Differentiated Corporate Legal Consciousness in International Human Rights Disputes: Security and Transnational Oil Companies in Sudan

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Over the past decade or so, human rights have emerged as an important paradigm for framing disputes over corporate social responsibility. Although the extent to which this human rights perspective is an entirely new one in corporate social responsibility discourse is contested,[2] what does seem undeniable is that human rights concerns are much more at the centre of that discourse then ever before. This is especially the case at the level of international human rights. Indeed, some have begun to describe this new paradigm of corporate social responsibility as the "second revolution" in international human rights discourse.[3]

The four-stage pattern of this rights revolution unfolding is not difficult to discern. The first stage was the application of human rights norms in domestic law against state actors. The models are from constitutional law, for example, the 1789 U.S. Bill of Rights or the 1982 Canadian Charter of Rights and Freedoms. The second stage was the extension of human rights to the private sector or institutions of civil society in mature legal systems. This meant for example the regulation of private firms and institutions in terms of racial and sex discrimination. The reasoning for this extension was the observation that many of society's inequalities and injustices stem not from the state but rather in the context of these private firms and institutions. The earliest such laws were the various federal Civil Rights Acts enacted during the Reconstruction Era after the American Civil War. In Canada, the earliest such laws date to efforts to prevent racial discrimination in the rental housing market in Ontario in 1943. By the 1970s, most advanced industrial countries had in place some sort of human rights code or civil rights law designed to regulate domestically the behaviour of corporations.[4] The third stage was the shift to international human rights instruments as an approach to regulating the behaviour of states and their agents. The 1948 United Nations Declaration of Human Rights is the obvious starting point here. The fourth stage is the extension of international human rights instruments

1 Research for this paper was supported by the Social Sciences and Humanities Research Council of Canada through its Major Collaborative Research Initiative Asia Pacific Dispute Resolution Project.

2 Douglas M. Branson, "Corporate Social Responsibility Redux", *Tulane Law Review, 76* (2002), 1207-1226.

3 Douglass Cassel, "Corporate Initiatives: A Second Human Rights Revolution?", *Fordham International Law Journal, 19* (1996), at 1963.

4 I have described this second stage in more depth in Lesley Jacobs, *Pursing Equal Opportunities* (New York: Cambridge University Press, 2004), ch. 4.

to the institutions of civil society or non-governmental actors, most notably, multinational or transnational corporations. Like with the development of civil rights and human rights codes in domestic law, the reasoning has been that it is these corporations that often pose threats to human rights, not states.[5] The articulation of the "Sullivan Principles" in the late 1980s is an early significant moment but it is largely since the late 1990s with the United Nations Global Compact and then in 2003 with the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights that this stage in the rights revolution is clearly demarcated.[6]

This fourth stage in the rights revolution has been widely embraced in the human rights community. Leading international human rights organizations such as Amnesty International, Human Rights Watch, and Human Rights First have recently taken leading roles in the promulgation of this idea of viewing corporate social responsibility through the lens of human rights. These three organizations are likely the most influential and best known international human rights organizations. Each is well established with a track record on international human rights advocacy dating many years. Each has been traditionally state-centred in the sense that they concentrated their attention on states as the principal threats to human rights. Human Rights Watch, for example, has its origins in the Helsinki Accord and initially focused on human rights issues in the Soviet block in Eastern Europe. Human Rights First (named The Lawyers Committee for Human Rights until 2003) stemmed from concerns about human rights violations by governments in Central and South America as well as the role of American foreign policy in those regimes. Amnesty International has had a more global focus but likewise traditionally focused on governments. In the late 1990s, each began to devote more attention to corporations and international human rights. Some of this arose from the connections between their advocacy for women's rights and labour conditions, especially around pay. Human Rights Watch began issuing reports on corporate social responsibility and human rights in 1999. Amnesty International established its Committee on Corporations and Human Rights in 1998.[7]

5 See for example the descriptions offered by Muria Weissbrodt, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights", *American Journal of International Law, 97* (2003), 901-922 and Julia Campagna, "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers", *John Marshall Law Review, 37* (2004), pp. 1205-1252.

6 It should be emphasized that the UN in April 2004 denied the status of binding international law to the Norms on the Responsibilities of Transnational Corporations. Currently, however, it is entertaining the proposal that a special rappateur be appointed to promote the norms.

