteria set out in the US/UK *Voluntary Principles on Security and Human Rights* be adopted for risk assessments. A risk assessment under the Code should consider:

- Security risks to, and by, the company;
- Potential for violence, especially in the area of company operations;
- Human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security organizations, and the capacity of the above entities to respond to situations of violence in a lawful manner;
- Rule of law;
- Conflict analysis that would identify and understand the root causes of existing conflicts, level of adherence to human rights and international humanitarian standards by key actors;
- Equipment transfers from the company to security forces that may use the equipment in a rights abusing manner.

3. Continuous Monitoring

We recommend two options for on-going monitoring:

- Self-reporting by the TNC to be reviewed and verified by the Working Group; or
- Monitoring by a team of experts commissioned by the Working Group.

The results of the monitoring would be publicly available. The Working Group would assess the results of the monitoring and determine the extent to which the TNC's performance is in compliance with the Code of Conduct, and, where appropriate, make recommendations on how the TNC could bring its conduct into compliance. We anticipate that the form and frequency of monitoring would vary with the exigencies presented by the particular context.

4. Consequences of Non-Compliance

We recommend the following changes or additions to facilitative, incentive and coercive legal mechanisms to ensure compliance with the Code of Conduct:

- The imposition of disclosure requirements across the full range of "socially responsible investment" criteria. These should include disclosure of Working

Group reports (pre-investment risk assessments, Working Group evaluations and on-going monitoring reports) to, at a minimum, all present and prospective shareholders and fund members. Disclosure could also be a pre-requisite to listing on any Canadian stock exchange.

- The amendment of the *Income Tax Act* of Canada to deny corporations the benefit of deducting taxes paid to foreign jurisdictions in either of two circumstances:
- where the Canadian government has annulled a tax treaty with the foreign jurisdiction in question on human rights grounds; or,
- upon the recommendation of the Working Group.
- The imposition of an obligation on Export Development Canada to explicitly tie the availability of its full range of trade finance services to the findings and recommendations of the Working Group regarding the impact of TNC investment and/or continued activity on human rights and humanitarian standards in a conflict zone.
- The amendment of the Special Economic Measures Act to clarify its ability to prohibit certain business activities or investment in a particular state.
- The creation of specific criminal offences and/or private causes of action should be considered within three years of the introduction of the measures discussed above.
- Legislation that protects whistleblower employees who disclose information they have reasonable cause to believe shows that a human rights violation, criminal offence, illegal act, miscarriage of justice, environmental damage or human health or safety risk exists, or will likely occur.

## Appendix

### Principles of Human Rights Law and Humanitarian Law Applicable to TNCs Operating in Conflict Zones<sup>1</sup>

No company shall directly or indirectly commit or be complicit in the breach of the following principles of international human rights and humanitarian law:

Part I – International Law Issues Related to Abduction, Forced Labour and Slavery

Example of Violation	Applicable Law	Commentary
Abduction and Exploitation of Women and Children	<p>The <b>Slavery Convention</b> (“SC”) and the <b>Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery</b> (“Supplementary SC”) prohibit all forms of slavery and the slave trade and require states to take positive steps to abolish all forms of slavery including debt bondage, serfdom, institutions or practices whereby a woman may be sold into marriage, traded, inherited or whereby a child may be given up for exploitation or labour.</p> <p><b>Article 8 of the International Covenant on Civil and Political Rights (“ICCPR”)</b> states <i>inter alia</i>:</p> <p>(1) No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.</p> <p>(2) No one shall be held in servitude.</p> <p>(3) No one shall be required to perform forced or compulsory labour.</p>	<p>⇒ The prohibition of slavery is also a rule of customary international human rights law and is an obligation <i>erga omnes</i>. It is an offence subject to universal jurisdiction. A violation of the prohibition against slavery is considered a gross violation of human rights. Slavery also has been cited by the International Law Commission as an international crime.</p> <p>⇒ The abduction of women by militia for marriage, sex or domestic labour is a violation of both conventional and customary international human rights law.</p> <p>⇒ <b>Article 1 of the Declaration on the Protection of All Persons from Enforced Disappearance</b><sup>2</sup> adopted by the General Assembly in 1992 states that enforced</p>

<sup>1</sup> The authors have relied to a large extent on the information and commentaries found in: *Internally Displaced Persons: Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57, Compilation and Analysis of Legal Norms*, UN ECSOR, 51st Sess., UN Doc. E/CN.4/1996/52/Add.2, (1995); and *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39, Addendum, Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UN ECSOR, 54th Sess., UN Doc. E/CN.4/1998/53/Add.1, (1998).

