global witness

Global Witness' Submission to the United Nations Special Representative to the Secretary General on Human Rights and Business

16th January 2007

A. Introduction

Global Witness is a London-based non-governmental organisation that exposes the exploitation of natural resources and international trade systems, to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses (see: www.globalwitness.org). We aim to promote improved governance, transparency and accountability in the management of the natural resource sector to ensure that revenues from resource use are mobilized for peaceful and sustainable development rather than to finance or fuel conflicts, corruption or state looting. We were nominated for the 2003 Nobel Peace Prize for our work on conflict diamonds.

Over the past year, Global Witness has been actively contributing to defining Professor John Ruggie's mandate on business and human rights. This submission will focus on the aspect of the mandate addressing *the identification and clarification of corporate responsibility and accountability for human rights*. We focus on the key question of *how* businesses can be held legally liable for human rights abuses committed in foreign countries in conflict zones involving financial transactions and natural resources.

Focusing this submission is our belief that it is of vital importance to separate responsibilities and accountability from any form of "charitable donations" or "good works" by companies and ensure that potentially negative and damaging activity can not be "offset" in this way. Throughout we will provide examples to illustrate our ideas on this pertinent issue.

B. Global Witness Position

In summary, Global Witness believes:

I. Voluntary codes of corporate conduct with respect to human rights are insufficient. Current frameworks do not measure actual company practice and were not designed to, being intended more as discussion spaces to promote good ideas.
II. A clear definition of the circumstances in which legal liability can follow is required. This will inform the emergence of binding norms for companies.
III. A definition of conflict resources is a necessity. Such a definition would assist the international community in differentiating between cases where natural resources are legitimately used to pay the costs of conflict and in cases where the extraction and trade of such resources is funding illegitimate activity. It would also prove to be a crucial preventative tool.

IV. A clear definition of reasonable behaviour by companies is required. The facts of each case may differ somewhat. However, distinctions can be drawn between acceptable and unacceptable corporate behaviour within the context of natural resource related human rights abuses. Reasonable behaviour consists of an act or collection of acts undertaken by a company that reflects an awareness of its corporate activities on human rights.
V. A home state should do what it takes to hold companies and employees accountable for their behaviour. This requires an effective regulatory regime and legal enforcement through domestic courts in the home state. At the international level, the United Nations should monitor how seriously states take action and thus, accept responsibility for the acts of their companies acting abroad.

I. Voluntary Corporate Codes of Conduct

There are a number of voluntary frameworks which provide human rights guidelines for corporations: Global Witness is about to publish a study of four of them (the UN Global Compact, the OECD Guidelines for Multinational Enterprises, the Global Reporting Initiative and the Voluntary Principles on Security and Human Rights).

These frameworks, to varying degrees, have the merit of prompting companies to consider their human rights impacts and to share ideas about good practice with each other and other stakeholders such as NGOs. There have also been a couple of interesting experiments by companies of embedding human rights guidelines within their agreements with states - for example, the explicit references to the Voluntary Principles in agreements between BP, its partners and the governments of Georgia and Indonesia, that cover the deployment of security forces at BP-operated projects.

That said, these frameworks place commitments on companies which are so loosely-defined and open-ended, and their oversight and verification mechanisms so weak, that it is nearly impossible to assess whether any particular company is genuinely implementing the principles of the framework or not. Not only that, but their voluntary nature means that they only apply to companies that choose to be bound by them. There is also a fundamental conflict of interest in a situation where companies, in effect, set out to define their own responsibilities as far as their accountability in relation to human rights abuses is concerned.

Companies are putting the credibility of these frameworks under serious strain by presenting a company's membership of them as if it were evidence of good human rights practice. These frameworks do not measure actual company practice and were not designed to, being intended more as discussion spaces to promote good ideas. As a result, the credibility of these frameworks is likely to crumble over time unless their membership requirements are tightened or companies stop presenting them as evidence of activity rather than intention.

II. How can businesses be held legally liable for human rights abuses linked to natural resource exploitation in host states?

