



global witness



SIMPLY CRIMINAL

Targeting Rogue Business
in Violent Conflict

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EXECUTIVE SUMMARY

Around the world, examples proliferate of businesses which have facilitated, been complicit in, or benefitted from corruption and conflict.

Business entities with links to the international trade system can provide legitimacy and funds for corrupt or violent dictators. The willingness of businesses to turn a blind eye to surrounding conflict can entrench and even reward lawlessness or abuse of human rights and natural resources. Conversely, responsible businesses, which abide by national laws and international guidelines, can contribute to peace and economic development, and provide legitimate employment.

Substantial legal opinion in many countries view existing criminal law, penal code provisions or other legislation¹ as being applicable to business involvement in serious violations. However, attempts by Global Witness and others to encourage legal actions have exposed legal and practical challenges to their enforcement.

Global Witness believes that prosecutors, law enforcers and regulators must be in no doubt about how to pursue businesses involved in 'violent' or 'predatory crimes',² in particular rogue businesses which have found a niche operating in situations of widespread violence.

Courts around the world are being challenged to hold to account businesses involved in gross human rights abuse and, in particular, those involved in violent or predatory crimes in conflict areas. Yet, only a handful of businesspeople have been convicted. No company has ever been successfully prosecuted. There are also issues arising about the appropriate level of culpability for those that operate in areas, or use goods produced in areas, where gross human rights abuses are widespread. There is currently no

component of national or international law that specifically addresses the culpability of business involvement in crimes such as torture, sexual assault, or murder. Nor is there any specific prohibition on businesses knowingly dealing in materials or goods produced in circumstances involving grave human rights abuses.

When the proper tools are not in place or fail to be used, the human cost is significant and international stability is further undermined. Responsible business is driven away, and predatory business may take its place.

In this paper, we propose a culpability framework for business entities involved in violent or predatory crimes using existing domestic anti-corruption and international criminal law as principle sources. We outline wrongful acts that we believe are covered by existing law and identify a standard for the *mens rea* or mental element of such crimes. These are referred to below as Prohibition 1 and Prohibition 2 respectively. In addition, we propose a new prohibition (Prohibition 3) against the practice of dealing in conflict goods. Prohibition 3 is based on the existing illegalities against violent crimes and trafficking (including an affirmative defence for companies based on due diligence), and draws on norms which have evolved recently at the United Nations Security Council (UNSC) and the OECD against dealing in conflict minerals.

Much of what we propose is not new law but aims to clarify and expand existing law to make it more practicable and effective. The principle objective of the Global Witness proposals is to end the impunity that rogue business entities currently enjoy.

Global Witness believes ministries of justice and other relevant authorities must take steps

to bring prosecutions. The decision to prosecute should be premised in law and based on the recognition that these prohibitions are culpable acts for which corporate accountability is required. Prosecutors, who are willing to take these cases forward, need to know what is essential to prove in order to get a successful conviction.

The proposals put forward below outline courses of action that can lead to securing business accountability for the worst forms of human rights abuse.³ An important additional policy gain would be the clarification of a minimum

standard of unacceptable business behaviour or 'bottom line', generating predictability about the regulation of business activities in situations of widespread violence and encouraging business compliance with criminal law and human rights responsibilities.

It is, however, important to recognise that certain risks cannot be mitigated. In certain situations, the risk of culpability for a business operating in violent places or with violent actors may be so high that the only proper reaction would be to suspend or halt operations.⁴

Proposing Three Prohibitions

The objective of the prohibitions is twofold: first, to facilitate legal action against rogue businesses operating in areas of widespread violence; and second, to encourage business entities to ensure that their behaviour remains above a common standard of unacceptable behaviour.

All prohibitions would apply to domiciled and registered businesses, and their associates abroad (*i.e.* employees, subsidiaries, agents or affiliates),⁵ applying the same theory of culpability common to most anti-corruption legislation. For Prohibition 3 (strict liability), affirmative defences may be available, in particular where the company has conducted due diligence, which includes fact finding, risk assessment and taking steps to mitigate the risk of human rights abuses occurring.

Certain risks cannot be mitigated. In such situations, the most appropriate reaction would be to suspend or halt operations.

PROHIBITION 1:

Affirming the prohibition against the commission of violent or predatory crimes by a business entity

This prohibition would specify in law the applicability to business entities of certain existing criminal, penal law or equivalent provisions forbidding violent or predatory crimes.

Targeted offences include: murder, torture, rape, war crimes and crimes against humanity; forcing people to work or expulsion of people from communities in situations of armed conflict; the appropriation of natural resources without consent (public or private property) linked to war or armed conflict (pillage, plunder or spoliation), the receipt of stolen goods, and violations of UNSC sanctions.

PROHIBITION 2:

Clarifying the prohibition against a business knowingly providing substantial assistance to those who commit violent or predatory crimes

This prohibition would specify in law the acts that constitute aiding and abetting by business entities in their relations to those who commit violent or predatory crimes.

Substantial assistance would include: knowingly providing transportation, equipment, weapons, finance and logistical or other material support in the commission of a crime or crimes by another.

PROHIBITION 3:

A prohibition against trafficking in conflict goods

This prohibition would introduce into law a prohibition against dealing in goods or services produced by means of the kinds of serious human rights abuses associated with situations of widespread violence, including conflict.

PART 1

THE PROBLEM

Businesses operating across borders can be implicated in serious human rights abuses – particularly those working in conflict areas.⁶ They may become caught up in conflict or alternatively even seek to operate within areas of conflict so as to profit from the situation. While many businesses avoid conflict areas,⁷ the fact remains that many do not.