	<p><b>Article 5 of the African Charter (“AC”)</b> states:  “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”</p> <p><b>Article 2 of the Forced Labour Convention (FLC)</b> defines “forced or compulsory labour as:  “all work or service which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily.”</p> <p><b>Art. 1 FLC</b> requires each party to the convention to suppress the use of forced or compulsory labour in all its forms in the shortest possible period.</p> <p><b>Article 1 of the Abolition of Forced Labour Convention</b> requires each party to “suppress and not to make use of any form of forced or compulsory labour” <i>inter alia</i> “as a means of racial, social, national, or religious discrimination.”</p> <p><b>Art. 23(3) ICCPR</b>  No marriage shall be entered into without the free and full consent of the intending spouses.</p>	<p>disappearance is an “offence to human dignity” and a flagrant violation of human rights. It describes it as a situation in which:  “persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law.”</p>
<p><b>Abduction and Exploitation of Children (see above)</b>  <b>Conscription of Children into Armed Forces and Militia</b></p>	<p><b>Article 8 of the Convention on the Rights of the Child (“CRC”)</b>  (1) “States Parties undertake to respect the child’s right to maintain his or her identity, including ... family relations as recognized by law without unlawful interference.  (2) Where the child is illegally deprived of some or all the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”</p> <p><b>Art. 19(1) CRC</b> requires parties:  “to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of the parent(s) ... or any other person who has the care of the child”.</p>	<p>⇒ The international customary and conventional law rules relating to slavery and forced labour set out above are applicable to the abduction and exploitation of children.</p>

<sup>2</sup> The Declaration on the Protection of All Persons applies to acts perpetrated by or on behalf of the state agents. It is a non-binding declaration that reflects to a large extent customary law. See Deng, “Compilation and Analysis of Legal Norms”, *supra* note 1, para. 99.



	<p><b>Art. 32 CRC</b> requires that parties recognize:  “the right of the child to be protected from economic exploitation and from performing work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development” and to take <i>inter alia</i> legislative, administrative and social measures to ensure the implementation of this obligation.</p> <p><b>Art. 35 CRC</b>  States parties shall take all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.</p> <p><b>Art. 36 CRC</b> requires the parties to:  “protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.”</p> <p><b>Art. 38 CRC</b> requires parties to:</p> <ol style="list-style-type: none"> <li>(1) undertake to respect and to ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child;</li> <li>(2) take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities;</li> <li>(3) refrain from recruiting any person who has not attained the age of fifteen years into their armed forces and in recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties shall endeavour to give priority to those who are oldest;</li> <li>(4) take all feasible measures to ensure the protection and care of children who are affected by an armed conflict in accordance with the parties’ obligations under international humanitarian law to protect the civilian population in armed conflicts.</li> </ol> <p>Protocols I and II and the Statute of the International Criminal Court oblige parties to a conflict to take all feasible measures to ensure that children under the age of 15 years do not take part in the hostilities and to refrain from recruiting them into their armed forces. The ICC Statute lists as a war crime conscription of children into the armed forces or using children to participate actively in war.</p>	
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Factual Circumstance	Applicable Law	Commentary
<p><b>Indiscriminate Attacks and Intentional Targeting of Civilians</b></p>	<p><b>Common Article 3 of the Geneva Conventions of 12 August 1949</b> (“<b>Common Art. 3</b>”) requires that “persons no active part in the hostilities”, “including members of armed forces who have laid down their arms and those placed hors de combat” shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. In respect of the above persons, <b>Common Art. 3</b> prohibits at any time and in any place, among other things:</p> <ol style="list-style-type: none"> <li>1. violence to life and person, in particular murder of all kinds; and</li> <li>2. summary executions.</li> </ol> <p><b>Customary international law and Art. 13(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts</b> (“<b>Protocol II</b>”) prohibit:</p> <ol style="list-style-type: none"> <li>(1) making civilians as such the object of attack; and,</li> <li>(2) acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.</li> </ol> <p><b>Customary international law</b> dictates that:</p> <ol style="list-style-type: none"> <li>1. all combat activity must be justified on military grounds; activity that is not militarily necessary is prohibited.</li> <li>2. attacks may be directed only against objects that make a contribution to the enemy’s military effort and are of tactical and strategic importance. Incidental loss and damage must be minimized.</li> <li>3. parties to an armed conflict must always distinguish between combatants, who may take a direct part in hostilities and be attacked themselves, and non-combatants, who do not take a direct part in hostilities and cannot be attacked or used as human shields.</li> </ol>	<p>⇒ <b>Common Art. 3</b> applies to non-international conflict in the territory of a State party. It requires that all parties to the conflict apply as a minimum the requirements set out in <b>Common Art. 3</b>.</p> <p>⇒ Although <b>Common Art. 3</b> does not expressly prohibit attacks against civilians, such attacks against civilian men, women and children is in violation of the prohibition against violence to life, murder of all kinds and summary executions of persons not taking part in the hostilities.</p> <p>⇒ Attacks and combat activity targeted at civilians are in violation of customary international law that gives immunity to civilians and requires parties to a conflict to distinguish between civilians, civilian objects and combatants on the one hand and military targets on the other.</p> <p>⇒ According to Francis Deng, the Representative of the Secretary-General of the United Nations Commission on Human Rights Issues Related to Displaced Persons, even if civilians provide indirect support to the rebels by, for example, supplying food, shelter or acting as messengers “they may not be subject to direct individualized attack since they pose no immediate threat”.</p> <p>⇒ Intentional, deliberate and wilful killing and targeting of civilians is a war crime, and a crime against humanity when committed as part of a widespread or systematic attack directed against a civilian population. <b>The Statute of the International Criminal Court (ICC)</b> lists as war crimes in internal conflicts several serious violations of <b>Common Art.</b></p>

