



global witness

6th Floor, Buchanan House
30 Holborn, London EC1N 2HS
Tel +44 (0)20 7492 5820
Fax +44 (0)20 7492 5821
Email mail@globalwitness.org
www.globalwitness.org

Towards a proactive business and human rights regime

A Global Witness paper to Danish EU Presidency May 2012

Background

Global Witness is a non-governmental organisation that for 17 years has run pioneering campaigns against natural resource-related conflict and corruption and associated human rights abuses. We have exposed the brutality and injustice that results from the fight to access and control natural resource wealth, and have sought to bring the perpetrators of this corruption and conflict to account.

Since 2007, we have proactively engaged in the business and human rights debate. In the first instance, we seconded a member of staff to Professor Ruggie's team to help develop a better understanding of the respective obligations of the State, private enterprises and NGOs operating in conflict zones. In 2008, after the publication of the UN "Protect, Respect and Remedy" Framework for Business and Human Rights, we co-hosted a meeting of corporate, government and civil society experts in London to seek to identify ways of minimizing human rights abuses caused by companies operating in volatile areas by moving from Professor Ruggie's policy framework into practice. We have continued to stay involved in the mandate, most recently attending the first meeting of the newly formed UN Working Group on the issue of human rights and transnational corporations and other business enterprises ('UN Working Group') in Geneva in January of this year.

The Issue

Despite the UN Human Rights Council's (UNHRC) endorsement of the UN Guiding Principles, there is still a need for greater clarification of a minimum standard of unacceptable business behaviour or "bottom line" and about the regulation of business activities in situations of widespread violence. In addition, home states where businesses are based, need to be significantly more proactive to ensure business compliance with their global human rights responsibilities.

Partly as a result of the work undertaken by Professor Ruggie whilst working as the UN Special Representative on Business and Human Rights, there is now a consensus that concrete action is required by business to ensure they respect human rights. However, states still need to put mechanisms into place to ensure protections from

and remedy for business-related human rights abuses. When the proper tools are not in place or fail to be used, the human cost is significant.

We have found many examples of business entities – both local and international - which have facilitated or been complicit in human rights abuses, either through their own operations or indirectly through their relationships with unsavoury business or individuals. Numerous examples are available on our website www.globalwitness.org. Such case studies show that there are companies that willingly or unwillingly, ignorantly or proactively, are involved in human rights abuse, that governments are often unwilling or unable to prevent or are complicit in these abuses and that victims have limited access to remedy.

Global Witness believes the UN Guiding Principles are a minimum standard. The importance, usefulness and success of the UN Guiding Principles is in their implementation – in summary they are of no use if they are not used or not used effectively. At the very least, the EU needs to ensure that the UN Guiding Principles are upheld and reported on. We also think that the EU should also be pushing governments and companies to operate to a higher standard. The EU needs to lead, coax and compel governments and companies to reinforce the unacceptability of corporate involvement in human rights abuses whilst ensuring it too is upholding the UN Guiding Principles in all it does.

The EU has recently made strong public commitments regarding its support of the UNHRC. This support needs to be translated into action. Global Witness believes that:

- All EU agencies, bodies, and staff must :
 - Be fully aware of the obligations of states and companies as outlined in the UN Guiding Principles and what they can do to make sure the UN Guiding Principles are being upheld. This in-depth knowledge must be complemented by effective cooperation within the EU to ensure there is no duplication of effort or, potentially more damaging, gaps where information is lost.
 - Monitor and report on cases of corporations linked to human rights abuses and report these to the relevant investigative or prosecutorial authorities.
 - Ensure that conversations the EU has with governments, address their interpretation and implementation of the UN Guiding Principles.
 - Ensure that the EU make it clear that respect for international human rights standards is integral to all future trade with and investment deals.
 - Regularly report to the UNHRC on how they are monitoring and encouraging the implementation of the UN Guiding Principles, and as appropriate, any breaches they have seen or been made aware of.

- The EU need to ensure that all states:
 - Introduce methodologies for ensuring all their companies, operating at home or abroad, are aware, understand and are implementing the UN Guiding Principles. This needs to include regular monitoring and evaluation of their companies' understanding and implementation of the UN Guiding Principles.
 - Collate information regarding their companies operations at home and abroad including allegations of corporate behaviour that would be in breach of the UN Guiding Principles.
 - Respond swiftly and genuinely to allegations and evidence of any breaches by any companies' operating within their jurisdiction.

- Include reporting on the UN Guiding Principles in the UNHRC Universal Periodic Review and other country reporting mechanisms.
 - Report at least annually to the UN Working Group on Business and Human Rights on their activities regarding the implementation of the UN Guiding Principles. This process will also require an opportunity for 3rd party scrutiny of these claims.
- That EU sanctions regimes should be utilised to better effect.
 - Sanctions are one of the few coercive measures at the EU's disposal and are potentially one of the most powerful instruments available. Sanctions can send a clear signal to governments, industry and consumers about what not to buy, who not to do business with and can also demonstrate how economic decisions can affect human rights.
 - Sanctions can have the dual impact of positively affecting situations where human rights abuses have been facilitated or committed by companies and of reinforcing the State's role in monitoring and taking action against companies in breach.
 - Unfortunately Global Witness' experience has shown that sanctions are often poorly targeted, badly timed, slow moving, inconsistent and inefficient. They can also have the adverse effect of punishing those who are not associated with any illegal or violent activity.
 - Therefore it is imperative that the EU ensures that their sanctions regimes are used to better effect and where appropriate, states must be held accountable for their failure to implement sanctions.
 - States should be obliged to report at least annually to the EU on how they are implementing sanctions and what steps they have taken to ensure all companies that may be affected by the sanctions are aware of them.
 - Where there are breaches in the sanctions or a failure to implement them then both the state and companies involved need to be held to account.

