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Multinational Enterprise, Public Authority, and Public Responsibility: The Case of Talisman Energy and Human Rights in Sudan

Disciplines

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8 *Multinational enterprise, public
authority, and public
responsibility:*

*the case of Talisman Energy and
human rights in Sudan*

STEPHEN J. KOBRIN

Recognizing that even though states have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.

(United Nations Social and Economic Council, 2003, p. 1)

Corporations . . . are increasingly being asked to step into roles that were once the domain of governments or international bodies such as the United Nations. Defining what is properly expected of a company needs to be more clearly articulated and rigorously debated.”

(Jim Buckee, CEO Talisman Energy. Corporate Social Responsibility Group, 2001, p. 5)

In November 2001 a \$1billion class-action lawsuit was brought against Talisman Energy, a large Canadian independent oil and gas producer, on behalf of the Presbyterian Church of Sudan and a number of individual plaintiffs. The plaintiffs allege that Talisman violated the human rights of Christian and other non-Muslim minorities in Sudan as part of its oil exploration, development, and production operations in that country. Specifically, the suit accuses Talisman of conducting a campaign of ethnic cleansing to clear the land for oil operations (Wichita Global Coalition, 2001; D’Avino, 2002).¹

¹ The suit was later amended to include the Government of Sudan as a defendant; a motion to dismiss on the part of Talisman was rejected by a

globalization: an integrated world economy governed by political authorities which are still primarily local and national. The nongovernmental organizations (NGOs) concerned with the impact of Talisman's operations in Sudan on human rights had a limited range of options.² The host country (Sudan) was obviously unwilling to pursue the matter and the home country (Canada) either unwilling or unable to deal with what amounted to extraterritorial activities on the part of one of its companies. Furthermore, as a private firm, Talisman's activities in Sudan were beyond the reach of international organizations such as the United Nations. Thus, a case brought under the ACTA in a US court provided one of the few venues available to NGOs to pursue a MNC for alleged human rights violations in an international system characterized by fragmented, geographically based political and regulatory authority.

The modern international political system reflects its Westphalian origins: it is defined by mutually exclusive territorial jurisdiction, geographic sovereignty, and state-centrism – states as the only political actors and the only subjects of international law. Given these parameters, private actors such as business firms are objects rather than subjects, their role, authority, and responsibilities in international politics (and international law) are strictly limited.

The process of globalization brings significant changes to the organization of international politics and economics. The once clear line between domestic and international affairs has blurred and morphed into what Rosenau calls the “domestic-foreign frontier” (1997), in many respects borders are no longer either discrete or meaningful. Furthermore, states are no longer the only significant international political actors; while they may still occupy a “seat at the head of the table,” advocacy groups and other NGOs, international institutions, and multinational firms have considerable power in the international politics. As Cutler observes “Westphalian-inspired notions of state-centricity, positivist international law, and ‘public’ definitions of authority are incapable of capturing the significance of non-state actors, like transnational corporations and individuals . . . and private economic power in the global economy” (2001, p. 133).

² As will be discussed below, the advocacy groups concerned with Talisman's operations in Sudan mounted a very successful campaign aimed at institutional investors and shareholders which, in large part, was responsible for Talisman withdrawing from Sudan in 2003.

If multinational firms have become significant actors in international politics, they definitionally command some degree of “authority.” It is a short step from acknowledging multinationals as commanding some degree of “public authority” to holding them responsible for public functions such as the protection of human rights. The ACTA cases in American courts can be seen as a tentative, if very controversial, step in that direction.

I next turn to a more complete discussion of the question of public authority and responsibility in the international system, both in general and as regards MNCs. I will then review the experience of Talisman Energy in Sudan, especially in regards to the charges brought against it by a variety of groups that it was complicit in the very severe violations of human rights that have occurred in that country during its brutal civil war. I will then attempt to use the Talisman case to try to generalize about multinational firms’ responsibilities for human rights. I conclude by exploring questions of the limits of public responsibilities of multinational firms.

Private actors in international politics

While the international business literature deals with questions of fragmentation of strategy and the limits of headquarters’ control over subsidiaries, the multinational enterprise is typically seen as a single transnational enterprise operating in a relatively large number of countries. We talk about Shell, Oil, Sony, and Lever as coherent global entities.

The legal reality is quite different, the multinational – as such – does not exist. It is not possible to incorporate under international law: the global firm is an apparition (Cutler, 2001), a coalition of companies incorporated under the laws of many different states. Thus, under accepted principles of international law, “each of the constituent corporations of a corporate group is a national of the nation-state in which it has been incorporated and subject to the laws of that state” (Blumberg, 2002, p. 494).

For private firms operating transnationally, “legal personality is conferred under national and municipal laws, and corporate rights, duties, and remedies remain a function of national law.” As a result, the legal (and political) rights and obligations of multinational firms are derivative, they flow from their status as national firms responsive to

national governments (Cutler, 2001, p. 141). Thus, the fact that private multinational firms lack “legal personality” renders them unaccountable under international law. “TNCs benefit from their international nonstatus. Nonstatus immunizes them from direct accountability to international legal norms and permits them to use sympathetic national governments to parry outside efforts to mold their behavior” (Charney, 1983, cited in Cutler 2001, p. 143).