<p>Indiscriminate attacks are illegal under customary law. These include:</p> <ol style="list-style-type: none"> <li>(1) widespread and intended damage of civilian property (“wanton destruction”)</li> <li>(2) attacks that are not targeted at military objectives;</li> <li>(3) the use of weapons that cannot be properly targeted ;and</li> <li>(4) attacks that treat an area with similar concentrations of military and civilian objectives as a single military objective;</li> <li>(5) use of weapons that have an uncontrollable effect;</li> <li>(6) an attack that may be expected to cause harm to civilians or civilian objectives in excess of the concrete and direct military advantage anticipated.</li> </ol> <p><b>Art. 38(4) CRC</b> states:</p> <p>“In accordance with the parties obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure the protection and care of children who are affected by an armed conflict.”</p> <p><b>Article 6(1) ICCPR</b> states that:</p> <p>“Every human being has the inherent right to life. This right shall be protected by law. No one shall arbitrarily be deprived of his life.”</p> <p><b>Art. 4 AC</b></p> <p>“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one shall be arbitrarily deprived of this right.”</p> <p><b>Art. 6 CRC</b> states that:</p> <p>States Parties recognize that every child had the inherent right to life.</p> <p>States Parties shall ensure to the maximum extent possible the survival and development of the child.</p>	<p>3 including violence to life and person including murder, outrages upon personal dignity, and summary executions. Serious violations of customary law that are war crimes include intentional attacks on the civilian population and individual civilians, pillage and rape. In addition, persons found responsible for indiscriminate attacks on civilians that result in extensive, unnecessary and willful damage may also be guilty of the crime of wanton destruction.</p> <p>⇒ UN General Assembly resolution 2444 (XXIII) of 19 December 1968 on respect for human rights in armed conflicts, the recognized the principle of civilian immunity and affirmed that “it is prohibited to launch attacks against civilian populations as such.”</p> <p>⇒ Indiscriminate and arbitrary attacks on civilians are in violation of the non-derogable right to life articulated in the ICCPR, the AC and the CRC.</p> <p>⇒ Attacks leveled against all civilians including women and children violate the obligation under the CRC to ensure the protection of children.</p>
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<p><b>Bombing, burning of shelters, pillage, destruction of objects necessary for survival</b></p>	<p><b>Customary international law</b> and <b>Art. 4(2)(g) Protocol II</b> prohibit “pillage” of personal property of civilians who have fled from their homes. Non-combatants and their property must be spared from the incidental effects of military operations. Stealing is an offence of war.</p> <p><b>Customary international law</b> and <b>Art. 14 Protocol II</b> provide that:  “Starvation of civilians as a method of warfare is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water ...”</p> <p><b>Art. 17 ICCPR</b> states:  (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home ...  (2) Everyone has the right to the protection of the law against such interference or attacks.</p> <p><b>Art. 14 AC</b> states:  “The right to property<sup>3</sup> shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”</p>	<p>⇒ The use of irregular or private militias to perform some of these acts implicates whoever employs them in the violation of the prohibition against pillage of personal property.</p> <p>⇒ Starvation of civilians is also prohibited by customary international law.</p> <p>⇒ This right of non-interference relates to all types of residential property. While this right is not absolute<sup>4</sup>, interference is “unlawful if it is contrary to international or domestic law and is “arbitrary” where the interference contains elements of injustice, unpredictability and unreasonableness.</p>
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<sup>3</sup> Article 17 of the Universal Declaration of Human Rights (“UDHR”) states:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

