

# Emergency and protection of investment in Africa: exploring human rights approach of investment in Republic of South Sudan.

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## Abstract

*As global economy becomes increasingly interconnected, investment in developing regions such as in Africa has become a crucial factor in promoting economic development and poverty alleviation. Examining the intersection of human rights and investment in South Sudan, the need for a more comprehensive and holistic approach to emergency situations that not only addresses immediate needs but also the long-term implications for human rights and sustainable development. The paper discuss the potential benefits of integrating human rights considerations into investment law and policies in South Sudan, including improved social outcomes, increase investor confidence, and accountability for the foreign investors and governments. This paper also explores the human rights approach to investment in South Sudan, focusing on the protection of investments in emergencies. The human rights based approach to investment can provide a more sustainable and equitable framework for promoting development in fragile states.*

## 1.1. Introduction

After more than 20 years of civil war, South Sudan gained its independence on 9 July 2011. The first civil war in Sudan started from 1955 and ended with the signing of Addis Ababa Peace Agreement in 1972. The second civil war, which broke out in 1983 as a result of abundant resources such oil and gas were a major factor and continued until 2005, when the Sudan government Bahir and Sudan People Liberation Movement (SPLM/A) signed a Comprehensive Peace Agreement (CPA). Investment in South Sudan is hazardous because country's lack infrastructure, political unrest, and violations of human rights. However, it is important to consider human rights implications of investment in order to ensure that rights of local communities are protected and respected. Investment in South Sudan can be safeguard or protect by respecting human rights by meaningfully and openly interacting with stakeholders and local populations. The United Nations (UN) established mechanisms

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that states should abide by in order to ensure that their investment does not contribute to human rights violations or abuses.<sup>1</sup>

## 1.2. Legal Definition and phenomenon of Investment

According to Black's Law Dictionary, an investment is an expenditure made to acquire property or assets for generating revenue, essentially a capital outlay.<sup>2</sup> The definition becomes just as clear as the explanation of "investor" in the same dictionary. A person purchasing securities or other assets in order to make a profit without using up the principal. More broadly, someone who spends money with the expectation of making a profit.<sup>3</sup> From the above descriptions, Investment Law can be define as a collection of regulations governing the investment industry, outlining the rights, obligations, and responsibilities of investors at the national or international level. The legal definition is essentially links ownership of the invested property in any form, and this is the economic theory of investment itself, because legal rules are formulates to specify duties, responsibilities and ensure investors rights in their relation to themselves and states in which they invest their properties and money both nationally and internationally.<sup>4</sup>

The South Sudan Investment Promotion Act of 2009 merely defines "investment" as "national, foreign, direct and indirect investments and portfolio" in section (5), leaving out any more clarification. There are two opposing perspectives on the phenomenon of investments. One way is put money to work for period of time in some sort of project or undertaking to generate positive returns. It is the act of allocating resources, usually capital with the expectation of generating an income, profit, or gains. The second way involves moving our properties and assets taking them out of storage, using them for investment to benefits from them through getting income profits. These are the good ways to manage assets or money. However, there is another kind of saving that is longer-term and more dependable.<sup>5</sup>

## 1.3. Emergence and protection of Human Right in Investment

The art of Investing has been a longstanding method of commerce and trade; it has been practiced since the dawn of Homo economics.<sup>6</sup> Throughout the ages, people have sought to grow their wealth by working harder to increase the returns from selling goods at local

1 The UN Principles on Business and Human Rights, Principle I & II.

2 *Garner B. A.*, Black Law Dictionary, 10 edition, USA, Co. © West Thomson Reuters, 2009, P.954.

3 *Ibid*, P. 955.

4 *Dagbanja, D.N.*, The Investment Treaty Regimes and public interest Regulation in Africa, Oxford, Oxford University Press, 2022, P.220.

5 *Ibid*

6 Andrew, W.Lo. and Foerster, S.R., A Brief History of Investments, Princeton University Press, 2021, p.1 available at <https://doi.org/10.1515/978069122684-003>.

markets can linked to risk or reward. Local laws were used to settle disputes, but when European traders ventured to trade with communities in Asia, Africa, and Latin America, it was deemed that their home country's laws would apply to them, not the laws of the local communities. From then on, trade expanded from local to global levels, making it no longer just a domestic affair.<sup>7</sup> The foreign investments were then protected by military force or diplomatic protection<sup>8</sup> as a result domestic and international investment law is regulating it now.

