# 9

# Corporate Crime in a Globalized Economy: An Examination of the Corporate Legal Conundrum and Positive Prospects for Peace

*Paula Richardson*

"This is it. They are going to arrest us all and execute us. All for Shell." Ken Saro-Wiwa, a leader of the Nigerian Movement for the Survival of the Ogoni People (MOSAP), made this statement two weeks before his arrest in May 1994. Jailed for exposing the company's role in directing and arming the Nigerian military, Saro-Wiwa's efforts paved the way for similar campaigns throughout the world, in places as diverse as India, China, Colombia, Chad and Sudan. As the number of such cases has increased over the past decade, so too has the public's scrutiny. What are the legal and ethical obligations of corporations operating in a conflict zone? How effective is existing international law in ensuring that companies are held accountable for extraterritorial human rights violations? Taking into account existing efforts to address corporate accountability on a global scale, this paper concludes that neither national legislation nor voluntary corporate codes of conduct provide an adequate means to ensure the protection of human rights. Instead, an international system must be created—one

*Paula Richardson is a Master of Arts candidate at the Norman Paterson School of International Affairs, Carleton University (pjsb@hotmail.com).*

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> with sufficient oversight and monitoring powers to ensure that corporations adopt conflict-sensitive policies that contribute to peace and security.

At the beginning of the twenty-first century, we are living in a world of increasing economic interdependence. Global markets provide opportunities for firms to do business on six continents, seven days a week, twenty-four hours a day. While the increase in foreign investment creates limitless opportunities for expansion within developing countries, the legal and regulatory frameworks governing working conditions differ radically from state to state, posing many new challenges for corporations, governments, and communities. These challenges have drawn increased public scrutiny in recent years, particularly surrounding business activities in zones of conflict.[1] The revelations of corporate involvement in human rights abuses, from the highly publicized stories of Royal Dutch/Shell in Nigeria to those of British Petroleum in Colombia, have placed the philosophy of corporate governance under the spotlight and raised several questions as to the regulation of extraterritorial corporate conduct.

In an era of increasing economic interdependence, what role, if any, do corporations play in conflict? How effective is existing international law in ensuring that companies are held accountable for the violations they commit abroad? Are local laws and enforcement capacities within host countries sufficiently robust to control and constrain corporate behavior? What does the trend toward corporate self-regulation mean for advocates pushing to address fundamental human rights concerns?

This paper seeks to explore these and other questions relevant to the debate on global corporate accountability. As the evidence below will suggest, a serious governance gap currently exists in the extraterritorial operations of corporations, rendering them unaccountable for grave violations of international human rights and humanitarian law. While international and multilateral efforts aimed at promoting the incorporation of social accountability for corporations are notable, they have been largely unsuccessful in ensuring that private sector activity is not a source of support for instability. Businesses can play an important role in contributing to long-term peace and the protection of human rights, especially in conflict-prone areas. Such actions can be encouraged through the adoption of an international monitoring and enforcement mechanism.

This paper begins by reviewing current trends in corporate activity within zones of conflict. Highlighting the potential role of corporations in conflict prevention, several conflict-sensitive policies are then examined.

In the section that follows, the corporate legal conundrum is discussed, focusing on the existing international and national measures of accountability for corporations that operate beyond their borders. Next, recent initiatives of corporate self-regulation are examined, in addition to two multilateral efforts, namely, the United Nations Global Compact and the Organization for Economic Cooperation and Development's (OECD) Declaration on International Investment and Multinational Enterprises. Finally, the paper offers several recommendations for strengthening multilateral efforts at creating a global regulatory and legal framework.

## Corporations in Conflict

The prevalence of inter- as well as intra-state conflict has increasingly important implications for the private sector. In 2000, a paper produced by International Alert, the Council on Economic Priorities, and The Prince of Wales Business Leaders Forum reported that the security threat within 72 countries where foreign business operated was rated medium, high, or extreme (International Alert 2003). Multinational companies were reported to be investing more than US $150 billion annually in "nearly 50 countries which fall below the intermediate point in Transparency International's Corruption Perception Index—in other words, countries which may be confidently described as fairly to very corrupt" (International Alert 2003).

As conflict typically exercises a negative impact on private investment and business activity, there is a widespread assumption that corporations have a vested interest in preventing and managing conflict. However, as analysts have increasingly found, "not all corporations share the same level of interest in ethical practices or assessment of risk" (International Peace Academy 2001, 7). While corporations generally prefer to operate in politically and economically stable regions, in certain sectors, particularly the natural resource extraction sector, "asset specificity, long production cycles, and the expected returns on investment may simply outweigh the reputation and security costs of continuing to operate in areas of conflict" (International Peace Academy 2001, 7).[2] Petroleum, natural gas, mining, and other extractive industries are particularly reluctant to withdraw from these settings as they have extensive financial and physical investments which are often tied to concession agreements that may carry timeframes of several decades (International Peace Academy 2001, 6).

