

## ABHANDLUNGEN / ARTICLES

### Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan

By *Charles Riziki Majinge*, London / Heidelberg\*

#### I. Introduction

Increasingly the activities of the Multinational Corporations operating both in developed and developing countries greatly affect the individual rights and freedoms of the people in countries where they operate.<sup>1</sup> Previously MNCs considered themselves as having nothing to do with human rights arguing that addressing human rights constituted a direct interference in the domestic affairs of sovereign countries.<sup>2</sup> An argument which reinforced the inaction of Multinational Companies to refrain from activities which directly impacted human rights protection in host countries. With the incontrovertible reality that most dictatorial regimes especially in developing countries, which abuse and trample on the rights of their own people, partly depend on the proceeds from these powerful corporations to sustain themselves in power, the link between MNCs and human rights abuse could no longer be denied.<sup>3</sup> Multinational Companies have assumed the central role in providing financial resources which are blamed for fuelling conflicts leading to human rights violations.<sup>4</sup> It is no longer an isolated case when multinational companies become complicit in human rights violations by supplying financial resources to the government fighting rebels

\* *Charles Riziki Majinge*, LL.B (University of Dar Es Salaam, Tanzania), LL.M (Northwestern University School of Law, Chicago), Doctoral Candidate (London School of Economics and Political Science-LSE, England). I am grateful to Noah Bialostozky in New York and Dr. Philipp Dann in Heidelberg for their useful comments. Usual disclaimer applies. Email: C.R.Majinge@lse.ac.uk.

<sup>1</sup> *Jordan Paust*, Human Rights Responsibilities of Private Corporations, *Vanderbilt Journal of Transnational Law*, Vol. 35, (2002), p 802. See also, Clapham Andrew, 'Privatization of Human Rights' *European Human Rights Law Review* (1995), pp. 20-27. See also Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5. April 2008.

<sup>2</sup> See *Beth Stephens*, The Amoral of Profits: Transnational Corporations and Human Rights, *Berkeley Journal of International Law*, Vol. 20, 2002, p 62.

<sup>3</sup> *Anita Ramasastry*, From Nuremberg to Rangoon: An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations, *Berkeley Journal of International Law*, Vol. 20, 2002, p. 93

<sup>4</sup> *Eric W. Orts*, War and the Business Corporation, *Vanderbilt Journal of Transnational Law*, Vol. 35, 2002, pp. 568-574. See also *R. Sullivan*, *Business and Human Rights: Dilemmas and Solutions*, 2003.

in turn for the concession of mining or oil rights.<sup>5</sup> As eloquently stated by the Chairman of Transparency International in 1999 “the scale of bribe paying by international corporations in the developing countries of the world is massive ... and the results include growing poverty in poor countries, persistent undermining of the institutions of democracy, and mounting distortions in fair international commerce”.<sup>6</sup> In this unholy alliance between the Multinational Companies and governments or rebel groups, the most disadvantaged constituent is ordinary people who are left on their own to endure human rights atrocities. In developing countries governments and rebels, are no longer afraid of committing human rights violations precisely because they know that they can contract and subcontract natural resource hungry Multinational Companies to fill the void left by bilateral support from developed countries or international financial institutions.

The history of natural resource extraction in Africa is one fraught with poor track record characterised by environmental degradation, increased poverty, human rights abuse and wide spread corruption.<sup>7</sup> Nowhere has the work of Multinational Companies more negatively impacted human rights and individual freedoms than in post conflict Africa. Indeed, today most regimes accused of human rights violations against their own people, have managed to stay in power partly due to the multimillion concessions of natural resources to powerful Multinational Corporations. From Congo, Chad, Equatorial Guinea, Angola to Sudan, the regimes greatly depend on proceeds from foreign investments in natural resources to stay in power.<sup>8</sup> Yet successive governments in these countries have squandered wealth accrued from natural resources, stashing it away in foreign bank accounts rather than investing in badly needed social services such as education, health or transport infrastructure. Despite this sad reality linking human rights violations with the work of Multinational Companies, the international community has taken few concrete steps to address this challenge. Indeed some countries benefiting from this lucrative industry in places like Sudan, DR Congo or Equatorial Guinea, have actively refrained from condemning human rights violations in these countries in fear of upsetting their trading partners.

<sup>5</sup> See Enough Project Paper, A Comprehensive Approach to Congo’s Conflict Minerals, April 2009. Available at: <http://www.enoughproject.org/publications/comprehensive-approach-conflict-minerals-strategy-paper>.

<sup>6</sup> *Peter Eigen*, The Transparency International Bribe Payers Survey, 1999.

<sup>7</sup> For example see, The Causes of Conflict and the Promotion of the Durable Peace and Sustainable Development in Africa: The Report of the UN Secretary General to the General Assembly, April 1998. A/52/871 – S/1998/318. See also, A. *Gelb, et al.*, Oil Windfalls: Blessing or Curse? (Oxford, Oxford University Press 1988); Final Report of the Extractive Industries Review (EIR), ‘Striking a Better Balance: The World Bank Group and Extractive Industries’, Vol. I, 2003, p 15.

<sup>8</sup> *Abiodun Alao*, Natural Resources and Conflict in Africa: The Tragedy of Endowment, University of Rochester Press, 2007, at pp. 242-258.

This contribution argues that, Multinational Companies have a potential and constructive role to play to ensure that their activities do not continue to breed violence<sup>9</sup> in the already volatile hotspots like Sudan or DR. Congo. Specifically Multinational Companies working in conflict ridden countries have a special role to play to ensure that their activities do not become an impediment to the wider efforts of the international community to hold accountable elements accused of human rights abuse.<sup>10</sup> In Sudan, a country whose human rights and rule of law record has had a chequered history, successive ruling governments have managed to survive partly because of the Multinational Companies who have helped unlock the oil wealth which sustains the regime in power. Unless these Companies are compelled to make their activities more transparent and be accountable for their actions, their activities will continue to significantly encourage human rights violations and be an impediment to collective efforts of the international community to address human rights concerns in post conflict society.

With the growing appreciation of the role of Multinational Companies in the violations of human rights and the pivotal role they play in influencing domestic policies in countries where they invest, the United Nations launched the Global Compact Principles. This UN sponsored initiative, essentially requires companies to commit themselves to respect ten core principles in relation to human rights, labour and environment.<sup>11</sup> Indeed, thousands of companies especially in the Western World have enlisted under this initiative.<sup>12</sup> The challenge with this initiative is that it is not binding to those companies that accept to take part in it. In other words companies have absolute discretion on whether to join the initiative or not. Examining what happens in post conflict areas and much of the developing countries on continued human rights violations which are partly perpetrated under the watch or acquiescence of these Multinational Companies, it may as well be argued that this initiative hasn't fully permeated the work of corporations especially those operating in extractive industry in conflict or post conflict areas. It is argued that, without a binding international mechanism to hold them to account in conflict prone areas, their activities will continue to be an obstacle towards effective international community's efforts to address human rights violations and rebuild rule of law.

To avoid a scenario where national governments deciding whether to intervene in a dispute involving human rights and business continue to respond in an ad hoc manner,

<sup>9</sup> Timothy L. Fort and Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, *Vanderbilt Journal of Transnational Law*, Vol. 35, 2002 p 405.

<sup>10</sup> Stephen R. Ratner "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale Law Journal*, Vol. 111, 2001, p 448.

<sup>11</sup> For historical account of the UN Global Compact see, *Sagafi-Nejad*, Tagi and Dunning John, *The UN and Transnational Corporations: From Code of Conduct to Global Compact*, 2008.