7 It is worth noting here the contrast between international human rights organizations and international environmental organizations such as Greenpeace, the Sierra Club, and the World Wildlife Federation. All of these environmental organizations, almost from their inception, and certainly by the 1970s, viewed corporations as major threats to the environment and have targeted them for this reason in international campaigns. The mainstream international human rights organizations have traditionally distanced themselves from these "green" movements, largely I suspect because of a concern that linking human rights advocacy with animal

An important consequence of the involvement of leading international human rights organizations in the advocacy of international human rights norms for corporations is the legalization of corporate social responsibility, that is to say, viewing concerns and disputes of corporate social responsibility as legal problems that involve or require legal mechanisms. Almost all of the focus in the international law community has been on how to develop an enforcement or accountability mechanism in international law for human rights violations committed by multinational or transnational corporations that parallels those directed at states. This requires innovation because virtually all of the existing international law mechanisms focus on compliance by states, not corporations.[8] The question is how well can existing state-centered mechanisms be adapted to enforce human rights norms for corporations.

Now, it is well known that although international human rights organizations seek state compliance through formal legal venues, their predominant strategy is what commonly described as "naming and blaming". Kenneth Roth, Executive Director of Human Rights Watch, explains, "The essence of that methodology…is not the ability to mobilize people in the streets, to engage in litigation, to press for broad national plans, or provide technical assistance. Rather, the core of our methodology is our ability to investigate, expose, and shame. We are at our most effective when we can hold governmental (or, in some cases, non-governmental) conduct up to a disapproving public."[9]

This paper identifies a different set of challenges to the success of the fourth stage of the rights revolution, ones that revolve around the varieties of legal consciousness among transnational corporations. For my purposes, transnational corporations are understood

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rights advocacy might trivialize the former. The fact that international human rights organizations have come to the corporate social responsibility table recently and well after they are established entities has, I think, the potential to threaten their legitimacy, in particular, because of conflict of interest considerations. Environmental organizations such as Greenpeace have from the very beginning rejected corporate and state funding for their operations in order to avoid conflicts of interest. International human rights agencies have generally avoided state funding but have a long history of corporate support (especially large international law firms). This has not in the past been a big issue because of their state-centred focus. Now, with their increasing emphasis on holding multinational corporations responsible for human rights violations, their funding structure raises very serious potential for conflict of interest. Indeed, even if the actual potential is in fact low, one of the more striking features of the responses by corporations to allegations of wrong-doing by international human rights organizations has been precisely the rhetoric of conflict of interest and huge financial gains for principals representing these organizations, for example, the legal fees of the large international and class action law firms that litigate the complaints on behalf of the international human rights organizations.

8 The point that the state-centred focus of the existing international law mechanisms is a basic theme in much of the literature. See e.g. David Kinley & Junko Tadaki, "From Talk to Walk: the emergence of human rights responsibilities for corporations at international law", *Virginia Journal of International Law, 44* (2004), 931-1023 at

9 Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization", *Human Rights Quarterly, 26.1 (2004),* p. 67.

as enterprises operating from a home base, across national borders.[10] They differ from multinational corporations, which are those businesses established by agreement between a number of countries and operating in accordance with those agreements. The underlying idea of the paper is that when transnational corporations have operations outside the national borders of their home base, they bring to those operations particular attitudes toward law and behavioural responses to law – legal consciousness -- that are partially a reflection of their national origin. This means that there is an immense amount of diversity among transnational corporations, which poses serious challenges to efforts to implement a naming and blaming methodology in the case of institutionalizing international human rights as norms for corporate social responsibility. These challenges are illustrated concretely in this paper by contrasting how two transnational corporations – China National Petroleum and Talisman Energy -- with headquarters in two different countries (China, Canada) responded to human rights concerns in their joint Greater Nile Project in Sudan. Ultimately, my objective is to partially schematize the varieties of corporate legal consciousness about international human rights by identifying and distinguishing two forms of legal consciousness among transnational corporations and illustrating how they are exemplified in the Greater Nile Project.