Extractive multinationals operating in conflict zones have garnered an increasing amount of international and domestic scrutiny in recent years. Canadian "junior" mining companies such as Rex Diamond, Am-

Can Minerals, and DiamondWorks operating in Sierra Leone during the 1990s are among those companies whose operations were targeted for their role in exacerbating conflict. Michael Renner, a senior researcher with WorldWatch Institute in Washington, reports that in 2001 approximately one-quarter of the roughly fifty ongoing wars and armed conflicts possessed "a strong resource dimension" and, in those cases, "legal or illegal exploitation of resources helped trigger or exacerbate violent conflict, or financed its continuation" (Renner 2002, 2) (See Tables 1 and 2). Renner further calculates that because of these resource wars, roughly five million people were killed, six million became external refugees and eleven to fifteen million were internally displaced (Renner 2002, 2).

## The Role of Corporations in Conflict Prevention

With the cross-border operation of major corporations, new opportunities allow private sector actors to play a key role in addressing many of the structural issues that underpin conflict. While there is no proven formula for conflict prevention, research suggests that efforts addressing structural factors, including economic and social conditions, are most conducive to peace. As a recent report on conflict prevention and peace-building notes: "Certain levels of achievement and improvement in conditions of life, such as economic well-being, freedom and choice, social stability and social justice, seem to be a necessary part of such development, as do trusted mechanisms of open, responsive governance, and the respect of individual and minority rights. At some point, these supporting beams, working together, do seem to provide a solid foundation for internal peace, and ultimately to be more conducive to peaceful relations with others—as well as being manifestly desirable in themselves" (Bernard 2001, 18).

A number of studies find a correlation between economic, political, and social instability, on the one hand, and conflict, on the other. A recent study on the links between poverty and violence found that when horizontal inequalities and social exclusion coincide with identity or regional boundaries, a society's predisposition toward violent conflict is more likely to increase. Poverty has also been shown to play a role in sustaining wars, as crime and violence can become the only viable livelihood strategy for the poor. Generally speaking, the risk for violent conflict increases when people are marginalized from economic opportunity and lack a voice in the political arena or access to social services (Goodhand 2001).

In light of these observations, the concept of conflict prevention has shifted over the past decade from "preventative diplomacy," which in-

cludes a limited set of diplomatic or military initiatives, toward structural interventions which seek to address the underlying causes of conflict. This shift was reflected in the 2001 *Report of the Secretary-General on Prevention of Armed Conflict*, in which "an effective preventive strategy" was defined as a comprehensive approach that "encompasses both short-term and long-term political, diplomatic, humanitarian, human rights, developmental, institutional, and other measures taken by the international community, in cooperation with national and regional actors" (Prevention of Armed Conflict 2001).

While this comprehensive approach to conflict is still relatively recent, it is potentially of great benefit to both developing countries—the sites for most contemporary conflicts—and to corporations, which are playing an increasingly prominent role within them. As Kofi Annan stated in a 1999 address to the United Nations: "The private sector and security are linked in many ways, most obviously because thriving markets and human security go hand in hand. Global corporations can do more than simply endorse the virtues of the market, however. Their active support for better governance policies can help create environments in which both markets and human security flourish" (United Nations Environment Programme Finance Initiative 2002). Through the adoption of conflict-sensitive internal management strategies, policy dialogue, and institution-building, corporations can help to maximize their contribution to peace. Arora Bela and Harriet Fletcher have put forth the following recommendations (Fletcher and Bela 2001):

1. **Risk and Impact Analysis:** Corporations should examine their impact on local communities by undertaking social impact studies.

2. **Dialogue and Consultation:** Corporations should regularly engage and consult with community members and key stakeholders in order to encourage "a participative policy-making process…which allows the community to have an element of ownership in the activities of the company."

3. **Anti-Corruption:** Corporations can help to improve transparency in government and business transactions by implementing anti-corruption policies and making public their condemnation of accepting or paying bribes.

4. **Recruitment and Human Resources:** Corporations should ensure minority or oppressed groups are given equal opportunities for employ-

> ment. This could include the active recruitment and encouragement of these groups through affirmative action programs.[3]

While these recommendations provide important guidance for businesses operating in conflict zones, they fail to ensure that multinational corporations will in fact play a positive role in their host environments. The following section will demonstrate that in order to certify that corporations take an active role in conflict prevention, an international framework is necessary.

## The Corporate Governance Conundrum

### Corporate Accountability under International Law

Under existing international law, corporations that operate extraterritorially cannot for the most part be held accountable for human rights violations and are under no direct obligation to respect, or ensure respect of, human rights within their sphere of influence (Gagnon, Macklin, and Simons 2003, 53). Whereas international law considers corporations to have certain rights, it "generally does not recognize corporations as bearers of legal obligations under international criminal law" (Harvard Law Review 2001, 4). While new initiatives to address corporate social responsibility are being developed within the United Nations and in various bilateral and multilateral free trade agreements, there currently exists no mechanism for monitoring and enforcing corporate accountability for complicity in, or perpetuation of, human rights abuses.