<sup>12</sup> According to the UN Global Compact Office, as of July 2009, more than 7000 companies had enlisted as participants under this initiative. Available: <http://www.unglobalcompact.org/AbouttheGC/>. Last visit April 2010.

largely, driven by domestic priorities or by legal framework that are likely to differ internationally, there is a need for binding global rules.<sup>13</sup> Without some international legal standards, we are likely to continue witnessing both excessive violations of human rights in some of the most intractable conflict situations especially in developing countries and the failure to hold such entities accountable for their actions. It is only international law which offers a process for appraising and in the end a possibility of resolving such contradictory relationship between business and human rights.<sup>14</sup>

This paper proceeds as follows. Part two of the article examines the legal regime regulating the work of various multinational corporations in Sudan. Specifically, the Interim National Constitution and Sudanese Investments Act and also discusses the duty of multinational corporations to respect human rights under the international law. Part three reviews the work of multinational corporations in Sudan and their impact on the rule of law and human rights. Part four specifically reviews Chinese multinational corporations involved in the oil industry in Sudan. China is singled out mainly because of its dominant position in the oil industry in the country and its pivotal role in protecting Sudan against any international condemnation for activities considered detrimental to human rights and rule of law. Part five reviews the UN Principles on Global Compact. Part six, demonstrates that there is a need to hold to account corporations for human rights violations especially those operating in failed or failing states. Similarly part seven makes a case for adopting a binding global standards and rules to hold multinational corporations accountable for activities which violate human rights. Part eight suggest that, ultimately it is the responsibility of the host governments whether strong or weak to hold to account corporations involved in human rights violations. As such any assistance extended by the international community to support government efforts must be considered as augmenting the existing government initiatives. The paper concludes with some modest suggestions on the way forward.

## II. Legal regime regulating Multinational Companies operating in Sudan

Sudan, like many other developing countries in Africa, has had a tragic history of violence since its independence from Britain in mid 1950s. It has experienced the longest civil war in Africa spanning three decades.<sup>15</sup> The government is currently involved in an armed conflict against armed opposition in the western part of the country in Darfur. In the South and Eastern part of the country, it has managed to sign a peace agreement with its antago-

<sup>13</sup> *Ratner*, supra note 10, p 448.

<sup>14</sup> *Ratner*, id at 448.

<sup>15</sup> There countless of literature on the conflict in Sudan, but for the causes of the conflict see, M. Daly and Ahmad Sikainga (ed.) *Civil War in the Sudan*, British Academic Press, 1993 and Francis Deng and Prosser Gifford (ed.) *The Search For Peace and Unity in Sudan*, 1987.

nist.<sup>16</sup> Underlying all these conflicts is untold human suffering which has claimed millions of lives, while condemning other millions in refugee camps uncertain about their future.<sup>17</sup> Investments in Sudan are regulated by the Interim National Constitution of Sudan 2005<sup>18</sup> and the Sudan Investment Encouragement Act of 1999 and Investment Encouragement Regulations of 2000 as amended from time to time.<sup>19</sup> The Sudanese Constitution guarantees the right to acquire or own property in accordance with the law. It also prohibits any expropriation, unless it is done in accordance with the law and in public interests and in consideration of fair and prompt compensation.<sup>20</sup> Interestingly the constitution guarantees right to own property to the Sudanese citizens only. This may be interpreted to curtail or restrict the operation or at least restrict the scope of property ownership for foreigners. But this seemingly exclusionary clause for foreigners to own property is addressed by the same provision which prohibits any kind of expropriation for private property without just and prompt compensation.<sup>21</sup> This may be interpreted to mean that; though the constitution does not expressly guarantee the right to own property for foreigners, but once they acquire or invest their capital in the country, their ownership is guaranteed against any encroachment by the State. This constitutional clause enshrined in the Bill of Rights provides constitutional guarantee against confiscation by abusive administrative or executive measures.

The law encourages companies to invest in Sudan and it grants them various rights and privileges. It allows foreign investors to transfer all their invested capital, profits and salaries of foreign employees to their home countries.<sup>22</sup> Reading the Investment Act, it is clear that the Minister responsible for investment at the National level has wider discretionary powers to make decisions on investments in the country than his counterpart at the state level. The law requires that any investment relating to infrastructure, roads, transport, energy, education, health, tourism shall be considered strategic.<sup>23</sup> Investments in areas such as; extraction of subterranean and deep seas wealth,<sup>24</sup> crossing more than one state,<sup>25</sup>

<sup>16</sup> See generally *Ruth Iyob and G.Khadiagala*, "Sudan: The Elusive Quest for Peace", 2006.

<sup>17</sup> Sudan occupies an infamous position of being the largest host of Internally Displaced Persons in Africa (IDPs). As of March 2010 Sudan had 4.9 Million IDPs. See, <http://www.internal-displacement.org/countries/sudan>. Last visit March 2010

<sup>18</sup> Interim National Constitution adopted after the conclusion of the Comprehensive Peace Agreement in 2005.

<sup>19</sup> These laws were amended in 2001, 2002, 2003, 2006 and 2008.

<sup>20</sup> Art. 43 of the Interim National Constitution.

<sup>21</sup> Art. 43 (2) INC

<sup>22</sup> *Fath El Rahman Abdallah Sheikh*, *The Legal Regime of Foreign Private Investment in Sudan and Saud Arabia*, 2<sup>nd</sup> Edition, 2005, p 137.

<sup>23</sup> Art. 9 (a) Investment Encouragement Act

<sup>24</sup> Art. 9 (1) (b) Investment Encouragement Act

<sup>25</sup> Art. 9(1) (d) Investments Encouragement Act

agricultural, animal and industrial production<sup>26</sup> shall also be considered strategic. The investments considered to be strategic enjoy exemption from the business profits tax for a period of ten years.<sup>27</sup> This exemption can also be extended to non strategic investment areas as may be determined by the Council of Ministers based on the recommendation of a responsible Minister.<sup>28</sup> The projects under strategic investment clause also enjoy exemption from customs duties.<sup>29</sup> Examining the legal regime regulating the work of Multinational Companies in Sudan especially those involved in oil industry like China National Petroleum Corporation (CNPC) and Petronas from Malaysia, it is clear that they enjoy unprecedented privileges and guarantees allowing them to significantly influence the policies of the government which have direct correlation with rights and freedoms enshrined in the Sudanese Constitution. Despite the extensive guarantees and privileges accorded to Multinational Companies, the law of Sudan does not impose or specify corresponding obligations towards the Multinational Companies to ensure that their activities do comply with domestic laws or more importantly human rights and fundamental freedoms as stipulated in the constitution.

There is no effective and consistent web of internationally binding legal framework which compels Transnational Corporations to observe international human rights standards. Despite this absence, the international community has progressively been attempting to fill this legal lacuna by exploring possibility of adopting international legally binding rules and standards to regulate the work of Multinational Companies. These efforts stem from the growing realization by the international community of the ever increasing impact of Multinational Companies in the protection and promotion of human rights in areas they operate. During the late 1960s and 1970s at the height of developing country's demand to determine the fate of their natural resources amidst the growing role of Multinational Companies in their economies, the international community started looking into this question.<sup>30</sup> This initiative which was largely championed by developing countries was unsuccessful precisely because developed countries, where the majority of Multinational Companies are located, did not approve it.<sup>31</sup> As confirmed by the President of the United Nations General Assembly who stated in 1992 that: no consensus was possible ... the delegations felt that

<sup>26</sup> Art. 9(1) (d) Investments Encouragement Act

<sup>27</sup> Art. 10(1) (a) Investments Encouragement Act

<sup>28</sup> Art. 10 (2) Investments Encouragement Act

<sup>29</sup> Art. 11 Investments Encouragement Act

<sup>30</sup> *Peter T. Muchlinski, Attempts To Extend the Accountability of Transnational Corporations: The Role of UNCTAD*, in Menno T. Kamminga & Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, 2000, at pp. 97-102.