The Greater Nile Project

The Greater Nile Project is engaged in the commercial exploration and extraction of oil in southern Sudan. It was formed in 1997 as a partnership between three transnational corporations and Sudan's national oil company, Sudapet. Talisman Energy acquired its operations in Sudan in October 1998 through the acquisition of another Canadian oil company, Arakis Energy Corporation, which was one of the corporations that founded the project. Along side the national oil companies of China (China National Petroleum Corporation – 40%), Malaysia (Petronas – 30%), and Sudan (Sudapet – 5%), Talisman joined the Greater Nile Oil Project as a 25% owner. The project began to export oil from Sudan in August 1999. Sale of this oil, principally to China and India, has generated large profits for the consortium of transnational companies involved in the project as well as for the Sudanese government.

The project has become a focal point for international human rights groups concerned about human rights violations in Sudan and the complicity of transnational corporations in those violations. Human Rights Watch has said, for example,

> The Sudanese government's efforts to control oilfields in the war-torn south have resulted in the displacement of hundreds of thousands of civilians…Foreign oil companies operating in Sudan have been complicit in this displacement, and the death and destruction

10 Andrew Judge, "International Institutions: Diversity, Borderline Cases, Functional Substitutes and Possible Alternatives" in P. Taylor and A. Groom, eds., *International Organization: A Conceptual Approach* (London: Pinter Press, 1978).

> that have accompanied it…Oil companies operating in Sudan were aware of the killing, bombing, and looting that took place in the south, all in the name of opening up the oilfields, but they continued to operate and make a profit as the devastation went on."[11]

Moreover, the Greater Nile Project is widely linked to the more general concern about the threats to human rights posed by resource extraction from developing countries by transnational corporations.

The Idea of Legal Consciousness

Legal consciousness is ordinarily understood in terms of knowledge or awareness of the law and its potential for resolving disputes and affecting social change.[12] Like many normative concepts, legal consciousness can be subject to a range of contested interpretations that yield particular conceptions of legal consciousness.[13] For our purposes, the emphasis will be on what has become known in recent socio-legal scholarship as the constitutive conception of legal consciousness.[14] At its core is the idea that legal consciousness is how ordinary people, as opposed to legal experts and professionals, understand and make sense of law. The significance of legal consciousness in this conception is that it provides people with interpretive frameworks to guide their interactions with law and inform their beliefs about law's promise or danger.

Constitutive legal consciousness is more than a simple reflection of attitudes or beliefs about legal rights. It is better thought of as a form of cultural practice where beliefs and attitudes about legal rights affect practices and what people do, which in turn shape beliefs and attitudes. "In this theoretical framing of legal consciousness as participation in the construction of legality," explain Ewick and Silbey, "consciousness is not an exclusively ideational, abstract, or decontextualized set of attitudes toward and about the law. Consciousness is not merely a state of mind. Legal consciousness is produced and revealed in what people do as well as way they say."[15]

Legal consciousness research is designed to identify its shapes and patterns. This

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11 Human Rights Watch News, "Sudan: Oil Companies Complicit in Rights Abuses" (25 November 2003) www.hrw.org (accessed 30 January 2005) See also the report by Human Rights Watch, *Sudan, Oil, and Human Rights* (London: 2003).

12 Trubek, David (1984). "Where the Action Is: Critical Legal Studies and Empiricism", *Stanford Law Review, 34*. Merry, Sally Engle (1990) *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*. Chicago: University of Chicago Press.

13 Ewick, Patricia, & Silbey, Susan (1992) "Conformity, Contestation, and Resistance: An Account of Legal Consciousness", *New England Law Review, 26*, 731-742.

14 Engel, David, & Munger, Frank. (2003) *Rights of Inclusion: Law and Identity in the Life Stories of Americans With Disabilities*. Chicago: University of Chicago Press; Ewick, Patricia, & Silbey, Susan (1998) *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press; Nielsen, Mary Beth (2000) "Situating Legal Consciousness", *Law & Society Review, 34*, 1055-1090; Umphrey, Martha (1999) "The Dialogics of Legal Meaning", *Law & Society Review, 33*, 393-423.