Global Witness investigations reveal the extent to which established local and international business can become implicated in such crimes and abuses, either directly through their own operations or indirectly via their relationships with unsavoury business or other actors. This phenomenon presents risks to people as well as challenges to business: many countries in conflict are rich with natural resources and other kinds of economic opportunity, making them attractive locations for transnational business and investors. The increasing drive to secure strategic natural resources is drawing business into places until which recently may have seemed too risky.

Today, there is consensus that the protection of human rights requires concrete action by business to ensure that they respect human rights.⁸ It is however the state's duty to protect the human rights of its citizens and there is a broad consensus that states should put in place mechanisms to ensure protection from business related human rights abuse.⁹ There is an emerging movement by states towards non-judicial remedies to deal with complaints against commercial entities alleging their involvement in human rights abuse abroad.¹⁰ While steps forward, non-judicial remedies or business initiatives alone are not appropriate when crimes are committed. If criminal activity is alleged, judicial remedies are a necessary part of ensuring accountability.

In states without adequate enforcement mechanisms to hold businesses accountable for their actions and provide victims with redress, there will be a serious deficit in human rights protection and impunity will prevail. Today, some large business entities are able to use the transnational nature of contemporary commerce – networked firms, globally complex transactions, long supply chains, etc. – to escape accountability for involvement in violent or predatory crimes. Where governments are unable or unwilling to protect their own citizens, or are themselves repressive, business entities and their associates¹¹ are significantly less likely to be held to account for committing or being complicit in the worst forms of human rights abuses.

There is no component of national or international law that is specifically designed to address the problem of businesses linked to serious violations of human rights, including their involvement in abuses that amount to crimes, such as torture, sexual assault, or murder. Lawyers around the world are pursuing corporate entities for allegations of participating in such abuses within the existing criminal, penal or other legal frameworks.¹² While laws against aiding and abetting, conspiracy or other modes of liability criminalise assistance to perpetrators of such crimes, the laws of most, if not all, national jurisdictions around the world do not specifically prohibit the involvement of their own registered or domiciled businesses¹³ in such crimes committed in conflict areas abroad. For example, there is no specific law against a business providing weapons or dual-use components to despotic state leaders which are then used to kill; or allowing company assets such as factory facilities or transport to be used for arbitrary detention; or financing state or

non-state armed groups who commit gross human rights violations.¹⁴ Such activities by businesses are obviously unethical, even potentially illegal, but they are not explicitly prohibited by criminal or penal codes anywhere.

This legal reality has not stopped cases from coming to court. Crimes committed by businesses abroad have been the subject of civil litigation in different home countries (*i.e.* the place where business is registered or domiciled) allowing victims to file claims seeking compensation. Numerous law suits alleging criminal and other torts have been filed in the past decade in the United States under the *Alien Torts Claims Act* (ATCA), as well as in a number of other jurisdictions.¹⁵ Nonetheless, there are significant practical obstacles that impede access to civil justice for the vast majority of victims,¹⁶ obstacles which also create real uncertainties for companies wishing to invest in countries where endemic violence or conflict may make the risk of association with human rights abuses a very real part of the operating environment.

Some countries have started prosecuting their own nationals (*i.e.* natural persons) for their involvement in international crimes abroad under domestic legislation.¹⁷ In addition, there is historical precedent for the prosecution of businesspeople arising from a company's either direct commission or aiding and abetting of international crimes in Japan and Germany during World War II, and in Iraq in the 1980s. These prosecutions of businesspeople are few and as of yet there is no known precedent for the prosecution of a business itself for such crimes. There is an emerging "web of liability" for businesses implicated in international crimes.¹⁸

However, during discussions with prosecutors, Global Witness has encountered hesitation when it comes to investigating businesses for alleged involvement in human rights crimes committed abroad. There are a range of obstacles to investigation, not least the challenge of theories of liability and evidentiary standards that are not adapted to international corporate structures, cumbersome law enforcement cooperation and other procedures. At present, the greatest obstacle is that the existing legal framework in most countries does not address the specific legal

challenges posed by the behaviour of business entities in conflict zones or other situations of widespread violence. In brief, the problems in current legal frameworks include:

- To date, no jurisdiction has clarified what types of business activity are unacceptable in situations of conflict or widespread violence;
- States have differing rules about whether a business entity can be prosecuted under criminal law. Some permit prosecutions, others only for certain kinds of crimes, and some do not permit them at all;
- States have varying rules about how their laws can apply to crimes committed abroad;
- Variations exist in the definition of 'complicity' (accomplice liability) used by national and international courts, particularly in the legal test for the *mens rea* (mental element) of the crime.

To address these problems, Global Witness believes that prosecutors, law enforcers and regulators should be in no doubt as to the elements of the law and how to apply them to business entities involved in widespread violence, especially in situations of conflict. In order to effectively target the worst offenders, it will be necessary for ministries of justice or other relevant authorities to amend or qualify the relevant legal framework in their own jurisdiction.¹⁹ In some countries, they may need to issue guidance on how to apply existing laws, while in others, it may be necessary to amend the relevant measures, be they criminal, penal or administrative, in order to clarify the applicability of certain prohibitions to businesses for their involvement in violent or predatory crimes.

PART 2

ELEMENTS OF A SOLUTION

Currently, the way countries regulate business entities differs: a number of countries already extend liability to business entities, either as a general principle of their national law or under specific penal or criminal provisions; others impose administrative or equivalent measures.²⁰ Similarly, countries have different legal traditions for imputing liability to them.