There is no corresponding right in either the ICCPR or the ICESCR. The scope and content of this right is contested and this thus probably not a reflection of customary international law.

<sup>4</sup> This right of non-interference may be limited in cases “determined by law in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare of democratic society” (ICCPR Art. 4).

<p><b>Rape and Other Sexual Violence</b></p>	<p><b>Common Art. 3</b> does not explicitly prohibit rape<sup>5</sup> but it requires parties to the conflict to treat all persons who are not active participants in the conflict “humanely without any adverse distinction founded on ... sex”. Furthermore it prohibits “outrages on personal dignity, in particular humiliating and degrading treatment”. (See also <b>Art. 2(1) Protocol II</b>)</p> <p><b>Art. 4(2)(e) Protocol II</b> prohibits, <i>inter alia</i>, “outrages upon personal dignity, in particular ... rape ... and any form of indecent assault”.</p> <p><b>Art. 1 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b> defines torture as:  “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted ... with the consent or acquiescence of a public official or other person acting in an official capacity.”</p> <p><b>Art. 5 ICCPR</b> states:  “<i>No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment</i>”</p> <p><b>Art. 5 AC</b> (see above)</p>	<p>⇒ Under Common Art. 3, clarified by Art. 4(2)(e) of Protocol II, rape is prohibited.</p> <p>⇒ The rights to life and security of the person and the prohibition of torture and cruel, inhuman or degrading treatment are non-derogable rights and any abrogation of them is a violation of international law. A violation of the prohibition against torture and cruel, inhuman or degrading treatment constitutes a war crime and where systematic, a crime against humanity. Inasmuch as rape is cruel, inhuman and degrading treatment it also constitutes a crime in international law.</p>
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<sup>5</sup> Sudan is not party to the Convention on the Elimination of All forms of Discrimination against Women (“CEDAW”). The Committee on CEDAW has interpreted the prohibition on gender discrimination that underlies many of the obligations in the convention, to forbid various forms of violence against women.

Attacks targeting members of ethnic/racial/religious groups	<p><b>Art. 5 International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”)</b> requires parties to:</p> <p>“undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law notably in the enjoyment of the following rights” <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>(1) the right to security of the person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;</li> <li>(2) the right to freedom of movement and residence within the border of the State;</li> <li>(3) the right to freedom of thought, conscience and religion.</li> </ul>	
Demographic manipulation through displacement, resettlement of non-local populations	<p><b>See Art. 5(e)(i) CERD (above)</b></p> <p>“... State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national ethnic origin, to equality before the law, notably in the enjoyment of” <i>inter alia</i> [e]conomic, social and cultural rights, in particular ... [t]he rights to work, free choice of employment, to just and favourable conditions of work, to protection against unemployment ....”</p>	<p>⇒ Discriminatory practices of moving a resident population out by forcible means and resettling the area with another population makes displacement permanent and violates <b>Art. 2 of the CERD</b>.</p> <p>⇒ Discriminatory hiring practices are in violation of the prohibition of discrimination with respect to the right to work and free choice of employment.</p>
Forced displacement	<p><b>Common Article 3</b> obliges states in all circumstances to treat civilians humanely without adverse distinction and prohibits violence to life and person and cruel treatment.</p> <p><b>Art. 17 Protocol II</b></p> <ul style="list-style-type: none"> <li>(1) The displacement of the civilian population shall not be ordered or forced for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.</li> </ul>	<p>⇒ Forcible displacement of civilians may constitute inhumane treatment, violence to life and person, and cruel treatment. Such practices arguably be war crimes and if systematic, widespread and the product of persecution against an identifiable group, crimes against humanity.</p> <p>⇒ Direct, indiscriminate attacks on civilians may be a means of inducing displacement. Such attacks not only kill individual civilians but also terrorize the population and cause a climate of insecurity. The indiscriminate attacks targeted at the civilian population violate Common Art. 3.</p>