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights (UDHR). The Declaration set an international precedent, aiming to recognize the responsibility of states and individuals to respect human rights. As the preamble states:

> Every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

The final article of the Declaration further clarifies the obligation of groups as well as individuals to "do no harm," and specifically includes corporations. This provision, also echoed in the International Covenant on Civil and Political Rights as well as many regional human rights treaties, states: "Nothing in this Declaration may be interpreted as implying for any

state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" (UDHR, Article 30). While the obligations outlined in the Declaration have served as the foundation for many other human rights treaties and corporate rights doctrine within free trade agreements, the Declaration itself is not legally binding on corporations. As a recent report concedes with regard to corporations' responsibilities vis-à-vis the UDHR, "the best that can be said is that TNCs have a moral and social obligation to respect the universal rights enshrined in the Declaration" (Gagnon, Macklin, and Simons 2003, 54). While the UDHR is clearly an authoritative statement by UN member states, and establishes a model of expected moral behavior, it remains an unenforceable ideal.

## Corporate Accountability under National Law

### *Home State Responsibility*

Regrettably, prosecution of extraterritorial corporate behavior is for the most part non-existent at the national level as well. Although states "are in certain circumstances liable for the acts or conduct of private actors," there is no imposed duty by which states attempt to prevent or punish corporations that are complicit in human rights abuses in host states (Gagnon, Macklin, and Simons 2003, 58).[4] The U.S. Foreign Corrupt Practice Act, enacted in 1977 and substantially revised in 1988, stands as an example of states' attempt to extend criminal legislation to national corporations.[5] Most nations have been resistant to this approach, however, due to their fear of the potential costs to diplomatic cooperation and access to markets, investment sites, and raw materials (Gagnon, Macklin, and Simons 2003, 103).

A serious political barrier to establishing corporate boundaries of responsibility exists, as many corporations wield considerable influence with host governments. In a 2002 report by Amnesty International, four companies—namely, ExxonMobil, ChevronTexaco, Occidental Petroleum, and Freeport-McMoRan—were highlighted for committing grave human rights violations. The report argues that the companies were able to significantly influence the U.S. government's response due, in large part, to their collective contribution of more than $2.8 million during the 2002 election cycle (Amnesty International 2003).

### *Host State Responsibility*

Host states have been increasingly regarded as the necessary regulatory body for corporate accountability, both in public debate and legally.

International human rights law recognizes host states as being responsible for preventing abuses by private actors, including companies (Petrasek 2001). This is confirmed in several human rights treaties, and has been recognized by an overwhelming majority of governments through UN declarations. While states are clearly not expected to be held responsible for every crime committed by private parties, they can be held accountable when "they fail to exercise due diligence in protecting the rights of people within their jurisdiction" (Gagnon, Macklin, and Simons 2003, 23).

Yet, in reality this approach toward corporate accountability remains highly problematic, as governments operating in a world of global markets are now less capable of effectively challenging and changing corporate behavior. Through mergers, corporations have grown remarkably quickly, and in terms of revenues, currently the largest six corporations are larger than all but the seven largest nation states (James and Garred 2000). Investor pressure, new international trade rules, weakened government tax bases, and budget cuts have all combined to weaken regulation at the national level.[6]

It is unlikely that host states alone will be effective in ensuring constructive corporate engagement in conflict settings. As exemplified by the cases of Unocal, Total, and Premier Oil in Burma, major barriers exist which obstruct the willingness of government authorities to adopt or enforce remedial regulation. Often governments either lack the physical capacity or political motivation to confront corporate abuses, or they may be themselves prime perpetrators of violence. This is particularly true for corporations operating in conflict zones. As one scholar notes:

> If companies engage in systematic discrimination in the workplace, knowingly work in a manner that supports repressive state institutions, show little concern for hazardous production processes that destroy people's livelihoods (and lives), or suppress freedom of association, it is of little help to the victims of such abuses that, in theory, duties to respond lie with the national government. Of course, individual governments should put in place the legal structure (laws, courts etc.) that would prevent such abuses, or act quickly against perpetrators. The fact is, however, that there are real obstacles to effective action at the national level. Even well intentioned governments may find resource and other constraints work to the advantage of those companies that are abusing rights (Petrasek 2001, 3).

## The Emerging Conception of Ethical Business

Due to the increasing media attention devoted to corporations' extraterritorial activities, the conventional view that corporations' sole responsibilities are to maximize profits and be responsible to their shareholders has been uprooted. As one expert has articulated: "There is a fundamental shift taking place. Human rights principles were really written with governments in mind. [But] it's clear that more and more, the [public] is looking at what the private sector is doing on human rights" (Laurent 2002).

At issue is the responsibility corporations have as global citizens and members of the local communities in which they operate. Even if the legal duties of a company remain solely with its shareholders, there is a growing acceptance that companies need to be more accountable to other stakeholders and the community at-large. The heightened expectations of what companies can or should contribute in terms of social progress has raised concerns over how and if corporate accountability should be implemented in the future.