States are the only “subjects” of *traditional* international law, the only entities with legal rights and duties. International law does not either articulate the obligations of corporations with regards to human rights or provide a mechanism for regulating, or even monitoring, corporate behavior in that area (Developments in the Law, 2001). Multinational firms are private actors who owe an obligation to their shareholders to produce profits and whose obligation to the state is defined by law and regulation. “(P)ivate non-state actors, such as MNEs, do not have any positive duty to observe human rights. Their only duty is to obey the law. Thus it is for the state to regulate on matters of social importance and for MNEs to observe the law” (Muchlinski, 2001, p. 35).

This sharp distinction between the public and private spheres is not inherent in the human experience, but rather a property of the Westphalian international system and the development of the sovereign territorial state. During the feudal period, political authority was diffuse, ambiguous, interwoven, and non-territorial (Kobrin, 1998; Cutler, 1999). There was no clear line between the public and private spheres, between political and economic authority. The public/private distinction developed with the rise of the territorially sovereign state and the development of private property and property rights (Cutler, 1999).

Modern ideas about the distinction between public political authority and private economic markets and actors developed in the nineteenth century with the rise of the self-regulating market. As Cutler notes, the market “perfected the association of ‘political’ and legal authority with the public sphere of governments and the association of ‘apolitical’ economic relations with the private sphere of individuals and markets” (Cutler, 2001, p. 138).

In the traditional liberal view only “public” entities – states and other governmental units – have political authority. Markets and firms are private, commanding economic but not political authority or responsibilities. During the twentieth century, what Muchlinski (2001, p. 36)

has called “a remarkably resilient model of a liberal market society” developed, characterized by a clear distinction between the public and private spheres. Liberalism “renders *private authority* an impossibility by creating the distinction between public and private activities and locating the ‘right to rule’ or authority squarely in the public sphere” (Cutler, 1999, p. 73, emphasis in the original).

That once clear distinction has blurred considerably with the political and economic changes that have accompanied globalization. In a rapidly evolving post-Westphalian world it has become reasonable to talk about private political authority and private political obligations. The standard Westphalian assumptions about power and authority are no longer capable of explaining contemporary reality (Cutler, 2001).

Globalization – defined in terms of deep, networked integration of economies, societies, and politics – involves significant systemic changes in the structure or organization of international economics and politics (Kobrin, 1997). Political authority has become fragmented and interwoven once again with the emergence of non-state entities such as civil society groups (NGOs) and multinational corporations as significant actors in international politics, the increased salience of international institutions such as the World Trade Organization, and the rise of supra-national powers such as the European Union. While states may still be the dominant players in the system, the state-centric model has broken down and states have lost power to other actors and to markets (Strange, 1996). States function, at least in part, as economic actors and multinational firms influence political outcomes (Cutler, 2001).

The result is a complex evolving international political system in which sovereign states are still dominant, but non-state entities are significant, authoritative actors (Burke, 1999). Much of the literature on private authority argues that the international integration of markets has affected the ability and willingness of states to intervene in economic affairs and is concerned with the role of multinational firms and other private actors in standard setting, the impact of privately arbitrated dispute resolution and, more generally, the role of firms in the governance of international economic affairs (Cutler, Haufler, and Porter, 1999; Haufler, 2001, p. 5). In addition, as Muchlinski (2001, p. 40) observes, the fact that MNCs participate directly in the activities of international institutions such as the WTO and EU creates “the clear perception of MNEs as entities capable of exerting power over public policy.”

My concern here is not the exercise of public authority by multinationals but rather the corresponding public *responsibilities* of MNCs in a number of important issue areas. One example is the global battle against AIDS where private multinational firms are being pressured to take on increasingly important public roles (Beattie, 2003). Another is human rights where responsibility, and perhaps liability, follows from MNCs role in the “global order” (Bridgeford, 2003). “The traditional notion that only states and state agents can be held accountable for violations of human rights is being challenged as the economic and social power of MNEs appears to rise in the wake of the increasing integration of the global economy that they have helped to bring about” (Muchlinski, 2001, p. 31).

Human rights has become a significant international issue and, notions of sovereignty aside, human rights violations within countries are now deemed to be the responsibility of the “international community.” United Nations Secretary General Kofi Anan argues that traditional notions of sovereignty can no longer do justice to people’s aspirations for human freedom; that nothing in the U.N. charter “precludes a recognition that there are rights beyond borders” (Littlejohns and Buchan, 1999, p. 5).

The problem at this point is that the “international community” is still an ambiguous construct. While less so than in the past, in all but the most egregious circumstances states are reluctant to cross borders to intervene to protect human rights. International organizations have neither the resources nor the capabilities to enforce human rights or even to monitor violations. As a result, the primary responsibility for monitoring human rights violations, publicizing problem areas, and advocating remedial action often falls on private civil society groups or NGOs such as Amnesty International and Human Rights Watch, among many others.

As Haufler (2001, p. 29) observes, “When governments do not govern, the private sector does – often in response to the demands of public interest groups who find themselves unable to move national governments.” As noted above, MNCs are increasingly perceived as significant, authoritative actors in international politics, actors with meaningful political power. However, political authority is a two-sided coin. On the one hand, MNCs are perceived as having the political power to positively affect human rights regimes in host countries. On the other hand, they are increasingly being held responsible – as quasi-public

actors – for human rights violations occurring in conjunction with their subsidiaries' operations.