<sup>31</sup> *Ruggie John, Business and Human Rights: The Evolving International Agenda*, *The American Journal of International Law*, vol. 101, 2007, p 819.

the changed international environment and the importance attached to encouraging foreign investments required a fresh approach.<sup>32</sup>

In 1993, the UN Sub Commission on the Promotion and Protection of Human Rights established a working group on business and human rights. The Group was tasked with making recommendations and proposals relating to the methods of work and activities of the Transnational Corporations in order to promote the enjoyment of Economic, Social and Cultural rights and the right to development as well as civil and political rights.<sup>33</sup> In 2003 the Working Group produced the draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”.<sup>34</sup> These principles were envisaged to be binding and accepted at the international level linking business and human rights. It is on the basis of this work and the resolve of the Human Rights Commission to address the growing role of TNCs that the Commission recommended to the United Nations Secretary General to appoint the Special Representative of the Secretary General (SRSG) with mandate to identify and clarify international standards and policies in relation to human rights and business. Unfortunately these norms are still what they were.<sup>35</sup> In other words they haven’t been legally adopted by the international community to regulate human rights and business. There are also substantial pronouncements which have been made by international human rights bodies and experts which reaffirm the duty of private enterprises to respect human rights. For example the international human rights instruments such as the Universal Declaration of Human Rights have been considered to bind all entities (whether legal or natural) with no exception.<sup>36</sup> Similarly, the Human Rights Committee has stated that the right to privacy protects people from all such interference and attacks whether they emanate from State authorities or from natural or legal person.<sup>37</sup> The Maastricht guidelines on violations of economic, Social and Cultural Rights reaffirm that “the obligation to protect includes the State’s responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights”.<sup>38</sup> Though this duty is placed on States and not Multinational Companies, nevertheless, it reaffirms the notion that Multinational Companies should refrain from carrying out activities which may deprive individuals of their social and economic rights.

<sup>32</sup> *Richter, Judith*, Holding Corporations Accountable, 2001, p 10

<sup>33</sup> *Ruggie*, supra Note 31 p 820

<sup>34</sup> Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003).

<sup>35</sup> *Ruggie*, supra note 31, p 821

<sup>36</sup> *Louis Henkin*, The Universal Declaration at 50 and the Challenge of Global Markets, Brooklyn Journal of International Law, Vol. 25:1, 1999, pp. 24-25.

<sup>37</sup> UN HRC General Comment 16, April 1988, Para. 1

<sup>38</sup> See Maastricht Guidelines, para 19. Available at [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html). Last Visit December 2009.

It is increasingly recognized that in order for people to protect their environment and benefit from their natural resources they must have political rights, including the right of public participation.<sup>39</sup> This recognition emanates from the fact that legal arrangements whereby the State owns and controls all natural resources found in its territory to the exclusion of its people has resulted in serious conflict between the host state and host population with serious consequences on private investments.<sup>40</sup> As stated by one scholar, environmental protection will be improved if the decision makers are the same as those who pay for and live by the consequences of their decisions.<sup>41</sup> Indeed the exclusion of the people in resource control and management has been the major cause of conflict in Sudan. The complacency of the international community in not adopting a binding legal framework regulating the work of Multinational Companies is partly premised on the belief that, Multinational Companies' activities are regulated by domestic legal regimes. Imposing international standards would have unduly interfered with the ability of countries to determine how and to whom to engage with in exercising the much cherished concept of permanent sovereignty over natural resources. A concept well recognized in international law.<sup>42</sup> Yet this assumption has been challenged not only by the inability and unwillingness of countries to hold accountable Multinational Companies operating within their borders but also by wilful partnership between Multinational Companies and national governments to the detriment of the defenceless citizens.<sup>43</sup> Indeed Multinational Companies especially those operating in developing countries are increasingly challenging the traditional economic and political role of the State. Many States are losing authority to these Multinational Companies which have become so powerful that their budget not only dwarfs the combined GDP

<sup>39</sup> *George Pring and Linda Siegele*, the Law of Public Participation in Global Mining, in Elizabeth Bastida et al (eds.), *International and Comparative Mineral Law and Policy: Trends and Prospects*, 2005 p 273.

<sup>40</sup> *George Akpan*, Host State Legal and Policy Responses to Resource Control Claims by Host Communities: Implications for Investment in the Natural Resources Sector in Bastida et al, *supra* note 59 p 284.

<sup>41</sup> *Pring*, *supra* note 39 p 275.

<sup>42</sup> For extensive discussion on this concept see, Michael W. Gordon, University of Miami Inter American Law Review, Vol. 16, 1984-1985 p 311, Kamal Hossain et al (eds.), *Permanent Sovereignty over natural resources in international law; Principle and Practice*, 1984; *James N. Hyde*, *Permanent Sovereignty over Natural Wealth and Resources*, American Journal of International Law, Vol. 50, 1956, at pp. 854-867, *Karol Gess*, *Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis (1964)* 13 *ICLQ* 398-449, *Schrijver Nico*, *Natural Resources, Permanent Sovereignty over*, Max Planck Encyclopedia of Public International Law, 2009

<sup>43</sup> *Anita Ramasastry*, *From Nuremberg to Rangoon: An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations*, 20 *Berkeley Journal of International Law*, 2002 at 92.



of several countries but they are even capable to topple some governments from power.<sup>44</sup> In such situation, the ability of some states to influence and regulate the conduct of Multinational Companies has diminished significantly.<sup>45</sup> Indeed some corporations are so powerful that they determine or influence the policies set by developing countries.<sup>46</sup> They do this by determining where to set up their capital. In other words, if the government fails to do or enact policies favoured by these corporations, they can threaten pulling out their capital to some other countries.<sup>47</sup> It is against this premise that some scholars have argued that Multinational Companies have become participants in the international legal system with the capacity to bear some rights and duties under international law.<sup>48</sup>

### III. Linking Human rights and rule of law with the MNCs activities in Sudan

Sudan is a signatory to a number of internationally recognized human rights instruments.<sup>49</sup> In 2005, as part of the Comprehensive Peace Agreement with the rebel movement of the South Sudan Peoples Liberation Movement/Army (SPLM) it enacted a new Constitution.<sup>50</sup> This Constitution not only incorporates all international human rights instruments Sudan is a party to, but it also commits Sudan to respect and promote these rights.<sup>51</sup> Among the rights enshrined in the Constitution include rights which have direct nexus with the Multinational Companies activities in the country. Some of these rights include non discrimination,<sup>52</sup> right to clean and health and environment,<sup>53</sup> respect for labour rights i.e. equal pay for equal work, right to education,<sup>54</sup> right to enjoy proceeds from natural resources, rights of the indigenous and marginalized people,<sup>55</sup> and the right to work. It further includes right to organize and freedom of expression, prohibition of forced and child labour and slavery.<sup>56</sup> Multinational Companies as one of the significant employer in the country play a big

44 *Christopher G. Weeramantry*, Human Rights and the Global Market Place, Brooklyn Journal of International Law, Vol. 25 (1999), p 41.

45 *Ratner*, supra note 10 p 461.

46 *Beth*, supra note 2 p 57.

47 *Ratner*, supra note 10 p 463.

48 *Rosalyn Higgins*, Problems and Progress: International Law and how we use it, 1995, p. 50.

49 As of 2009 Sudan was a party to 26 International Human Rights Instruments. This information is based on the research conducted by the author in Sudan during the year 2007/8. On file with the author.

50 The Constitution was adopted in December, 2005.

51 Art. 27 of the Interim National Constitution of Sudan

52 Art. 31 Interim National Constitution of Sudan

53 Art. 11 Interim National Constitution

54 Art. 44 Interim National Constitution

55 Art. 47 Interim National Constitution

56 Art. 30 Interim National Constitution

role in the realization of these rights. They have a legal duty to ensure that their activities align with the provisions as reflected in the Sudanese Constitution and international human rights standards. The latter rights have been incorporated as an integral part of the Constitution of Sudan. Given the dominant role of Multinational Companies in the Sudanese economy, it is clear that their policies continue to have a direct impact and to some extent influence the policies enacted by the government. For example oil companies in joint venture with the government can directly influence the government policies related to employment and human security in areas where oil is extracted. As such they bear responsibility for the rights on which they may have an impact and because some states are unable or unwilling to make them do so under domestic law, they must be subjected to direct and uniform international standards of accountability.