No one size will fit all. With that in mind, we suggest Three Prohibitions to clarify the basic elements necessary to ensure that national jurisdictions are in a position to effectively prosecute business entities for their involvement in violent or predatory crimes.

Adopting the prohibitions outlined below and using this approach to focus legal discussion can lead to securing business accountability for the worst forms of human rights abuse.²¹ An important additional policy gain would be the clarification of a minimum standard of unacceptable business behaviour, generating predictability about the regulation of business activities in such situations, and encouraging business compliance with their criminal law and human rights responsibilities.

The Prohibitions

As a first step, the appropriate authorities in each country should specify the prohibitions that apply to business entities in situations of widespread violence. We believe it is possible to identify a set of universally prohibited acts to which business actors may be associated, what we call generally ‘violent or predatory crimes’. ‘Violent crimes’ are those well known prohibitions under national and international criminal codes, penal laws

or the equivalent; for example, genocide, war crimes, crimes against humanity, murder, sexual assault, torture and other forms of cruel and inhuman treatment, and armed robbery. Often, these crimes correspond closely to the worst forms of human rights abuse found in conflict situations.²² ‘Predatory crimes’ are those national or international crimes associated with violence or the threat of violence, but which may not themselves be acts of violence. Examples include theft, extortion, pillage, racketeering, or receipt of stolen goods.

We have chosen to use the categories of violent or predatory crimes for two reasons:

First, patterns evidenced by Global Witness’ investigations leave us in no doubt that the extent and nature of business involvement in human rights abuses in conflict is largely covered by existing laws against violent or predatory crimes. For this reason, Prohibitions 1 and 2 outlined below do not present new elements of laws as much as clarify the applicability to business entities of elements of existing laws. Prohibition 3 – against trafficking or dealings in goods or services produced in association with violence and predatory crimes – builds on existing laws to create a specific obligation of due care for those doing business connected to situations of conflict or widespread violence.

Second, we believe the category of violent or predatory crimes represents universally accepted prohibitions found in the criminal or penal codes of all countries, as well as under international criminal law and the law of armed conflict. We have chosen these categories in order to ensure comprehensive coverage of the acts which would, in principle, give rise to culpability. Although we often use the language of ‘conflict areas’ in

this paper, the prohibitions against violent or predatory crimes would in fact criminalise certain acts that create associations of business with the worst forms of human rights abuse no matter where they happen.

We have chosen this approach in order to cover the range of situations in which violent or predatory crimes take place, such as instances of severe state repression or widespread violence, which may or may not be situations considered to be armed conflict under International Humanitarian Law.

The Theory of Culpability

In addition to the Three Prohibitions, the law must specify the theory of culpability or blame to be used when considering business involvement in such crimes. Individual employees, directors, and agents of businesses have been prosecuted for participating in international crimes. If pursued systematically, this form of culpability would have a significant deterrent effect on rogue businesses that should not be underestimated. This would be particularly effective if provision were made for ‘piercing the corporate veil’ (*i.e.* to treat the obligations of the company as those of the individual shareholders or directors) in cases involving violent or predatory crimes. However, while necessary, liability for individual company officials alone will fail to have a deterrent effect on the business as a whole and will not be sufficient. Greater regulation is required to ensure business entities structure their operations in conflict situations with the intent to avoid contributing to serious human rights abuses.

Different countries have different ways of regulating business entities, which includes variations in how jurisdictions attribute culpability to business entities. A review of existing law by Global Witness indicates that a common approach to business culpability is emerging in the realm of anti-corruption law and corporate criminal law more generally. The essence of this common approach is that businesses may be held liable for supporting the crimes of others or for a failure to prevent certain, specified forms of wrongful

conduct by its employees, directors, agents or other associates.

Business culpability for wrongful acts by employees and other associates has been elaborated under the anti-corruption laws of Australia, Canada, France and Hungary.²³ In the United States, culpability attaches to the business where there is knowledge. *The Foreign Corrupt Practices Act* (FCPA) legislative history makes it clear that ignorance – “conscious purpose to avoid learning the truth” – is no defence.²⁴ On this basis, and in order to ensure against businesses remaining wilfully ignorant of corrupt behaviour, enforcement of the FCPA makes anti-corruption due diligence key to companies defending themselves against charges of participating in corruption. Under the recently passed *UK Bribery Act* (2010), a strict liability approach imposes an obligation on a business to take due care, or to conduct due diligence, to prevent acts of bribery by those acting on its behalf – business employees and other associates.²⁵ Although different in legal theory from the FCPA,²⁶ the *UK Bribery Act* (2010) appears to have incorporated lessons from FCPA practice and evolved a more straightforward legislative – and therefore clearer – basis for reaching a similar result in practice. In other words, whether imposed via strict or vicarious liability, anti-corruption legislation has created an obligation for business to conduct due diligence to avoid involvement in corrupt activities.