### Voluntary Standards and Self-Regulation

Accompanying the recent public shift in perspective toward increasing corporations' scope of responsibility has been a growing initiative within the business sector to develop and implement policies and practices that ensure compliance with human rights standards. Several companies have adopted corporate codes of conduct and created new corporate functions dedicated to addressing human rights and labor practices.[7] Most of the new voluntary codes adopted by corporations express broad objectives and values, and specify commitments the companies have toward stakeholders, consumers, and (often) host governments. Employing inspirational language ("strive", "work towards", "try to minimize") many of the codes attempt to articulate the companies' values, ethical standards, and expectations (Petrasek 2001, 70). Critical of national investment rules and international regulations, pro-business voices have advocated the adoption of self-initiated voluntary codes, arguing that they reflect an effective move toward corporate accountability and responsibility.

While responsibility for governing behavior remains within the hands of individual corporations, these voluntary efforts are often based upon an overarching framework of values and corporate standards. The United Nations and the International Labor Organization (ILO) have established several codes of conduct and international principles that outline private sector human rights responsibilities. Other global initiatives have also taken hold, including the Global Reporting Initiative, Social Accountability 8000,

the Ethical Trading Initiative, the Fair Labor Association, and the Global Sullivan Principles. These guidelines allow companies to remain flexible and innovative in their operating contexts without requiring enforceable commitment mechanisms or punitive measures for non-compliance.

The International Chamber of Commerce, an association representing thousands of companies in over 130 countries worldwide, has emerged as a forceful advocate of self-monitoring and voluntary regulation. As a spokesperson of the organization stated: "Clearly, the way to ensure a greater business contribution to environmental and social progress is not through prescriptive codes and regulations imposed from outside, but by persuasion and peer pressure" (Cattaui 2003).

This argument rests upon two central points. Advocates from the International Chamber of Commerce believe that it is essential that company principles be appropriate to the vastly different conditions they face. Highlighting the culturally and geographically diverse climates in which corporations operate, the organization argues that government-mandated or other external codes that employ a "one-size-fits-all" approach are ineffective (Cattaui 2003). Voluntary codes are seen to be more "flexible" than regulatory rules in a rapidly changing environment, as they can be adopted more swiftly and are far less expensive to administer. While a valid argument, it should be noted that 'flexibility' also has its costs. Frequently, it results in codes that are simply vague statements of principles that fail to provide reliable guidelines for behavior. Such codes are often neither transparent nor accountable, and generally do not include any basis for legal claims or complaint procedures, thus providing little opportunity for individuals to be compensated for corporate violations that cause them harm (James and Garred 2000, 5).

Advocates of self-regulation also argue that voluntary codes are in businesses' best interest. Why should corporations pay attention to human rights? According to UN High Commissioner for Human Rights Mary Robinson, "business needs human rights and human rights need businesses" (Robinson 1998, 14). This rationale rests both on the assumption that corporations would be hampered in an environment where fundamental human rights were not respected and the belief that corporations implicated in human rights abuses would suffer from consumer discontent and loss of "brand value," thereby jeopardizing their economic profitability. While increased attention from non-governmental organizations (NGOs) and the media have undoubtedly led to progress in a few important cases, it is still of fundamental concern whether all corporations will implement voluntary standards that respect human rights, and further, whether they will adhere to the internal codes that they have adopted.[8]

A study conducted in 1998 by the Natural Heritage Institute found that fewer than ten percent of U.S.-based TNCs adopt human rights codes (Leighton and Getzler 1998). Since the threat of public pressure and negative publicity frequently act as the driving force behind the reform of corporate conduct, only a few sectors, such as the apparel and petroleum sectors, which have proven especially vulnerable to consumer pressure, are adopting codes (James and Garred 2000, 5).

Moreover, those companies that elect to adopt conflict prevention and management strategies or codes of conduct might actually find themselves at a comparative disadvantage vis-à-vis their competitors. Not only might they lose out on lucrative contracts and access to markets; they also face a "free-rider" problem because they will privately bear the costs of supplying a public good from which others might benefit.

Competitive pressures have been shown to lessen the incentive to adhere to self-implemented codes. A report released in 1999 by the UN Research Institute for Social Development (UNRISD) argues that many companies have "mastered socially responsible rhetoric," but only a few have taken concrete action to address human rights concerns (Stalker, De Alcantara, and Freedman 2001). The report points out that the small proportion of companies that have implemented business codes of conduct have done so in a narrow scope that rarely involves independent verification.

The fact that the threat of negative publicity acts as the only deterrent to hold companies back from committing human rights abuses is particularly troubling with respect to corporations operating in zones of conflict. As one expert has pointed out:

> Serious problems are posed by abuses occurring in countries where public protest is prohibited, where the press is controlled and where the legal system and/or the government are corrupt…. In countries where these systems and structures are not yet in place, national and local businesses can function without regard to formal and legal codes of conduct (Broadhurst 2000, 89).