The inadequacy of these voluntary frameworks underscores the need for corporate responsibility and accountability to be translated into *legal liability*. The challenge is to understand how this can happen. A clear definition of the circumstances in which legal

liability can follow will inform the emergence of binding norms for companies. The facts of each case may differ somewhat. However, distinctions can be drawn between acceptable and unacceptable corporate behaviour within the context of natural resource related human rights abuses.

III. Defining 'Conflict Resources'

The ability of those who are party to a conflict to exploit natural resources depends on their access to external markets. Take away the ability to profit from resource extraction and they can no longer exacerbate or sustain the conflict. Although it is now universally accepted that revenue from natural resources provided the means for war in countries such as Angola, Cambodia, Liberia and Sierra Leone, the international community has yet to address this problem effectively and systematically.

Global Witness believes that the international community, led by the Security Council, should put a comprehensive deterrent strategy in place with an authoritative mandate to stop conflict resources from contributing to human rights violations and to remove them from international trade. The first step towards such a strategy is to clearly define what a conflict resource is.

We propose the following definition of conflict resources to invoke international action:

Conflict resources are natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law.

Such a definition would assist the international community in differentiating between cases where natural resources are legitimately used to pay the costs of conflict and in cases where the extraction and trade of such resources is funding illegitimate activity. It would also prove to be a crucial preventative tool, as it would help business and the international community to identify those situations in which natural resources may become a driver of conflict and when their trade may render companies complicit in human rights violations.

A definition of conflict resources could play an important role in actually deterring the trade in these resources, and consequent human rights abuses, by providing a clear behavioural red flag for businesses and individuals operating in conflict zones. It could also help companies implement more conflict-sensitive business activities, create a more secure operating environment and ensure their role in the promotion and protection of human rights.[1]

IV. Defining 'reasonable' behaviour

Global Witness believes that there are places in the world that would be off limits to companies. This is based on the presumption that in these circumstances, it would be impossible for a company to engage in material transactions without adversely affecting a vulnerable person's human rights. Under these conditions, a company

[1] Global Witness, November 2006, *'The Sinews of War- Eliminating the Trade in Conflict Resources'*, a briefing document by Global Witness

could not use its influence or exercise any pro-active acts that could positively affect the human rights climate. These places or contexts are often identified in the public domain by the United Nations, leading human rights organisations and other authoritative sources as suffering from endemic and severe international crimes. Should a company choose to continue activities despite this then its behaviour would be considered unreasonable.

There are other places which would not be off limits to corporate investment, provided a company has taken all reasonable measures to avoid adverse effects on human rights.

Reasonable behaviour consists of an act or collection of acts undertaken by a company that reflects an awareness of its corporate activities on human rights.

What Global Witness defines as 'reasonable' could be:

1) An act or collection of acts that a company ought to have conducted before and whilst engaging in the host state, applying not only to the party that sources the natural resource but also to other actors involved in the supply chain. It is more than a dogmatic list of 'dos and don'ts' that companies can check off. This applies to the party that sources the natural resource, and other actors involved in the supply chain. Global Witness believes that economic activity coupled with knowledge or wilful blindness is enough to attract legal responsibility and accountability. The onus should be on the company to prove that it acted reasonably in the circumstances to successfully safeguard natural resource related human rights in its extraction and trade of natural resources.
2) A consideration of material contributions made by a company to cause or influence the perpetuation of human rights abuses. Direct and indirect acts are relevant for example, what a company does, induces or lobbies for. An oil and gas company does not act reasonably when it conducts philanthropic acts to ease its moral conscience. Although supplying malaria medication to local hospitals is in itself a 'noble' act, it does not negate, for example, corporate financing that encourages campaigns of displacement of local villagers living in concession areas.