The evolution of anti-corruption legislation world-wide, particularly the way in which a global standard and a level playing field were established, is an encouraging precedent. Today, impunity for corruption is far more constrained than just a decade ago, with regular prosecutions of companies for corruption in courts around the world. Prosecutors are able to take up these cases because the framework for prosecuting companies for corrupt acts committed abroad is clear. As a result, no serious company operating internationally can safely participate in corruption or ignore its due diligence obligations when operating in countries where corruption is a problem.²⁷

By contrast, criminal law in most countries is largely silent on the theory of culpability and

the potential consequences when a domiciled company or its associates, cause or materially contribute to violent or predatory crimes abroad. This need not be the case. The knowledge standard deployed by the FCPA is coherent with the standards for accomplice liability applied to individuals under international criminal and humanitarian law²⁸ – including businesspeople²⁹ – and is an old and well established mode of liability in every national jurisdiction.³⁰ The UN Special Representative to the Secretary General (SRSG) on Business and Human Rights has recently indicated that: “The weight of international legal opinion suggests that the relevant standard is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.”³¹

In other words, common ground exists in a theory of culpability in which:

- The wrongful acts of people are the basis for the liability of business organisations;
- Liability may attach to a business organisation where it knew or should have known that a violation was likely to arise from material support provided the perpetrator;
- Liability may attach to a business organisation directly where it has failed to conduct due diligence with respect to people who act in an official capacity or on behalf of the company.

The first two elements of this theory of culpability will be familiar to all jurisdictions. What is less common is governmental action on the basis of these theories when it comes to business entities in situations of widespread violence. At this stage, government efforts to affirm the applicability of this theory of culpability for businesses involved in violent or predatory crimes would mark a significant step forward, both for ensuring the accountability of business actors, as well as for communicating to businesses the minimum standard of unacceptable behaviour. For those jurisdictions which do not permit criminal prosecutions of juridical persons, it

will be important to clarify how the relevant administrative or tort / delict rules might capture the kind of elements outlined above.

To illustrate how this might be done, we propose Three Prohibitions based on the common ground of corporate culpability identified above. While each of the Three Prohibitions described in full below uses the so-called ‘knowledge’ standard, we have included differences in the *mens rea* in order to reflect the different standards of knowledge applied in some existing laws. Under Prohibition 1, the recklessness standard (common law) or *dolus eventualis* (civil law) is suggested. Under Prohibition 2, we suggest that a ‘probability’ standard be used in determining the mental element for providing material assistance where agents, subsidiaries or associates are the principle actors. In both prohibitions, we suggest that businesses which have conducted due diligence should be able to cite proof of their due diligence as a mitigating factor in sentencing. Under Prohibition 3, we suggest culpability be determined by a strict liability standard based on an obligation to conduct due diligence with respect to handling conflict commodities, and suggest that proof of the conduct of due diligence would serve as an affirmative defence.

Extraterritorial Reach

Clarifying the prohibitions and affirming the relevant theory of culpability for business entities will improve their accountability for involvement in serious human rights abuses in their home countries. However, given the global nature of most business activities and relationships, governments will have to also affirm jurisdiction over entities registered or domiciled within their jurisdiction when operating abroad, both directly and through associates.

Wrongful acts by businesses may prompt legal action if committed at home and, therefore, these acts should also be dealt with if committed by domiciled companies abroad. In some civil law jurisdictions, a court will have jurisdiction over an offence provided that the act was also illegal in the place where the wrong occurred. Where

host country authorities or courts are unwilling or unable to regulate, home state courts must be empowered to hear cases involving the sorts of crimes described here (*i.e.* violent or predatory crimes) when committed abroad. In practice, extraterritorial jurisdiction should be used to focus on areas where violence is significant and perpetrators are rarely, if ever, held to account.

Provision for the extraterritorial application of specific domestic criminal, penal or equivalent law is found in the legal systems of most countries. For example, under national laws, there are increasingly prevalent provisions governing extraterritorial jurisdiction over international crimes, such as genocide, war crimes and crimes against humanity,³² or anti-corruption legislation criminalising foreign bribery by domiciled businesses.³³ For example, in the United States,³⁴ the United Kingdom,³⁵ Canada, France and other signatory states to *OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions*³⁶

and the UN Convention against Corruption (UNCAC),³⁷ it is illegal for a company and its associated entities (individuals, including subsidiaries, affiliates or agents) to bribe public officials overseas. If they do, they can be prosecuted in the home jurisdiction of the business. International conventions, such as UNCAC and the *UN Convention on Transnational Organised Crime (UN TOC)*³⁸ call on signatory states to extend their jurisdiction to domiciled business entities engaged in the corruption of foreign officials abroad thus extending the reach extraterritorially or at least ensuring states' legislation has extraterritorial effect.³⁹ A number of governments have enacted laws to allow prosecution of their nationals for child sexual abuse committed outside of their home country.⁴⁰ Other legal domains relating to anti-trust and securities regulation allow for extraterritorial application to differing degrees.

Anti-Corruption Legislation and Criminal Jurisdiction Over Business Activities Abroad

The principle value of the anti-corruption model is that it provides a legislative template, legal precedent, and history of practical implementation that are important for addressing the impunity that currently exists when it comes to businesses associated with violent acts abroad. The *OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions*⁴¹ and, to an increasing degree, the *UN Convention against Corruption (UNCAC)* both contain provisions that provide jurisdictional basis for countries to investigate and prosecute nationals for offences committed abroad. The FCPA is arguably the best established and provides for the following:

Scope

- Application of the law to domiciled businesses and any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on its behalf.
- Jurisdiction over an “issuer,” or “domestic concern,” or a foreign national or business that is present in the U.S. or has links to the jurisdiction.⁴²

Jurisdiction

- Application of criminal law to domestic companies for conduct abroad (extraterritoriality).