In the context of prevention and protection, it is important to recognize human rights principles to influence the way investments are made and managed. In addition, investors should consider the potential social, economic, and environmental impacts of their investments on local communities, workers, and the environment. The emergencies and the protection of investments in South Sudan are key concerns that must be addressed through a human rights-based approach. With the ongoing conflict and political instability in the country, investors and communities face numerous risks that threaten their investments. For instance, South Sudan in 2018 experienced a tanker fire disaster, more than 1,300 people have died and at least 791 have received burn injuries.<sup>9</sup> Also in February 2024 in Wau market as one of the counties in South Sudan a petrol station destroyed or burst into flames causing panic among residents, and many died "Right to life violated" and some were injured.

South Sudan is open for business to companies, organizations and businesses seeking the strategic opportunity of tapping into the potential of a fast emerging market in Africa. South Sudan is concentrated in the oil and gas sector and other sectors that have attracted some investment include agriculture or arable land, mining, and infrastructure development. The investors are China, Malaysia, India, and Uganda are among the top countries investing in South Sudan.<sup>10</sup> Therefore, it is essential to prioritize the human rights investment practices to ensure sustainable development and stability in South Sudan.

## **2. Reasons for Involving Human Right Approach in Investment Law and Treaties.**

Human rights approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promote and protect human rights. International investment law and human rights stan-

7 Schefer, K.N., International investment law, Text, cases and materials, USA, Edward Elgar publishing limited, 2013, P.5.

8 Ibid.

9 Ewbank, C., A systematic review of oil tanker truck disasters, 2019 available at <https://www.sciencedirect.com/science/article/abs/pii/S0305417918306727> (accessed on 20 June 2024).

10 Southern Sudan investment Authority, South Sudan: Investing, May 2024, available at <https://www.tradecub.stanbicbank.com/portal/en/market-potential/south-sudan/investing> (accessed on 20 June 2024).

dards are interchangeable. The reasons for involving human rights approach in investment are as follows:

- (i) The investor's may violate human rights or assist in their infringement.
- (ii) The investor's human rights may be violate by the government or by an individual.
- (iii) The State's may implement a human rights-driven policy that infringes upon the investor's property rights.
- (iv) To address the inequalities and discriminatory practices and unjust distribution of power, that impede development progress often development and result in-group of people been left behind.<sup>11</sup>
- (v) A party's to the proceedings may with regard to procedural matters, refer the precedent of international human rights courts.
- (vi) Lastly, when interpreting or applying the duties related to investment protection, a party may refer to international human rights standards.

### 3. Domestic Legal Framework's for Investment protection in South Sudan

Investment as economic or commercial activity is organized and regulate by law; therefore, business transactions and investment in this regard get their legitimacy within legal framework at all levels domestically and internationally.

Legislation related to investment at domestic level comprises of Legal instruments collectively regulating investment issues, and as such, each instrument may dealt with under a suitable title within the study. Therefore, the topics under legislation here are about investment references in the constitution, and the principle statute that mainly regulates the investment in South Sudan. Investment promotion Act, 2009, and as noted the rest namely workers, taxation, investment protection and dispute resolution will be consider accordingly, and respectively in order to give a complete picture of at least the legal framework.

#### 3.1. Transitional Constitution of South Sudan (TCSS), 2011

The Transitional Constitution provides in its guiding principles for Development and Equitable Sharing of National Wealth<sup>12</sup> that excessive taxes on citizens and private sector and investors, and provides among others that the petroleum and gas development and management shall be guided by the following principles..." creating a secure and healthy investment environment."<sup>13</sup>

11 *UN Sustainable Development Group*, Human Right: Based Approach, available at [https://unsdg.un.org/2030\\_agenda](https://unsdg.un.org/2030_agenda) (accessed on 20 June 2024).

12 TCSS, article 169 (9),

13 TCSS, article 173 (h)

### **3.2. The Investment Promotion Act, 2009**

This law was issued to repeal their Investment Act, 2004, and in section, 3 states that; this Act is provided for promotion and facilitation of investment in South Sudan which shall be used throughout this note and the creation of administrative operational and government framework of South Sudan Investment Authority, to govern and manage investment in the country.<sup>14</sup> The above Act provides among others the following:

#### *(i) Investment Certificate*

The Investment Act obliges national and foreign investors who intend to invest in South Sudan to obtain investment certificates from the investment authority so that they can be entitled to investment incentives and benefits. According to this Act, investment certificate maybe transferred, amended or revoked whenever it does not breach any condition prescribed in that certificate and subject to any restriction in the regulations.<sup>15</sup>