15 Ewick & Silbey, The *Common Place of Law*, p. 46.

assumes that although the legal consciousness of an individual is constantly changing, there is something instructive about trying to identify the variety of forms it can take. These forms or varieties of legal consciousness are by necessity only ideal types or approximations. The underlying idea that how a person deals in a particular interaction with political and legal institutions and the law generally – a police stop, a letter from the bank's lawyer threatening to foreclose on a mortgage in default, a complaint about discrimination against a landlord – is largely a function of the broad position or viewpoint he or she has on law and legality. And moreover this viewpoint is a reflection of law's presence in and relevance to a person's everyday life. Elsewhere, I have introduced the idea of differentiated legal consciousness.[16] Instead of assuming a uniform legal consciousness when crises arise in a particular jurisdiction, my approach has been to treat legal consciousness as varied among groups of individuals differently situated in the crisis. The promise of this differentiated approach to legal consciousness is that it enables me both to draw contrasts between perspectives of differently situated groups within the same jurisdiction and to note commonalities between similarly situated groups in other jurisdictions. Here in this paper I extend this approach by focusing on a common site – the Greater Nile Project in Sudan – and differentiated between the legal consciousness of two of the major transnational corporations involved in the project.

Differentiated Corporate Legal Consciousness

Almost all of the existing research on varieties of legal consciousness has focused on individuals.[17] Legal consciousness is, however, never entirely the construction of a single individual or simply a subjective viewpoint. It is, in the words of Ewick and Silbey, "always a collective construction that simultaneously expresses, uses, and creates publicly exchanged understandings."[18] There is not, then, an obvious reason why it would not also make sense to try to frame the legal consciousness of organizations in a similar way.[19] This may be especially apt in the case of corporations because legally they are often viewed as persons. Logically, corporations can be seen also as partaking in the collective construction of legal consciousness that builds on public understandings.. Not surprisingly, given that transnational corporations will be engaged with different publicly exchanged understandings, depending on where their home base is, this should yield varieties of corporate legal consciousness about international human rights.

Careful reflection about the Greater Nile Project suggests, I think, two different forms

16 Lesley A. Jacobs, "Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto", *Law & Society Review, Vol 41/3 (Sept 2007), 511-553.*

17 An exception is Erik Larson, "Institutionalizing Legal Consciousness: Regulation and the Embedding of Market Participants in the Securities Industry in Ghana and Fiji", *Law & Society Review, 38* (2004), 711-736.

18 Ewick & Silbey, *The Common Place of Law*, p. 46.

19 A similar point about organizations (but not transnational corporations) is made by Michael McCann, Review of Ewick & Silbey, *The Common Place of Law*, *American Journal of Sociology, 105* (1999), pp. 238-240.

of corporate legal consciousness about international human rights concerns at play among the transnational corporations involved in the project. I will briefly describe and contrast these two forms of legal consciousness and then examine them in more depth. The point of this exercise is to better understand the nature of the human rights disputes at issue in the Greater Nile Project. It must be emphasized that these forms of corporate legal consciousness are principally heuristic devices designed to edify and magnify differences. Moreover, these two forms are not intended to exhaust the varieties of corporate legal consciousness.

One form of corporate legal consciousness views the social responsibility requirements of transnational corporations in terms of *embedded human rights*. The origins of this form of corporate legal consciousness is John Ruggie's pioneering work on embedded liberalism in international organization.[20] In effect, Ruggie argued in 1982 that in order for economic markets to be established and thrive, they require a social community in which there are social investments, safety nets, and a measure of security and respect for the values of its members. The slogan of embedded liberalism is that economic liberalization must be embedded in social community. Although according to Ruggie embedded liberalism is well established in many domestic economies, the logic of efficient global financial markets and investments by transnational corporations in operations in other parts of the world is that they too have to be embedded in social community. In order for transnational corporations to secure a stable long-term return on their overseas operations, they must also commit to the establishment of this sort of community. Ruggie was in the late 1990s the principal architect of the UN's Global Compact, which I noted at the outset of the paper established the idea that corporations, not just states, be subject to the norms of international human rights. The point was, for Ruggie, "embedding the global market within shared social values and institutional practices."[21] The norms of international human rights constitute those shared social values and institutional practices. Transnational corporations conform to these norms as the price of doing business in an international economy. Embedded human rights as a form of corporate legal consciousness turns on the idea that in order for these corporations to profit from their foreign investments, they must embed their business activities within the local social community, which is promoted through the respect for international human rights and engaging in that community. For example, Canadian or American oil companies such as Talisman that invest in foreign operations must respect international human rights in order to build a social community so that their investments have a solid footing to provide for long-term profitability.

