Deconstructing Engagement

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

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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.