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‘THE OBSERVANCE OF HUMAN RIGHTS
BY MULTINATIONAL CORPORATIONS IN
DEVELOPING COUNTRIES.’

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1 Introduction

1.1 HUMAN RIGHTS DEFINED

Human rights are rights that an individual is born with by the mere fact of being a human being. These rights are inalienable as they cannot be given up by an individual or transferred from one person to another and, they are also non-derogable. Not even the state can deny an individual the rights he or she is born with. Article 1 of the United Nations Universal Declaration of Human Rights clearly states that an individual is entitled to the right to life, liberty and security of the person.

It also states that all human rights are "universal, indivisible, interdependent and interrelated".¹ This means that human rights relate to all men and women, should be treated the same and to achieve one right, an individual may have to use one right in order to achieve the enjoyment of that other right. For example, to enjoy the right to life specified in the International Covenant on Civil and Political Rights, an individual needs to enjoy the right to food and health specified in the International Covenant on Economic Social and Cultural rights.

There is no universally accepted definition of human rights. Amongst the widely accepted definitions is the following:

“Human rights are fundamental principles allowing the individual freedom to lead a dignified life, freedom from abuse and violations, and freedom to express independent beliefs. Human rights are based on rules of the human behaviour common across diverse cultures to achieve stable, peaceful and equitable society”.²

Furthermore, human rights can also be distinguished from mere privileges on account of a number of characteristics. The following are the characteristics that distinguish human rights. They are:

- i). Universal and belong to all human beings everywhere;
- ii). Are inalienable and cannot be renounced, lost or fortified;
- iii). Based on the principles of the equality of all human beings, that is to say human beings must be treated the same and without favour regardless of the station they occupy in life;
- iv). Claims of right, not appeals to grace, or charity or brotherhood, or love, and they need not be earned or deserved; and
- v). Fundamental as life, dignity and other important values depend on them.

Human Rights have in the previous years become recognized worldwide therefore giving them international status with the term "International Human Rights"³. Human rights enjoy a prima facie presumption of

¹ UNCDHR -Adopted

² ING Investment Management –Sustainable Growth Fund-Human Rights and the Responsibility of Companies, pp. 1-2

³ ICCPR-Adopted in General Assembly resolution A(xx1) of 16 December 1966

inviolability and often “trump” over other public goods. Individual rights cannot be lightly sacrificed even for the good of the greatest number or even for the general good of all. However, it is also noteworthy that human rights, at least most of them are not absolute. They may be sacrificed if countervailing societal interests are important enough, in particular circumstances such as the existence of a state of war. These restrictions, however, are for limited times and purposes, and to the extent strictly necessary. It is also important to note that authorities in these times of emergency should not take advantage of the situation and violate human rights. There must, however, be good reasons for depriving a person of his rights and it must be done in an open and objective manner. It is also important to note that human rights are placed in various categories. There are currently three generations of rights.

The first generation consists of rights known as Civil and Political Rights. This category includes, amongst other rights, the right to life, (Article 6); the right to freedom of expression, (Article 19 (2)); the right to freedom of assembly, (Article 21); and the right to freedom of opinion (article 19), the right to freedom against torture, inhumane and degrading treatment or punishment (Article 2), etc. These were the first rights to be recognized and are also sometimes referred to as negative rights because they impose on the state the obligation of non-interference in their enjoyment. The state is expected to refrain from any action that might amount to arbitrary interference with these rights.

The next category to be recognized are referred to as the second generation rights, also known as Economic Social and Cultural Rights. These include the right to food, the right to adequate standard of living, the right to housing, all found in article 11; the right to health in article 12, the right to work in article 6, and the right to education in article 13 etc. These are also known as "positive rights"⁴, because they require the state to take positive action in their implementation through the mobilization of resources and the adoption of relevant policies.

Lastly, and not yet fully recognized are the third generation rights. As to the first and second generation rights, which are rights of individuals, third generation rights are "collective rights". This category includes the right to peace, the right to development, the right to a clean and healthy environment and the right to self-determination. It is worth noting that the international community is still divided on the conceptual aspect of third generation rights, some states do not recognize these as human rights.

Though the concept of generation rights is useful for analysis purposes, it has no legal implication and should not be understood to mean that there is a hierarchy of rights. It is worth noting that the United Nations recognized all human rights being universal, indivisible, interdependent and interrelated through the various covenants it has acknowledged such as the Universal Declaration of Human Rights.

⁴ CAT-Adopted in General Assembly resolution 34146 of 10 December 1984

For example civil and political rights are usually adhered to as their implementation can be immediate, not costly and they have been understood and interpreted more thoroughly by court decisions due to the number of cases that have been adjudicated on the violations of the right to life, the right to freedom of assembly and opinion etc. The economic social and cultural rights have been received with mixed feelings due to the fact that they have not yet really been fully interpreted for them to be clearly understood. Most countries have found these rights to be costly as a state needs financial resources to implement them. This is why most countries have failed to implement them. It is noteworthy that despite the difference in treatment, all human rights enjoy the same status.

The International Covenant on Economic Social and Cultural Rights has been ratified or acceded to by most states merely as an aspiration or to show commitment to strive and attain these rights. Even at the international level, these rights have not attained the level of justifiability, the more reason why most states ratify or accede to the covenant but do not face or see the urgency to fulfil or implement it. The right to development belonging to the third generation rights has equally been met with mixed feelings especially by developed countries. They believe that should they agree to accept these rights, they might be faced with the obligation to assist the developing countries financially for the later to attain the right.

It is, however, important to note that the various rights and freedoms are given different treatment in most jurisdictions. For example, Zambia is a

party to both covenants; the Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. However, the provisions of the two covenants are found in different parts of the constitution. The civil and political rights provisions are located in part III of the constitution, a part with justifiable provisions while economic, social and cultural rights are located in part IX of the constitution, a part consisting of directive principles of state policy which are not justifiable and are only meant to guide the executive arm of the government in the formulation of policy and enactment of legislation.

One can argue that the definition of what constitutes human rights in the strict sense of the term is more or less settled. However, what continues to pose difficulty to the concept of human rights is the different treatment accorded to them. Furthermore, “human rights” is a term that was mentioned first in the United Nations Universal Declaration of Human Rights. It came about as a result of the inhumane treatment of human beings after the Second World War. This inhumane treatment brought about the need and urgency to stop the continued commission of atrocities during the war which were caused by the use of destructive weapons, such as nuclear weapons, Dumb-Dumb bullets etc.

At the international level, the United Nations has adopted numerous agreements or treaties on human rights. These include the United Nations

Universal Declaration on Human Rights (UNUDHR⁵), the International Covenant on Civil and Political Rights (ICCPR⁶), the International Covenant on Economic Social and Cultural Rights (ICESCR⁷), the Convention against Torture and other inhumane treatment or punishment (CAT⁸), the Convention on the Elimination of all forms of Racial Discrimination (CERD⁹), the Convention on the Elimination of Discrimination against Women (CEDAW¹⁰), and the Optional Protocol to the covenant on Civil and Political Rights (which adds legal force to the ICCPR).

1.2 DEVELOPING COUNTRY DEFINED

Before attempting to define what a developing country is, it is worth noting that the term is inter-changeably used with such terms as least developed country or third world country. It is argued by some that there is no definite or clear definition of the term developing country. There are however, certain common characteristics that are identified with developing countries. It is also worth noting that even institutions such as the World Trade Organization (WTO) have not adopted a definition for a “developed” or “developing” country¹¹. It is interesting to learn that member states of the W.T.O announce on their own whether they are a developed or developing country. This, notwithstanding, there are certain characteristics that are ascribed to developing countries which include:

⁵ Adopted by the General Assembly Resolution

⁶ Adopted by the General Assembly Resolution 2200 A(XXI) of 16 December 1966

⁷ Adopted by the General Assembly Resolution 2200(XXI) of 16 December 1966

⁸ Adopted by the General Assembly Resolution 39/46 of 10 December 1984

⁹ Adopted by the General Assembly Resolution 2106A(XX) of 21 December 1965

¹⁰ Adopted by the General Assembly Resolution 34/46 of 10 December 1984

- i). Per capital annual income being less than \$1,000 (one thousand united states dollars) per day;
- ii). High rate of poverty with individuals living on less than or a dollar per day;
- iii). Products, expertise, and infrastructure are not well developed ¹².

Other attempts at defining a developing country include that of the Library of Congress:

“A country in which large segments of the economy are still comparatively under- developed and the majority of the population is very poor. Although there are wide variations in these countries GNP and per capital income, most countries have economics based on export of raw materials and their infrastructure (transport, social services educational systems etc) is inadequate for their needs¹³”.

In this context, the need to define a developing country, is relevant because of the significant role these countries play in vis a vis, human rights protection and the role of multinational corporations which operate in these countries, in this regard. It is evident that most human rights violations occur in developing countries. Furthermore, most multinational corporations prefer to set up their businesses in these countries for various reasons as we

¹¹ See, Who are the developing countries in the W.T.O

¹² What is different about Developing Countries?