Multinational Companies especially those operating in conflict and post conflict areas have a critical role to play in advancing rule of law.<sup>57</sup> The most visible and dominant rule of law sector where Multinational Companies have impact is the financial influence they wield over law and order institutions controlled by the central government.<sup>58</sup> Because of the indifference of the government to the plight of common people in places where these resources are extracted, it has been a tendency of some governments working together with Multinational Companies to deploy excessive law enforcement officers who ensure that people cannot legitimately and peacefully protest the impact of corporation's activities. Admittedly, it is not the responsibility of these companies to provide resources to the rule of law institutions such as judiciary or police. But nevertheless this reason does not shield them from the obligations to ensure that security personnel working under their auspices respect human rights. Indeed, in some other developing countries the law which provides for relocation of people (in most cases done with force and minimum or no compensation) is an indispensable clause enshrined in the contract between the government and Multinational Companies.<sup>59</sup> Because people are either given very little or no compensation, relocation is always a chaotic exercise characterised by gross violations of human rights. The Multinational Companies can eliminate such unfair practices by not only offering adequate

<sup>57</sup> *Shankleman, Jill*, Oil Profits and Peace: Does Business have a Role in Peacemaking?, United States Institute for Peace, 2006, p 237. See also *Lodge George & Wilson Craig*, A Corporate Solution to Global Poverty: How Multinationals Can Help the Poor and Reinvigorate their Own Legitimacy, 2006.

<sup>58</sup> *Anita Ramasastry*, supra note 3 p 93

<sup>59</sup> A good example of this kind of Agreement is the one signed between the government of Tanzania and Pangea Minerals a multinational company involved in mining industry in Tanzania. An Agreement famously, came to be known as the "Buzwagi scandal" named after the location where the company was to conduct mining activities. This Agreement specifically mandated the government to ensure that it "makes available" the area of investment to the company. In other words the government was asked to remove all the people from the land to pave way for the MNCs activities. Indeed most of the local population complained that they were displaced without compensation. Agreement on file with the author.

compensation but also signing the agreement with the government to ensure that security forces who oversee the relocation exercise refrain from committing human rights abuse. Further, they can insist on screening security force members assigned for their protection, to ensure that no member of the military or police implicated in human rights violations record is engaged in protecting oil fields.<sup>60</sup>

In Southern Sudan, where much of the oil extraction is done, the region is characterised by extreme poverty, human rights abuse and insecurity.<sup>61</sup> Multinational Companies more often than not, rely on the State protection to carry out their activities. For example in Bentiu, the capital of Unity state in Southern Sudan which produces more than half of Sudan's oil, has remained one of the poorest and insecure states in the country. As recounted by the paramount chief of the area, the biggest obstacle to peace and prosperity in Unity state is oil.<sup>62</sup> Indeed, this situation is not restricted to Unity state; rather it can be replicated elsewhere in Sudan where oil is extracted.

Oil exploration and extraction in Southern Sudan has also meant that surrounding population in these areas have been displaced to pave way for smooth operation of Multinational Companies. For example, attacks and civilian displacement in Western Upper Nile state were so severe in early 2000s that one observer likened the attacks and displacement as the clearest example of deliberate forced expulsion of local people from their homes by government forces in order to secure an area for oil fields development.<sup>63</sup> Similarly, a report conducted in 2000 concluded that "one of the major oil companies appear to have relied on Northern Sudanese security forces for local information, and failed to understand the long standing pattern of population displacement related to oil. It further stated that the company had incorrectly saw local conflict only as traditional interplay between armed local cattle herders. The report further contends that, the company failed to prevent the government from using the oil fields landing strip for military operations."<sup>64</sup> All these elements affect the role of Multinational Companies to engage in activities which do not affect human rights and rule of law.

<sup>60</sup> The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria Oil Producing Community, Human Rights Watch Report, 1999, p 5.

<sup>61</sup> Joint Assessment Mission (JAM) between the Government of Sudan, UNDP and World Bank estimates that around 80% of people living in Southern Sudan are illiterate incapable to read and write.

<sup>62</sup> Deadline Faultline Threatens to reignite Civil War in Sudan, the Independent newspaper, London, Dec. 2009.

<sup>63</sup> *Georgette Gagnon and John Ryle*, Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan, October 2001, p 24.

<sup>64</sup> *Shankleman*, supra note 57, p 136.

#### **IV. The Chinese Multinational Companies activities in Sudan and their impact on the rule of law and human rights**

China is one of the biggest investor in the oil industry in Sudan. Many of its companies play a leading role in the exploration and drilling of oil. It is estimated that as of 2009, Chinese companies enjoy the largest share of investments in the oil industry compared to other countries which have similar investments in the country like Malaysia or India.<sup>65</sup> It is this fact which compels a close scrutiny of these companies' activities especially in pivotal areas like rule of law and human rights. Precisely because their activities have a far reaching impact on the rule of law and protection of fundamental rights and freedoms in Sudan. China which currently is the biggest beneficiary of Sudanese oil, has also responded to the Sudanese government generosity of awarding its Multination Companies lucrative oil deals by increasing its arms trade with the government. Arms which have been used to fight rebel groups in the country while causing serious violations of human rights on the civilians. For example from 2003-2006 China sold over \$\$ 55million worthy of small arms to Sudan. Since 2004, China has assumed near exclusive role of providing small arms to Sudan providing more than 90% of the arms each year.<sup>66</sup> Further, Chinese companies have continuously provided much needed assistance to the government of Sudan in constructing three factories near Khartoum to manufacture arms. Arguably Sudan as a sovereign country has a right to self defence and to determine its friends, but what is forgotten or deliberately overlooked in all these political deals between Chinese and Sudanese governments is the fate of millions of people who die or get encamped in sub human refugee camps in the ensuing fighting between the government and groups opposed to its policies.

In Sudan, the efforts to protect human rights of the marginalized have all too often collided with the powerful interests of some Multinational Companies representing powerful governments. Indeed, unlike in other countries with a substantial stake in the oil industry in Sudan, most Multinational Companies from China are State controlled which increase the stake and influence of China in Sudan. As of 2009, China National Petroleum Corporation, a State owned enterprise and the largest Chinese supplier of crude oil and natural gas, dominates oil industry in the country.<sup>67</sup> As such it is not surprising to see that China has always been at the fore to block any meaningful efforts to hold the Sudanese government accountable for its actions. Various resolutions in the Security Council to address the situation in conflict ridden places like Darfur have always met stiff resistance from China, mainly because of the desire of China to protect its commercial interests in the country. These resolutions which end up being diluted to remove any serious language of accountability and punitive measures are more often than not adopted by the Security

<sup>65</sup> See Investing in tragedy: China's Money, Arms and Politics in Sudan, March 2008. A Report by the Human Rights First. Available at [www.humanrightsfirst.org](http://www.humanrightsfirst.org).

<sup>66</sup> Id p ii.

<sup>67</sup> Id p 5

Council without any serious potential of meaningful consequences in case of their violations. As observed by one report, between 2004 and 2007, the United Nations Security Council debated 14 substantive resolutions about Darfur, and China used its veto power and influence to weaken nine of them, forcing the removal of tough language of likely consequences in case of failure to abide by the directives of the Council.<sup>68</sup>

The Security Council arms embargo, initially imposed in 2004 under resolution 1556 and concretized by resolution 1591 of 2005 which prohibits arms transfer to Darfur has been ignored from time to time. One would wonder whether in such instances the Security Council can do anything when some of its core members are accused as being part of the syndicate that violate the Security Council Resolutions. Indeed this violation is not only limited to China some other influential countries like the US has acquiesced on the human rights situation in Sudan on the need to gain crucial information on war against terrorism. Indeed even some African countries have refrained to condemn Sudan on its human rights record as a gesture of “African solidarity” against the “Western neo colonialism”. What is clear though is that, amidst the bilateral dealings between Sudan and China, the latter has paid little attention to the impact of its actions to the larger Sudanese community, especially those in marginalized area like Darfur and Southern Sudan who endure insecurity and other atrocities resulting from government actions.