The other form of corporate legal consciousness I shall describe views the social

20 John Gerard Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order", *International Organization, 36* (1982)

21 John Gerard Ruggie, "Taking Embedded Liberalism Globally: The Corporate Connection" in David Held & Mathias Koenig-Archibugi, eds., *Taming Globalization: Frontiers of Governance* (Cambridge: Polity Press, 2003), p. 95.

responsibility requirements of transnational corporations in terms of *human rights as boundaries on frontiers*. Unlike transnational corporations that invest in operations overseas for the sake of profit, the transnational corporations subscribing to this form of corporate legal consciousness undertake these operations with a frontier mentality. The idea is that their home base needs some particular resource or raw material and the point of their overseas operation is to secure that resource. An early example of this sort of frontier mentality were English companies that sought raw cotton from India for the textile manufacturing industry in northern England.[22] The obvious contemporary examples I have in mind are transnational corporations such as China National Petroleum and India national oil company, ONGC Videsh Ltd., seeking to secure foreign oil for the domestic markets of China and India respectively. Rather than viewing respect for human rights as integral to successful global markets and economic liberalization along the lines of the embedded human rights form of corporate legal consciousness, human rights are viewed as setting boundaries or limits on transnational corporations seeking a particular resource or good. That is to say, respecting human rights is not integral or constitutive to the success of securing a resource such as oil, on this form of corporate legal consciousness. Instead, in the human rights as boundaries on frontiers form of corporate legal consciousness, human rights pose obstacles that can be overcome by transnational corporations when they meet thresholds for minimally acceptable behavior and avoid engagements and involvement with local communities, thus reducing the likelihood of human rights violations.

Talisman Energy: Corporate Legal Consciousness as Embedded Human Rights

Within six months of joining the Greater Nile Project in 1998, Talisman took the lead in the completion of the major pipeline to the Red Sea, which enabled the flow of oil from Sudanese oil fields to major international markets. The company found that although its Sudan operations accounted for only 10% of its assets, it constituted a much higher return on its investment compared to operations in other countries.[23]

However, almost immediately after it commenced operations in Sudan, church groups in Canada began to criticize Talisman for their involvement in brutal human rights violations in the oil-rich southern region of Sudan.[24] These criticisms were later seconded by the leading international human rights organizations involved in corporate social responsibility. The charges

22 Peter Perdue, "A Frontier View of Chineseness" in G.Arrighi, T.Hamasita & M. Selden, eds., *The Resurgence of East Asia, 500, 150 and 50 Year Perspectives* (London: Routledge, 2003), p. 68.

23 See the case study prepared by Gail Robertson and Larry Tapp (a member of Talisman's board of directors) "Talisman Energy Inc." (London, ON: Richard Ivey School of Business, 2002).

24 TCCR: The Taskforce on the Churches and Corporate Responsibility in Toronto for example began coordinating in 1998 an Investor Responsibility Project aimed at holding Talisman accountable to international human rights standards in its Sudan project. www.web.net/~tccr/CorpResp/resp-main.htm (accessed February 7, 2005).

of human rights violations had two distinct strands. One strand held that by providing the Sudanese government with oil revenues, Talisman was helping to fund a brutal civil war between the government-backed, predominantly Islamic north and the Christian minority in the south of Sudan. The second strand held that the Sudanese government was undertaking an "ethnic cleansing" of Christian Sudanese in the areas around the oil fields with the logistical and resource support of Talisman.

In November 2001, a complaint based on the Alien Torts Claim Act (ATCA) was filed in a federal court in New York alleging human rights violations by Talisman.[25] The ATCA was enacted in 1789 and allowed for alien plaintiffs not living in the United States to use the federal courts to sue for tort damages that arise from the violation of the "laws of nations".[26] The initial reasoning for the law was to assure other countries after the American Revolution that the United States would not be a haven for pirates. This law was virtually untested in the courts until 1980, nearly 200 years after its enactment. Since then, in nineteen cases, plaintiffs successfully sued individual government officials from other countries (by then living in the United States) for violations of the "laws of nation" such as state-sponsored torture and murder.[27] The U.S. Supreme Court ruled on the constitutionality of the ATCA for the first time in June 2004, upholding its use in two of these cases, over the objections of the Bush Administration and the Department of Justice.[28]