¹³ See, Collection Development. The Library of congress collection policy statement. Developing Countries.(<http://www.loc.gov/acq/devpol/devcountry.htm>)

shall later note in the following chapters. The term “developing country” came about during the 1980's when most African countries went through a slump in their export prices. Due to the sky rocketing interest rates coupled with the slump in raw materials, most African countries found themselves in an unstable economic situation.

Faced with this situation, African states borrowed heavily. Most of the borrowing made was from the World Bank and the International Monetary Fund. These two institutions (which are UN agencies) were empowered by the UN to assist such countries in their economic development. This was “following an agreement by the General Assembly without a vote in 1947, where the UN effectively gave up control of these policies”¹⁴ to the two institutions. The policies are those of macro-economics found under Article 58 of the UN Charter and Article 63 on the Economic and Social Council (ECOSOC) for them to coordinate and implement financial policies.

The borrowed funds came with conditions attached. This included the Structural Adjustment Program (SAP) - (a program that was designed to keep borrowing states on track with their repayments). The Structural Adjustment Program can be described as one of the reasons that placed most African states in their poor economic situation and a major factor for keeping them in the developing countries category. The Structural

¹⁴ Background to Emergence of the UN's Global Compact
(www.laetusinpraesens.org/docs/globcomp/globcom1.php)

Adjustment Program has been perceived as working against the attainment of human rights under the Covenant of Economic Social and Cultural Rights. It is believed to “hinder peoples’ access to food, water, shelter, health care, education”¹⁵.

During the Chiluba administration in Zambia (1991-2000), the Structural Adjustment Program was introduced by the International Monetary Fund and the World Bank. Under this program, most of the parastatal companies (quasi-governmental companies) were privatised. The result of this exercise was massive unemployment, as most of the companies that were privatised, have since closed down, leaving many people without jobs.

In addition, the country is now dependent on the services of foreign companies, for example, the liquidation of the national airline (Zambia Airways) has brought about a dependency on foreign airlines, the privatisation of the United Bus Company of Zambia (UBZ), has led to the dependency on private transporters and the privatisation of Zambia Consolidated Copper Mines (ZCCM) is now dependent on foreign mining corporations that have no commitment to the country. These measures have led to unemployment and to a drastic fall in the standard of living for most Zambians.

In so far as the physical location of developing countries is concerned, they are mostly found in Latin America, Asia, Africa, the Middle East and

¹⁵ See, More Resentment For IMF, World Bank by Pelekelo Liswaniso

Eastern Europe. As earlier on mentioned, there are a number of definitions for a developing country. There is however no universally agreed upon definition for the term a “developing country” but there are only certain characteristics that help determine whether a country falls within the definition of “developed” or “developing country”.

1.3 MULTINATIONAL CORPORATION DEFINED

Multinational Corporations, also known as Transnational Corporations, are big companies that carry on businesses beyond the boundaries of their nationality. Multinational corporations deal in various activities such as producing goods and providing services across borders. For example, Nike is a multinational corporation that operates in many countries producing footwear; while BP is a multinational corporation that produces and sells fuel and fuel products in almost all countries of the globe.

Multinational corporations have both positive and negative sides with regard to their operations. The positive side is that they bring investment and technologies into the host countries. On the other hand, they do not have any loyalty to the host countries. They are also economically stronger than some of the developing countries in which they operate. Multinational corporations normally have their headquarters in the country of incorporation and have a chain of branches in other countries.

The common characteristics of multinational corporations are the following:

- i). They tend to establish subsidiaries in countries where conditions are more favourable to their business operations;
- ii). They subordinate people to profit;
- iii). They are global in nature¹⁶.

According to the Draft Universal Human Rights Guidelines for Companies, the working group that drafted the guidelines provided the following possible definitions for multinational corporations;

- 1). An entity with affiliated business operations in more than one country.
- 2). An entity with certain minimum size, controls production or service plants outside it's home state and it incorporates these plans into a unified corporations strategy.
- 3). A cluster of corporations with diverse nationality joined together by a common ownership and a responsive to a common management strategy¹⁷.

The primary objective of all multinational corporations for being in business is to “maximize short-term private financial profits”¹⁸, that is to make as much profit as possible with little resources within the shortest possible time. Various other declarations have provided definitions for multinational corporations. For example the ILO’s Tripartite Declaration of principles concerning multinational enterprises and social policy defines a

¹⁶ See, Multinational Corporations (MNCs) <http://www.dragon.acadiau.ca/-dagora/HRIP/Glossary/mnc2.htm>

¹⁷ See, Draft universal human rights guidelines for companies (U.N.Doc.E/CN.4/Sub.2/2001/WG.2/wp.1(2001))

multinational corporation as “enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside of the country in which they are based”¹⁹. The Organization of Economic Cooperation and Development (OECD) Guidelines for Multinational Corporations equally defines multinational corporations as companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways.

It is therefore important to note that multinational corporations are not directly responsible for the protection of human rights, the more reason they feel that they have no moral obligation or duty in relation to the lack of the respect for human rights in the communities they operate. Their primary objective is to make profit for their stakeholders. They claim that they do not have any positive duty to observe human rights, their duty is to observe the law²⁰.

1.4 MNC’s GLOBAL REACH

Due to the globalisation of the world economy, multinational corporations have become even more powerful “in the current world order²¹” perceived by most developing countries as a challenge to their state sovereignty. For example developing countries have been forced to devalue their currency in

¹⁸ Corporate Capitalism-<http://uwsp.edu/geo/courses/geog340/Caus-corpCap.htm>

¹⁹ See, Draft universal human rights guidelines for companies

²⁰ Human Rights and Multinationals: Is there a problem? By Peter Muchlinski

order to attract foreign direct investment. As a result of devaluation of their currency, the centrality of the state is usually diminished .The liberalization of trade and the increase in the power and size of these companies has made multinational corporations become even more powerful than ever before. As a result of this, they have acquired great influence in international trade and have attained great influence on the global scene than anyone else, including some governments, especially those in developing countries. They have as a result great influence in fostering development.

Multinational corporations are mighty in financial resources and are able to invest in numerous countries, especially developing countries which have a heavy debt burden. This has lead to a trend, therefore where resources flow from developing countries into the developed countries. Furthermore the liberalization of economies in developing countries has also made it possible for multinational corporations to expand their operations worldwide. This has made them attain even greater recognition than before on the international scene.

Financial institutions such as the World Bank and the International Monetary Fund play a major role in financing multinational corporations thus expanding their influence both at local, regional and international levels. This has put them in a powerful position to the extent that they are able to dictate to countries, especially developing ones. Both the World

²¹ Multinational corporations and human rights- questions about their relationship-by David Kinley and Sarah Joseph

Bank and the International Monetary Fund are controlled by the richest countries in the world, referred to as the G8; namely, the United States, the United Kingdom, France, Japan, Canada, Germany and Italy. These institutions play a major role in the development process of developing countries together with other United Nations agencies such as UNDP.

The World Bank determines who borrow and under what terms for the loans repayment. They decide which multinational corporations can borrow money and for what projects and in which developing country. Out of desperation, due to unstable economic conditions, developing countries accept the rigid loan conditions. For example, currently the Zambian government has had to bend backwards to accept conditions from the International Monetary Fund and the World Bank because of the governments projected budget over run. The International Monetary Fund has threatened not to provide more money until the government takes the necessary measures to ensure that there would be no budget over run. Obviously, due to the impoverished nature of the country, Zambia finds it has no choice but to yield to the dictates of these two institutions.

Multinational corporations have also acquired great political influence in most developing countries. This political influence has been attained due to their financial might which is sometimes used to provide financial support to political parties in a particular country with a view to influence legislation or change of government. Secondly, multinational corporations have great influence on the culture of a country as they operate mostly in

local communities consisting of indigenous people with a strong culture. While providing employment, multinational corporations also bring with them outside people to work for them. These people may have different backgrounds, and therefore end up “corrupting” the culture of the indigenous people.

Out “Of the top hundred Transnationals, 43 are based in the European Union, 29 in the United States and 16 in Japan”²². These have a “quarter of a million subsidiaries and half operate in the developing world”²³. Financially multinational corporations also make more money in sales than the Gross Domestic Product (GDP) of many countries.

This outreach and economic power provides multinational corporations with the possibility of having great influence and political power in most countries where they have vested interests. “With capital accumulation, the capitalist class exerts increased influence over politics and government”²⁴. They are therefore capable of determining who gets into power through huge donations made to political parties of their choice of election campaigns

To demonstrate the influence of multinational corporations, during the presidential elections in the United States in the year 2000, some

²² Privitization, Globalization and the growing power of Transnational Corporations; pp2(<http://www.iticlo.it/english/actrav/global/ilo/clause/nkpriv.htm>)

²³ See, the above

²⁴ See, Corporate Capitalism(as above)

multinational corporations donated millions of dollars to George W. Bush or to Al Gore in a bid to have their desired candidate get into the white house. Such donations allow them to have the capability of influencing policies should the candidate they donate money to win the elections. Moreover, some multinational corporations' annual incomes equal or even surpass that of some countries. Motorola's annual income, for example is equal to that of Nigeria's national annual income. This means therefore that the financial viability and economical strength of multinational corporations is sometimes even greater than that of some developing countries.