Reasonable behaviour is most likely a series of collective acts from start to finish:

- As a starting point, the human rights of nationals of the host state are universally accepted and companies have the duty to uphold these rights. Sources include the constitution, domestic law and/or international treaties.
- Does the area where the company wants to engage have a history of human rights violations?
- Who could be affected by the company's activities in this area?
- Is this a "no go" area of the world where it would be unreasonable to think that company activities can be disconnected from human rights violations?
- What could the company reasonably do to not negatively affect the Vulnerable Group?

Illustrative examples of "reasonable" and "unreasonable" behaviour

From Global Witness' on-going investigative work, the following good practices have been extracted to illustrate 'reasonable' acts.

It is reasonable for a company to:

- Take necessary steps to acquire information and build the knowledge required to make an informed choice regarding company practices. This is part of conducting an effective Human Rights Impact Assessment ("HRIA") that integrates the key aspects of transparency, accountability, participation and meaningful consultation at different stages of the engagement, and as a measurable result. A company must comply with the relevant human rights laws, including the constitution, any domestic legislation and international treaties, and also be familiar with the local socio-political context relevant to the state's human rights record. If a history of abuse is uncovered, a company must decide how it can reasonably isolate its business practices from human rights violations if at all.
- Ensure that all payments by a company to agencies or officials of the host government are made in full compliance with the law; are made only into the official accounts of institutions authorised to receive them; are publicly disclosed in full and independently audited to ensure there has been no misappropriation or misdirection of funds.
- Ensure that any material support by a company to public security forces that protect its operations (including the provision of money, logistical support or facilities) is only provided where there is an explicit legal or regulatory requirement to do so; is made available on condition that the recipients comply with international human rights standards; is fully disclosed to the public and is independently audited to ensure that it has been used for the intended purpose.
- Encourage and facilitate monitoring and scrutiny from an independent third party where there are credible concerns that the company's activities are contributing to and/or benefiting from human rights abuses. In these circumstances, companies should be willing to open their facilities and operations to scrutiny and to take appropriate action, up to and including the suspension of their activities in that region, if it becomes clear that the company's activities are contributing to/benefiting from human rights abuses.

Banks, financial institutions and regulators

Thus far, banks, financial institutions and regulators have not been sufficiently involved in the human rights and business debate. It would be reasonable to expect banks and other financial institutions to be:

- transparent about funds and financing provided for resource extraction deals;
- transparent about resource-backed loans and refrain from providing them to resource-rich countries with a high risk of corruption;
- able to demonstrate that they have undertaken heightened due diligence on deposits from Politically Exposed Persons from resource-rich countries; and
- for regulators to treat resource deals and resource-backed loans as a red flag for money laundering.

From Global Witness' on-going investigative work, the following bad practices have been extracted to illustrate 'unreasonable' acts.

It is unreasonable for a company to:

- Supply resources or facilities to militias or armies committing human rights abuses.

Anvil Mining[2]**:**

Anvil Mining stated that it had no option but to agree to supply air and ground transport to the Congolese military in response to rebel activity in Kilwa in October 2004; the Congolese troops went on to kill around 100 unarmed civilians. In 2006, the prosecutor at Katanga's Military Court in the DRC decided to indict three former employees of Anvil Mining Congo for complicity in war crimes. The trial in the DRC began in December 2006 and we are following its progress.

- Provide financing for arms sales to such groups, or financing for commercial transactions which will provide these groups with the means to commit human rights abuses.

- Make payments, including "taxes", to militias or armies who are known to be committing human rights abuses.

Afrimex[3]**:**

In July 2006 UK-based Afrimex, a company that trades in coltan and cassiterite in Eastern DRC, admitted to the UK Parliament's International Development Committee that it had paid taxes to RCD-Goma, the armed rebel group controlling that region. RCD-Goma was responsible for numerous serious human rights abuses.

- Conduct business as usual and ignore claims made by the United Nations and reputable civil society organisations that its practices are financing systemic human rights abuses. Omission to act *i.e.* not take steps to disengage, is unreasonable behaviour and deserves to attract legal liability.

- Employ armed security forces that actively recruit and use child soldiers.

- Pay licensing fees and operation taxes to companies and factions supporting slave labour in mines.