Indeed, contrary to conventional wisdom, evidence shows that the failure of corporations to pursue a human rights strategy is unlikely to be reflected in their bottom line. According to one study, while Shell, Nestle, Monsanto, and Nike were identified as having a poor human rights record and subjected to public boycotts, no demonstrable effect was observed with respect to their share prices or dividends. Even when Nike chief executives were claiming a negative effect on share prices, the empirical evidence did not support this claim (Zadek and Forstater 1999). As a result

of these challenges, it is unlikely that voluntary codes will be effective in ensuring constructive corporate engagement in conflict settings.

## International Efforts at Corporate Accountability

### *The United Nations Global Compact*

One half-century after the UN Declaration of Human Rights was drafted, UN Secretary-General Kofi Annan called on business leaders, trade unions, and NGOs to consolidate efforts in developing and implementing a set of principles in the areas of human rights, labor standards, and the environment. His call was well received by the international community, resulting in the launching of the UN Global Compact on July 26, 2000. The Compact was welcomed with widespread enthusiasm from the business community, and within the first six months the number of participants rose to over two-hundred-and-fifty. The Global Compact encompasses nine central principles and asks companies to act on these principles in their own corporate environment (UN Global Compact Portal 2004). These principles call on corporations to:

- Support and respect the protection of international human rights within their sphere of influence;
- Ensure that they are not complicit in human rights abuses;
- Guarantee freedom of association in the workplace as well as the right to collective bargaining;
- Eliminate all forms of discrimination, especially with respect to employment and occupation;
- Support a precautionary approach to environmental challenges;
- Undertake initiatives to enhance environmental responsibility; and
- Encourage the development and diffusion of environmentally friendly technologies.

The Global Compact has become a general framework for UN cooperation with the private sector. Yet as the Secretary-General's report to the General Assembly concedes, "the Global Compact is not intended as, and does not have the capacity to be, a corporate code of conduct or global standard" (*Report of the Secretary-General* 2001, 10).

Although the Compact sets a precedent in demonstrating international interest in corporate accountability, its voluntary nature and lack of monitoring mechanism make it little more than a public relations exercise, and may in fact act as a veil for corporate irresponsibility. Most crucially, it remains questionable whether the poetic mandate of the Compact stated by Kofi Annan to "unite the powers of markets with the authority of universal principles" will be achieved (UN Global Compact Portal 2004). Rather, as discussed below, in several respects the Compact has not led to a concrete commitment to the core principles by corporations, and fails to reflect businesses' desire to enhance and support the awareness of societal values and concerns.

Due to its lack of monitoring and enforcement mechanisms, the Global Compact has encountered serious difficulty in effecting real change in corporate conduct. Rather, as some have pointed out, "corporations signing up are able to claim the legitimacy of a wide-ranging code under the prestigious United Nations, while only having to adhere to it symbolically" (James and Garred 2000, 7). Several international NGOs, including Amnesty International and CorpWatch, publicly announced violations of the principles of the Compact by signatory companies. Nike, a U.S.-based apparel manufacturer, was pronounced as violating Principle 3 in Vietnam, China, Indonesia, Cambodia and Mexico;[9] British-based mining conglomerate Rio Tinto was targeted for violating Principles 3 and 8 at the PT kelian gold mine in Indonesia;[10] and Norwegian-owned Norsk Hydro was targeted for violating Principles 1 and 2 at its bauxite/alumina joint venture in India.[11] Although the Guidelines on Cooperation Between the United Nations and the Business Community issued on July 20, 2000 state that "business entities that are complicit in human rights abuses… are not eligible for partnership," this component has clearly not been enforced (Guidelines on Cooperation Between the United Nations and the Business Community 2000). Indeed, the inclusion of Shell, a company infamous for its human rights abuses in the Ogoni territory of Nigeria, has served to vastly undermine the Compact's legitimacy and credibility.

Another concern about voluntary corporate responsibility is that it can "become an obstacle when used as a diversion from attempts to hold corporations accountable" (CorpWatch 2002, 2). With the implementation of the Global Compact and other voluntary measures, it is increasingly likely that corporations will use these measures as leverage to undermine the necessity of a legal framework to hold corporations accountable internationally.

It is important to note, however, that the Global Compact does in fact reflect a significant focal shift by the international community. The

UN human rights system, which traditionally focused exclusively on the responsibilities of government, is now addressing the role of the business sector in achieving public goals. That said, there is so far little convincing evidence that the Compact and other voluntary measures can adequately ensure the protection and enforcement of global human rights.

### *OECD Agreements on Corporate Accountability*

Adopting the principles of the UDHR, several corporate rights and accountability measures are being incorporated by institutions, most significantly within the OECD and in the International Labor Organization (ILO) Tripartite Declaration.[12] Regrettably, these agreements have weaknesses similar to those of the Global Compact, as they do not specify a legal obligation of corporations to respect human rights in the conduct of business.