The central goal of foreign investment, ideally, should not only be to realize revenue from the investments but also to create local employment and enhance managerial skills of local workforce. But this has not been the case in most conflict or post conflict areas, Sudan being one of them. Several Multinational Companies especially those from emerging economies like China, have been accused of relying on imported Chinese workers and as such do not make significant contribution in altering unemployment statistics in countries where they operate.<sup>69</sup> Because of the more often existing hostilities between local population and Multinational Companies who are considered to condone human rights abuse by the government against them, some of these foreign workers find themselves at heightened risk of attacks by local populations outraged by China’s actions in supporting the Sudanese government policies. For example one of the largest rebel movements in Darfur has openly stated that “all the people of Darfur believe that China is a partner for this genocidal government in Khartoum”.<sup>70</sup> Without respecting basic human rights such as provision of employment opportunities to the local people and pay them decent living wages, the legitimacy of these Multinational Companies will always be questionable and their investments be vulnerable to destruction by the people dissatisfied with their activities. For example before the signing of the Comprehensive Peace Agreement, oil pipeline from the South to Port Sudan were a legitimate military target by the Sudanese Peoples Liberation Move-

68 Id p 18

69 Id p 3

70 Id

ment/Army (SPLM).<sup>71</sup> Mainly because they considered oil to be a major source of revenue for the government which enabled her to purchase state of the art military hardware.

Promoting human rights and rule of law would potentially help create and sustain trust between the people on the ground and business entities. It is in violation of universal human rights standards for Multinational Companies and their supporting governments to consistently side with the governments accused of human rights violations such as Sudanese government. Yes, in the short run, the alliance between Sudan and international actors like China and other countries ensure continued flow of oil in the latter's economy, all while Sudan continues getting its much needed foreign currency to sustain its multiple conflicts. But mindful of the volatile nature of Sudanese political system and especially the history of Sudanese conflicts which largely emanate from marginalization of the peripherals by the centre, it would be wise for Multinational Companies to take into account this trend. In case the current government is not in power, it will require these Companies and their sponsoring governments to form new alliances with the new government in power. For example, Southern Sudan is slated to conduct the referendum in 2011 which among other things will decide whether Southern Sudan secedes from Sudan or remains part of the united Sudan.<sup>72</sup>

The implication of this referendum for the work of Multinational Companies in oil industry is immense. Much of the oil is extracted from Southern Sudan whose people have endured decades of brutal suffering by the regime in Khartoum at the watch of these Multinational Companies and their home countries supporting them. This will likely complicate their activities in case the referendum confirms secession of the South. Indeed there are possibilities that in case of secession by Southern Sudan, the government will renegotiate the terms of oil contracts of oil fields located in Southern Sudan. As such, if Multinational Companies involved in Sudan are genuine when they claim they will play a neutral role in Sudanese politics, they should re-examine the impact of their activities and start taking into account strategies meant to promote fundamental rights and the rule of law. In this way, they will earn the trust of marginalized Sudanese people as genuine investors rather than being instrument of the regime meant to oppress them. Multinational Companies would be better served if they could appreciate the negative role of resources like oil or mining in sustaining African conflict which have caused untold suffering to the common people.

## **V. Innovative nature of the UN Global Compact Principles**

In 1999 at the World Economic Forum, the then UN Secretary General Kofi Annan proposed to the business leaders "a global compact of shared values and principles which will

<sup>71</sup> For example see press release: SPLA scores major victory in oilfields, 20<sup>th</sup> November 2001. Available at: <http://www.sudan.net/news/press/postedr/54.shtml>. Last visit January 2010.

<sup>72</sup> The Comprehensive Peace Agreement makes a provision for this referendum. See also Art. 9 of the Interim Constitution of Southern Sudan.

give a human face to the global market". In his address Secretary Annan envisaged the compact to comprise a set of core values in the areas of human rights, labour standards and environmental practices.<sup>73</sup> Underlying his motive was the need to ensure that human rights and labour standards abuse do not threaten the multilateral trade regime. Following up to this proposal, in 2000 the UN adopted Global Compact ten principles which require companies to embrace and support a set of core values in the areas previously identified by the Secretary General, including: human rights, labour standards, environment and corruption.<sup>74</sup> Global compact relies on the ability and will of corporations to regulate themselves. Category one specifically deals with human rights. Under this category Multinational Companies are required to support and respect the protection of the internationally proclaimed human rights standards and are also required to refrain from being complicit to human rights abuses. The second category deals with labour standards. Under this category business are required to recognize and uphold freedom of association and collective bargaining and elimination of all forms of forced labour. Business is required also to abolish child labour and any form of discrimination in employment. Third category requires business establishment to support precautionary approach to environmental challenges, promote greater environmental responsibility and encourage the use of environmentally friendly technology. The last category requires business to shun corruption and bribery in their activities.

Examining the UN Global Compact principles it may be argued that all the stated principles have a direct correlation with the work of the Multinational Companies. The four categories enumerated namely human rights, labour standards, environment and corruption greatly define their work especially in developing countries. This initiative is substantially innovative compared to the Corporate Social Responsibility precisely because of its specificity. It offers specific human rights benchmarks which Multinational companies are required to meet. For example unlike the vagueness of CRS which requires Multinational Companies to uphold ethical standards in their work and contribute to the wellbeing of the people in host areas, the UN Global Compact Principles go further and are more direct. They require Multinational Companies to commit to a fair and just labour and environment standards. As such Multinational Companies will be measured against clearly stated goals which are determined beforehand. However, this initiative, noble as it may seem, is voluntary in nature as such its impact is limited to companies which decide on their own to uphold the enshrined principles. Under the Global Compact Initiative, no mention is made of the need for effective procedures of monitoring and enforcement that are independent of the industry. In absence of the internationally binding legal framework to regulate the work of

<sup>73</sup> *Richter*, supra note 32 p 14.

<sup>74</sup> The principles require business entities to commit to certain set standards on human rights. They are not binding rather they are discretionary in nature. For overview of the principles and the functions of the UN Global Compact Office see: <http://www.unglobalcompact.org/AboutTheGC/>. Last visit April 2010.

Multinational Companies, UN Global Compact Principles serve as the minimum benchmark under which companies are required to operate. These standards though not legally binding, can generally be argued to provide moral force for business entities like Multinational Companies to observe some well recognized international human rights standards. The moral appeal of these principles is especially visible in the developed world where significant section of informed masses have started to question the activities of some companies operating in different parts of the world and whose products find their way on the shelves of western markets.<sup>75</sup> Indeed some Non Governmental Organizations have played a key role in sensitizing people on the activities of Multinational Companies especially those operating in developing or failing States.<sup>76</sup>

Obligations relating to labour standards, corruption and human rights in general have proved too complicated to enforce in the absence of strong domestic oversight mechanism and the binding legal norms enforced internationally. But still for countries committed to holding Multinational Companies operating in their countries accountable, these Global Compact principles serve as a legitimate platform for countries to adopt their own legislations modelled on these principles to hold business enterprises accountable while benefiting their own people.<sup>77</sup> In the absence of commitment from host countries and the business entities concerned, UN Global Compact will have little impact especially in post conflict areas where much of the lucrative resources like oil and minerals are extracted.