In the late 1990s, a series of law suits based on the ATCA began to be filed against multinational corporations for international human rights violations in developing countries where they had operations. What distinguished these suits from the ones that began in 1980 was that the multinational corporations were being sued for violating the "laws of nations", as opposed to states and their agents. There have been more than a dozen of these cases filed and the defendants have included Royal Dutch Petroleum, Coca-Cola, Exon Mobil, Unocal, and Texaco.[29] The most recent one I know involving the ACTA was filed against a representative of a Chinese broadcasting company in late 2004 and reported in January 2005, the first involving a corporation based in China.[30] Most of these cases have either been summarily dismissed, are proceeding to trial, or are being reviewed by appellate courts. None have yielded a judgment for

25 *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc. et al*., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Civil Action No. 01CV 9882 [DLC])

26 28 U.S.C. 1330, 1331 & 1350

27 Nineteen cases are cited by Human Rights First, www.humanrightsfirst.org/international_justic/w_context/ (accessed on January 13, 2005).

28 *United States v. Alvarez-Machain and Sosa v. Alvarez-Machain,* 542 U.S. 2004.

29 Ronen Shamir, "Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility", *Law and Society Review, 38* (2004), pp. 635-664 at 639-41.

30 Adam Liptak, "Chinese TV Director Sued by Falun Gong Claims Free Speech Protection in the U.S." *New York Times*, A7 (January 2, 2005).

the plaintiff that has been upheld by a federal appeals court.[31]

In the Talisman case that invoked the ACTA, the complainants were the Presbyterian Church of Sudan, the American-based Nuer Community Development Services, and individual Sudanese living in Sudan, the United States, and refugee camps adjacent to Sudan. The complainants by suing Talisman are among a small group of plaintiffs "seeking compensation from multinational oil companies responsible for participating in or aid and abetting systematic human rights violations in their overseas operations."[32] In the Amended Complaint, filed in February 2002, it was alleged, "The oil companies agreed to invest in the infrastructure, such as transportation, roads and airfields and communications facilities, to support exploration and the Government would use that same infrastructure to support its genocidal military campaign of ethnic cleansing against the local population…Talisman hired its own military advisors to coordinate military strategy with the Government. Based upon their joint strategy, Government troops and allied militia engaged in an ethnic cleansing operation to execute, torture, rape or displace non-Muslim, African Sudanese civilian population from areas that are near the pipeline or where Talisman wanted to drill."[33]

The federal district court confirmed the jurisdictional applicability of the complaint in March 2003. Talisman appealed the judge's decision but that decision was upheld by the appellate court in August 2004. At present, the case is proceeding to the disclosure stage and the application for class certification by the court. However, despite Amici Curiae briefs by international human rights groups such as Human Rights First supporting a comprehensive application of the ATCA to corporations,[34] the legal standard set by the U.S. Supreme Court in their June 2004 decision is that corporations can only be subject to judgements under the ACTA if it can be shown that the corporation had control over or directed state actors in the violation of the "law of nations" or acted in the capacity of being a state actor.[35] On September 12, 2006, after two failed attempts to certify the class action suit against Talisman, the United States District Court for the Southern District of New York granted Talisman's Motion for Summary Judgment, dismissing the lawsuit.[36]

The corporate legal consciousness of Talisman is revealed by what the corporation said and did in response to these human rights complaints. While denying any involvement

31 Unocal, which was accused of complicity with human rights abuses in Burma in the 1990s, settled their case out of court in 2005. See below.

32 This is the description offered by the class action law firm, Berger& Montague, P.C. of New York, representing the complainants. www.bergermontague/com/case-summary.cfm?id=34 (accessed on January 13, 2005).

33 Second Amended Class Action Complaint (February 2002), *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc. et al*., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Civil Action No. 01CV 9882 [DLC]), pp. 16 & 18.

34 Ralph G. Steinhardt & William J. Aceves, "Brief Amici Curiae of International Law Scholars and Human Rights Organizations in Support of Plaintiffs" (2003) No. 01 Civ. 9882, United States District Court (S. D. N. Y.)