	<p>(2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.</p> <p><b>The Statute of the ICC</b> lists as a war crime the forcible displacement of the civilian population for reasons related to the conflict. Widespread and systematic forced displacement of the civilian population by expulsion or other coercive acts from their area, in furtherance of a state or organizational policy, is a crime against humanity.</p> <p><b>ICCPR 12</b> states <i>inter alia</i>:</p> <p>(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.</p> <p>(2) ...</p> <p>(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (<i>ordre public</i>), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.</p> <p><b>Art. 12(1) AC</b></p> <p>"Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law."</p> <p><b>Art. 11(1) ICESCR</b> states that the Parties recognize:</p> <p>"the right of everyone to an adequate standard of living for himself and his family, including adequate food, housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right ...."</p>	<p>and they cannot be justified under the exceptions in <b>Art. 17(1) Protocol II</b>. Indeed the purpose of these attacks expressly violates the prohibition in <b>Art. 17</b>.</p> <p>⇒ The <b>ICRC Commentary to Article 17</b> states that the intent of the prohibition against forced displacement is to minimize civilian displacement that is politically motivated.</p> <p>⇒ Freedom of movement and residence may be suspended in times of genuine emergencies. However, derogation from these rights must not be in violation of <i>inter alia</i>, the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, the right not to be held in slavery or servitude, the right to freedom of thought, conscience and religion. In addition, the rights articulated in <b>Art. 12 ICCPR</b> may only be restricted for the particular "emergency" situations set out in subsection 3 (law, national security, public order etc.).</p> <p>⇒ As stated above, the attacks on civilians by the GOS are in violation of the right to life. The abductions of women and children and the rape of women by the militias allied with the GOS violate among other rights, the right not to be subjected to cruel, inhuman or degrading treatment and the prohibition against slavery. Therefore these attacks, the purpose of which is to forcibly displace the civilian population also violate the rights of freedom of movement and residence in <b>Art. 12 ICCPR</b> and <b>Art 12(1) AC</b>.</p> <p>⇒ The Committee on Economic Social and Cultural Rights (the "Committee on ESCR") has stated that "instances of forced eviction are <i>prima facie</i> incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law"</p>
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Part II Section B – Humanitarian Law and Human Rights Law Issues Arising as a Result of Forced Displacement

Factual Circumstance	Applicable Law	Commentary
<p><b>Detention of Civilians</b></p>	<p><b>Common Art. 3</b> obliges states in all circumstances to treat civilians humanely without adverse distinction and prohibits violence to life and person, cruel treatment and outrages upon personal dignity, in particular humiliating and degrading treatment.</p> <p><b>Art. 4 Protocol II</b> requires that states in all circumstances treat all persons taking no active part in hostilities humanely.</p> <p><b>Art. 9(1) ICCPR</b>  “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”</p> <p><b>Art. 6 AC</b>  “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily attested or detained.”</p> <p><b>Art 10(1) ICCPR</b>  “All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.”</p> <p><b>Art. 37(b) CRC</b>  “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.</p> <p><b>Art. 12 ICCPR</b> (see above)</p> <p><b>Art. 12(1) AC</b> (see above)</p>	<p>⇒ According to Deng, the guarantees in <b>Art. 5(1)(b)</b> include food, drinking water, and protection against the weather and the dangers of the armed conflict, “to the same extent as the local civilian population”. Although housing and clothing are not expressly mentioned, they may be inferred from the “protection against the rigours of the climate and the dangers of the armed conflict”.</p> <p>⇒ Neither <b>Common Article 3</b> nor <b>Protocol II</b> codifies the rules as to when civilians may be interned in an internal armed conflict. However, the deprivation of basic necessities to detained persons may violate the requirement of <b>Common Art. 3</b> and <b>Art. 4 Protocol II</b> to treat persons taking no active part in the conflict humanely in all circumstances.</p> <p>⇒ For the law relating to rape of women see above.</p> <p>⇒ The Human Rights Committee has emphasized that this guarantee “applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals ... detention camps or correctional institutions or elsewhere”.</p> <p>⇒ The lack of provision of shelter, food and water by the GOS as well as the theft of provisions gathered from, and rape of, the civilian women are violations of the requirement to treat persons deprived of their liberty with humanity and respect.</p> <p>⇒ Detention of children in these camps is unlikely to meet the requirements of a measure of last resort and is therefore a violation of <b>Art. 37(b) of the CRC</b>.</p>