Advocacy groups increasingly target MNCs directly (Broad and Cavanagh, 1998). NGOs monitor human rights violations occurring in conjunction with corporate activity, publicize them widely and often very effectively, and bring pressure to bear on home-country governments, but more importantly, managers, shareholders, and investors to effect change. MNCs are being held “liable” – at least in the forum of public opinion and perhaps in the courts – for “complicity” in human rights violations. More interestingly, as the quote at the start of this paper illustrates, MNCs are increasingly seen as having a positive responsibility or duty for promoting and securing human rights, for using their power and influence to change a given regime's human rights policies and practices.

That raises some critical questions. First, if MNCs are to be held responsible for complicity in human rights violations, what does complicity entail? Is simply entering a country where human rights violations are the norm complicity or, at the other end of the scale, does a firm have to actually participate in activities that violate the rights of individuals? Second, who is to establish the parameters of corporate responsibilities for human rights, and how are violations to be monitored and judged and penalties for transgressions enforced? The experience of Talisman Energy in Sudan is directly relevant and provides a rich case study in which to ground further discussion of these issues.

War in Sudan³

Sudan has been engaged in civil war for thirty-six of the forty-seven years since its independence from Great Britain in 1956. The “second civil war,” which began in 1983, has been characterized by a vicious brutality that has resulted in two million deaths – the majority of whom are civilians – and over four million displaced persons (International Crisis Group, 2002; Martin, 2002). Sudan sits squarely on the divide between primarily Arab and Moslem North Africa and the primarily Black, Christian and “Animist” area south of the Sahara; the southern provinces are ethnically diverse containing a large number of tribes and

³ See (Kobrin, 2003) for a more complete discussion of the origins of the civil war in Sudan.

linguistic groups (Idahosa, 2002). A focal point of the war has been the Upper West Nile region in which Talisman's operations were located.

The rebellion in the southern provinces at independence intensified in 1958 when a campaign by the government in the North to forcibly extend Islam to the south resulted in a full-fledged civil war (International Crisis Group, 2002). The "end" of the first civil war came in 1972 with the Addis Ababa agreement which provided security guarantees and some degree of political and economic autonomy to the south. However, by the end of that decade, the government in Khartoum came under pressure from hardliners to re-exert control over the south and the regime embraced strict Islamism (Sudan Update, 1999; Gagnon and Ryle, 2001; Idahosa, 2002).

The situation in Sudan was complicated by the discovery of oil (in the southern provinces) during the 1970s which (eventually) altered the balance of power in that country and provided an additional motivation for the conflict. In 1980 the regime in Khartoum redrew the boundaries of the Upper Nile province to include the areas where oil had been discovered within the north, and in 1983 it issued an order abrogating the Addis Ababa agreement, returning powers to the central government, eliminating the South's autonomy and dividing it into three administrative provinces. Shortly thereafter, Sudan was declared an Islamic state and *sharia* the law throughout the country. Southerners then mobilized around the Sudan Peoples Liberation Army (SPLA), rebelled and the second, and even more destructive, civil war began (Harker, 2000; Gagnon and Ryle, 2001).

While there was a brief window where peace appeared possible in the late 1980s, after General Umar al-Bashir took power through a coup in 1989, the war was pursued with a vengeance with the regime in Khartoum attempting to impose "God's law" throughout the country (Sudan Update, 1999, International Crisis Group, 2002; Martin, 2002). While there have been various attempts at settlements, and recent (late 2003) hopes for peace, at this writing the situation in Sudan remains unsettled and dangerous.

The Sudanese civil war is complex and can no longer be characterized as a conflict between the Islamic north and Christian, Animist and tribal south. While the Government's attempt to impose Islam and Islamic law on the entire country continues to fuel the conflict, the longstanding marginalization of the southern provinces, an attempt by the Government to extend its control over the disputed areas, and

a struggle among several groups for control over Sudan's territory and resources are all important reasons for the continued fighting.

During the 1990s, the war evolved from its roots as a largely north-south conflict "into a contest for power that involves groups from across the nation." In addition to the forces of the government in Khartoum and the SPLA (now the SPLM), it involves a relatively large number of militias and inter-tribal factions, some of whom change sides as it is advantageous (United Nations Office for the Coordination of Humanitarian Efforts, 2000, Gagnon, Macklin, and Simons, 2003, p. 15).

The war involves massive attacks on and displacement of civilians and human slavery as a result of raids by Khartoum-supported Murahaleen militias on southern tribes. "The vast majority of Sudan's casualties are not combatants killed in battle but southern civilians who fall victim to famine and disease" (Martin, 2002; Gagnon, Macklin, and Simons, 2003). While both sides are guilty of atrocities and attacks on civilian non-combatants, there is general agreement that the primary responsibility for the destitution, death, and destruction in the south lies with the Government of Sudan.

Oil and Talisman's Entry

While oil exploration and development began in Sudan in the early 1960s, serious efforts started with the entry of Chevron who was granted a concession in 1974 (Shell later took a 25 percent interest). Although Chevron made a number of significant discoveries and Sudanese oil appeared to have had considerable potential, the company suspended operations and withdrew in 1984 after a rebel group kidnapped and killed three expatriate employees. Chevron relinquished its concessions in 1990 after having spent \$1 billion in Sudan (Sudan Update, 1999, Harker, 2000, Energy Information Administration, 2003, Gagnon, Macklin, and Simons, 2003).