[2] Global Witness report, "Digging in corruption: Fraud, abuse and exploitation in Katanga's copper and cobalt mines", July 2006; also *see*: Anvil confirms denial of unfounded allegations, Anvil Mining Limited news release, June 21st, 2005, available at: http://www.anvil.com.au/PDF/2005June212005Allegations.pdf, accessed June 2006.
[3] Global Witness report, "Under-mining peace – Tin: The explosive trade in cassiterite in eastern DRC", June 2005; also *see*: Corrected transcript of oral evidence before the International Development Committee, Session on Conflict and Development: peacebuilding and post-conflict reconstruction, 4 July 2006.

V. Enforcement and monitoring

Global Witness believes that the home state has an essential role in determining liability and holding companies and employees of these companies accountable for human rights abuses committed abroad. This requires an effective regulatory regime and legal enforcement through domestic courts in the home state. At the international level, the United Nations should monitor how seriously states take action and thus, accept responsibility for the activities of their companies acting abroad.

This requires both a legal and political will to make human rights abuses committed in foreign states a priority. Where reasonable, home courts should accept jurisdiction over corporate structures overseas – that is, a corporation should not be able to avoid liability simply by routing its participation in an overseas subsidiary through a complex ownership structure. Home courts should not concede to obstacles posed by corporate substructures acting globally, and accept jurisdiction if this would be reasonable. It must be ensured that due process and proper investigations are conducted once allegations of corporate human rights abuses are raised.

Countries should consider long-arm enforcement measures to deter their own nationals from sanctions busting irrespective of their physical location; recent efforts by the Netherlands to prosecute its nationals for profiting from economic and war crimes may provide a useful model.

Liberia and Oriental Timber Company ("OTC")

Despite widespread international publicity from 2000-2003 linking Liberia's timber industry to the civil wars in Liberia and Sierra Leone, European and Chinese timber companies continued to buy Liberian timber. Through his company OTC, Dutch timber baron Guus van Kouwenhoven was directly involved in importing weapons for former president Charles Taylor, in violation of the UN arms embargo on Liberia. In 2006 Kouwenhoven was convicted under Dutch law of violating the UN arms embargo on Liberia. He was charged, but acquitted, of war crimes.

C. Conclusion and the way forward

To conclude our submission we would like to reiterate some important areas of work that are still outstanding and that we feel should be addressed within the scope of your mandate. They fall into 3 key areas:

1) *What is reasonable and unreasonable behaviour?* – The terms "reasonable" and "unreasonable" are too subjective and open to misinterpretation. To ensure that there is no room for misunderstanding, we believe that a clear and definitive list of what constitutes reasonable and unreasonable behaviour needs to be established so that all those working in this field know where the line is. We recognise that this needs to be realistic but we would caution against trying to appease all sides and given this unique opportunity, aim for the highest, strictest tests and conditions achievable.
2) *Degrees of separation?* – In our work we constantly face the problem of companies appearing to indemnify themselves by being one step along the

supply chain. Currently there is no consistency on how far along the supply chain culpability travels. For example, should purchasers be immune from liability when they buy products from those who commit international crimes? This also correlates with the issue of shell and front companies which our experience shows are often established primarily to get around the issue of direct culpability.

3) *Enforcement and Monitoring?* – Who should be responsible for enforcement? Complex ownership structures crossing many borders, nationalities and legal territories create an almost impenetrable web when trying to establish jurisdiction and enforcement. Should enforcement be left to national law or international law? Should the company's home state bear an equal or greater weight of responsibility? Once these questions have been answered who then will ensure that enforcement takes place? Accountability should not stop at the company's gate and the home state government should be held to account for actions of companies resident within its borders. Should an OECD style monitoring process be implemented?

In closing, we would like to thank you for this opportunity to contribute to your work on corporate accountability. We hope our submission is useful and that you consider the points raised when preparing for your presentation to the United Nations General Assembly.

Please do not hesitate to contact us should you have any questions regarding the above submission.