Case studies have further shown that some multinational corporation's profits and their assets combined exceed those of most developing countries. For example, Mitsubishi, earns more profit than Indonesia; and South Africa's Gross National Product is less than that of Kard's profits in a year. It has also been noted that the Royal Dutch Shell company earns more money than Norway, a country considered developed and having a sound economy. It should also be noted that 51% of the world's wealth is concentrated in multinational corporations²⁵.

Therefore, multinational corporations are definitely wealthier than some if not, most developing countries . Their activities, especially in developing countries have had a lot of adverse effect on the local communities in which they operate. They also have vast political influence on most governments.

²⁵ See, Corporations and human rights
(<http://www.globalissues.org/TradeRelated/Corporations/HumanRights.asp>)

2 CHAPTER 2

2.1 NATURE OF THE PROBLEM:

MULTINATIONAL CORPORATIONS AND THEIR AFFECTION ON THE ENJOYMENT OF HUMAN RIGHTS

It can be argued that the level of human rights enjoyment in developed countries is to some extent better than that enjoyed in developing countries. Many factors account for this disparity, ranging from poverty be it human or income poverty, bad governance, weak bargaining position in international trade and struggling economies in developing countries which lack foreign direct investment. These negative factors have in most instances undermined the full enjoyment of fundamental rights and freedoms in developing countries.

The situation in developing countries has, it can be argued, been taken advantage of by some multinational corporations operating within their jurisdiction, yet in most cases these MNCs pay lip-service to the observance of fundamental human rights and freedoms which, paradoxically, their parent countries have subscribed to at the international level. One would expect these MNCs to act in accordance with whatever human rights norms the parent countries subscribe to.

Multinational corporations have, in the past years affected, and continue to affect the enjoyment of fundamental freedoms and human rights throughout

the world, especially in developing countries. In most situations, multinational corporations are directly or indirectly involved in the violation of human rights. This is due to the fact that they operate in economically unstable countries and usually unstable political situations.

Furthermore, the negative effects on the enjoyment of human rights have occurred because of the lack of respect of human rights by MNCs. Therefore, without the respect for human rights, indigenous people feel a sense of insecurity as a result of actions of the MNCs. Moreover, the indigenous people have not been able to benefit from the development that ought to accompany the activities of multinational corporation through their direct investment.

In a rush to maximize on profits, multinational corporations may often find themselves in complicit with the violation of human rights. Some multinational corporations disassociate themselves from human rights observance arguing that enforcement of human rights is not their responsibility but that of governments. As noted by some corporate executives “companies are designed to make profit, not to make the world a better place”²⁶. However, although governments have the primary responsibility for the protection of human rights, it should be acknowledged that individuals and multinational corporations also have a major responsibility for the respect of human rights and are expected to conduct their business in accordance with the laws of the host state.

Sometimes multinational corporations choose to work with oppressive governments. Such MNCs are equally guilty of human rights violations as much as the repressive host governments. International law does not impose direct "human rights duties on corporations". This close association with oppressive governments, therefore, makes it difficult to reprimand or to punish multinational corporations for human rights violations. However, in the recent past, non-state actors, including multinational corporations, have had the obligations imposed upon them to respect human rights.

This has been done through the adoption of national laws to this effect. Furthermore, numerous declarations and recommendations have been adopted by the UN and other organizations to encourage the promotion and observance of human rights by multinational corporations. One such covenant to which a multinational corporation can be directly held accountable is the Genocide Convention. According to the Draft Norms on Responsibilities of Transnational Corporations, MNCs are not expected to benefit directly or indirectly from such crimes.

These norms place certain responsibilities on MNCs in the course of their operation in a given society. Organizations, such as the UN, the ILO and the OECD have established guidelines to help with the observance of the promotion of human rights. Such guidelines include the Global Compact initiated by the Secretary General of the United Nations to this effect.

²⁶ Corporate Responsibility.pp

In Zambia, all the covenants it ratifies or accedes to are incorporated and become part of the law of Zambia. The fact that human rights are “interrelated, inter dependent and indivisible” means that all rights are treated the same way, that is to say no right is superior than the other. However, Multinational Corporations being social organizations in society, affect the enjoyment of human rights in many ways. For example, when multinational corporations set up their businesses, in developing countries, such as building of highways, dams, roads etc, this may lead to forced evictions of the indigenous people from their communities.

The forced move violates their basic right to survival, they are denied the right to food as they are unable to farm their land. Without food the indigenous people face a possibility of suffering from malnutrition. This may therefore affect their right to health. The MNCs’ may also violate the right to a healthy environment as a result of the destruction of the environment through dumping of toxic waste in rivers, which may contaminate the water used for drinking. Furthermore the introduction of foreigners to work in local communities may lead to the introduction of different types of diseases not known to the local communities.

An example of the violation of human rights by an MNC especially the right to health, concerns the Yanomani people, an indigenous people in Brazil. A highway passing through the Yanomani community constructed by a multinational corporation passed through the Yanomani community. In the

process, the Yanomani people were displaced from their land. The workers on the road project who were from outside the community, brought with them diseases that affected the health of the local people. The case was brought before the inter-American court under the American Declaration. The Brazilian government was held accountable as it was said to be under an obligation not to violate the right concerning the preservation of health.

The Brazilian Government was taken to court for its failure to take timely and effective measures to protect the human rights of the Yanomani. The government was found not in compliance with the duty to prevent and protect the rights of these indigenous people²⁷.

As earlier noted, some American companies have expressed the view that they do not have a responsibility to protect and prevent the violation of human rights while conducting business in a host state. For example, Enron has denied being in complicit in the beating and arresting of people against its activities of building the world's largest power plant in India. The local community has protested against the building of this plant as they feel it will have negative effects on the economy and environment. These protests have been quashed by the local police paid by Enron²⁸. The human rights of the local community have been violated with the full complicit of Enron that hired private security forces to beat up protestors thus impinging on their

²⁷ See, Litigating environmental abuses under the alien tort claims act: a practical assessment-pp594

²⁸ See, Dabhol power corporation; Corporations and human rights-Business and human rights-the bottom line-Commentary by Arival Ganesan

right to freedom from torture, bodily harm as well as their freedom to a peaceful assembly and freedom of free expression.

In Burma, strikes by textile workers have been quashed by the use of force or threats of the use of force, including shooting of workers who try to peacefully assemble. Driven by the desire to maximize profit, most multinational corporations have had no regard on the implications of their activities regarding the violation of human rights. Another case in point is that of the Anglo-American, a corporation that was operating in Zambia that has caused great suffering to the local people on the Copperbelt province in Zambia after it pulled out of the country without any due notice. Moreover, the copper mining activity produces a lot of dust that causes people to suffer from respiratory problems.

In addition, stagnant water from the mine dump causes mosquitoes to breed and spread malaria, a killer disease²⁹. No measures were taken by the multinational corporation to ensure the peoples' enjoyment of the right to health. Meanwhile the multinational corporation has since pulled out of the country with no consequences for its violation of human rights.

Numerous covenants have been adopted in an attempt to curb the violation of human rights by MNCs. These impose a duty on MNCs to observe, promote and protect human rights. Among various covenants adopted in this regard, include the Convention on the Rights of the Child which prohibits

child labour. Many multinational corporations, despite the existence of this instruments still continue to violate the rights of children by employing them as cheap labour. The Covenant on Economic Social and Cultural Rights, provides for the workers to have an adequate standard of living, housing, etc. But the provisions of this convention are routinely violated by MNCs payment of low wages to their workers.

Moreover, some multinational corporations provide poor employment practices and as a result breach the rights of their employees. They offer poor working conditions that include poor health and safety conditions in the workplace. The Convention on the Elimination of Discrimination Against Women attempts to ameliorate the conditions of women in the employment sector. The practice by some multinational corporations tends to discriminate against women by giving preference to men in their employment practices, or when women are employed, their salaries are usually less than that of men. The Convention on Civil and Political Rights provides for the right of the workers to a peaceful assemble, to express their opinions freely and bargain collectively. This right is often violated by multinational corporations.

Some multinational corporations such as Nike, have routinely been in violation of the above right by suppressing trade unions and avoiding the use of collective bargaining for their employees. Sometimes, MNCs' use local police to crack down on the workers exercising their right to assemble.

²⁹ See, Limitations of corporate social responsibility on Zambia's copperbelt-pp1

For example, in the “Ogani Crisis” involving Shell in Nigeria, there is evidence that the multinational corporation was in complicit with the government of Nigeria in violation of the right to life. An activist, Ken Sarowiwa together with others, was executed for campaigning against Shell. He and his people were exercising their right to a peaceful assembly and freedom of expression in their attempt to stop Shell from destroying their environment through oil drilling.