In 1976, the OECD adopted the Declaration on International Investment and Multinational Enterprises. The Declaration was designed primarily to protect the rights of investors, while also including guidelines for multinational enterprises. A revised version of these guidelines was adopted by member states in June 2000. Standards were proposed in the guidelines for multinationals that covered workers' rights and industrial relations, environmental protection, bribery, consumer interests, payment of taxes, science and technology, and, most significantly, human rights. As paragraph II.2, states, "[Enterprises should] respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments" (OECD Guidelines for Multinational Enterprises 2000, Article 2). As the document is merely a recommendation that companies are "invited" to follow voluntarily, it is doubtful that the Declaration will exercise a significant impact on corporate behavior. The agreement also fails to include mechanisms that allow for citizens or groups, whose human rights may have been violated by business practices, to express their concerns. This calls into question how the rights guaranteed under the agreements can be adequately enforced.

Yet while the OECD agreement offers little in the way of enforcing the protection of human rights, it does set a significant precedent in public policy. The OECD is composed of twenty-nine countries that collectively produce two-thirds of the world's goods. As such, the Declaration reflects, at the very least, an important recognition by the world powers that businesses should play a role in social responsibility.[13]

## Enhancing Corporate Accountability

The pervasiveness of the problems associated with voluntary codes and national legislation implies that corporations' good social and environmental behavior is better ensured if a framework for corporate accountability is established at the global level. Binding international regulations can play the essential role of providing a universal standard against which corporate conduct can be judged, and can complement and strengthen both voluntary efforts and national regulations. Binding legal regulations are wide-ranging and demand adherence, removing the competitive problems faced by voluntary codes. Features of compulsion, which includes fines, withdrawal of licenses, and other penalties, can also be promoted by a public authority.

### Possibilities for Creating a Global Regulatory and Legal Framework

While the current climate for international corporate accountability is indeed challenging, the dramatic changes in both the corporate landscape and governance philosophy in the past decade point to greater opportunities for enforcement through international law.[14] Concerned citizens, lawyers, academics, and civil society organizations are raising the issue of a new rule-based global economic system and the conditions for its existence are beginning to take root.[15]

In 1998, the advisory panel for the UN Commission on Human Rights established a working group on the Working Methods and Activities of Transnational Corporations which agreed to develop a code of conduct for companies based on human rights standards.[16] After three years of consultations and draft revisions, the UN advisory panel approved the draft in August 2003.

While the draft code itself is expected to be voluntary, it represents a substantial move toward corporate accountability, as once it is enacted, companies would be required to ensure "that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they knew or ought to have known" (United Nations 2003). Implementation procedures in the draft code would also require companies to incorporate the draft norms into an internal code of conduct; apply the norms through the company's entire supply chain; agree to periodic monitoring by national, international, governmental, and non-governmental mechanisms; conduct periodic evaluations of the company's impact on human rights; and pay reparations to anyone affected by failures to comply with the norms. This draft goes significantly

farther than the UN Global Compact, as it subjects companies to the kind of enforcement procedures at the UN Commission for Human Rights previously applied only to nation states (Adhikari 2003).

This multilateral effort is an important step toward integrating socially responsible policies and practices into mainstream business activities, and could operate as the basis for an enforceable code of conduct.[17] Ideally, this draft could forge the way for creating a regulatory and legal framework that would include the adoption of established rules for consistent high standards of corporate behavior; social and environmental duties for corporations; sanctions; and mechanisms for adversely affected stakeholders to obtain redress. For this to be achieved, there are several important steps that need to be taken:

***Improve Research:*** More research and empirically based analysis is needed to understand some of the consequences of private sector activity and corporate decision-making in conflict settings, as well as the role corporations can play in preventing conflict. Research must also focus on the applicability of many different areas of national and international law, and on international rules concerning mergers and criminal law.[18]

***Build Coalitions:*** NGOs, trade unions, and other civil society organizations interested in corporate responsibility and human rights issues can work together to contribute to raising standards. Campaigning, awareness-raising, and North/South linkages can increase the pressure for adopting monitoring mechanisms and, more importantly, keep the issue on the agenda.

***Establish New Opportunities for Dialogue:*** Forums for discussion between key stakeholders need to be established, specifically in relation to the UN sub-commission's draft codes. The United States Council for International Business (USCIB), the International Chamber of Commerce, and the International Organization of Employers have come out strongly against the codes, and will need to play a role in the policy dialogue process.[19]

***Raise Public Awareness:*** For active investor and other stakeholder participation, a reporting mechanism can be put into practice that provides information to the public on issues of interest and concern.[20]

***Improve Availability of Legal Protection:*** This is currently a necessity for employee whistleblowers and NGO watchdogs. This may include creating a stronger relationship between the United Nations and NGOs.

***Develop Global Consumer Protection Rules:*** This can help to ensure fundamental product safety and reliability, and ensure restrained, truthful, and non-manipulative advertising, based on strengthened UN guidelines.[21]

## Conclusion

In the context of growing economic integration and the expansion of global investment, there is rising concern over the role business can and should play in ensuring peace and security, particularly in zones of conflict. Corporations can play a critical role in both the structural prevention of conflict and in developing conflict-sensitive policies and practices. However, for this role to be realized, internationally harmonized regulations are necessary. The current corporate legal conundrum provides weak and insufficient assurance that corporations operating exterritorialy will respect human rights. Similarly, voluntary codes drafted and implemented by corporations, including the UN Global Compact and other multilateral initiatives, are insufficient to prevent human rights abuses. Significant progress has already been achieved in convincing companies of the importance of protecting human rights. Through enhanced accountability, international law can provide the incentive and assurance that this perspective will be put into practice.