#### *(ii) Investment Benefits*

Upon the issuance of investment certificate, the holder of investment certificate shall be entitled to the following:

- A. License upon application made within twelve months after the investment certificate is issue and upon payment of the applicable fee, if any, and any other fee as the case may be.
- B. Renewed initial entry permits, which shall include owner, different employees, shareholders or partners for two years on the condition that it work within the prescribed time, and that the holder of the permit complies with the laws of South Sudan. It is worth mentioning that, for each permit the holder of investment certificate is entitled to the issue of a dependent's pass (reentry permit) upon application and payment of a fee and in accordance with the law and regulations.<sup>16</sup>

#### *(iii) Investment Incentives*

An investment enterprise as the case may be, shall be entitled to such benefits and<sup>17</sup>incentives as provided in the second schedule of the investment Act, 2009 and any other law in South Sudan, for example tax law. They include among others;

14 South Sudan investment promotion Act, 2009, section 3.

15 South Sudan investment promotion Act, 2009, section 24.

16 Ibid, section 30.

17 Ibid, section 32.

- a) Concession (discount)
- b) Privileges – Tax Exemption
- c) Preferential Treatment

#### **4. Investment Protection**

Investment activities are fully protected at the domestic level through various local legislatures, for example investment Acts, Taxation or revenue Laws and other including bilateral and multilateral agreement.

##### **4.1. Investment Guarantees in South Sudan**

The law provides for many guarantees to safeguard and protect investment in South Sudan and through bilateral, multilateral<sup>18</sup> and international law, so that the investors assure that the investment environment is conducive and appropriate to invest in the country. Those guarantees are as follows:

###### *4.1.1. Fair and Equitable Treatment*

Each Party at all times accords fair and equitable treatment to the nationals and companies of the other party and to their property, enterprises and other interests without discrimination.<sup>19</sup> Since then. Many bilateral and multilateral treaties provide for fair and equitable requirements so that they may fill any gap in the treatment of investors. Foreign investors host state expects to be transparent, consistent, and should not discriminate against aliens.

Under South Sudan investment Promotion Act, 2009, all domestic and international investors are equal before the law, non-discrimination based on country of origin or nationality,<sup>20</sup> and equal treatments are allow and encourage to the states. Foreign investors are subject to the same laws applied to domestic business organizations.<sup>21</sup> Therefore, foreign investors may own business organizations in any sector of the economy.

###### *4.1.2. Umbrella Clause*

This investment clause is included in the treaty and contract to ensure protection that guarantees the observation of obligations of protection of human rights assumed by the host state so they were see as a bridge between private contractual arrangements, the domestic law of the host state and the public international law, allowing for more investor security. However, the wording of the umbrella clause is not identical; therefore, interpretational

18 South Sudan Investment Promotion Act, 2009, Section 39 (4) (b).

19 *ibid*, Section 33.

20 *Ibid* section 33(4)

21 *Ibid*, section 33 (6).

approaches may slightly vary in application, but the purpose remains the same for the implementation purpose. Each party to the treaty or contract must respect the terms as agreed on.

#### *4.1.3. Extraordinary Circumstances*

Investors and the host state are placed in uncomfortable situations during tough times, such as during wars, emergencies, tragedies, and unusual circumstances. The host state is required to attempt to establish legal measures to prevent these scenarios. Nonetheless, as the host state took all reasonable precautions to avoid the occurrence both before and during it, it is not liable under international customary law or treaty law for the damages incurred by the contracting party. Most European and US treaties provide compensation in these unnatural conditions.

#### *4.1.4. Prohibition of Expropriation*

The protection of legal rights is the balancing of conflicting interests in the particular case. International human rights law provides guidance on this issue. Under international human rights, bodies have examined the interference by seeking balance between public interest and private rights of ownership.<sup>22</sup>

As a matter of rule, government or any other person has no right to nationalize or compel any domestic or foreign investor to cede, (relinquish) all or part of his or her property, interest or capital to any other person or government at all levels. Exception to this rule may only be for the following grounds and conditions:

- i. if the expropriation is carried out for national interest;
- ii. expropriation is done without discrimination;
- iii. expropriation shall be done in accordance with due process of law;
- iv. payment of fair and adequate compensation determined according to fair market value of the expropriated property, paid without undue delay; and
- v. The investor has the right of objection before, the court of law.<sup>23</sup>

#### *4.1.5. Intellectual Property Rights*

Based on international Conventions to which South Sudan is a signatory, the government protects all forms of intellectual property rights of all persons and investors. Article 35 of South Sudan investment Promotion Act, 2009 requires the Government to protect Intellectual property ownership rights are copyrights, trademark, geographic indications, commercial

22 *Garcia L.G*, The Role of Human Rights in International Investment Law, p.2.