Furthermore, The Covenant against Torture was also violated by the multinational corporation, due to the use of the state police in a bid to stop protests against their activities.

Protesters are sometimes beaten, tortured or even killed, for their attempt to defend the environment. Finally, the Covenant on the Elimination of All Forms of Racial Discrimination, aims to eradicate racial discrimination in the work place. An individual should be employed not because of his race, colour, religious beliefs, etc, but on account of his or her merit.

2.2 THE PUBLIC POLICY IN DEVELOPING COUNTRIES REGARDING FOREIGN DIRECT INVESTMENT (FDI) AND THE ROLE OF MNC'S

Developing countries have in the last few years liberalized their economies to facilitate development of their countries and to attract foreign investment from multinational corporations that are “the primary channel for

transmitting foreign direct investment to developing countries”³⁰. The need of host governments for FDI and the failure to screen the MNCs before allowing them to invest in their countries has led to a wholesale of MNCs streaming of all sorts even those with little human rights standards³¹. Multinational corporations are lured to invest in developing countries by giving them incentives such as tax rebates.

By conducting operations in a country, MNCs contribute to the wealth of the nation through taxation. It has been reserved that “customary international law recognizes the sovereign right of each state to tax alien residents or owning property within its territory”³².

Through FDI developing countries may benefit from technology transfer (a process through which advanced technical knowledge is transmitted from one trading partner to another geographically) from foreign companies to the local industries. It is important to note that local industries currently lag behind in advanced technology are trying to replace imports with exports and trying to create jobs³³.

Developed countries have a competition policy that has been seen as a significant tool for economic development. This policy seems to have had a positive impact on the developed countries. As pointed out “Competition

³⁰ See, Legal aspects of foreign direct investment in Zambia-text (http://www.murdoch.edu.au/elaw/issues/v6n4/mwenda64_text.html)

³¹ Cardiff Center for Ethics , Law and Society (<http://www.ccels.cardiff.ac.uk/pubs/wellspaper.html>)

Policy helps to attract foreign direct investment because it provides a level-playing field for fair competition among firms and a sound and stable institutional environment, which diminishes the risk of investing in the country”³⁴. This conclusion however, does not seem to support the case in developing countries. This, trend is however slowly changing, as governments open up their markets and remove trade barriers in order to attract FDI from more multinational corporations.

According to statistics, in 1996, there was a 37 percent inflow of foreign Direct Investment to developing countries³⁵. A survey has shown that multinational corporations contribute to over 90% of all foreign direct investment in the global market³⁶. The biggest contributors of foreign direct investment are corporations from the United States, Japan, Germany, France, Italy, the United Kingdom and Canada with those from the United States being the biggest contributor³⁷.

South Africa is an example of a country that has also introduced the competition policy and has therefore been able to attract a good inflow of foreign direct investment. Currently many developing countries are trying to set laws favourable and conducive to foreign investment.

³² See,(footnote29)

³³ See, Transnational Corporations, vol.10.1(April 2001)

³⁴ See, as above.pp71

³⁵ See, Competition Law & Policy in a Global

Context(<http://www.compcom.co.za/events/conferences/14%20%2015%20march%202006/20c> 6/24/2003

³⁶ See, Foreign Direct Investment(part iv of xii)
(<http://www.economist.com.na/2001/06041/story9.htm>

³⁷ See, Foreign Direct Investment

In Zambia the Investment Act of 1991 was enacted but was later repealed and replaced by the Investment Act of 1993, to promote and coordinate investment and offer incentives that would attract foreign investors. Part iv and v of the Investment Act provides a number of incentives for multinational corporations willing to invest in Zambia, such as capital allowance. An investor is taxed on that portion of income that is determined by the commission, as originating from the export of non-traditional products at a rate of fifteen per centum, entitlement to capital allowance etc³⁸.

Regarding unfair competition, the Zambian Competition Commission was established in 1997 under the Competition and Fair Trading Act, Section 4 of Chapter 417 of the laws of Zambia, to prevent anti-competitive and restrictive business practices and promote consumer welfare³⁹. Like Zambia, a number of developing countries have enacted laws aimed at attracting foreign Direct Investment. A number of incentives are provided including tax credits. As earlier noted, these measures are taken to attract FDI, which brings benefits such as job creation, training of local nationals to use advanced technology and the construction and improvement of exiting infrastructure.

³⁸ See, The Investment Act of Zambia

³⁹ See, Zambia Competition Commission (http://www.zcc.com.zm/about_zcc.html)

2.3 EFFORTS OF WORKERS AND UNIONS IN ENSURING MULTINATIONAL CORPORATION'S COMPLIANCE AND RESPECT OF HUMAN RIGHTS

Trade unions throughout the world face a number of problems in trying to organize and set up effective unions as a channel of airing out workers grievances and ensuring the workers enjoyment of their rights. In Africa, the work of labour unions has been greatly affected due to the on going globalisation. Due to globalisation, African workers are paying the highest taxes to payoff foreign debt incurred by their economic and political elite⁴⁰.

For example, in the past, the majority of companies in Zambia were state owned and trade unions were relatively strong then. But during the period 1990 - 2002, the liberalized market economy brought about the privatisation of most companies. This resulted in the instability of most trade unions which thus weakened them. The Zambian government for example, imposed a wage freeze on public workers. Despite the efforts of the unions however, this has not been reversed. The trade unions were threatened with a revocation of their licenses, which is a clear violation of international Labour Organization Standards.

However, the right to strike by the unionised workers in Zambia (when all other means are exhausted) has continued to be respected .The only exception relates to essential workers, such as the police, intelligence

services, prison workers etc. Also in times of national disaster or emergency, workers may be obliged to work.

There has been a number of strikes by public workers in Zambia in the exercise of their rights. The recent strikes include the 2000 strike involving doctors, council workers and public service workers in connection with their demand for increased salaries⁴¹. The dispute was however later resolved. There was also the four-month countrywide strike, but was later called off by the Zambia Congress of Trade Unions. The unions decided to take the government to court instead over non- payment of increased wages to the civil servants.

By virtue of various international instruments, such as those of the ILO, multinational corporations have a duty and an obligation to respect worker's rights .In pursuance of this, trade unions are working hard to seek MNCs compliance with the respect of their rights. For example, the Zambia Congress of Trade Union has been putting pressure on the national government to enact stronger labour laws that will prevent multinational corporations from abusing worker's rights. They have also requested for stiff penalties on all multinational corporations that do not respect or observe such laws .The government is also called upon to inform and educate new investors on the labour laws of Zambia⁴².

⁴⁰ Labour under globalisation (<http://www.weekly.ahram.org.eg/1999/460/in3.htm>)

⁴¹ Zambia-Compensation & Benefit

Legislation(<http://www.salaryexpert.com/seco/careerjournal/hrcodes/ZAMBIA.htm>)

⁴² The Monitor-media release (<http://www.monitor.co.zm/media/news/newsnews.cgi>)

In Zambia, multinational corporations, such as Shoprite Checkers are being criticized for paying low wages to its employees. The wages are considered to be too low to afford an adequate standard of living under the international labour standards and the Covenant on Economic Social and Cultural Rights. Under these instruments, an individual is entitled to receive a reasonable salary that will ensure provision of an adequate standard of living.

Articles 8 and 22 of the International Covenant on Civil and Political Rights and article 23 of the United Nations declaration provide for the right of individuals to form trade unions of human rights. Through their trade unions, workers can air their grievances and thus put pressure on multinational corporations as a means of recourse in accordance with article 21 of the ICCPR and article 1 of the optional protocol to the International Covenant on Civil and Political Rights⁴³.

Through this mechanism, Nike recently paid out \$1.5 million dollars against a lawsuit filed by a San Francisco consumer activist, claiming Nike workers suffered physical punishment and sexual abuse, endured dangerous working conditions, and worked as long as 14 hours a day without earning a “living wage”. According to this law suit “Nike was accused of misleading the public about the working conditions of the Vietnamese, Chinese and Indonesian labourers and claimed it’s statements amounted to

⁴³ See, Roaul Wallenberg compilation of human rights instruments

false advertising”⁴⁴ . This is a good example of how workers, non-governmental and labour organizations are making efforts to ensure multinational corporations are held socially accountable for their actions.

Another example relates to workers in Zambia who have sought legal recourse against Supreme Furnishers, a multinational corporation, which wished to pull out of Zambia and externalise all its assets without giving compensation to its workers. This case is currently under adjudication in the courts. However some skepticism has been expressed, notwithstanding an injunction that was placed on the corporation not to close any of its offices, the company nevertheless closed all its offices throughout the country without compensating its more than 400 workers .