**Table 1.**
**Resource-related Conflicts Involving Extractive Industries**

| Location | Conflict Period | Conflict Resources |
|---|---|---|
| Afghanistan | 1979-2001 | Opium, lapis lazuli, emeralds |
| Angola | 1975-2002 | Diamonds, oil |
| Burma | 1949-present | Timber, natural gas, opium, precious stones |
| Cambodia | 1988-1997 | Timber, rubies, sapphires |
| Colombia | 1948-present | Oil, coca |
| Democratic Republic of the Congo | 1996-present | Diamonds, gold, coltan, copper, cobalt, timber, coffee, and others |
| Indonesia (Aceh) | 1976-present | Natural gas, timber |
| Indonesia (Kalimantan) | Late 1960s-present | Timber |
| Indonesia (West Papua) | Mid-1960s-present | Gold |
| Liberia | 1989-present | Diamonds, timber |
| Nigeria | 1990s-present | Oil |
| Papua New Guinea | 1988-1998 | Copper |
| Sierra Leone | 1991-2001 | Diamonds |

**Table 2.**
**Estimated Revenues from Conflict Resources (Selected Cases)**

| Combatant | Resource | Period | Estimated Revenue |
|---|---|---|---|
| Angola rebels (UNITA) | Diamonds | 1992-2001 | $4-4.2 billion total |
| Sierra Leone rebels (RUF) | Diamonds | 1990s | $25-125 million / year |
| Liberian government | Timber | Late 1990s | $100-187 million / year |
| Sudanese government | Oil | Since 1999 | $400 million / year |
| Rwandan government | Coltan (from the Democratic Republic of the Congo) | 1999-2000 | $250 million total |
| Afghanistan (Taliban, Northern Alliance) | Opium, Lapis Lazuli, Emeralds | Mid-1990s-2001 | $90-100 million / year |
| Cambodian government, Khmer Rouge | Timber | Mid-1990s | $220-390 million / year |
| Burmese government | Timber | 1990s | $112 million / year |
| Colombia (FARC rebels) | Cocaine | Late 1990s | $140 million / year |

*Source: Renner 2002*

## NOTES

[1] For the purposes of this paper, zones of conflict/conflict zones refer to regions that are experiencing ongoing armed hostilities, but are not necessarily involved in an officially declared war. The adversaries may include the military of one or more states, armed militia, irregular forces, rebel insurgents, mercenaries, or even criminal gangs (Gagnon, Macklin, and Simons 2003, 123).

[2] That said, there have been instances when extractive industries have withdrawn from countries experiencing serious instability and conflict—for example, multinational oil companies withdrew from Burma/Myanmar (International Peace Academy 2001).

[3] For example, agricultural companies have adopted policies to train and recruit former Muslim rebels in the war-torn region of Mindanao in the Southern Philippines. "Beyond tackling unemployment and economic exclusion, this has had the knock-on effect of promoting peace and stability in the region." (Fletcher and Bela 2001, 5) Similar initiatives are now being considered in Indonesia, Colombia, Sri Lanka, and Nigeria.

[4] That said, recently the U.S. Alien Tort Claims Act (ATCA) of 1789 has been used as a tool to enhance global corporate accountability by trying corporate offenders in U.S. courts. The Act gives U.S. federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In 1997, a U.S. federal district court in Los Angeles issued a landmark decision by agreeing to hear the case of *Doe v. Unocal*, a case brought by Burmese villagers in which the plaintiffs alleged that Unocal, a California-based energy company, was complicit in abuses committed by the Burmese military. The ruling concluded that corporations and their executive officers could be held legally responsible for violating human rights norms in foreign countries, and that such claims can be adjudicated by U.S. courts. Since this ruling, several multinational corporations have been forced to stand trial in U.S. courts on charges of complicity in human rights violations, including torture, extrajudicial killing, forced labor, and genocide. In addition to *Doe v. Unocal*, other prominent cases include *Wiwa v. Royal Dutch Petroleum Corp* (in which the defendant was accused of complicity in abuses committed by the Nigerian Military), *the Presbyterian Church of Sudan v. Talisman Energy* (in which the defendant was accused of participation in the Sudanese Government's ethnic cleansing of Christian and other non-Muslim minorities in southern Sudan), and *Doe v. Exxon Mobil* (in which the defendant was accused of providing Indonesian forces involved in killings and torture with equipment and logistical support). While these cases represent an important contribution to addressing corporate accountability, as of May 2003 there had only been twenty-five cases brought against multinational companies and none

had resulted in a judgment against the defendant. More importantly, although favorable rulings in U.S. courts can lead to financial compensation for the victims, they do little to address the deficiencies of local laws within countries in which abuses are committed or to strengthen local enforcement of those laws. The ATCA is currently being challenged by the National Foreign Trade Council and the International Chamber of Commerce, backed by major American business groups. These organizations are seeking to repeal or sharply limit the law, arguing that "over the past decade, the Alien Tort Act has become a serious impediment to U.S. companies investing abroad" (Lane 2003, 1). For further discussion of the ATCA, see Slaughter and Bosco 2000; regarding limitations on using and expanding the ATCA, see Harvard Law Review 2001.