## **VI. Holding accountable MNCs for human rights violations: Lack of binding international legal framework**

Protecting human rights solely through obligations on governments seems rather uncontroversial if host states represented the only threat to human dignity, or if states could be counted on to restrain conduct within their borders effectively.<sup>78</sup> Corporate accountability is of particular significance in the context of transnational economic activities, especially when production takes place in countries where social and environmental protective stan-

<sup>75</sup> *Louis Henkin*, supra note 36 p 22

<sup>76</sup> A good example of this initiative is the Publish what You Pay initiative, a global coalition of civil society groups dedicated to raise awareness of what multinational companies pay to the government. More information available at: <http://www.publishwhatyoupay.org/>. Last visit January 2010.

<sup>77</sup> Botswana has been hailed as one of the best example where genuine government commitment to utilize natural resources can benefit people while avoiding the label of “resource curse” a badge largely associated with many resource rich but poor and conflict ridden African countries. See *Glenn-Marie Lange* and *Mathew Wright*, *Sustainable Development in Mineral Economies: The Example of Botswana*, Environment and Development Economics, Vol. 9, 2004, at pp. 485-505.

<sup>78</sup> *Ratner*, supra note 10 p 461



dards are low or nonexistent, be it due to insufficient legislation or lack of enforcement.<sup>79</sup> The major challenge to provide oversight for the activities of Multinational Companies in post conflict areas has been the lack of strong backed internationally binding legal framework to compel these companies to respect core values of international human rights norms.

The need for international mechanism to provide oversight for Multinational Companies compliance with international human rights standards is reinforced by the general unwillingness or inability of host governments to hold to account these companies for their actions. As observed in Sudan, the unwillingness of the government to provide scrutiny on the activities of Multinational Companies stem from the reality that the government cannot hold accountable Multinational Companies who are partly responsible to fund its continuous hold onto power. The UN Security Council has unearthed countless violations of human rights perpetrated by Multinational Companies especially those operating in conflict prone countries like DR Congo and Sudan, but very little has been done to hold them to account.<sup>80</sup> Partly because some of these Companies are fronting the interests of powerful members within the international governance system. It is this reality in international politics where States compete for access to markets and investments more often in conflict ridden countries that greatly hinder meaningful collective action on the part of the international community.

Naturally, it would be expected that in the absence of the binding international legal framework, host governments would assume the responsibility to enact and enforce laws regulating the conduct of Multinational Companies within their national boundaries. Sadly in majority post conflict societies the opposite has been the case. Countries are either too weak or too corrupt to engage in meaningful reforms. Indeed, some governments such as DR Congo, the government doesn't exercise effective territorial sovereignty over the whole country, leaving some business entities under the jurisdiction of the militias and rebel groups. It is not only the governments but also rebel groups that have formed an alliance with Multinational Companies in turn of concession of oil or mineral rights. Ultimately it is this money accrued from natural resources which provide continuous funding for rebel groups to sustain armed rebellion in the process causing untold suffering to the common people. It is argued that, with this reality confronting the international community, where domestic laws can no longer be relied upon to provide effective regulatory mechanism for the work of Multinational Companies, then international community must assume a leadership role of holding to account these Companies for the human rights violations. Accounts

<sup>79</sup> *Carola Glinski, Corporate Codes of Conduct: A Moral or Legal Obligation?* In: Doreen McBarnet et al (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, 2007 p 119.

<sup>80</sup> For example see; Report of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. Available at <http://www.un.org/News/dh/latest/drcongo.htm>. Last visit December 2009.

of human rights violations by Multinational Companies must also be seen in context of both social and political trend that are tending to gradually reduce State intervention in the economy which directly increases the scope of private sector activity.

It is argued that Equator Principles on investments may serve as possible model to compel multinational corporations to respect human rights and avoid activities which may be detrimental to rule of law advancement.<sup>81</sup> Under this model financial institutions commit not to provide loans to projects where the borrower is unable to comply with its respective social and environmental obligations. Indeed, as of 2009 more than fifty major financial institutions around the world have committed themselves to uphold these principles. Similarly foreign corporations with substantial investments in countries like Sudan could be subjected to similar requirements to respect human rights before they get financing of their projects. Arguably, this model would face its own challenges because national governments would probably come in to finance their activities especially for those companies which are State owned. Nevertheless, adoption of such principles would go an extra mile in requiring companies to refrain from activities which would result into violation of universal values of human rights and standards. At least they would be aware of financing consequences from major financial institutions.

If the UN Security Council can identify Multinational Companies whose activities are complicit for committing atrocities in Congo and other areas experiencing conflicts in Africa, it is potentially within the reach of the Council to provide leadership to create binding international rules which can hold accountable those business entities who violate or are complicit to human rights violations. Admittedly there have been some laudable initiatives like the Kimberly Process which is meant to address blood diamond or diamond emanating from conflict areas<sup>82</sup> and also Extractive Industries Transparent Initiative.<sup>83</sup> The problem with the process is that it is restricted to diamond and it only addresses the end product and where it comes from. It does not address human rights issues especially in the extractive process where host of rights are violated with impunity. However the global real politik has meant that some powerful members of the Council are reluctant to provide this leadership precisely because Multinational Companies from their countries are the main culprit. But without this possibility, then it is doubtful whether Multinational Corporations actively extracting cobalt or uranium in rebel controlled Kivu or Goma will ever stop from

<sup>81</sup> *Florian Wettstein, Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi- Governmental Institutions, 2009.*

<sup>82</sup> See the United Nations General Assembly Resolution on the role of diamonds in fuelling conflict. Resolution A/62/L.16, November 2007. See also similar UNGA Resolution supporting the work of the Kimberly Process. Resolution GA/10662.

<sup>83</sup> This initiative was announced by Tony Blair, the then Prime Minister of Britain during the World Summit for Sustainable Development in Johannesburg in 2002. The initiative now is considered as an authoritative mechanism for its stance of promoting sustainable use of natural resources. Its secretariat is currently based in Oslo. More information available at: <http://eitransparency.org/eiti/principles>. Last visit January 2010.

supplying money and arms to rebel groups who are accused of perpetrating human rights atrocities against civilians.

## **VII. Towards an enforceable legal framework to regulate MNCs activities in post conflict areas**

To address the negative impact of multinational business in conflict and post conflict countries, the international community should commit itself to a legally binding Convention that is internationally enforceable and applicable not only to states but also to corporations, and in addition covers corporate supply-chains as well as corporate subsidiaries.<sup>84</sup> The imperative of internationally binding legal regime further lies in its capability to provide redress and compensation for human rights violations. Experience especially in resource rich countries in post conflict has shown that demanding redress against powerful foreign corporations is not only difficult but also a nightmare. There are some enormous corporations that have operations in more than fifty different countries and with more than hundreds of corporate registrations. Sometimes it would take years of painstaking research to get to the bottom of some particular activity and trace it to its actual source due to the existing veil of multiple corporate registration standing between the decision maker and the resulting action.<sup>85</sup> This contribution does not in any way advocate or suggest the imposition by the international community through the United Nations a set of arbitrary or unilateral rules to regulate the conduct of multinational Companies without their full participation in developing such rules. Rather it is argued that public participation is the cardinal requirement in healthy democracy. Because, ultimately public participation envisages a role of states and their citizens (both legal and natural) in developing norms and values which would apportion rights and duties to both states and their people. Many of the smaller, poor, conflict ridden or those countries emerging from conflict lack technical and legislative capacity to deal adequately with powerful multinational corporations.<sup>86</sup> With the ongoing governance and human rights challenges facing post conflict society and the undisputable impact of Multinational Companies activities in these areas, it would be more desirable to explore the possibility of adopting a legally binding international instrument to regulate the work of Multinational Companies. This argument stems from the reality that existing codes of conduct and other self regulatory instruments create moral obligations at best but have no legal effects whatsoever. Some scholars and activist have argued that significant progress have been achieved in getting companies to take serious human rights in their projects. Similarly it has been claimed that codes of conduct and other voluntary

<sup>84</sup> *Aurora Voiculescu*, Changing paradigms of corporate criminal responsibility: Lessons for Corporate Social Responsibility in Doreen McBarnet et al (eds), *the New Corporate Accountability: Corporate Social Responsibility and the Law*, 2007 p 400.