Many multinational corporations, such as Anglo American, Smart Center, Guys and Girls, etc; have also recently pulled out of Zambia leaving workers without jobs or any remuneration. It is believed by trade unions and non- governmental organizations that the pulling out of these companies is due to the expiration date of their grace period for the lucrative tax incentives and tax exemption that they have enjoyed. This is proof of how multinational corporations are able of escaping their responsibility for abuse of human rights⁴⁵.

⁴⁴ See, Nike Settles Free-Speech Case(<http://fsnews.findlaw.com/articles/business/s/20030912/textilesnikedc.html>)

⁴⁵ See, Cardiff Center for Ethics, Law and Society (<http://www.ccels.cardiff.ac.uk/pubs/wellspaper.html>)

3 CHAPTER 3

3.1 MULTINATIONAL CORPORATIONS AND THEIR EFFECT ON THE ENJOYMENT OF HUMAN RIGHTS

With the growth in both size and economic strength, multinational corporations have the capability of bringing about positive effects on human rights in the countries in which they operate, especially the developing countries.

It should be noted that sometimes MNCs engage sub-contractors with a known record of human rights violations. It is suggested that multinational corporations should desist from engaging such contractors and should instead deal only with those that are free of human rights violations. Multinational corporations have become more conscious of the need to respect human rights due to pressure by the non-governmental organizations. Also a number of treaties have been adopted that impose responsibilities on MNCs in this regard.

These treaties include the Rome Statute on the International Criminal Court; the Genocide Convention; and the Convention against Torture. It is noteworthy that under the Rome Statute liability rests with individuals and not multinational corporations for human rights violations. Multinational corporations are however managed by natural persons. They can therefore be held vicariously liable for the actions through the natural persons that

manage them. Therefore, the acknowledging and observance of not going against these covenants will ensure the promotion and violation of human rights.

MNCs use of contractors with bad human rights records and the engagement of military personnel to guard their infrastructures may lead to act in complicit with them in human rights violations. For example, in the event of protests, the repressive actions used to quell such demonstrations could be in violation of the convention against Torture. Protestors are often tortured or subjected to inhuman and degrading treatment. MNCs subscription to a code of conduct will ensure the respect of human rights.

Secondly, multinational corporations can prevent the use of child labour by putting into practice international labour standards that do not permit such use of child labour. They should also ensure that their contractors should not employ children or use sweatshops. If they do, they should be blacklisted. Towards this end, multinational corporations should encourage on the spot checks of factories contracted to produce goods especially in countries like China, India, Indonesia where multinational corporations like Nike are well known for operating sweatshops.

In view of the fact that MNCs often operate in countries with a bad human rights record, they should take the lead in ensuring the respect of human rights by influencing and defending the rights of employees against repressive regimes. This could be achieved through:-

- 1). Developing an explicit company policy on human rights;
- 2). Providing effective training for their managers and their staff in international human rights standards, preferably with input and assistance from appropriate non-governmental organizations conversant with these standards;
- 3). Consulting non-governmental organizations, including Amnesty International on the level and nature of human rights abuses in different countries so as to refrain from investing there in;
- 4). Establishing a clear framework for assessing the potential impact on human rights of all the company's and sub-contracts operations.⁴⁶

Multinational corporations should also encourage, the creation of trade unions to ensure transparency and accountability. While the need for foreign direct investment makes the developing countries vulnerable, multinational corporations should however, not take advantage of this situation. They should instead create a good relationship with these countries and should avoid being in complicit with them in human rights violations. If possible they should avoid investing in countries with a bad record of human rights or should make it clear to the host government that they would participate actively in the promotion of human rights.

Multinational corporations should equally promote and observe human rights issues even when these are not included in the host countries national laws. The Draft Norms on Transnational Corporations, state that multinational corporations are expected to respect Civil, Political, Economic, Social, and Cultural rights and are expected to be involved in their promotion particularly the right to development, adequate food, health, housing and education.

Multinational corporations can also take proactive steps in educating their employees on human rights. A good example of this is Statoil, a Norwegian oil company that has introduced a training program for its workers on human rights issues. This is a worldwide program throughout the countries the corporations operate in, to enable workers take responsibility on human rights issues.

It is important for multinational corporations to make channels and methods available for employees to communicate or report those not complying with company codes of conduct and international human rights. Royal Dutch Shell has also developed a training program for its managers in 'Business and human rights' which attempts to assist employees to understand their

⁴⁶ Article on human rights and corporate responsibility-start taking responsibility: Introduction to human rights principles for corporations, [Http://www.amnesty.ca/business/principles.htm](http://www.amnesty.ca/business/principles.htm)

responsibilities in promoting and presenting human rights⁴⁷ and has also created a website towards this cause.

Once codes of conduct are set up by multinational corporations, there is a need to monitor the system of implementation, which also needs to be independent to ensure that companies are actually abiding with what they have put on paper. The monitoring should not occur only when there is a claim of MNCs complicit in the violation of human rights, but should be consistent and transparent, in order to attain credibility. The workers should be involved in the monitoring process.

Apart from monitoring the observance of human rights, multinational corporations should ensure that company codes of conduct are implemented. Statistics show that some multinational corporations formulate company codes of conduct but fall short of implementing them. For example Richard Hawitt, a member of parliament responsible for the adoption of the European parliament resolution on codes of conduct for European transnational corporations states that:

“No company can have a credible code of conduct, unless within that code is a system of monitoring and implementation in order for there to be a realization of human rights enjoyment, through company codes of conduct,

⁴⁷ Business and human rights in a time of change. <http://www.business-humanrights.org/chapter3.htm>

implementation and monitoring is cardinal”. Chapter3: Business and human rights in time of change, p. 11

The Gap, a multinational corporation dealing in the production of clothes has introduced the “Gap Agreement” to avoid human rights abuses such as child labour and unfavourable working conditions for workers. This agreement also enables periodic on site visits to the factory by independent monitors, to ensure that all workers enjoy their human rights in the work environment.

In 1996, the Apparel Industry Partnership (labour intensive industry whose aim is cutting down on labour costs and has a bad record on human rights) was created and comprises of companies such as Nike, Reebok and some non-governmental organizations. The aim of this organization is to deal with the sweatshop problem, prohibiting child labour, forced working hours, giving a minimum of 40 working hours per week for each individual etc.

The World Bank is also using human rights as a factor to be considered when lending to governments and multinational corporations .In order to qualify for loans from these institutions it is important for governments and multinational corporations to have a positive image on human rights. By observing the respect for human rights a multinational corporation will be able to borrow from these institutions and investment in developing countries. Such investments bring about job creation which is clearly a human right benefit. The right to work improves and quarantees the

enjoyment of other human rights. Moreover multinational corporations are better paying than local industries due to their high percentages of foreign capital.⁴⁸

Since multinational corporations originate mostly from industrialized countries, investing in a developing country comes with advanced technology. The Local industries are usually able to benefit, from this technology transfer, and training of local staff. Multinational corporations also help governments through FDI which go to build schools, health care etc. Multinational corporations are a significant source of revenue as the tax paid by them helps in the development of a county. Through provisions of public services, this also helps raise the standard of living for all citizens. At the same time, MNC's respect of human rights, and the national laws of host state helps in to bringing about a positive change in the county in which they operate.

With a good human rights record, multinational corporations will also acquire good public relations and attract professional workers. This will in turn result in quality products and services of the MNCs. The campaigns by pressure groups such as a boycott of their products, is a major tool for MNC's observance of human rights. The Draft Universal Human Rights Guidelines for Companies emphasises the need for multinational corporations to be given more responsibilities in ensuring the observance and promotion of human rights.

⁴⁸ See. Transnational corporations, vol. No. 1, April 2001

3.2 MULTINATIONAL CORPORATIONS MOTIVES FOR SETTING UP PRODUCTION LINES IN DEVELOPING COUNTRIES

Throughout history, multinational corporations have tended to operate in developing countries for a number of reasons. Firstly, multinational corporations are able to obtain raw materials cheaply due to their abundance from developing countries. They are able then to sell the finished products at higher prices. Secondly, due to the unstable economic situation in developing countries and dependency on the International Monetary Fund and the World Bank for capital, most developing countries have favourable national laws aimed at attracting trade in flow.

Therefore the various incentives such as income tax exemption on dividend and exemption from customs duty and sales tax encourage multinational corporations to invest in developing countries. There are several fiscal incentives for multinational corporations to invest in a developing country and to externalise their profits, out of the country easily. The stable political, but poor economic situation of a developing country also serve as incentives for MNCs to invest in a given developing country.

Some multinational corporations tend to sell their products in countries with a low tax base to evade paying higher taxes in the countries that they operate in. Zambia is one country that has not yet fully explained its fiscal policy in the investment act. This has led to the MNC's rampant externalisation of profits. However, the government is in the process of

amending the investment act to provide for a more conducive business environment. The amendment of this act is directed at providing an incentive for multinational corporations to invest in Zambia.

Thirdly, multinational corporations are able to make more profit in developing countries as they enjoy tax rebates which are aimed at attracting them to invest in these countries. For example, in Zambia, when the economy was liberalized in 1991, the government provided a number of tax incentives to multinational corporations willing to invest in Zambia. However, recently the government has realized that it has lost a lot of money through these incentives, including the externalising of profits and is in the process of revisiting the laws in order to correct this imbalance.