- Individuals and firms can also be penalised if they order, authorise, or assist another to violate the FCPA or if they conspire to violate its provisions.
- U.S. parent corporations may be held liable for the acts of foreign subsidiaries where the former authorised, directed, or controlled the activity in question or where parent company liability can be established based on the accounting provisions it had in place (*i.e.* failure to meet accounting standards under the FCPA).

Mental element

- A workable existing definition of the *mens rea* applicable to businesses.
- Awareness that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur.
- Wilful blindness or conscious avoidance of actual knowledge might satisfy this standard.

Payments through intermediaries

- It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term “knowing” includes conscious disregard and deliberate ignorance. In this case the “recipient” is the intermediary who is making the payment to the requisite “foreign official.”

Due Diligence

- Creates a due diligence obligation for businesses which must show that steps were taken to stay on the right side of the law.
- Disclosure and reporting requirements on the domiciled parent company which extends to the activities of its subsidiaries, affiliates and agents operating abroad.
- Authorises the Attorney General to issue guidelines to assist business in complying with the statute.

Enforcement

- Sanctioning can include both criminal penalties with maximum fines identified and possible jail time for corporate officers. Alternatively, a civil action can be brought where appropriate.
- Other consequences, such as being barred from doing business with the Federal government or being ruled ineligible for receiving export licenses may result if a person or firm is found to be in violation. Private causes of action are still available under other federal or state laws.

Books and records provision

- Businesses will be prosecuted for a failure to show information.

PART 3

THE PROHIBITIONS AND EXAMPLE OFFENCES

The prohibitions outlined below are illustrative of how the elements described above might be combined. A principal challenge to amending existing legislation, or even introducing a new prohibition, will be to balance accountability and predictability so that businesses understand what should be done to stay within the limits of the law.

Prohibitions 1 and 2 reflect existing law. Prohibition 3 – against the practice of dealing in conflict commodities – is based on the existing prohibitions against violent crimes and trafficking. Together, the combination of clarifying the applicability to business entities of existing law, and the introduction of one specific new prohibition, would provide clearer standards for prosecutions and clarify the minimum standard for unacceptable behaviour by businesses in situations of conflict or widespread violence.

Below we define the Three Prohibitions. All would apply to domiciled and registered businesses and their associates operating abroad using the same theory of culpability common to most anti-corruption legislation. As discussed, affirmative defences for Prohibition 3 (outlined below) would be available to the company, in particular where the company has conducted due diligence, which includes fact finding, risk assessment and taking steps to mitigate the risk of human rights abuses occurring (see Affirmative Defences below):

Prohibition 1

Affirming the prohibition against the commission of violent or predatory crimes by a business entity

This prohibition would specify in law the applicability to business entities of certain existing criminal, penal law or equivalent provisions forbidding violent or predatory crimes.

Illegal act: violent or predatory acts such as murder, torture, rape, war crimes and crimes against humanity; forcing people to work or expulsion of people from communities in situations of armed conflict; the appropriation of natural resources (public or private property) without consent linked to war or armed conflict (pillage, plunder or spoliation), the receipt of stolen goods, and violations of UNSC sanctions.

Mens rea (mental element): the standard should closely follow that of the so-called ‘knowledge’ standard, which is that knowledge consists of an awareness of conduct or circumstances and that there is a probability that such conduct will result in a crime. Evidence would be required of awareness of a likelihood or probability that the offence will occur or conscious disregard and deliberate ignorance.⁴³ The *mens rea* for direct commission by a company should correspond to ‘recklessness’ in common law systems and *dolus eventualis* in civil law systems. Such intent, or state of mind, need not be documented but could be inferred from the evidence in a court of law.⁴⁴

For the crime of pillage, leading sources suggest that a similar knowledge standard is required, where the business purposely acquired the good

without consent of the owner or knew that the good had been acquired illegally, or knew that it was “probably stolen” or “probably” acquired through illegal means.⁴⁵

For example, if a business purchases timber from an arms trafficker, given the suspicious circumstances, illegality would seem probable. Proof that parliament has failed to ratify a concession contract for timber extraction as required by national law would also be compelling evidence.

Example offences:

In principle, these provisions would cover all business entities. For example:

- A private security company would face liability if its employees detained and physically abused civilians, or participated in torture during interrogation, or were involved in extra-judicial killings, etc.⁴⁶
- A domiciled business operating abroad would face liability if it has gained access to the site on which it operates, where it builds infrastructure, or where it explores for natural resources, through the forced displacement of a community by its own security guards.⁴⁷
- A domiciled manufacturing business operating abroad would face liability if it were forcing people to work through the threat or use of violence, or under life-threatening conditions.⁴⁸
- A domiciled business would face liability at home for knowingly purchasing and trading in raw materials that have been obtained illegally and by third parties who do not have valid legal title to the property.

Prohibition 2

Clarifying the prohibition against a business knowingly providing substantial assistance to those who commit violent or predatory crimes

This prohibition would specify in law the acts that constitute aiding and abetting by business entities in their relations to those who commit violent or predatory crimes.

Illegal act: material assistance would include the provision of transportation, equipment, weapons, financing, logistical or other material support in the commission of a crime or crimes by another. Any material support provided, whether through contractual or non-contractual or other business transactions, would qualify as the illegal act (*actus reus*).⁴⁹ These acts would constitute a criminal offence once the requisite knowledge is established.

A crime should have been committed and material support actually provided. The crimes could be specified in legislation but, at a minimum, would govern acts that would normally be considered violent or predatory under the implementing country’s own law and international law (e.g. killings or extra-judicial executions; torture, kidnappings, forced displacement, detention without due process, etc).