	<p><b>Art 5(d)(i) CERD</b> (see above)</p>	<p>⇒ Detention of civilians in these camps is also an infringement of the right of freedom of movement and freedom of residence set out in <b>Art. 12 ICCPR</b> and <b>Art. 12(1) AC</b>.</p> <p>⇒ The detention of only non-Arab South Sudanese Christian/Animist civilians is also a violation of the prohibition of discrimination on the basis of race with respect to the right to exercise the freedom of movement and residence within the borders of one's own state.</p>
<p><b>Dispersal of family</b></p>	<p><b>Art. 23 (1) ICCPR</b>          "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."</p> <p><b>Art. 10(1) ICESCR</b> requires that parties recognize that:          "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."</p> <p><b>Art. 18 AC</b>          (1) "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral needs.          (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."</p> <p><b>Art. 24 (1) ICCPR</b> guarantees that:          "Every child, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society or the State."</p> <p><b>Art. 7 (1) CRC</b> states <i>inter alia</i> that the child,          "as far as possible, has the right to know and be cared for by his or her parents".</p>	<p>⇒ The effect of the GOS attacks on civilians and civilian areas is to cause the victims of the attacks to flee and in so doing many families are separated. These attacks therefore violate the positive obligations incumbent on the GOS under the <b>ICCPR</b>, the <b>ICESCR</b> and the <b>CRC</b>, to protect the family unit, to protect children and to ensure that children are not separated from their families against the will of their parents.</p>

	<p><b>Art. 9 CRC</b> provides <i>inter alia</i>:</p> <p>(1) States Parties shall ensure that a child is not separated from his or her parents against their will, except where competent authorities subject to judicial review determine in accordance with applicable law and procedures, that such separation is necessary in the best interests of the child. ...</p> <p>Where such separation results from any action initiated by a State party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. ...”</p>	
Forced abandonment of means of livelihood	<p><b>Article 6 ICESCR</b></p> <p>“The States Parties to the present Covenant recognize the right to work, which includes the right everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”</p>	<p>⇒ Inasmuch as the GOS attacks are aimed at forcefully displacing civilians, such attacks also force these persons to abandon against their will their traditional form of livelihood. These attacks, therefore, also violate the right of these persons to make their living as they have chosen to do. These attacks are also contrary to the obligation incumbent on the GOS to “take appropriate steps to safeguard this right.”</p>
Denial of access to humanitarian and/or medical assistance	<p><b>Customary international law</b> and <b>Art. 14 Protocol II</b> (see above) prohibit starvation of civilians as a method of warfare.</p>	<p>⇒ International humanitarian law recognizes the right to humanitarian access. Frequent GOS flight bans to areas where displaced persons are concentrated may constitute a violation of the right of those civilians to humanitarian access.</p> <p>⇒ In addition, these flight bans mean that humanitarian organizations have no ability to provide food and other assistance to the population of IDPs. As a result many of these IDPs have no means of subsistence. This is tantamount to using hunger as a weapon and violates the</p>