As a result of an acquisition, Arakis Energy (a Canadian independent) gained control of a large part of Chevron's concession in 1994; at that point the project involved both oil exploration, development, and production, and the construction of a pipeline to the Red Sea. Arakis, however, could not finance the project on its own and in late 1996 it entered into a consortium, the Greater Nile Petroleum Operating Company, in which it held a 25 percent share, the Chinese National

Petroleum Company 40 percent, Petronas of Malaysia 30 percent, and the Sudanese national firm 5 percent (Arakis Energy Corporation, 1998; Chase, 1998; Sudan Update, 1999).

Arakis still found itself in a very difficult situation. The US imposed sanctions on Sudan in 1997, as a result of concerns over both that country's support for terrorism and human rights violations, that prevented American participation in Sudanese oil and limited Arakis' ability to raise funds in US markets. Furthermore, there was an eight quarter decline in crude oil prices from \$23 a barrel to a low of \$13 in the summer of 1998. In any event, when it became clear that Arakis would not be able to raise the \$200 million necessary to fund its share of the project it encouraged offers from other companies (Cattaneo, 1998; Jones, 1998b; Sudan Update, 1999 Gagnon, Macklin, and Simons, 2003).

On August 17, 1997 Talisman Energy acquired the outstanding shares of Arakis, and thus acquired that company's 25 percent share of the Greater Nile Petroleum Operating Company (GNPOP) in Sudan. Talisman, which originated as a spin-off of the British Petroleum's Canadian subsidiary, was the second largest Canadian independent oil company by 1997 (Cattaneo, 1998; "The Human Factor," 1999; Sudan Update, 1999).⁴ Despite the American missile attack on the al-Shifa plant in Khartoum a few days later, the takeover took place as scheduled on October 8 (Jones, 1998).

A number of analysts saw the project as a high-risk-high-return investment that made sense for the company. Despite the ongoing civil war and the location of the concessions in the midst of the disputed area, Talisman obtained a 25 percent share of five fields with an estimated production of 150,000 bbls/day and a pipeline and marine terminal expected to be completed by late 1999 (Alden, 1998; Cattaneo, 1998; Talisman Energy, 1998).

Talisman's short, unhappy, Sudan experience

Despite oil production and profits that far exceeded expectations, Talisman withdrew from Sudan in March 2003, selling its 25 percent share of GNPOP to a subsidiary of India's national oil company

⁴ An independent has only "upstream" operations, it did not refine petroleum or own retail outlets.

(“Talisman Closes Sale of Sudan Oil Stake” 2003). While Talisman was able to handle the political situation in Sudan and produce petroleum in spite of the civil war – production in Sudan was estimated to reach 300,000 bbls/day in 2003 and the pipeline reached capacity in 2003 (“Exploration Hums as Sudan’s Output Reaches Pipeline Capacity” 2002; “Sudan” 2002) – its stock price fell at the announcement of the deal and sold at a 10 to 20 percent discount during the time Talisman was in Sudan as compared with a 20 percent premium (to net asset value) before the investment (Carlisle, 2000; Dabrowski, 2002; Olive, 2002).

While Talisman encountered considerable opposition from both the United States and Canadian Governments, its difficulties were due, in large part, to a very successful campaign waged by a coalition of advocacy groups and NGOs who persuaded a number of institutional investors to sell their Talisman stock and maintained a continual barrage of pressure on Talisman’s shareholders and managers. Sudanese production, which never amounted to more than 12 percent of Talisman’s operations, was not worth the considerable political costs it incurred. As CEO Jim Buckee noted after the sale, “Shareholders have told me that they were tired of continually having to monitor and analyze events relating to Sudan” (“Talisman to Sell Sudan Assets for C\$1.2 Billion” 2002).

The divestment campaign, led by the American Anti-Slavery Group, was directed at the major institutional investors holding Talisman’s stock. Advocacy groups linked the company directly to the brutal violations of human rights in Sudan including forced displacement of civilians and the slave trade. They accused the funds owning Talisman’s stock of supporting genocide. During 1999 and 2000 at least six American pension funds sold millions of share of the company’s stock including TIAA-CREFF, CALPERS, The Texas Teachers’ Retirement Fund and the New York City Pension Fund (Gillis, 1999). While it is difficult to gauge the success of similar efforts mounted against mutual funds such as Fidelity and Vanguard it is reasonable to assume that the activists’ efforts had a significant effect on purchases and sales of Talisman’s stock (Scherer, 2001).

Oil production has always been a risky business and given the very active civil war and the location of Talisman’s operations, it is clear that the level of political risks associated with the project were very high. What drove Talisman from Sudan, however, was not in-country

risk: they managed a difficult situation well and, as noted above, production exceeded expectations. Rather, Talisman sold its Sudanese operations because of “political risks” arising in North America from activists’ successful efforts to associate it with complicity in human rights violations in Sudan. As will be discussed below, the Company argued that it fully complied with local law and engaged in significant efforts to improve the lives and livelihoods of Sudanese in the affected areas.

That raises the more general question of exactly what “complicity” means, what the obligations of multinational firms are with respect to human rights violations in the countries in which they operate. I will argue that MNCs are now regarded as international political actors with “political” authority and responsibility and that directly affects both the perception and reality of their human rights obligations. As a first step in developing that argument, I turn to a more detailed examination of Talisman’s role, and the role of oil more generally, in Sudan.