35 Shamir, "Between Self-Regulation and the Alien Tort Claims Act", p. 642.

36 http://www.talisman-energy.com/responsibility/human_rights.html?disclaimer=1 (accessed on November 18, 2007).

in the killings, torture and ethnic cleansing by the Sudanese government, Talisman began to invest heavily in local community projects. These projects included new schools and hospitals, vaccinations, orphanages, water well and irrigation schemes, and training programs so that local Sudanese could be employed in the company's operations. The consistent message from Talisman was, in the words of its President and CEO James Buckee, "Talisman's presence and community development work were highly beneficial…subsequent events will show that the responsible development of hydrocarbon resources will play a fundamental role in the development of the country and will bring great benefits to all the people of Sudan."[37] This sort of effort was viewed by Talisman as fulfilling the corporate social responsibility requirements of international human rights. And in this respect reveals a clear commitment to what I above characterized as an embedded human rights form of corporate legal consciousness.

Talisman began in 2001 to issue an annual Corporate Social Responsibility Report to reinforce to international human rights groups as well as its own shareholders that it was meeting its international human rights responsibilities. These reports detail what Talisman is doing in terms of environmental sustainability and community development, and are subject to independent verification. These reports have subsequently become models for other Canadian corporations. Talisman's *2003 Corporate Responsibility Report*, for example, was a 2004 winner for excellence in sustainable development reporting by the Canadian Institute of Chartered Accounts and was ranked as the only Canadian oil and gas company among the top 100 by the 2004 Global Reporters International Benchmark Survey of Corporate Sustainability Reporting.[38]

However, in October 2002, Talisman announced that it was selling its operations in Sudan to India's national oil company, ONGC Videsh. Despite objections by the other partners in The Greater Nile Oil Project and a delay in the closing date, in March 2003 Talisman received $1.1 billion for its operations. (The initial cost to acquire Arkas was $200 million.) The main reason for the sale appears to have been the ongoing civil war in Sudan.[39] The civil war created a concern that the operations were at risk and in this regard lead to a discounting of Talisman's shares on both the Toronto and New York Stock Exchanges, which lead to mounting criticism of the operation by institutional shareholders. Moreover, the escalation of the civil war in 2001 raised genuine concerns among the senior management at Talisman that the instability genuinely

37 James Buckee, "The President's Report" in *2003 Annual Report* (Calgary: Talisman Energy Corporation, 2004), p. 3.

38 www.talisman-energy.com/socialresponsibility/cr_report (accessed on January 20, 2005)

39 The U.S. Government's labeling of Sudan as a terrorist state appears to have played little role in the decision. In the Spring of 2001, the U.S. Congress reviewed the actions of the government of Sudan with a view to determine its links to international terrorism. Subsequently, the Sudan Peace Act was enacted in October 2002 and identified some of the acts of the Government of Sudan as constituting genocide. Although the initial bill proposed a ban on capital markets for companies with operations in Sudan with the effect of delisting Talisman from the New York Stock Exchange, the final act did not include this provision. Sudan Peace Act, P.L. No. 107-245 (2002). This is significant because in 2001 there was speculation that the proposed bill was the major impetus for Talisman selling its operations in Sudan. See Robertson & Tapp, "Talisman Energy Inc.", p. 17.

did threaten the project. In concluding the sale, James Buckee, Talisman's CEO, stated, "It has been very difficult for us to operate…In the event of signing a peace agreement, we will come back to Sudan."[40] Of course, this observation about civil war and unrest simply reinforces the fundamental theme of Ruggie's concept of embedded liberalism. In the short run, Talisman continued to make profits from its operations in Sudan, right up to the date of sale. Indeed, it made huge unexpected profits because the sale to ONGC Videsh was delayed.[41] Embedded liberalism encourages, however, a longer term perspective on profitability, which requires a strong social community.

The extent to which this form of embedded human rights pervades Talisman's corporate legal consciousness was, I believe, reinforced by the corporation's continued preoccupation with the legal case in the US federal court based on the ACTA. Even though, from the perspective of an informed legal insider, the likelihood of the corporation losing the case was extremely low, the corporation still gave significant weight to the complaints. In the company's 2004 annual report, the case still played a large role in the risk and uncertainties assessment analysis provided by senior management,

> Talisman continues to be subject to a lawsuit brought by the Presbyterian Church of Sudan and others under the Alien Tort Claims Act in the United States District Court for the Southern District of New York…In August 2003, the plaintiffs filed a motion seeking certification of the case as a class action…Talisman believes these claims to be entirely without merit and is continuing to vigorously defend itself against this lawsuit and does not expect this to have a material adverse effect.[42]

This seems to me be taking very seriously a claim that had yet to be subject to class action certification and which the US Supreme Court has set a very high threshold of burden of proof on the complainants. It is hard to make sense of this risk assessment, without placing it in the broader context of embedded liberalism.[43] The point of course is that Talisman demonstrated how

40 BBC News, "Talisman pulls out of Sudan" (March 10, 2003). http://news.bbc.co.uk/2/hi/business/2835713 (Accessed on February 7, 2005).