	<p><b>Common Art. 3(2)</b> requires that the parties to the conflict parties to collect and care for the wounded and sick without conditions. It further states:</p> <p>“An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”</p> <p><b>Art. 7(2) Protocol II</b></p> <p>“In all circumstances [the wounded and sick] shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.”</p>	<p>customary international law rule (noted above), which prohibits the use of starvation as a method of warfare.</p> <p>⇒ According to the ICRC, fear of diversion of food aid to enemy forces provides no legal justification for refusing passage of food aid.</p> <p>⇒ The wounded and sick displaced persons who fall under the control of a party to the conflict are entitled to medical care, whether or not they previously committed hostile acts.</p> <p>⇒ Deng suggests that inasmuch as “as article 7 of Protocol II merely clarifies and elaborates on the pre-existing duty in common article 3 to provide the wounded and sick with medical care, it should be regarded as customary law.</p> <p>⇒ Deng further states that although <b>Common Art. 3</b> is silent on the question of access by relief workers to persons in need once the state party has consented to offers of humanitarian relief, “[c] onsent to such access, which is indispensable to the provision of relief, must be presumed from the acceptance of the organization’s offer of humanitarian services”.</p> <p>⇒ <b>Common Art. 3</b> does not expressly provide for protection of humanitarian relief workers or their relief bases or compounds. However, as persons who are taking no active part in the conflict, these workers are protected under <b>Common Art. 3</b> and customary international law.</p> <p>⇒ The Committee on ESCR has stated that the deprivation of any significant number of persons “of essential primary health care” constitutes a violation of the</p>
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	<p>The <b>Statute of the ICC</b> lists as a war crime in internal conflicts:</p> <ol style="list-style-type: none"> <li>(1) intentionally directing attacks against medical units;</li> <li>(2) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict and;</li> <li>(3) intentionally directing attacks against hospitals and places where the sick and wounded are collected, provided they are not military objectives.</li> </ol> <p><b>Art. 12 ICESCR</b></p> <ol style="list-style-type: none"> <li>(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</li> <li>(2) The steps to be taken by the States Parties ... to achieve the full realization of this right shall include ... (c) the prevention, treatment and control of epidemic, endemic, occupational or other diseases; (d) the creation of conditions which assure to all medical service and medical attention in case of sickness."</li> </ol> <p><b>Art. 16 AC</b></p> <ol style="list-style-type: none"> <li>(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.</li> <li>(2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.</li> </ol> <p><b>Art. 5(e)(iv) CERD</b> requires States Parties to guarantee to each person, without discrimination, equality in the enjoyment of the right to public health, medical care and social services.</p>	<p>Covenant unless the State concerned can demonstrate "that every effort has been made to use all resources that are at its disposition".</p> <p>⇒ If continuing attacks by armed forces on civilians and civilian areas may make it too dangerous for humanitarian workers to operate in certain areas. As a result a civilian population in dire need of humanitarian assistance (both medical attention and food) is deprived of this necessary aid. This is therefore also a violation of the GOS obligations under the <b>ICESCR</b>, the <b>AC</b> and the <b>CRC</b> to ensure that civilians — men, women, children and the elderly — have access to and receive necessary medical treatment.</p>
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	<p><b>Art. 24 CRC</b></p> <p>(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.</p> <p>(2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures (a) to diminish infant and child mortality; (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) to combat disease and malnutrition, including, within the framework of primary health care ... through the provision of adequate nutritious foods and clean drinking water ....”</p> <p><b>Art. 18 AC</b></p> <p>“The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”</p>	
Denial of access to food, water, clothing and housing	<p><b>Common Art. 3</b> (see above)</p> <p><b>Art. 6(1) ICCPR</b> (See above)</p> <p><b>Art. 4 AC</b> (See above)</p> <p><b>Art. 6 CRC</b> (See above)</p> <p><b>Art. 11(1) ICESCR</b> (See above)</p> <p><b>Art. 11(2) ICESCR</b></p> <p>“The States Parties to the present Covenant recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:</p>	<p>⇒ Deng points out that while the rights to food and water are not explicitly mentioned in <b>Common Art. 3</b>, these rights, to the extent they are necessary for survival, should be regarded as inherent in the guarantee of humane treatment contained in <b>Common Art. 3</b>.</p> <p>⇒ Forcible displacement of civilians that <i>inter alia</i> prevents these persons from cultivating and producing food necessary for survival violates the right to be free from hunger and, in addition violates positive obligations under <b>Art. 11 ICESCR</b>.</p> <p>⇒ According to the Committee on ESCR, a “State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing</p>