Mens rea (mental element): knowledge consists of an awareness of conduct or circumstances, and where there is a probability⁵⁰ that such conduct will assist in a crime. Such knowledge, or ‘state of mind’, could be demonstrated by examining the totality of evidence in a court of law.⁵¹

Example offences:

- The use of disproportionate force by government or private security forces acting with material support of a company would create liabilities for the company itself, even where the actions of the security forces (e.g. killing, beating, abduction, rape) were neither ordered nor intended by the company.

- Businesses may be liable if they provide weapons or dual-use equipment to governments or armed groups who use those products to commit atrocities. This may be the case even where import and export regulations are fully respected, if it can be shown that there was a reasonable expectation that the goods provided would make a substantial contribution to the commission of violent or predatory crimes.
- Providing financial resources to those who are known to commit international crimes (e.g. direct payments to abusive military or rebel units) may result in culpability as those resources may materially assist the crimes being committed. The risk of culpability increases if the company persists in doing business with the violators, particularly once the violations are common knowledge.⁵²

Prohibition 3

A prohibition against trafficking in conflict goods

Currently, there is no specific legal prohibition preventing businesses from dealing with armed groups engaged in the illicit trade of natural resources. As one clear example, Global Witness and the UN Group of Experts for the Democratic Republic of Congo (DRC), among others, have published detailed reports highlighting how rebels and Congolese soldiers have hijacked the trade in mineral ores from eastern DRC, while subjecting the civilian population to massacres, rape, extortion, forced labour and forced recruitment of child soldiers. The warring parties have financed themselves via the control of mines in the regions that produce tin, tantalum ore, tungsten ore and gold.⁵³ They have also generated substantial sums through illegal ‘taxation’ of the minerals traded along transportation routes. Congo’s ‘conflict minerals’ have then been laundered into the global supply chain by exporters in the east of the country before being transformed into refined metals.

There is increasing focus on the problem by the UNSC,⁵⁴ the OECD⁵⁵ and in the United States.⁵⁶ Prohibition 3 would build on this emerging norm against conflict commodities by introducing into law a ban against dealing in goods or services produced by means of the kinds of serious human rights abuses associated with situations of widespread violence, including conflict.

Illegal act: dealing in a good or service produced by means of serious human rights abuse, where:

- Dealing includes the purchase, sale, transfer, harbouring or receipt of a good or service;
- A good or service includes all services and tradable goods, including natural resource commodities at various stages of the supply / value chain, dual-use equipment, and some consumer goods (e.g. computers or mobile phones);
- Serious human rights abuse means, at a minimum, violations and abuse similar to violent or predatory crimes and international crimes under the implementing country’s own law under domestic or international law (e.g. killings or extra-judicial executions, rape, torture, kidnappings, forced displacement, detention without due process, enslavement, forced labour, etc.);
- Or, where United Nations commodity⁵⁷ and targeted sanctions are imposed by the UNSC.

Strict Liability: A business would be liable for a failure to prevent itself, an employee or other associate from trafficking a good or service produced by means of the threat or use of force or serious human rights abuse.

Example offences:

In the absence of adequate due diligence procedures, a business operating abroad may be held liable for buying, selling or transporting products, commodities or assets originating from a production process that involved forced labour, killings or other prohibited practices. Trade in basic commodities emerging from areas of conflict, such as diamonds, timber, oil, and a variety of metals important for the high-tech sector, could be affected.

For example:

- A financial services company handling the ill gotten gains for companies owned by parties to a conflict who are known to be perpetrating widespread abuse;
- A transport company shipping timber to consumer markets which originates from an area controlled by forces under UNSC sanction;
- A business purchasing a commodity from suppliers who are financing parties to a conflict who are committing serious human rights abuses;

Key Provisions of the UK Bribery Act⁵⁸

Influential provisions of the *UK Bribery Act* (2010) establish the following:

Strict liability for failure to prevent bribery

A business will be liable for a failure to prevent bribery by an associated person.

Affirmative defence for failure to prevent bribery

It is a defence for the business to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

Associated persons

A business will be liable for bribery carried out on its behalf by associated persons. An associated person is defined to include a person who performs services for or on behalf of the business regardless of capacity and may be an employee, agent or subsidiary. This determination will be made based on relevant circumstances and not only depend on the nature of the relationship between the two parties. It will be presumed that an employee is an associated person unless proven otherwise.

PART 4

AFFIRMATIVE DEFENCES

Only under Prohibition 3 (strict liability for trafficking in conflict goods) could an affirmative defence be relied on by a domiciled business entity operating abroad. As such, the business must prove that it has complied in good faith with national human rights laws and, in their absence, international human rights standards.⁵⁹ Businesses would have to show they have exercised a duty of care, in particular that they have conducted human rights due diligence⁶⁰ and taken appropriate steps to mitigate the risk of violations occurring. An additional mitigating factor might be whether or not the business entity reported a violation committed by its own actions or someone acting on its behalf (self-reporting).

Proof for such defences may include filings with Securities Commissions, Justice Departments or otherwise showing that a Human Rights Impact Assessment (HRIA)⁶¹ commensurate with best practice standards was conducted and adequate due diligence was carried out at all relevant periods of the business cycle and in the supply chain.⁶² The standards in this respect should reflect current best practice models. Adequate due diligence over the supply chain means: tighter controls, finding out exactly when minerals were extracted, where they are coming from, and whose hands they have passed through. It involves taking steps to ensure compliance, conducting on-the-spot checks and audits of the supply chain. More than verbal assurances are required. A failure to show the above could result in liability.