The Hanes / Sara Lee Corporation, Disney, Nike, Reebok, Sears, and Walmart corporations are a few examples of United States companies that actually seek to invest in developing countries that have a high unemployment rate and weak environmental and labour laws in order to maximize their profits.

In order to maximize on their profits, multinational corporations decide to operate in developing countries because of their low production costs.

Lastly, some developing countries enjoy a strategic location. MNCs may therefore, wish to place production facilities nearer to their markets or sources of raw materials in order to keep down transport costs. The support

given to them by host states in their quest for development is an added incentive. These are factors that are considered by MNC's before deciding to invest in a particular developing country

3.3 WAGE FACTOR

As earlier mentioned, the fact that most developing countries are highly indebted to bilateral and multilateral institutions restricts governments from paying reasonable wages to workers commensurate with an adequate standard of living. The priority for developing countries has been to service their foreign debt and to avoid being in default. This has resulted in greater economic hardships for these countries. The minimum wage in Zambia for non-unionised workers, for example, is 245 Kwacha per day (about 20 cents). This means that an individual's minimum wage per month is 47,000.00 kwacha which is about \$12.70.⁴⁹

The workers falling under this category are general workers (blue collar workers)⁵⁰, the Acceptable conditions of work in Zambia, Section 6.d⁵¹ states the minimum wage for Zambia which is clearly not sufficient enough to provide an adequate standard of living. Maize meal, a staple food, costs 20,000.00. kwacha per 50kg bag. Two such bags are required for an average family each month. This therefore takes up about 99% of the salary earned.

⁴⁹ Zambia – Compensation and Benefits Legislation,
<http://www.salaryexpert.com/seco/careerjournal/hrodes/ZAMBIA.htm>

⁵⁰ Zambia – Compensation and Benefits Legislation - Acceptable conditions of work in Zambia Section 6.d, <http://www.eriery.co.uk/freedata/HRCodes/ZAMBIA.htm-19k>

⁵¹ Zambia-Compensation &Benefit Legislation
(<http://www.eriery.co.uk/freedata/HRCodes/ZAMBIA.htm-19k>)

But the worker still has to provide for other essentials, such as meats, vegetables, rent, transport to get to work, school fees, etc.

Thus a worker is not able to afford a decent living with this salary. The result is malnutrition of kids, dropouts of kids from school etc. In Ghana, efforts have been made to increase the minimum wage of the country to 9000 Cedis, which is equivalent to \$1.05 per day. This minimum wage was rejected as it was only 28% increment from the previous one which the workers rejected as insufficient. The workers have demanded for a 68% increment instead⁵².

3.4 IMPROVEMENT OF HUMAN RIGHTS BY MNCs

As previously noted, all human rights are interrelated, interdependent and indivisible. They are equal in that no human rights are more equal or more important than others. The enjoyment of one human right leads to the enjoyment of other human rights and this is more like a chain reaction. Under international law, multinational corporations are expected to respect human rights regardless of whether the host government respects them or not. Through investment in developing countries by multinational corporations, there is job creation. This improves the chances for attaining the right to an adequate standard of living as workers are able to receive a more adequate salary for their sustenance.

⁵² Ghana: Dissatisfaction over new minimum wage
(<http://www.africaonline.com/site/Articles/1,3,52274.jsp>)

Article 11 of the International Covenant on Economic Social and Cultural Rights clearly provides for the right to an adequate standard of living. This implies access to housing, and food as the worker acquires the power to purchase food or acquire land to grow food for consumption. The right to health (article 12-ICESCR) can also be attained as an individual is also able to afford proper medical facilities with his or her salary. An individual gets a salary because he enjoys the right to work under good working conditions (article 6 and 7-ICESCR). These rights are attained through job creation by multinational corporation's investment in a particular country.

The ability to form trade unions and use collective bargaining means that there can be a realization of the workers' right to freedom of expression and assembly which gives them a channel to air out their grievances or demands.

Furthermore, the right to education is realized through the building of schools with taxes earned from MNCs that invest in the country. Furthermore with in-house training programs, there is transfer of technology to the workers. Article 13 (C.) of ICESCR provides the right to higher education. Multinational corporations are expected to "protect, respect and fulfil"⁵³ certain obligations under the ICESCR covenant, as they are also important organs of society with a duty to fulfil⁵⁴. The right to education

⁵³ See, General Comment 14 of ICESCR

⁵⁴ Rights and duties for companies as entities of society

also brings the possibility to get a good job in a competitive market. This leads to the enjoyment of various other human rights.

At the same time, most developing countries in which multinational corporations operate have signed, acceded to or ratified various human rights conventions, such as the CERD, IESCR, ICCPR, CRC, CEDAW and CAT. They should therefore use this leverage to ensure that MNC's respect human rights, such as paying an adequate wage so that workers may attain their various human rights.

Despite the fact that governments have the primary responsibility of ensuring the full enjoyment of human rights by their citizens, multinational corporations also have a social responsibility as their activities have an impact on the communities they operate in as MNC's are key players in society⁵⁵.

Multinational Corporations can also affect the right to self-determination provided in article 1 of the Economic Social and Cultural Rights, for example, by dumping toxic wastes in rivers or destroying of large forests which affects the local communities' right to a healthy environment and health. MNC's should therefore follow the laid down rules which they normally perceive as too costly, instead of choosing the easy way out such as getting rid of waste in unauthorized areas. By acting according to rules,

⁵⁵ Sustainable Growth Fund.ING.InvestmentManagement

multinational corporations can help keep the environment clean and healthy
and therefore promote the right to health.

4 CHAPTER 4

4.1 METHODS OF PROTECTION AND OBSERVANCE OF HUMAN RIGHTS

4.2 LOCAL LAWS

Through the liberalization of their economies, developing countries have enacted certain laws and regulations to attract foreign investment. For example as mentioned earlier in the case of Zambia, the Investment Centre was created (through the investment act No. 19 of 1991), to coordinate policies on, and facilitate investment in the country and also to ensure the monitoring of multinational corporations in the way they carry out their business activities.

The liberalization of the Zambian economy in 1991 was an effort to attract foreign investment with a view to boosting the economy. The Investment Centre therefore, amongst other functions, facilitates the registration of investors and the issuance of investment certificates. Once an investor has fulfilled all the necessary formalities and obtains the work permits, business can begin. Investors are also provided with General incentives or special incentives.

Under the general incentives, investors allowed to do business in Zambia are:

- i). Eligible to be taxed only on the portion of income determined by the commission;
- ii). Entitled to capital allowances usually deducted in determining the gains or profits after being offered special rates.

Furthermore, the immigration and deportation act as amended by Act No. 5 of 1996, states that investors who invest at least a minimum of Two Hundred and Fifty Thousand dollars and employs at least 10 people qualifies to a self-employment permit or resident permit⁵⁶.

Secondly, the special incentives as repealed by act no. 5 of 1996, state that small scale enterprises issued with licenses before 27th January, 1996 and registered under the small enterprises development act, are entitled to exemption from customs duties and value added tax, that are payable on imported equipment used by them. The Centre therefore, helps investors obtain a license permit and performs registration and authorization formalities for the business enterprises.

Currently, the Zambian government is about to introduce a law that will require investors to keep some of their profits in the host country and not to externalise it all. Under various national laws, multinational corporations have a duty and legal obligation to observe human rights, for example they are not to discriminate in their recruitment practices on the basis of race, sex, age or nationality. Under consumer protection laws, multinational

corporations may be liable for misleading advertising or public statements regarding their products or operations⁵⁷.

In some cases, some multinational corporations have been found criminally liable for their actions. This is in a case where they have been found negligent, for example, under the Alien Torts Claims Act (ATCA). A case in point is that of the *Doe v. Unocal Corp.* This is the first ATCA against a corporate defendant where, Burmese villagers sued a Californian Oil Company for international human rights violations perpetrated by the Burmese military junta⁵⁸. The multinational corporation if found guilty, could be liable for aiding and abetting the Burmese military junta to commit human rights violations.

4.3 UNION PRACTICES

Union practices vary from country to country. It has been observed that most multinational corporations prefer to do their business in countries that have flexible and ineffective labour laws. One such multinational corporation accused of seeking and setting up operations in such countries is Nike.

In Zambia, formation of trade unions is recognized in the constitution of Zambia. The constitution provides for all citizens to have the right to form trade unions that are independent from the government and political party's

⁵⁶ See, The Investment Act of Zambia No.5 of 1996

⁵⁷ See, Activists Welcome Ruling That Corporations "Must Speak Truthfully" by Jim Lobe (<http://www.commondreams.org/headlines02/0506-01.htm>)

influences. Workers in Zambia have therefore the right to strike if all legal means to resolve the dispute fail. The law provides for a “one union, one industry” principle and employees and unions in each industry are allowed to negotiate collective bargaining agreements without governmental involvement.