[5] The provisions of the FCPA prohibit the bribery of foreign government officials by U.S. persons for the purpose of obtaining or retaining business and prescribe accounting and record-keeping practices. However, the FCPA deals only with bribes made to foreign government officials and therefore excludes payments to other foreign persons and "grease" or facilitating payments.

[6] Many countries, including most notably Mexico, have created special investment zones that are both tax- and regulation-free.

[7] The U.K.-based Body Shop, a global retailer of shampoo, soaps, and other personal beauty products, is an example of a company that has voluntarily adopted codes of conduct and stands publicly committed to human rights standards.

[8] The "name and shame" campaign spearheaded by NGOs against the South Africa-based diamond manufacturer De Beers succeeded in persuading the company to withdraw from all trade in conflict diamonds and to support rough diamond certification (International Peace Academy 2001, 9).

[9] Nike's failure to uphold "freedom of association and the effective recognition of the right to collective bargaining," along with related violations, including accounts of repression, firings, violence, and threats, have been documented since 1997. In addition, the apparel manufacturer has been a vocal opponent of using trade policy to pressure China to respect worker's rights (Corp Watch 2002).

[10] The Indonesian government's National Human Rights Commission investigated human rights abuse allegations in 2000 and found "egregious violations." Since opening the mine in 1992, the Commission revealed that the company, in coordination with the Indonesian military, evicted traditional miners and burned down local villages. Several incidents of sexual harassment, rape, and violence against local women have also been linked directly to Kelian employees, including senior staff (Kennedy 2001).

[11] In December 2000 Norsk Hydro faced a crisis in the Eastern Indian state of Orissa, when locals began protesting the bauxite/alumina project in which

the Norwegian corporation had a $1 billion dollar investment. Police were called in to repress dissent, resulting in the deaths of two villagers and serious injuries to nine others. While implementation of the project was "temporarily curtailed," it continued to be go forward despite the wishes of local people (Jayaraman 2001).

[12] In 1977 the ILO's Governing Body adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The Declaration covers several human rights issues. It is not, however, legally binding on states or the business sector.

[13] As the OECD Secretary-General stated at the June 2000 ministerial meeting, "The Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promoting. The Guidelines' recommendations express the shared values of governments of countries that are the source of most of the world's direct investment flows and home to most multinational enterprises. The Guidelines aim to promote their positive contributions to economic, environmental and social progress" (Report by Secretary General 2000, para. 3).

[14] The Bush administration's vocal opposition to the International Criminal Court, coupled with its desire to limit the scope of the Alien Tort Claims Act, makes the task of creating international enforceable standards all the more daunting.

[15] More recently, the cumulative effort by the UN Security Council to pass new resolutions on conflict diamonds, the arms trade, finance, oil, and smuggling has set new rules for corporate conduct and accountability in zones of conflict. Two of the most significant endeavors have been the United Nations Convention Against Transnational Organized Crime, which was opened for signature on December 12, 2000 and the Kimberley Accord on conflict diamonds. These multilateral treaties mark significant steps forward as they not only recognize the liability of corporations in committing international crimes, but have also created regimes for national enforcement.

[16] The idea first originated in 1972, when the UN Economic and Social Council asked the UN Secretary-General to appoint a group to study the impact of multinational corporate activity on development. In 1977, the United Nations Centre on Transnational Corporations (UNCTC) began negotiations to establish a voluntary Draft Code of Conduct on Transnational Corporations. Due to a series of disagreements, however, by 1992, the UNCTC abandoned the code and adjourned for good.

[17] It has also been suggested by Friends of the Earth International that the jurisdiction of the International Criminal Court be extended to try directors of corporations for environmental, social, and human rights crimes (Friends of the Earth 2002).

[18] Further attempts to regulate MNCs must also heed previous lessons learned. Many of the key issues concerning corporate regulation have been considered by governments before. Those involved in drafting codes of conduct and enforcement mechanisms should refer to previous political debates and issues of contention in order to build upon existing knowledge and experience. See Friends of the Earth 1998 for a further discussion of lessons learned.

[19] A lesson learned from the consensus on the Tripartite Declaration is that an agreement's success depends on consultation with all relevant stakeholders. In addition, "the Declaration shows that negotiation requiring consensus with the targets of such regulation—corporations—may result in a weak agreement" (Friends of the Earth 1998). Coming to an agreement will require substantial dialogue and compromise.

[20] This can ensure that investors have the same level of knowledge as the corporation does about its business. The Global Reporting Initiative presently provides information on corporate behavior, but it would benefit from triangulating its information so that affected communities are part of the reporting process.

[21] This has been suggested by Garred and James, and may help to guide the path toward an international legal framework.

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