23 South Sudan Investment Promotion Act, 2009, Section 34.

secrets, industrial patents, and bio-diversity, and so on are supposed to be registered by their owners according to the law so that they enjoy proper protection.<sup>24</sup>

#### *4.1.6. Access to Public Information*

The legislature gives investors and business rights to have direct and open access to public information in order to facilitate their work; such and access shall be done in accordance with the law. Public information includes decisions of courts and any other adjudicative bodies as well as other public information that has connection with national relationship to their investment interest.<sup>25</sup>

#### *4.1.7. Free Movement of Capitals*

According to the Investment Act, 2009, there are no restrictions on investment activities. No law restricts freedom of movement for a registered investor to work anywhere in the country. Business organizations are subject to tax and have the right to dispose, take their assets or money, move them convert them into other currencies and even transfer and repatriate them outside South Sudan, through an authorized bank, as provided for in the law.<sup>26</sup>

### **5. States Obligations on Protection of Human Rights for Investment in South Sudan.**

International human rights law, regional treaties, and domestic legal frameworks influence the obligations of the state with respect to human rights in the context of foreign investment in South Sudan. Exploring the state obligations on the human rights approach to investment in South Sudan.

#### *5.1. International Human Rights obligations*

The Universal Declaration of Human Rights (UDHR): South Sudan, as a member of the United Nations, is bound to adhere to the principles set forth in the UDHR<sup>27</sup>, which is important of safeguarding human rights while fostering development and investment.

International Covenant on Civil and Political Rights (ICCPR): South Sudan's commitments to the ICCPR mandates it to respect and ensure the rights of individuals, which includes preventing violations that may arise from activities related to foreign investments.<sup>28</sup>

<sup>24</sup> Ibid, section 35.

<sup>25</sup> South Sudan Investment Promotion Act, 2009, Section 36.

<sup>26</sup> Ibid, 2009, section 37.

<sup>27</sup> Universal Declaration of Human Rights, 1948, Preamble.

<sup>28</sup> International Covenant on Civil and Political Rights, 1966.

International Covenant on Economic, Social and Cultural Rights (ICESCR): the ICESCR obligates South Sudan to promote progressive realization of economic, social, and cultural rights for local communities, which can be impact by investment projects.<sup>29</sup> In addition, state should observe the principles of Human Rights include human dignity, non-discrimination, participation, transparency, and accountability.

### *5.2. Responsibility to protect Human Rights*

The state has a duty to protect citizens against human rights abuses committed by third parties, including private investors. The constitution of South Sudan enshrines basic human rights and freedoms and it is the state responsibility to ensure these rights are respect and protect, including against potential harms from investment activities<sup>30</sup>. This is articulate in the UN Guiding Principles on Business and Human Rights, which assert that it is the state responsibility to create the policy, and regulatory framework that ensures respect for human rights.<sup>31</sup>

Therefore, states have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights. for instance, the Organization for Economic Operation and Development (OECD) attempt to draft a Multilateral Agreement on Investment in 1995 and was been criticisms by the coalition of human rights activists. The critics were of the view that Multilateral Agreement on Investment emphasized the protection of investment at the expense of the need to protect human rights from abuse of Multinational business. For instance, *in the case of Wena Hotels*, the private actors forcefully look over the claimant's hotels. While the government was not involved in the seizure, the police did not act to stop the individuals from their illegal actions. The tribunal found that this is the breach of bilateral treaty by the state of Egypt.<sup>32</sup>

### *5.3. Corporate and state accountability mechanisms*

The state is task with establishing effective grievance mechanisms that allow local populations to address grievances resulting from investment activities. Such mechanisms are essential to hold both investors and the state accountable for human rights violations.<sup>33</sup>

29 International Covenant on Economic, Social and Cultural Rights 1966.

30 The Transitional constitution of South Sudan, 2011 as amended in 2015.

31 UN Guiding Principles on Business and Human Rights, 2011

32 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/Award, JJ84-95(Dec.8 2000), 42ILM 896(2002).