The law provides that if disputes referred to conciliation fail to be resolved, they are referred to the Industrial Relations Court. If all else fails, they are eventually referred to the Supreme Court.

In Nigeria, union practices have been greatly abused and the government has been found to be in violation of various International Labour Standards. In this regard a Commission of Inquires was established under article 26 of the ILO convention. Some of the violations of the ILO standards relate to imprisonment of trade union leaders without trial. Despite protests by the international community, Nigeria has not done much to correct the situation.

4.4 UN RESOLUTIONS AND PRACTICES

The United Nations General Assembly has in recent past adopted a number of resolutions and declarations that directly or indirectly affect the actions of multinational corporations in relation to the protection and observance of human rights. This action has been taken due to the realization that human rights are routinely violated by MNCs at both the national and international level. Multinational corporations have also equally felt the need to get rid of

⁵⁸ See, Recent ATCA Cases Against Corporate Defendants (webmaster@earthrights.org)

the negative image surrounding their operations following enormous pressure from human rights groups, including the UN.

There has been a call for multinational corporations to cooperate in the observance of human rights and to be socially responsible. This call was made by the General Assembly in its resolution 52/186 dated 21 February, 1998, and by the Joint ministerial meeting of the International Monetary Fund and the World Bank, on the subject of "Managing the Global market", which resolved that:

“Developed nations be observed to make sure that they are working to help developing countries, not just impoverished nations to develop, not just expecting cheaper labour and resources...”

This means that they must take positive steps that will lead to development in the host countries. In this resolution, the United Nations has expressed its objection to the use of cheap labour in order to generate more profit. Cheap labour comes in different forms, including use of child labour, forced labour and having poor wage structures in developing countries. This practice is prohibited by the International Covenant on the Rights of the Child and Forced Labour adopted in the 1998. The ILO also prohibits child labour and forced labour that comes with low wages and bad working conditions.

Throughout history multinational corporations have had a negative image for being associated with human rights violations and corrupt practices. The United Nations thus found it necessary to bring to the limelight multinational corporation practices that violate human rights. The United Nations Conference on Trade and Development (UNCTAD), was established as a critical channel for monitoring the activities of multinational corporations. It has helped draw up many resolutions on the abusive practices and violations of human rights and has made recommendations regarding the action to be taken against such abuses.

The United Nations further created the Centre for Transnational Corporations to monitor multinational corporation's activities with regard to their operations. However, the Centre is no longer in existence, it was scrapped during the Rio and Johannesburg conferences due to lack of support from the developing countries who felt that it was not taking the necessary action against multinational corporations that were in violation of human rights.

4.5 PRACTICE OF OECD

The Organization for Economic Cooperation and Development (OECD) guidelines on good conduct of multinational corporations were first established in 1976 with the aim of helping them improve their governance. Since these guidelines are non-binding, multinational corporations are responsible for their implementation through commitment. The OECD

guidelines identify four core human rights set out in International Labour Organization standards and United Nations conventions. These are:

- 1). Freedom of Association;
- 2). Non-discrimination in the work place;
- 3). Ban on child labour;
- 4). Ban on forced labour.

In the observance of these core labour standards and human rights, the OECD provides that employees have the right to form and join trade unions. Secondly, children below the age of 15 are not allowed to be employed, and multinational corporations are requested to be actively involved in the eradication of child labour. Thirdly, they prohibit any form of forced labour and encourage equal pay and benefits. Lastly, the guidelines prohibit discrimination of any kind at the work place.

According to these OECD guidelines, violation of these norms is a matter of particular concern ⁵⁹and all multinational corporations that adhere to these principles are expected to respect the national laws of the countries they operate in. For example, multinational corporations are expected to give information on how their activities affect the environment and, countries that adhere to the OECD guidelines are expected to establish a National Contact Point (NCP). The NCP acts as a centre dealing with inquiries and

⁵⁹ Review of the OECD Guidelines for Multinational Enterprises
(<http://www.web.net/~chaihr/pubs/oecd.htm>)

is also a channel for promoting the guidelines and helps sort out issues that relate to the implementation of these guidelines.

If multinational corporations operating in countries without such facilities are found to be involved in illegal acts or acts contrary to the guidelines, groups or individuals can raise the matter in the multinational corporation's country of origin. An example of an NCP is the United Kingdom National Contact Point where individuals and groups can raise issues concerning corporate behaviour of multinational corporations in the United Kingdom operating in countries that adhere to the guidelines.

In Zambia for example, AFRONET a non-governmental organization, has lodged a complaint against the Anglo-American corporation for violating OECD guidelines, claiming that during its bid for the Zambia Consolidated Copper Mines (ZCCM) the mining giant used "anti competitive behaviour" by frustrating other buyers or bidders of the company and abused "its powerful and privileged position as a preferred bidder"⁶⁰.

The behaviour of the Anglo-American Corporation has been perceived as a corrupt practice or involved bribery which is prohibited under the guidelines. This complaint is currently being investigated by the UK NCP, pending an outcome. Furthermore, Anglo-American has pulled out of the country before the end of the contract, thus causing loss of jobs for some

⁶⁰ See, OECD Guidelines for Multinational Enterprises
(<http://www.2tidti.gov.uic/ewt/ukncp.htm>)

11000 miners. Another example concerns a case in which a Canadian NCP prevented the eviction of some peasant farmers from a mine land in Zambia. The procedural guidelines of OECD helped prevent this problem from occurring in Zambia.

4.6 THE GLOBAL COMPACT IN STANDARD SETTINGS

The Secretary General of the United Nations Mr. Koffi Annan, in 1999 proposed an initiative called the Global compact. It comprised three components, namely the environment, human rights and labour principles. The objective was to put a challenge to business leaders to join an international initiative that would bring companies together with United Nations agencies to take into account or to observe human rights, labour rights and environmental rights during their operations.

These principles direct multinational corporations to put into consideration human rights, environmental issues and labour rights standards during their operations for the benefit of everyone and the global community as a whole. Towards this end, various meetings have been held to try and promote these principles. Multinational corporations are free to subscribe to the global compact and to publicly announce their commitment to the nine principles of the compact by posting their name on the global compact website.

Although the principles are not legally binding, the global compact has attracted the attention of a number of multinational corporations. Pressure

groups have been lobbying MNC's to ascribe to the Global Compact with much positive result. Since the principles are not legally binding, there is a possibility that multinational corporations will not honour their commitments. The compact depends on the commitment of MNCs that have promised to be transparent in their activities, accountable in their actions, so as to integrate the nine principles in all business activities and thereby support United Nations goals. Most governments have reservations for making multinational corporations directly accountable to the United Nations.

Such governments feel that giving multinational corporations the same leverage as states, could give the latter enormous strength and could eventually undermine state sovereignty. As a result of the global compact, some multinational corporations, such as ABB, AHOLD, BP, Cadbury Schweppes etc, have taken steps to adopt formal company policies specifically on human rights.

The Global compact has so far been launched in many countries, for example in Zambia the Global compact was launched by the French Ambassador to Zambia Mr. Jean Paul Monchau on the 12 March, 2003. To date 61 Zambian based institutions and companies including Tata (Z) Limited, Zambia Investment Centre, Zambia National Broadcasting

Corporation, Konkola Copper Mines etc⁶¹ have signed the global compact and have committed themselves to put these principles into practice.

Through the global compact Nike has announced its change of activities for the better. Its negative publicity is derived from it's use of sweatshops and acting against labour unions as well as human rights groups in support of independent monitoring programs. To show that it supports the promotion and protection of human rights, Nike has established an organization called the Workers Rights Consortium (WRC).

Secondly, Shell Corporation has also signed up to the compact. It should be recalled that the corporation has a negative reputation on human rights abuses including the most controversial one involving the Ogoni Crisis in which a union activist Ken-sarowiwa, was executed by the Nigerian government together with eight others for protesting against the drilling of oil and pollution of the environment by Shell in the Ogoni region. The multinational corporation was found to be in complicit with the host government. The above multinational corporations are among “a partial list of some of the 50 global compact partners with the most enormous human rights and environmental records”⁶².

⁶¹ See, About the Global Compact
([http://www.uniglobalcompact.../pagebuilder\[mypage\]?pagename-un.men.what_it_is.oversee](http://www.uniglobalcompact.../pagebuilder[mypage]?pagename-un.men.what_it_is.oversee) 7/11/03

The objective of joining the global compact is in order to create a positive image and to introduce standards compatible with the initiative of helping desist from human rights abuses and promote transparency. The global compact encourages multinational corporations to make the compact part of their corporate strategy, human rights, labour rights and environmental rights so that they become part of the daily activities of multinational corporations.

The global compact is therefore a positive step for multinational corporations to take human rights, labour rights and environmental rights into account in their business activities. There is a need to lobby for the compact to become a legally binding instrument and for establishment of a monitoring system to ensure compliance.