PART 5

PENALTIES

The specific sanction chosen should reflect the severity of the violations and might include the following:

- **Criminal:** including i) loss of operating license, maximum fines identified for the business; plus ii) maximum fines and maximum jail time identified for business associates, e.g. officers, directors, shareholders, employees, and agents.
- **Administrative:** in countries where criminal law does not apply to business entities in general: i) loss of operating license, maximum fines identified for the business; plus ii) maximum fines and maximum jail time identified for business officers, directors, shareholders, employees, and agents.
- **Civil:** where appropriate, a civil action may be brought with a fine up to a maximum determined value against any firm as well as any associate (e.g. officer, director, employee, or agent of a firm, or stockholder) acting on behalf of the firm, who violates the proposed criminal provision. This action would not bar other legal action from being taken under other laws, where appropriate.

In terms of other governmental action, sanctions could include, but not be limited to, the guilty business being barred from doing business with the government agencies and ruled ineligible for receiving export licenses or other forms of government support. Specific sanctioning measures could include: blacklisting companies, withdrawing any / all government support (e.g. insurance and other support from national export credit agencies), revoking a company's license to operate, and de-listing a company from major stock exchanges.

PART 6

CONCLUSION: WHAT GOVERNMENTS MUST DO

The Three Prohibitions outlined above draw on the evolution of national and international criminal law, anti-corruption law and human rights law to suggest ways of overcoming the existing obstacles to pursuing accountability for business involvement in serious human rights abuse. Prohibitions 1 and 2 reflect formulations based on current law. Prohibition 3 is a natural extension of current law in order to deal with the trafficking of conflict goods.

Global Witness believes that prosecutors, law enforcers and regulators must be in no doubt about how to pursue businesses involved in violent or predatory crimes, in particular those 'rogue' businesses who have found a niche in situations of widespread violence. Prohibitions 1 and 2 outline the wrongful acts we believe are covered by existing law and propose standards for the mental element of such crimes. Prohibition 3 proposes strict liability for the practice of dealing in conflict commodities based on the existing prohibitions against violent crimes and trafficking (including an affirmative defence for companies based on due diligence).

The overarching effect of the measures proposed is to set a minimum standard of unacceptable behaviour by business in situations of widespread violence, and encourage prosecutions against those that commit and facilitate violent and predatory crimes, including those amounting to serious human rights abuses. The proposal assumes that most legal traditions have ways of protecting fundamental human rights and does not assume that one size will fit all. Our proposal assumes that the most effective regulatory action

will occur at the national level, but recognizes the trans-national effects of advancements in anti-corruption law, international criminal law and human rights law which are already globalizing fundamental responsibilities for business entities. The proposals outlined here do not rule out that governments may desire some form of harmonisation via international legal instruments.⁶³

The most timely and effective route is for governments to adapt prohibitions along the lines suggested in this paper to their own regulatory frameworks. This would provide immediate clarity about the minimum standard of behaviour expected of their companies abroad. To that end, governments should:

Clarify the regulatory framework:

- Promulgate prosecutorial or regulatory guidelines that clarify how to prosecute business for violent or predatory crimes and amend existing legislation or pass new legislation along the lines suggested here, or in the manner appropriate to criminalising domiciled business entities, for their involvement in abuse committed abroad.
- Compel domiciled businesses to carry out due diligence to ensure that trade in natural resources from conflict affected areas is legal and complies with international human rights instruments. This includes requiring that businesses show that materials purchased from conflict affected countries neither finance

abusive armed groups or military units nor contribute to human rights abuses at any point along the supply chain in line with emerging international best practice standards.

Monitor and sanction bad behaviour:

- Sanction businesses found to be involved in violent or predatory crimes through mechanisms and techniques reflecting the severity of the violations including criminal, civil or administrative penalties.
- Give immediate effect to UNSC sanctions and develop a fair and clear procedure for putting forward commercial entities and individuals for listing by the UN Sanctions Committee.
- Monitor the activities of businesses operating in conflict areas and require that they report on the implementation of their due diligence obligations.

Provide policy guidance:

- Issue warnings and provide advice and assistance to domiciled business entities operating in conflict affected areas with respect to human rights concerns prevalent in those areas.
- Facilitate cooperative bilateral efforts with host states, particularly with respect to information sharing and developing joint strategies for pursuing criminal investigations.

Provide sufficient resources:

- Allocate the resources and training required to build the confidence of prosecutors who are willing to pursue these cases.

There is a clear precedent for home states both investigating and prosecuting their own citizens, as well as domiciled companies, for crimes committed abroad. Surely, if governments can

take legal action against their citizens implicated in international crimes abroad, or against their business entities involved in corruption in other countries, they should also exercise their legal power to prosecute business entities involved in violent or predatory crimes or serious human rights abuse.

It should be emphasised that, in many cases, the presence of companies in conflict areas is not in itself the problem. Foreign investment in such areas can play an important role in efforts to promote peace and stability, as well as efforts to promote democratic transition. To provide clarity for business, a definition of prohibited activities is required not merely the delineation of ‘no-go zones’ from which all investment should be excluded.

On the other hand, it must be recognised that business can also contribute to entrenching human rights abuse and the spread of violence in conflict areas. Domiciled businesses operating in foreign jurisdictions may be conducting business with clients, customers, subsidiaries, affiliates or agents who are committing or contributing to gross human rights abuse. The behaviour of such businesses can have a significant impact on human rights in such places and pose a real risk to people, as well as to the company’s brand-value and their home-country’s national economic or strategic interests.