<sup>85</sup> *Weeramantry*, supra note 44 p 41.

<sup>86</sup> *Glinski*, supra note 79 at pp. 119-120

initiatives by companies are ultimately effective in changing corporation's human behaviour than legal regulations.<sup>87</sup> Clearly these arguments, it may tempt to believe that, are made in relation to the work of business entities in developed countries where powerful and well funded consumer and human rights groups exercise effective oversight role through public naming and shaming campaign. Indeed even some governments in the developed world have been steadily exercising oversight role against Multinational Companies in their countries.

On the contrary, in developing countries and specifically in conflict ridden Africa, Multinational companies' activities have continued to engage or acquiesce in human rights violation with impunity with very little or no oversight from both the governments and poorly funded civil society groups. As admitted by Special Representative of the Secretary General, the response of business entities to voluntary human rights initiative have expanded rapidly, but this response has mainly been concentrated in Western European countries, North America and Japan.<sup>88</sup> In conflict afflicted countries labour standards are not respected which means that; few workers who manage to get semi skilled jobs work long hours without commensurate pay, the right to exercise collective bargaining hardly exist and working environment are prohibitively hostile. Similarly environmental degradation goes without remedy and above all corruption has become a defining element of winning contracts and suppressing any opposition to any legitimate debate questioning the viability of some projects.

The need to have a legally binding international instrument to regulate the activities of Multinational Companies is especially pressing in conflict afflicted countries.<sup>89</sup> In such areas the only hope available for common people is the international community. Precisely because more often than not foreign corporations work with the governments in power to suppress the rights of the people who may potentially resist their operations. Clearly, it would be beyond expectations to assume that a central government in Kinshasa would ensure effective oversight of the activities of Multinational Companies working in Eastern Congo where it doesn't even have full territorial jurisdiction. If self regulation and market forces were the best means to ensure respect for human rights and promote rule of law, then it would be expected that the number of human rights abuse attributable to Multinational Corporations to have diminished. This has not been the case. In fact, the report compiled by the Special Representative of the Secretary General (SRSG) on Business and Human Rights in 2006 contend that Multinational Companies continue to engage in activities which

<sup>87</sup> *Glinkski*, id p 120. See also, *F. Bird*, and *M. Velasquez*, *Just Business Practices in a Diverse and Developing World: Essays on International Business and Global Responsibilities*, 2006.

<sup>88</sup> *Ruggie*, supra note 31 p 836

<sup>89</sup> The challenge with this suggestion is that this legal regime might be ignored just like other human rights treaties which have been adopted by the international community yet they have failed to stem human rights violations. As such a regime would be backed up by an enforcement mechanism such as extending the jurisdiction of the ICC to cover such crimes.

violate human rights disproportionately especially in poor countries and especially those emerging from conflicts. The report contends that, in all allegations of violations reported to the Special Representative; oil, gas and mining accounted for two-thirds of the total. Virtually all allegations took place in low income countries, of which nearly two-thirds either had recently emerged from conflict or were still immersed in conflict. All but two fell below the global average for the rule of law threshold developed by the World Bank.<sup>90</sup>

This report of the SRSG linking natural resources exploitation in post conflict areas and the continued violence in places like Sudan and Congo, both areas rich in natural resources and a hot destination for Multinational companies, underscore the importance of adopting a legally binding legal regime to regulate the work of these corporations in human rights related activities. Having a binding legal regime would effectively balance power and obligations by establishing legal rights and corresponding obligations. With the extremely weak and corrupt judiciary in domestic setting, the international regulatory system remains an alternative avenue to provide meaningful redress for victims. An international system that emphasizes the legal accountability of companies for human rights violations will enable victims to claim redress, including compensation, restitution, and rehabilitation for damage caused. Despite the slow nature of the international court proceedings, but its usefulness would lie in its power to encourage, albeit gradually a culture of compliance with legally binding international rules.<sup>91</sup>

Indeed in western countries where judiciary is effective and relatively independent it has been possible to lodge claims against Multinational Companies for human rights violations. For example in 2001 under the US Alien Tort Claims Act, the Presbyterian Church of Sudan and some villagers filed a claim under the US Alien Tort Claims Act citing the Sudanese Government ethnic cleansing of Christians and animist minorities in Sudan. The suit alleges that one of the major oil company Talisman aided and abetted government military assault on minority villages in order to help the government clear the way for Talisman's oil exploration. Despite the dismissal of allegations by the company, the US court entertained the claim and the suit is ongoing.<sup>92</sup> As to whether the claim will succeed is another matter altogether but the mere ability and opportunity to institute such a claim against powerful multinational company like Talisman shows that redress for human rights abuse at a domestic level can only be pursued when the judiciary is effective and independent. Something which hardly exist in conflict plagued countries. Similarly the US court in *Iwanowa v. Ford Motor Co* stated that "no logical reason exist for allowing private indi-

<sup>90</sup> Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Interim Report, UN Doc. E/CN.4/2006/97, para 24-30.

<sup>91</sup> Beyond voluntarism: Human Rights and the Developing International Legal Obligations of Companies, Report by the International Council on Human Rights Policy, 2002, p 11

<sup>92</sup> *Shankleman*, supra note 64 p 137.

dividuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under colour of law<sup>93</sup>

The international community should further explore the possibility of extending the jurisdiction of the International Criminal Court (ICC) to cover crimes committed in the course of Multinational Companies activities. Despite the fact that Multinational Corporations might not be personally responsible for crimes within the jurisdiction of ICC, but examining the trend in conflict ridden countries, it is clear that their activities have increasingly abetted and aided commission of such crimes. The fact that the ICC Prosecutor has significant powers to act independently without being constrained by the powers and real politik of the UN Security Council, he/she can use such powers to investigate alleged crimes committed in conflict or post conflict in which Multinational Companies are complicit to such violations. Due to the complementary nature of the court which requires State Parties to assume primary responsibility to trying crimes under the jurisdiction of the Court, it would potentially compel States to address crimes committed within their jurisdiction.<sup>94</sup> Failure to act would trigger the intervention of the Court in accordance and in conformity with the Rome Statute. Of course this possibility presents its own dangers, as ICC Member States might be extremely sceptical of the role of the Prosecutor to interfere in their domestic affairs, especially where multimillion dollar oil or mining industry is at stake. But given the history and the continuing commission of atrocities especially in post conflict Africa and the spirited attempt by powerful countries to protect their friendly regimes in the international fora, perhaps ICC Prosecutor represents one of the last frontiers of hope for the common people whose governments wilfully join hands with MNCs at their expense. As the former UN Secretary General Kofi Annan once said, the prospects of ICC lies in its promise of universal justice.<sup>95</sup> Perhaps, victims of gross human rights violations resulting from Multinational Corporations activities would also be accorded international justice as part of this promise.

### VIII. Enhancing the oversight role of domestic governments

The Host State as the basic unit of international law has the primary duty to promote and enforce human rights in relation to its own people within its own boundaries. Indeed, the argument that Multinational Companies should be accountable for their actions do not in any way absolve states their primary responsibility to protect and enforce human rights within their borders. As such any international protection offered by the international community should be viewed as a complement to the work of the national governments.

<sup>93</sup> *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J 1999).

<sup>94</sup> *William Burke-White*, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, *Harvard International Law Journal*, Vol.49, 1, 2008 p 55.

<sup>95</sup> *Jenia Turner*, Nationalizing International Criminal Law, *Stanford Journal of International Law*, Vol. 41, 1, 2005 p 4.