The EU needs to ensure that its support for a positive business and human rights environment is proactive and clearly stated. It must ensure that across the EU member states and at the EU level there is consistency, clarity and when appropriate restrictions and penalties are applied. We include two case studies to explain in more detail what the EC and EU member states should be doing to operationalise the protect, respect, remedy framework.

Case Study 1: Due Diligence on conflict minerals from Congo

Due diligence is an ongoing, proactive and reactive process by which companies take responsibility for ensuring that they respect human rights and avoid contributing to conflict through their business activities.

The OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas*, developed in 2010 and 2011 by a working group of governments, NGOs and companies, provides a detailed blueprint to help companies manage their mineral supply chains in a responsible way. The Guidance is structured around a five-step framework, and includes a model due diligence policy and two supplements with recommendations specifically tailored to the gold industry, and the tin, tantalum and tungsten industries. The five core due diligence elements are:

- Establishing strong company management systems.
- Identifying and assessing risk in the supply chain.
- Designing and implementing a strategy to respond to identified risks.
- Carrying out independent third party audits of supply chain due diligence.
- Publicly reporting on supply chain due diligence.

The trade in tin, tantalum, tungsten and gold has been fuelling the conflict in eastern Democratic Republic of Congo (DRC) for over a decade. Rebel groups and members of the Congolese national army have made millions of dollars through illegal control of mines and trading routes, while inflicting appalling suffering on the local population.

Companies sourcing minerals from eastern DRC must carry out due diligence in order to assess the risks of their purchases benefiting abusive armed groups and military units.

The key advantage of supply chain due diligence as a means of dealing with the conflict financing in a context like eastern DRC, is that it addresses all types of transactions that benefit warring parties and is therefore comprehensive in scope. In addition, it targets only harmful parts of the trade, thus protecting legitimate business, and it is quicker and less costly to initiate than complex certification schemes.

There is growing consensus around the OECD due diligence framework:

- The Guidance was supported by the UN Security Council last year through the work of the UN Group of Experts on DRC.
- The International Conference on the Great Lakes Region, a grouping of regional governments, have endorsed it as a core part of a new regional mineral certification mechanism.
- The Congolese government passed a law in March obliging all mining and mineral trading companies operating in DRC to carry out due diligence in line with OECD standards.
- In the US, Congress passed a law in July 2010 requiring all firms using tin, tantalum, tungsten or gold from DRC and neighbouring countries to do supply chain due diligence.

These measures to combat the conflict minerals problem in eastern Congo reflect a growing recognition by international policymakers of the need for action to break the links between the exploitation of natural resources and armed conflict.

As initiatives to address the issue gather pace, this could put European firms at a commercial disadvantage internationally if they are seen to be failing to address the risk of contributing to

terrible human rights abuses. The European Commission should consider a stand-alone European Parliament and Council Regulation setting out the due diligence measures developed by the OECD as obligations on operators who place minerals and products containing minerals on the EU market. Global Witness recommends that the regulation be sufficiently broad that it also covers the trade in other natural resources produced in conflict-affected areas.

Case Study 2: Conflict diamonds from Zimbabwe

The 2008 power sharing deal gave the opposition Movement for Democratic Change (MDC) control over the Finance Ministry and the 'soft' ministries delivering public services such as Education and Health. ZANU PF retained control over the Ministry of Defence, the police, the Office of the President and Cabinet, and the parent department of Zimbabwe's feared secret police, the Central Intelligence Organisation (CIO). The loss of control by ZANU PF of the Ministry of Finance and the subsequent clipping of the wings of the Reserve Bank, sparked a search for sources of off-budget finance for the security forces.

Global Witness research reveals the results of that search:

- The Zimbabwean police requested a concession at Marange in the name of a company aptly named Security Self Reliance Enterprises (Pvt) Ltd.
- A very large concession was granted to Anjin Investments. Ostensibly a joint venture between a Chinese construction company and a previously unknown Zimbabwean company called Matt Bronze, Anjin is in reality controlled by the military and police. Its executive board includes the Permanent Secretary at the Ministry of Defence, and serving and retired military and police officers.
- The CIO set up another company, Sino Zimbabwe, with a network of Chinese companies known as the 88 Queensway syndicate. It is possible that this CIO company has left the diamond sector, but it is still active in Zimbabwe's cotton and property sectors
- Twenty five per cent of Mbada diamonds was transferred to 'Transfrontier' an opaque group of companies registered in Hong Kong, Dubai and the British Virgin Islands. Transfrontier is ultimately linked to a man widely reported to be President Mugabe's former helicopter pilot.

The E.U.'s policy is incoherent. The E.U. maintains the Zimbabwean parastatal mining company, the Zimbabwe Mining Development Corporation (ZMDC), on its sanctions list. This applies, by default, also to ZMDC's subsidiaries and joint ventures such as Marange Resources, Mbada Diamonds, and Diamond Mining Corporation. However these are the very same companies which have just been certified through the E.U.'s support of the Kimberley Process decision giving Zimbabwe the green light to export diamonds produced from the controversial Marange diamond mines. However, Marange Resources, Mbada and Diamond Mining Corporation are sanctioned entities but Anjin and Sino Zimbabwe are free to export diamonds into the E.U. Coherence would require that either these latter companies are added to the sanctions list, or that the ZMDC and its subsidiaries are removed.

Given that violence in Zimbabwe is highly correlated with elections, that there is an election due by mid 2013, and that the security forces remain highly partisan and prone to attacks on civilians, we recommend that Anjin and Sino Zimbabwe are added to the EU sanctions list.