	<p>To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; Taking into account the problems of both food-importing and food-exporting countries, to ensure and equitable distribution of world food supplies in relation to need."</p> <p><b>Art. 27 CRC</b> provides that <i>inter alia</i>:</p> <p>State Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. ...</p> <p>States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."</p>	<p>to discharge its obligations under the Covenant" unless it can "demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations". In addition the Committee noted that the human right to adequate housing is of central importance to the enjoyment of all economic, social and cultural rights and it dismissed a "narrow or restrictive" interpretation of the right in favour of one viewing it as a "right to live somewhere in security, peace and dignity".</p> <p>⇒ The right to be free from hunger relates to the non-derogable right to life. If the actions of a perpetrator against the civilian population are the cause of widespread hunger, starvation, sickness and death, they violate the fundamental non-derogable right to life, the right to an adequate standard of living including adequate food and housing as prescribed in <b>Art. 11(1) ICESCR</b>, as well as the right of "every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".</p> <p>⇒ According to the Human Rights Committee, protection of the right to life requires positive measures.</p>
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## DECONSTRUCTING ENGAGEMENT

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Georgette Gagnon holds an LL.B from Osgoode Hall Law School and an LL.M in International Human Rights Law from the University of Essex in the UK. In Spring 2002, Ms. Gagnon served as the legal/technical advisor to a US-led international eminent persons group that investigated and reported on slavery, abduction and forced servitude in Sudan in April and May 2002, as part of the United States' four-point peace program for Sudan. In early 2001, Ms. Gagnon investigated and reported on oil, conflict and displacement in Western Upper Nile, Sudan for Canadian and British non-governmental organizations. She was a member of the 1999 Canadian Assessment Mission to Sudan (Harker Mission), appointed by Canada's Minister of Foreign Affairs and International Trade, that investigated slavery as well as links between oil development in Sudan and violations of human rights.

Ms. Gagnon has served with United Nations human rights field operations in Bosnia and Herzegovina and Rwanda and as a consultant to the Canadian International Development Agency (CIDA) in human rights and rule of law. Since July 2001, she has been Director of Human Rights for the Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina based in Sarajevo.

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Audrey Macklin is an associate professor at the Faculty of Law, University of Toronto. She holds law degrees from Yale and Toronto, and a Bachelor of Science degree from Alberta. After graduating from the University of Toronto, she served as law clerk to Mme Justice Bertha Wilson at the Supreme Court of Canada. She was appointed to the faculty of Dalhousie Law School in 1991, and promoted to Associate Professor 1998. While teaching at Dalhousie, she also served as a member of Canada's Immigration and Refugee Board. She was a member of the 1999 Canadian Assessment Mission to Sudan (Harker Mission), appointed by Canada's Minister of Foreign Affairs and International Trade, that investigated slavery as well as links between oil development in Sudan and violations of human rights.

Professor Macklin's teaching areas include criminal law, administrative law, and immigration and refugee law. Her research and writing interests include transnational migration, citizenship, forced migration, feminist and cultural analysis, and human rights. She has published on these subjects in journals such as *Refuge* and *Canadian Woman Studies*, and in collections of essays such as *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* and *Engendering Forced Migration*.

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Penelope Simons has an LL.M. and Ph.D. in International Law from Cambridge University. She obtained her LL.B. from Dalhousie Law School and was called to the British Columbia Bar in 1996. She practiced corporate and commercial law at McCarthy Tétrault, and subsequently worked in the nongovernmental sector on peace and disarmament issues. She was a member of the 1999 Canadian Assessment Mission to Sudan (Harker Mission), appointed by Canada's Minister of Foreign Affairs and International Trade, that investigated slavery as well as links between oil development in Sudan and violations of human rights. Dr. Simons is currently a Research Fellow at the University of Toronto, Faculty of Law. She is involved in two major research projects that examine governance and policy concerns regarding the human rights implications of the extraterritorial activities of multinational corporations.

Cover Photos (from top):

1. Village of Bentiu, Western Upper Nile, Sudan  
Greater Nile Petroleum Operating Company (GNPOC)/Talisman Energy operating area  
December 1999  
(Audrey Macklin photo)
2. Village of Pariang, Western Upper Nile, Sudan  
GNPOC/Talisman Energy operating area  
December 1999  
(Audrey Macklin photo)
3. GNPOC/Talisman Energy oil facility, Heglig, Western Upper Nile, Sudan  
December 1999  
(Audrey Macklin photo)
4. Protestors demonstrate outside Chatham House, St. James Square, London, UK,  
at a conference on corporate social responsibility  
featuring an address by Dr. Jim Buckee, President of Talisman Energy  
October 13, 2001  
(Photo courtesy Tearfund)

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