Talisman, oil, and human rights in Sudan

While an oversimplification, it is reasonable to characterize the differences between Talisman and its critics in terms of differences in the interpretation of events within Sudan and the extent of the company’s responsibilities for human rights within that country. In general, the company tended to minimize the extent of the conflict, argue that it was overblown in the media, and see its responsibilities in terms of contributing to overall economic growth and to the well-being of Sudanese in the area through construction of schools, clinics, and the like. It is also fair to say that the Company’s view changed somewhat over time. There were a number of concerns expressed by a wide variety of observers about the impact of the Company’s operations on human rights in Sudan.

Oil production exacerbated and changed the nature of the conflict.

A wide range of observers argue that oil production and the opening of the pipeline by the GNPOC intensified the war and has changed its dynamics by providing significant new resources to the government in Khartoum. The investigation undertaken at the request of the

Canadian Ministry of Foreign Affairs concluded that “oil is exacerbating the conflict in Sudan” (Harker, 2000, p. 14).

Oil production transformed the conflict from a fight over control of territory to a fight over control of a valuable resource and the benefits it produces. In 2002, a UN Special Rapporteur (Gerhart Baum) noted that “oil exploration is closely linked to the conflict . . . which is primarily a war for the control of resources, and, thus, power” (cited in Human Rights Watch, 2003, p. 58). More important, it transformed Sudan from one of the poorest countries in Africa to an exporter of petroleum. Oil revenues which were negligible in 1998, increased dramatically from \$61 million in 1999 – the first year of significant production – to almost \$600 million in 2001 (Energy Information Administration, 2003; Human Rights Watch, 2003); by 2001 oil revenues accounted for around 40 percent of Sudan’s total income (Gagnon, Macklin, and Simons, 2003). There is little question that Talisman provided the technology and experience necessary for GNPOC to exploit Sudan’s oil reserves; as noted above, oil production increased significantly within a year after the company’s entry (Gagnon and Ryle, 2001).

The oil revenues were spent on arms and military equipment, including the purchase of modern weapons and helicopter gun ships. Sudan can now manufacture its own light arms and munitions and is planning to build tanks and artillery (International Crisis Group, 2002; Martin, 2002). The Khartoum regime’s military expenditures and military capabilities increased dramatically as a direct result of successful oil exploration, development, and production; by 2001 the war cost the government over \$1 million a day (International Crisis Group, 2002). That level of expenditure would have been unthinkable before 1999.

Measures taken to provide security to oil operations have resulted in serious human rights violations.

Talisman’s operations (as part of the GNPOC) are located in the midst of the war zone, an area disputed by rebel forces and the government in Khartoum. They are an obvious target and have been for some time. As discussed above, an attack on Chevron’s operations in 1984 resulted in the deaths of three expatriate employees and led to that company’s eventual withdrawal from Sudan. When Talisman first entered in 1998, the SPLA publically declared the company’s operations to be a legitimate military target (Gagnon and Ryle, 2001).

The importance of oil to the government's war effort has led to increased attacks on oil operations by rebel forces and increased the intensity of the war in the area of Talisman's operations by both sides. The government's response has been brutal, including attacks on civilians, forced displacement of very large numbers of people, and the burning, looting, and destruction of villages in the area (Gagnon and Ryle, 2001).

The government is engaged in an attempt to depopulate the area around the oil fields.

A UN Special Rapporteur (Leonardo Franco) concluded that a "swath of scorched earth/cleared territory is being created around the oil fields"; the Harker investigation agreed with Franco's findings (Harker, 2000, p. 11). In fact, Human Rights Watch concludes that "forced displacement of the civilian population, and the death and destruction that have accompanied it, are the central human rights issues relating to oil development in Sudan" (2003, p. 36).

Similarly, an article in *The Economist* (2001, p. 41) notes that the government of Sudan has "adopted a brutal new policy of clearing the oil areas." Before the marked increase in oil production in 1999, the government armed Arab militia groups and encouraged them to raid southern villages for cattle and to take slaves. While this certainly resulted in widespread suffering, it did not entail the massive displacement of the civilian population seen since oil production became an issue. As noted above, oil operations are in disputed border areas and the government wants "the southerners out" *Economist*, (2001). The Human Rights Watch (2003) report on oil and human rights in Sudan contains an extensive discussion of the displacement of civilians from the oil producing areas both before and after Talisman's entry.

Talisman's facilities were used to stage military action against both rebel and civilian targets.

Talisman itself agreed that there were at least four instances of the use of its airstrip at the Heglig field for "non-defensive" military purposes (Talisman Energy, 2000; Gagnon, Macklin, and Simons, 2003). The Harker Report (Harker, 2000, p 15) noted that "... flights clearly linked to the oil war have been a regular feature of life at the Heglig

airstrip . . . It is operated by the consortium, and Canadian chartered helicopters and fixed wing aircraft which use the strip have shared the facilities with helicopter gunships and Antonov bombers of the GOS [Government of Sudan]. These have armed and re-fuelled at Heglig and from there attacked civilians.” Furthermore, a number of observers have concluded that the government used the infrastructure built by the oil companies – the roads and bridges – to launch attacks on civilians in the area (Human Rights Watch, 2003).