4.7 ILO STANDARDS AND PRACTICES

The International Labour Organization's mission is to "promote strong social policies, justice and democratic institutions" and is the mandated international organization and competent body to set and deal with international labour standards. It enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles⁶². Members of the International Labour Organization have an obligation "to respect, promote and to realize in good faith" this convention.

⁶² See, The Global Compact Corporate partners-Corpwatch
(<http://www.corpwatch.org/campaigns/PCD.jsp?artidad=93>)

⁶³ About the ILO-Declaration of Fundamental Principles and the Rights at Work

The Universal Declaration on Human Rights clearly states, in Articles 23 through 25, that labour rights are universal rights. In the recent past, these articles have been subject of violation by some multinational corporations, in their quest to maximize on profits. The 1998 Declaration of Fundamental principles and rights at the workplace adopted by the ILO sets out the following labour rights:

- 1). The right to organize and engage in free collective bargaining;
- 2). The right to equality of treatment and equal remuneration for work of equal value;
- 3). A minimum working age;
- 4). The abolition of forced labour⁶⁴.

Article 12 of the international labour organization states the obligation of the organization to support the above efforts. Member states of the organization are requested to submit reports to the International Labour Organization in accordance of article 19 paragraph 5(e). This would enable the ILO to know if the standards are being followed. This enables the ILO to know the effectiveness of its assistance to the member states and to determine future practices.

⁶⁴ See, Article on the international Labour Standards Enforced(<http://www.iol.org/public/english/standards/norms/enforced/index.htm>)

This procedure of monitoring is called the regular systems of supervision where in the case of a specific allegation against any member state, including those that are not part of the covenant, can be reprimanded if the allegations are proved.

There are eight fundamental international labour conventions which a majority of developing countries, including, Zambia and Nigeria, have ratified. For example, Zambia has ratified the following eight fundamental conventions:

- 1). Convention 87 (1948)- dealing with freedom of association;
- 2). Convention 98 (1949) - concerning the right to organise trade unions and for collective bargaining. This is similar to convention 87 above.
- 3). Convention 29 - which prohibits forced labour and compulsory labour.
- 4). Convention 182- which provides for the right of workers to a minimum age.
- 5). Convention 138 - concerning the elimination of child labour. Only persons above the age of 18 years may be employed.
- 6). Convention 100 - equal remuneration for men and women workers for work of equal value.
- 7). Convention 111 - Dealing with non-discrimination in employment.

8). Convention 105- Dealing with forced labour.

Recently the ILO has established the “Code on AIDS and Employment”. This code applies both to prospective employees and those already employed in the work place. It prohibits discrimination against people who are HIV positive. It also calls for workers education, awareness and preventative programs on the HIV and AIDS pandemic⁶⁵. The international labour conventions mentioned above are aimed at supporting worker’s rights, and are a channel of trying to overcome or eradicate poverty. They are a "cornerstone of decent work".

4.8 OUTCOME OF THE RIO AND JOHANNESBURG CONFERENCE PROTECTION OF THE ENVIRONMENT

The Rio Conference on Sustainable Development of 1992, was a starting point for working towards international agreements that respect the interests of all and protect the integrity of the global environment and development system.

It was equally an affirmation of the Stockholm declaration of 1972, where the United Nations requested governments to revisit their methods of economic development to find better means that would avoid environmental

⁶⁵ Code on HIV/AIDS and Employment in the Southern African Development Community(SADC)-<http://www.costau.org.za/doocs/1998/sadc-hiv.htm>

degradation. For many years the key players in environmental degradation had been multinational corporations and individuals. Due to the persistence of environmental degradation, the United Nations thought it necessary to bring about a change in the behaviour and attitude of the actors concerned.

In the past years there has been no regard on the implications of over consumption of natural resources by key players due to the desire for profit. As earlier mentioned, “some corporate executives claim companies are designed to make profit, not to make the world a better place”⁶⁶. Furthermore, MNC’s dump toxic materials with no regard to it’s consequences on the environment. This has been possible due to the weakness in environmental laws.

This action has great effect on nature and the public. Such trends have been of great concern and have aroused the need for governments and the UN to "scrutinize" the production of toxic components in a systematic manner. Therefore the Rio summit has been viewed as bringing about three significant points. Firstly, Agenda 21, which “addresses problems on combating poverty, changing patterns of productions and consumption and conserving natural resources that are a basis to life”.

Secondly, the agreement on the environment and development containing a number of principles that define the rights and responsibilities of states as provided in Article 2 of the declaration, while states have a right to use their

natural resources in anyway, this however is not, “absolute”. A government should use its resources in a systematic way and should not abuse it.

Lastly, a statement of principles relating to forests which aims at ensuring the good management of forests worldwide. This was a reaction to the depletion of natural resources through deforestation and a lack of responsibility to replant the trees that are cut down.

Furthermore, two legally binding conventions were adopted:

1). The United Nations framework Convention on Climate Change which calls on governments to cut down on their 'Green house gas' to avoid global warming and;

2). The convention on Biological Diversity which concerns the conservation of important biological resources. These international agreements have actually shown the “interdependence between the environment and development”⁶⁷.

The Rio Conference therefore, brought about significant global agreements aimed at the preservation of the environment. Developed countries also pledged to provide "new and additional" financial resources, over Official Development Assistance (ODA) flows (no specific amounts were pledged). This was to assist the developing countries with resources to alleviate this

⁶⁶ Rio on Environment and Development

problem. It is unfortunate to note that most countries that made these pledges have not lived up to their promises. This conference has been perceived as a failure, since no binding international measures were adopted to look into the malpractices of multinational corporations and to hold them accountable for their action relating to the pollution of the environment. For example, “the United Nations Centre on Transnational Corporations was closed and a proposed Code on TNCs was scrapped”⁶⁸. However, on the other hand, the Rio Conference was considered to be positive one as it was perceived to be a way ‘for environmental protection, poverty alleviation and economic development’⁶⁹.

The Johannesburg summit was held in 2002. This was more of a progress review of the Rio conference. The 1987, Kyoto Protocol, to reduce green house gas emissions, was found to have been ignored by countries such as the United States, Australia, Canada and Russian which to date have not yet ratified the convention. The Kyoto Protocol was supposed to have entered into force by the commencement of the Johannesburg conference.

At the Johannesburg summit, the Bush Administration's attitude was seen as an obstacle to the success of the conference by putting its priority on multinational corporations against the effects their actions had on human rights. Most multinational corporations have been considered a threat

⁶⁷ See, Rio on Environment and Development (<http://www.habitat.ige.org/agenda21/rio-dec.htm>)

⁶⁸ Corporate Accountability & the Johannesburg Earth Summit (<http://www.foe.org/WSSD/rightsforpeople.html>)

to the depletion of natural resources which provide a basic need for people. There was a call for the need to implement and enforce the Rio earth summit agreements. The call included:

- 1). Increased global equity and an effective global partnership for sustainable development;
- 2). Better integration of environment and development at the international level;
- 3). Adoption of environment and development targets to provide focus to the Rio process; and
- 4). More effective action at the national level with stronger international monitoring⁷⁰.

⁶⁹ See, as above

⁷⁰ See, From Rio to Johannesburg-a lost decade,C.Dasgupta-The Hindu business on line, 26/8/02

5 CHAPTER 5

5.1 CONCLUSION

Through this study, the general shared view is that, multinational corporations believe they do not have the responsibility for human rights violations nor do they feel the responsibility to promote and protect these rights. Instead, they regard governments as primarily responsible for violations of human rights. Furthermore governments bear the responsibility for ensuring protection and promotion of these rights. However, in the last ten years, there has been enormous sensitisation carried out on this subject. This has brought the realization that multinational corporations also have a responsibility and a duty to observe human rights since they are also social organs in society and whose activities affect everyone in the communities they operate.

There has been an increasing tendency for governments to adopt national laws to make multinational corporations accountable for their actions. Furthermore there are conventions, such as the Genocide convention, by which MNC's can be held directly accountable for their actions. There are also various initiatives, declarations and commitments that have been adopted to ensure that MNCs uphold human rights. Some of these have, however, not been honoured since they are not legally binding instruments, rather they depend on the good will of the corporations themselves.

There is therefore a need to ensure that these declarations and initiatives are legally transformed into binding instruments if accountability is to be achieved. Such declarations and commitments are, however, a starting point for making MNC's responsible and accountable as well as in the observance of human rights and in realizing that they have a duty in society. The full realization of multinational corporations that they have a duty in promoting and protecting human rights is not a short term but long term strategy. The continued pressure of various human rights groups will also eventually lead to holding multinational corporations directly accountable for their actions in connection with the promotion and protection of human rights.

RECOMMENDATIONS

There is need to hold states accountable for the illegal actions of multinational corporations as they have the responsibility to ensure that rules of the land are implemented and respected. This can be done by, making national laws consistent with international human rights standards. The mechanisms used at the international level such as the public shame factor should be used in order for states to comply and avoid being in complicit with multinational corporations in human rights violations.

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