33 *UN Human Rights Council, A/HRC/32/19-Report of the working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprise*, 2016, available at <https://www.undocs.org/en/A/HRC/32/19> (accessed on 20/Aug/2024).

## 6. Investors Obligations on Protection of Human Rights Approach for Investment in South Sudan.

The role and responsibility of institutional investors is therefore to assess whether portfolio companies have robust and effective human rights policies, due diligence processes, and grievance mechanisms in place and take meaningful action based on those assessments.

### 6.1. *Formalizing and communicating human right expectation*

The investors should formally be communicating their human right expectations among all the business relationships including to potential portfolio companies between the assets owners and managers and to other business relationships. The assets owners and managers should publicly communicate their expectation that companies respect human rights and implementation of the UN Guiding principles. Both assets owners and managers should put forward the human rights expectation grounded in the UN Guiding principles framework as the basic responsibility for investment.<sup>34</sup> The UNGPs outlines the responsibilities of the investors concerning human rights states that every investor or business enterprises should respect human rights<sup>35</sup>; make sure that they do not contribute to human rights harms through their operation<sup>36</sup>; and provide effective grievance mechanisms for individuals affected by their activities.<sup>37</sup>

### 6.2. *Investor obligations in conflict Zones*

South Sudan is ongoing conflict challenges with including the armed conflict, ethnic, cattle riding and land grabbers violence and humanitarian crises, it is imperative for investors to takes a proactive human rights approach that acknowledges the risks involved in operating in such environments. Investors have a responsibility to conduct due diligence to identify, prevent and mitigate human rights impacts associated with their investment that would affect the communities and vulnerable groups.<sup>38</sup>

34 Robert Wood Johnson foundation, Human Rights Principles Statement for Investments, 28 July 2022.

35 UN Guiding Principles on Business and Human Rights, 2011, Principle 11.

36 Ibid, Principle 13.

37 Ibid, Principle 29.

38 *Organization for Economic Co-operation and Development (OECD)*, OECD due diligence Guidance for responsibility business conduct, 2018, available at <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm> (accessed on 22/Aug/2024).

### *6.3. Corporate Social Responsibility (CSR) in South Sudan*

Many companies, particularly in sectors such as oil and gas have adopted CSR policies that explicitly commit to upholding human rights within their operations. Investors must ensure that policies go beyond mere compliance and are embedded into their business models.<sup>39</sup>

### *6.4. Local impacts and stakeholder engagement*

Investors should engage with the local communities and stakeholders to understand their perspectives and grievances. This engagement is essential for ensuring that operations do not lead to human rights abuses, such as land dispossession or cultural erasure.<sup>40</sup>

### *6.5. Accountability and Grievance Mechanisms*

Investors should implement accessible grievance mechanisms that allow local communities to report human rights violations. These mechanisms should be effective, transparent and ensure that grievances are addressed promptly.<sup>41</sup>

## **7. Conclusion**

Human rights based approach to investment in South Sudan requires a multi-stakeholder collaboration between investors, the government, civil society, and local communities to ensure that investments contribute to sustainable development, peace, and stability in the country. By prioritizing human rights in investment practices, investors can help to build a more inclusive and equitable society in South Sudan while also protecting their investment in the long term.

## **8. Recommendations**

- (i) Incorporation of Human Rights standard: South Sudan are encouraged to include explicit human rights considerations in the investment agreements and policies. This can enhance legal and regulatory frameworks to protect human rights in the context of investment.

39 Business and Human Rights Resource Centre, Company Responses to Human Rights Violations in South Sudan 2020, available at <https://www.business-humanrights.org/en/>

40 *International Finance Corporation (IFC)*, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets, 2007, available at [https://www.ifc.org/wps/wew/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/strategy-and-operations/stakeholder-engagement](https://www.ifc.org/wps/wew/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/strategy-and-operations/stakeholder-engagement) (22/Aug/2024).

41 *UN Human Rights Council*, A/HRC/32/19-Report of the working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprise, 2016, available at <https://www.undocs.org/en/A/HRC/32/19> (accessed on 20/Aug/2024).

- (ii) Conducting assessments before entering into investment treaties or agreements can help identify and mitigate potential or human rights impacts.
- (iii) Reformation and establishment of strong of human rights institutions to deal with human rights violation resulted from investment.
- (iv) Engagement with the stakeholders such as community leaders, Revenue Authority, civil society, and other stakeholders in the investment process can help ensure that human rights norms are respected and upheld.

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