Complicity

I suspect that most observers, including Talisman Energy, would agree that the military use of corporate facilities – especially for non-defensive operations – is inappropriate and renders the company complicit in the ensuing human rights violations. Once one moves beyond this sort of direct involvement in the violations of human rights, however, the situation gets much more ambiguous. Talisman is a private company whose obligation to its shareholders to generate revenue and profits requires it to explore, develop, and produce petroleum. It is certainly not unusual for oil reserves to be found in difficult environments, both physically and politically. Does Talisman, or any other company in a similar situation, have obligations which go beyond avoiding direct complicity in human rights violations and obeying the law of both host and home countries? The regime in Khartoum is recognized as sovereign internationally and one could argue it was appropriate for Talisman to rely on the Government of Sudan to defend its operations against rebel attacks.

I will argue that as multinationals emerge as significant actors in international politics, their new-found “private” political authority will bring with it “public” political responsibilities. The line between public authorities and private economic actors has blurred to the point where MNCs may begin to be held liable for a much broader definition of complicity in human rights violations, which may even include a positive responsibility to effect a change in the host country’s human rights policies. There have been a number of recent attempts to define “complicity” or to suggest the extent of MNCs’ responsibilities for human rights.

Gagnon, Macklin and Simons (2003, p 8) use Canadian and international law to define complicity in the commission of acts of a perpetrator [of human rights violations] as:

- Acts or omissions that provide material assistance in circumstances where the TNC [Transnational Corporation] knew or should 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 relationship with that party.

In their extensive review of oil and human rights in Sudan, Human Rights Watch (2003, p. 61) puts it more directly: “. . . [Talisman] had a responsibility to ensure that its business operations did not depend upon, or benefit from, gross human rights abuses such as those that have been committed by the government and its proxy forces in Sudan.”

The UN Global Compact, which is a voluntary initiative to promote “responsible corporate citizenship,” devotes two of its nine principles to human rights (Global Compact, 2003b). Principle One states that businesses should “support and respect the protection of internationally proclaimed human rights within their sphere of influence.” In its elaboration of Principle One, the compact argues that, at a minimum, business should “ensure its operations are consistent with legal principles in the country of operation.” It also notes that businesses may have an opportunity to promote human rights and raise standards in host countries. Businesses can prevent the “forcible displacement of individuals, groups and communities” and have a right and responsibility to express their view on human rights to governments (Global Compact, 2003b).

Principle Two states that businesses should make sure that they are not complicit in human rights abuses. Complicity is defined in the following terms (Global Compact, 2003b):

- Direct Complicity occurs when a company knowingly assists a state in violating human rights. Assisting in forced location is given as an example.
- Beneficial Complicity suggests that a company benefits from the abuse of human rights. Violations by security forces guarding installations are given as an example.
- Silent Complicity involves the failure by a company to raise the question of systematic violations of human rights with authorities.

Last, the “UN Norms on the Responsibilities of Transnational Corporations . . .” is, perhaps, most explicit about the extended human rights responsibilities of MNCs. While noting that states have the primary responsibility for human rights protection, including ensuring the compliance of MNCs, it goes on to state that transnational corporations have “ . . . the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in *international as well as national law* . . . ” (United Nations Social and Economic Council, 2003, p. 3. emphasis added). Furthermore, transnational corporations are held to recognize applicable norms of international law, national law and regulation, the rule of law, the public interest, development objectives, etc. (United Nations Social and Economic Council, 2003, p. 4).

Two points are obvious from this brief summary. First, most if not all go well beyond the traditional view of the MNC as a private actor, an object rather than a subject of international law and politics. MNCs are held to a positive duty to promote and secure human rights that transcends obeying national law and regulation. Furthermore, these statements – especially the UN “Norms” – appear to point toward liability for MNCs for human rights violations under international law. Second, it is far from clear what any of these strictures mean in practice. Do any operations in a conflict ridden country “benefit” from human rights violations as a matter of course?

Complicity or constructive engagement?

As the criticism of its operations in Sudan mounted, Talisman Energy established a dedicated Corporate Social Responsibility Group in March 2000; as a result two Corporate Social Responsibility Reports were published in 2000 and 2001. In the second, CEO Jim Buckee notes, “Some express the opinion that we should leave Sudan, however, many people we speak to believe that the appropriate moral response is to stay and use our corporate resources in a broad and responsible manner to encourage peace, provide economic opportunities and support the communities in the areas in which we operate” (Talisman Energy, 2001, p. 5). The Company consistently took the position that its presence in Sudan was beneficial, even as it sold its operations in 2003.

It should be noted that one of the major points of contention between Talisman and its critics is the extent of forced dislocations of the

civilian population in the area of the oil concessions. As noted above, the human rights organizations active in Sudan, the UN Special Rapporteurs, and the Canadian Government's Harker Report all found that there were massive forced displacement of civilians in the Upper West Nile Region. The Company tended to dismiss local conflict as tribal in origin and after commissioning a satellite photo study concluded that "there was no evidence of appreciable human migration – in other words displacement – within the concession areas studied" (Talisman Energy, 2001, p. 16). They did go on to note that "many people hold a differing opinion on this issue."

It does appear clear that the Company either knew or should have known the full extent of the situation it was getting into. The "second civil war" in Sudan had been raging for fifteen years when it entered in 1998; most of the rural areas in the oil concessions had been outside of government control since that time (Gagnon and Ryle, 2001). The government's strategy of "division and displacement" of the southern population had been in place since the 1980s (Human Rights Watch, 2003). Furthermore, Chevron had been forced out by rebel activity and the SPLA had made it clear that they considered the oil concessions a target.