41 Claudia Cattaneo, "Talisman Sudan Deal Dispute: Sale to India Delayed", National Post, January 3, 2003. http://sudan.activist.ca/view.php?id=0-5172 (accessed on February 7, 2005).

42 Talisman Energy Inc., "Management's Discussion and Analysis", *2003 Annual Report* (March 3, 2004), p. 39.

43 The events surrounding another ATCA case involving another multinational corporation will probably further cement this sort of legal consciousness. In December 2004, Unocal announced that it was settling its case with complainants who allege gross human rights violations by Unocal in its operations in Burma (*Doe, et.a al. v. Unocal Corporation et al.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). Although the details of the settlement have not been made available, this settlement is a landmark because it represents the first time that any multinational corporation has settled a case based on the Alien Tort Claims Act. See See Rachel Chambers, "The *Unocal* Settlement: The implications for the Developing Law on Corporate Complicity in Human Rights Abuses",

seriously it takes the naming and blaming strategy of international human rights organizations.

Conclusion

The concept of constitutive legal consciousness teaches us that all multinational corporations cannot be assumed to share a similar legal consciousness. What the Talisman example illustrates is that for international human rights organizations, those transnational corporations that embrace a corporate legal consciousness of embedded human rights, the naming and blaming methodology is likely to be an effective one.

However, in their report on Sudan, oil and human rights, Human Rights Watch reported that human rights violations worsened with the withdrawal of Talisman. Moreover, the other partners "have shown little interest in corporate responsibility…[and] in human rights accountability."[44] In effect, China National Petroleum has not responded to the naming and blaming strategy of international human rights organizations. The finding that a Chinese multinational corporation such as the China National Petroleum Corporation does not view law and legality and the risks of litigation in the same way that Talisman or Unocal do should not be a surprise. Indeed, this difference in legal consciousness can be an advantage for China National Petroleum in so far as it enables them to think outside the box.[45] The pattern for China National Petroleum in Sudan has been to avoid contact with local communities. They have for example continued the community projects they inherited from Talisman but have not initiated any of their own. Unlike Talisman, they have not employed local security forces, relying instead on Chinese security services. And in doing so have avoided many of the situations that formed the basis for claims that Talisman was complicit in human rights abuses. The irony is that although China National Petroleum has not responded to the naming and blaming methodology that works well with transnational corporations that embrace the corporate legal consciousness of embedded human rights, it may have inadvertently through its been less complicit in human rights abuses in Sudan.[46]

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available at http://www.globalpolicy.org/intljustice/atca/2005/09unocal.pdf (accessed November 18, 2007). This sort of settlement reflects where human rights are emerging as a norm of corporate social responsibility for multinational corporations based in advanced industrial countries through a process whereby these corporations gradually accept responsibility that their operations in developing countries are subject to these international human rights, not the fledging domestic laws of those countries. This pattern is described by Claire Moore Dickerson, "Human Rights: The Emerging Norm of Corporate Social Responsibility", *Tulane Law Review, 76* (2002), pp. 1431-1460.

44 Human Rights Watch, *Sudan, Oil, and Human Rights*, p. 67.

45 Witness for example the revelation of their role in the takeover of the biggest oil production fields in Russia. That takeover involved the $10 billion acquisition by a small Russian oil company with total assets of $3 billion. CNPC apparently prepaid the smaller company more than $6 billion for oil from the fields, even though a contract of this sort for that amount of money upfront would be viewed as legally unorthodox.

46 Of course, the Chinese government, as distinct from China National Petroleum, is certainly complicit in human rights abuses in Sudan in virtue of its sale of military weaponry to the Sudanese government in exchange for oil.