But due to the weak governance structures, corruption and prolonged violence in conflict areas, more often than not governments have been failing to protect the rights of its own people. Domestic legal regimes that govern companies in individual countries should be strengthened so that they effectively reflect and enforce international human rights principles and standards. The State has the obligation to respect, protect and fulfil international human rights standards as enshrined in both national and international instruments. This responsibility invites positive obligations from the state to take actions through its various departments to ensure that people enjoy their rights.

The primary duty of the State to protect human rights in relation to its own people has been reinforced by different international human rights instruments. General Comment 31 of the Human Rights Committee reaffirms the primary role of the State. It states that “the positive obligations on State Parties to ensure that provisions of the Covenant will only be discharged if individuals are protected by the State, not against violations of covenants rights by its agents, but also against acts committed by private persons or entities.”<sup>96</sup> Further the Commission was clear to the effect that States could be considered to have breached their obligations if they fail to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>97</sup>

Despite these express obligations of the State to protect and provide redress for human rights violations towards its people, in post conflict areas, governments are hardly in position to discharge this obligation. The capability of most governments in post conflict areas to exercise adequate and effective oversight role against the work of corporations is greatly compromised by many factors but chiefly; weak governance structures such as weak and corrupt judiciary, law enforcement department and poor correctional service. International community can lend crucial support to supporting host government to enhance their capacities to effectively address human rights violations within their own borders. Further, UN Global Compact Principles though not legally binding, still these principles have the potential to provide a model on which host governments can build their own domestic legislations.

Another challenge facing post conflict countries to hold accountable Multinational Companies is the question of corruption. Admittedly corruption exists in almost all countries, but in post conflict areas it is done with impunity. Normally some Multinational Companies take advantage of existing weak governance structures to advance their corrupt activities by co-opting few elites into some position of board directorship. Effectively silencing any likely voice of dissent. Corruption is more often than not seen as a “lubricant of the wheel” used to win contracts and concession. Indeed, most contracts signed between Multinational Companies and most developing countries are so much skewed in favour of

<sup>96</sup> Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc. CCPR/C/21Rev.1/Add.13. Para 8.

<sup>97</sup> General Comment id.

the later that they only impoverish the majority and benefit the few elites. The international community can enhance the capacity of host government by supporting measures meant to strengthening governance structures to address corruption. Measures such as capacity building for the judicial officials, domesticating ant graft laws, and strengthening or establishing the office of corruption ombudsman can all help address the venal challenge of corruption. In turn these departments can play a major role in interpreting and enforcing international human rights provisions as reflected both in international human rights instruments and domestic laws.

## IX. Conclusion

Clearly, if corporations are complicit in human rights violations, the victims of the abuse have a legal right to compensation.<sup>98</sup> Whether at a domestic or international level. The UN Global Compact Principles arguably provide the best framework upon which countries especially those emerging from conflicts can build upon their domestic legislations to address human rights violations committed by business entities operating within their borders. In this contribution it has been argued that Multinational Companies actively involved in extracting resources in conflict ridden areas, should also take proactive measures to ensure that not only should their activities encourage human rights promotion but they should also help the surrounding communities to restart their lives with some help accrued from their resources. Despite the fact that host governments are responsible for enforcing human rights standards and norms domestically it is also clear that most governments are either weak or wilfully unable to enforce human rights standards. Especially against powerful corporations responsible for funding government's continued stay in power. This contribution has demonstrated that countries like Sudan experiencing conflicts and wide spread human rights violations have been reluctant to condemn the activities of Multinational Companies within its borders. Precisely because the government depends on these Companies and their home governments for financial resources and political backing respectively. Both aspects critical for its continued stay in power.

It is also clear that the UN Global Compact Principles and other corporate social responsibility initiatives may be scoring some significant success in developed countries where companies are becoming more transparent and human rights compliant. This success is partly attributed to the strong and effective government and civil society oversight against the work of these Companies.<sup>99</sup> This has not been the case in conflict prone countries. In post conflict countries because of weak governance structures and rampant corruption, business entities have managed to engage in activities which violate human rights

<sup>98</sup> *Beth*, supra note 2 p 46

<sup>99</sup> *Douglas Cassel*, Corporate Initiatives: A Second Human Rights Revolution? *Fordham Internat. Law Journal*, Vol. 19, 1996, pp. 1975-80. See also *C. Smith*, and *G. Lenssen*, *Mainstreaming Corporate Responsibility*, 2009.



norms partly because of the reality that they won't be held accountable. Indeed with some senior governments officials having a stake in such inflated profits resulting from abusive behaviour of corporations they can hardly have incentives to enforce even basic norms of accountability.<sup>100</sup> It is argued that if at all international community wants to consolidate rule of law and human rights protection in conflict and post conflict areas, it must provide requisite leadership to formulate rules which will be uniformly applicable to sanction activities of business entities violating and condoning continued violations of human rights.

Ultimately the duty to promote rule of law and human rights in any given society lies with the host government. Yet this duty can only be discharged in countries with stable governance structures and political will to address human rights violations. In areas like Congo where the government lack effective control over the large part of its territory it is only with the support of the international community that it can hold to account business entities in its borders. International community should work to strengthen the existing capacity of States to regulate and adjudicate harmful actions by business entities. Also the fact that at the international level States compete for resources especially from countries in conflict significantly undermine their political will and credibility to address human rights violations in countries where they occur. As such the only credible alternative is an internationally binding legal framework imposing rights and duties for business entities under international law. Further, institutions like the International Criminal Court, its mandate should be extended to investigate and prosecute business entities engaging in egregious violations of human rights in places where they operate. But any international framework in this context should be considered as a tool to complement and augmenting existing domestic institutional capacities. Adopting binding international rules will mean that victims of human rights abuses who are more often than not ignored at the domestic level because of political considerations will gain a platform to direct their grievances. International rules providing genuine and effective oversight role, can significantly compel business entities which tend to operate in conflict ridden societies as a no man's land, to start adopting comprehensive strategy to address human rights violations and support rule of law initiatives in areas where they operate.

<sup>100</sup> *Beth*, supra note 2 p 63.

## ABSTRACTS

### **Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan**

By *Charles Riziki Majinge*, London

This paper examines the potential role of business entities operating in conflict and post conflict Africa in promoting rule of law and human rights norms. The paper contends that, if at all rule of law and human rights are to be strengthened in resource rich conflict or post conflict areas to enable people to rebuild their societies premised on rule of law ideals, the international community must adopt international binding rules to provide for rights and duties of business entities especially those working in conflict ridden areas like Sudan or DR Congo. Without such binding rules, MNCs operating in conflict afflicted countries will continue taking advantage of corrupt host governments and weak governance system while enjoying the protection of their powerful home governments to continue committing or acquiescing to human rights violations with impunity and in the process inflicting greater harm to the already powerless and impoverished citizens in these countries.

### **Comparative Observations on the International Reception of the Proportionality Principle**

By *Stylianos-Ioannis G. Koutnatzis*, Berlin

Under German law, the limitations of fundamental rights receive constitutional approval only if they pass the three-pronged proportionality test. Accordingly, rights limitations must be suitable, necessary and appropriate vis-à-vis a legitimate governmental purpose. Against this background, this article focuses on the proportionality principle as an example for the reception of German constitutional jurisprudence in transnational constitutional discourse. It provides a comparative overview on the dissemination of the proportionality test in other constitutional systems around the world. The article first outlines the function and applicability of the proportionality principle in German law. It then describes the reception of this principle in Europe and overseas, and compares the proportionality test's fundamental concepts and doctrinal development. While originating in German law, scholars and the courts typically scrutinize limitations of fundamental rights using different versions of proportionality test based on the European Convention on Human Rights, the law of the European Union and the constitutional law of most European states. Further, in countries such as Brazil, South Korea and Japan, German law has inspired the proportionality test analysis, despite considerable differences in its application. In contrast, Canadian jurisprudence has developed a distinct proportionality approach that focuses on the principle of