Canadian NGOs approached Talisman immediately upon its announcement of its takeover of Arakis to protest their involvement in Sudan, citing the considerable human rights abuses in that country. By late 1999, the Canadian Minister of Foreign Affairs (Lloyd Axworthy) had expressed strong reservations about Talisman's involvement in Sudan (Bowley, 1999; Foster, 1999). Talisman's response, at least at first, was to deny the mass displacement of civilians; there is no evidence that they made an effort to mount an investigation of the allegations of human rights abuses before entering the country (Human Rights Watch, 2003).

There is no doubt that Sudan during the time of Talisman's investment represents an unusually stark and difficult environment in which to operate responsibly with regards to human rights. I suspect that there would be general agreement about what constitutes direct complicity in human rights violations: consenting to the government's use of the airstrip to mount "non-defensive" operations, for example, or assisting in the forced dislocation of civilians to clear a concession area.

At the other extreme, Gagnon and Ryle (2001, p. 39) argue that "a company operating in the war zone of Sudan cannot be neutral. Every aspect of its operation benefits one side – the government side – in a

conflict where human rights violations are the norm. In these conditions, all aspects of oil development contribute to the worsening situation for the inhabitants of the Upper Nile.” It is not unreasonable to ask whether the act of entering the country, in this case producing and transporting oil in Sudan, renders the company “complicit” in human rights violations. Given the need to secure facilities and the very high probability of a rebel attack on oil operations and some knowledge of the government’s strategy and tactics to date, should it have been clear that the company would be dependent on the government to protect its concessions and that human rights violations would be probable in the course of government operations? Could any oil company enter Sudan in 1998 without becoming “beneficially complicit?”

While Talisman has tended to minimize the forced displacements taking place as a result of oil exploration (as noted above), one of the UN Special Rapporteurs has been quoted as saying that “if the oil companies don’t know what’s going on, they’re not looking over the fences of their compounds” (Harker, 2000, p. 14). Assuming that the Harker Report and other human rights monitoring in Sudan are correct, it is reasonable to argue that any oil firm entering Sudan should have known that the concessions were in the midst of a war zone, that the government had engaged in human rights abuses in attempting to clear that area previously, and that the company would be dependent on government forces accused of human rights abuses to defend their concessions from attack. It is hard to avoid a conclusion that any oil firm entering Sudan had to accept that it was likely to both benefit from human rights abuses on the part of the government and depend on them for survival.

Direct complicity and determining that merely entering the country constitutes as complicity are two ends of a continuum, there is a great deal of ground in between. One possibility is certainly constructive engagement, where a company undertakes a positive obligation to influence the policy of the regime and mitigate human rights abuses. As the Harker Report concluded (Harker, 2000, p. 17), “. . . if the company is either unwilling or unable to constructively influence the GOS [Government of Sudan], perhaps it should not be in Sudan at this time.”

My point here is that defining “complicity” specifically or the obligations of MNCs with regards to human rights more generally is complex and may well be beyond the capabilities of a given firm at any point in time. As multinational firms take on “public” authority and “public” responsibilities, including potential liability for human rights

violations, determining the extent of those responsibilities and liabilities becomes critically important. I will return to this topic below.

Talisman's response

As discussed above, Talisman Energy responded to the mounting wave of criticism of its operations in Sudan by establishing a Corporate Social Responsibility Group in early 2000. One result was the publication of two Corporate Social Responsibility Reports (2000 and 2001) which focused on the Company's operations in Sudan. In his introduction to the first, CEO Buckee noted that "as a business we should focus on delivering shareholder value and to do this effectively, we must achieve high standards of social and environmental performance. In all countries where we operate, we believe that we have a duty to advocate respect for human rights where there are abuses" (Talisman Energy, 2000, p. 7). While the reports are controversial and the Company's response has been disputed by advocacy organizations, what is of interest here is that they indicate an acceptance of responsibilities that go far beyond focusing "on delivering shareholder value" and obeying the law.

By the time of publication of the 2000 Report, Talisman had "accepted" the need to comply with the International Code of Ethics for Canadian Business and to support the principle of the UN Declaration for Human Rights. It also accepted as "objectives" the need to use their corporate influence to ensure that GNPOC infrastructure was not used for offensive military operations, to promote "to the Government of Sudan the formalization of the provision of security that complies with the pertinent UN Codes of Conduct" and to advocate support for the Universal Declaration of Human Rights with the Government. It did note that security of its operations and personnel was a primary concern and that the Government of Sudan had "primary protection for the protection of oilfield staff and property" (Talisman Energy, 2000, pp. 9 and 14). The report also describes the more traditional community development efforts such as funding for schools, water development, and clinics as well as human rights monitoring efforts.

During 2001 Talisman reported an attempt to develop an agreement between GNPOC and the Government of Sudan that contained provisions dealing with respect for human rights, the appropriate use of oilfield infrastructure, and the prohibition of the use of irregular

Sudanese military forces for oilfield protection. It also asked that the Government ensure that all security forces comply with appropriate United Nations codes. The Government of Sudan “ultimately rejected the draft security agreement . . . on the basis that the provision of security is the prime responsibility and prerogative of governments and that these issues were not appropriate to be addressed by a company residing in and operating under the laws of Sudan” (Talisman Energy, 2001, p. 17).

The Canadian government backs off

In late 1999 Madeline Albright, the US Secretary of State sent a strongly worded letter to Lloyd Axworthy, the Canadian Foreign Affairs Minister, urging him to ask Talisman to withdraw from Sudan (Frank, 1999). While Axworthy was initially somewhat miffed over US involvement in Canadian affairs, he quickly called CEO Jim Buckee in for consultations and launched a high-profile investigation of Talisman’s involvement in Sudan culminating in the Harker mission and report. He threatened sanctions if the investigation found that oil money was either perpetuating the conflict or contributing to human rights abuses (Bowley, 1999; Drohan, 1999; Foster, 1999; Nikifouruk, 1999).

While the Harker Report stopped short of explicitly recommending sanctions, it found that oil had become a key factor in the war, that oil exacerbated the conflict, and that “it is difficult to imagine a cease-fire while oil extraction continues, and almost impossible to do so if revenues keep flowing to GNOPC parents and the GOS . . . ” (Harker, 2000, p 16). The Canadian government, however, did not impose any sanctions or restrictions on Talisman.

Mr. Axworthy had discussed the possibilities of sanctions a number of times. In March 1999 he told a conference on religious prosecution he had met with oil executives about the situation in Sudan, noting “We’ve been engaged recently in the role we play in Sudan, partly because I think that there is a responsibility of Canada because of the activities of some of our private-sector companies” (Human Rights Watch, 2003, p. 393). Somewhat later he warned that “if it becomes evident that oil extraction is exacerbating the conflict in Sudan, or resulting in violations of human rights or humanitarian law, the government of Canada may consider, if required, economic and trade restrictions . . . ” (cited in Human Rights Watch, 2003, p. 401). On

February 14, 2000 Mr. Axworthy announced that Canada would not impose sanctions on Talisman.

The turn-about resulted from a massive public relations campaign mounted by Talisman, including at least implicit suggestions that it was important to keep the head office of a major Canadian firm in Canada, and pressure from the Canadian oil industry in general. Axworthy later noted that he had gotten ahead of himself “when I set up the Harker Commission I said, ‘look, we’ll do something about it.’ And then I got the rug pulled out from under me because I didn’t have the legislative authority I thought I did . . . And I’m not sure I could have done it politically, because I got a lot of pressure around town” (Drohan, 2003, p. 271).

A governance gap

There are a number of critical points to be drawn from the case of Talisman Energy in Sudan. First, in a very real sense, the company activities in that country were beyond the reach of any “public” political authority. The government of Sudan had no interest whatsoever in restraining human rights abuses in that country and rebuffed even Talisman’s rather tepid effort at an agreement in that area. The Canadian government was either unable or unwilling to extend its reach to the extraterritorial activities of one of its companies to protect non-Canadian citizens outside of its territory. Last, the firm as a private actor was beyond the reach of existing international organizations or international law. As Gagnon, Macklin, and Simons conclude, “At present, corporations are not directly accountable at international law for their activities and operations that violate human rights standards. While an increasingly sophisticated regime of corporate rights is developing under various free trade agreements . . . none of these agreements link corporate rights or the rights of the states parties to obligations to ensure respect for human rights in the conduct of business” (2003, p. 51).

Second, defining the human rights obligations of multinational firms in situations such as that in Sudan is complex and extremely difficult. Once one accepts that the obligation of the firm goes beyond obeying local law, such as it is, it is not easy to draw boundaries around the firm’s responsibility or set standards for behavior. In this case one could argue that simply entering into oil production in Sudan entailed

some degree of complicity in human rights violations. The point is that once one moves beyond a narrow definition of responsibility to the shareholders, defining that responsibility cannot be left to the individual firm. It becomes a task of society at large.

Third, the mechanisms used in the case to attempt to force Talisman to accept responsibility for its actions in Sudan, and eventually to withdraw from that country, were less than satisfactory from a governance perspective. The Alien Tort Claims Act Cases in United States Courts are an ad hoc and cobbled-together attempt at global governance by extending the jurisdictional reach of a single country. While the NGOs' advocacy efforts with institutional investors eventually drove Talisman to sell its operations in Sudan, that surely is not the best way to establish the rule of law internationally. At a minimum, it relies on primarily Northern NGOs and multinational firms to make policy in third world countries.

As noted above, Kofi Anan argues that definitions of sovereignty have changed and that human rights violations within countries are now the responsibility of the international community. Furthermore, as should be clear from the arguments and case detailed in this paper, the rights and responsibilities of multinational firms can no longer be considered purely derivative: as they gain political authority in the international arena, MNCs will increasingly be held to responsibilities, and potential liabilities, beyond that of the traditional private economic actor.

The problem at this point is that systems of global governance are ill-formed and incomplete. Attempting to hold multinational firms accountable through campaigns by advocacy groups or action in US courts is not fair, democratic, or effective. There is every indication that multinational firms are increasingly being held to broader, public standards in the area of human rights and other issue areas. If that is the case, then coordinated international action is needed to establish standards, monitor compliance, and enforce sanctions. Given the evolution of the political system that will require cooperation between a number of actors including the firms themselves, states, civil society groups, and international organizations. Holding firms accountable under some agreed upon form of international law or regulation will be both more effective in dealing with human rights abuses and fairer to the firms involved.