For all of these reasons, strong protections need to be in place and counter-measures aggressively enforced. The effect of the reforms suggested here would be to close the loop-holes that permit rogue businesses to operate with impunity, as well as to clarify the basis on which businesses that mean well could continue to operate in difficult human rights contexts.

ENDNOTES

- 1 E.g. domestic corporate administrative law regimes.
- 2 These terms are defined at pages 8-9 of this paper.
- 3 We do not make an analogy between criminal law and human rights law. Our view is that, to the extent they both contain prohibitions against certain kinds of violence against people, the criminal law regime should be viewed as one enforcement mechanism to help defend human rights.
- 4 See: Global Witness publication "Do No Harm" at: http://www.globalwitness.org/sites/default/files/pdfs/do_no_harm_global_witness.pdf.
- 5 This term is further defined at endnote 11.
- 6 Since 1993, businesses have played a significant role in investigations carried out by Global Witness relating to human rights violations; also see: "Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse" UN Human Rights Council A/HRC/8/5/Add.2 23 May 2008.
- 7 The terms 'conflict areas' and 'conflict affected areas' are used interchangeably throughout this paper and are used to depict areas where violence is widespread and a range of crimes and human rights abuse may result.
- 8 For direction on the business 'Responsibility to Respect Human Rights' and due diligence practices as the operationalization of this responsibility, see: Professor John Ruggie's "Protect, Respect and Remedy: a Framework for Business and Human Rights", endorsed by the UN Human Rights Council A/HRC/8/5 7 April 2008.
- 9 The framework of UN Special Representative to the Secretary General (SRSG) on Business and Human Rights John Ruggie was welcomed unanimously in June 2008; also see: joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights, May 2008.
- 10 Reform of UK and Dutch National Contact Points (NCPs); Canada's Corporate Social Responsibility (CSR) counsellor; Norway's plan to revise the NCP.
- 11 An associated person is one who performs services for or on behalf of the business regardless of capacity and may be an employee, agent or subsidiary. It will be presumed that an employee is an associated person unless proven otherwise. A similar definition is used in the *UK Bribery Act (2010)*.
- 12 See: e.g., <http://www.redflags.info> for a list of cases in which charges or allegations involving business entities have been brought to court.
- 13 Throughout this brief, we refer to 'domiciled businesses', meaning companies and other commercial entities domiciled or registered under national laws. The terms "involvement", "association" and "participation" are used to reflect a link between a business and violent crime, and their use is not intended to prejudice any of the usages of those terms in the laws in particular jurisdictions.

- 14 Directors may be held liable for failing to fulfil the 'duty of care' owed to a business. However, whether duty of care encompasses fulfilment of human rights remains unclear and a legal action based on a breach can only be brought by shareholders in most jurisdictions; see: findings from numerous jurisdictions relating to directors' liabilities in "SRSG's Corporate Law Tools Project" Paper produced as part of the Business and Human Rights Mandate (draft dated 23 October 2009).
- 15 See: e.g., <http://www.business-humanrights.org/LegalPortal/Home> for a list of recent and ongoing cases.
- 16 "Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses" Mark B. Taylor, Robert C. Thompson, Anita Ramasastry, Fafo, 2010.
- 17 This is often as a result of changes made to domestic criminal law arising from ratification of the Rome Statute. As of March 2010, 108 states have incorporated international crimes directly into national law with the result being that companies are now prosecutable for these crimes in some of these national jurisdictions.
- 18 "Translating Unocal: the expanding web of liability for Business Entities Implicated in International Crimes", Robert C. Thompson, Anita Ramasastry and Mark B. Taylor, 40 GWILR 841 (2009).
- 19 In this paper, we focus on national jurisdictions because it is these which most directly regulate business activity in general. While jurisdiction for international crimes also exists at the international level, at present the jurisdiction of the International Criminal Court and similar tribunals extends only to natural persons.
- 20 See: the survey of jurisdictions under the Business and International Crimes project <http://www.fafo.no/liabilities>.
- 21 Our focus is on criminal law as one vehicle for enforcement. We do not reject the possibility that there may be complimentary measures in other areas of law, not least company law.
- 22 We assume that criminal law and human rights law are two separate legal regimes with their own pedigrees, theories and enforcement mechanisms. Our primary concern here is criminal law, although we are conscious of the significance to strategies of human rights protection that criminal law may afford.
- 23 For example legislation, see: French Criminal Code sections 435-3 and 435-4. Also see: Paragraphs 258/B-D of the Hungarian Penal Code (law no 4 of 1978) which provides the definition and punishment for bribery of foreign officials. Paragraph 3(1) also provides for extraterritorial jurisdiction for all crimes that are committed abroad by a Hungarian national, the only condition is that it is a crime in Hungary. Australia has provisions that can be used to "hold the corporation directly liable for criminal offences in circumstances where features of the organisation of a corporation, including its 'corporate culture', directed, encouraged, tolerated or led to the commission of the offence." Canada operates a modified

- "identification model" in which the "corporation is held directly liable for the wrongful conduct engaged in by senior officers and employees on the basis that the state of mind of the senior employee was the state of mind of the corporation". Also see: "Corporate Culture' as a Basis for the Criminal Liability of Corporations", Prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business, February 2008, <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.
- 24 This is often referred to as the 'known or should have known' standard of knowledge and is intended to mitigate the possibility of what in *Foreign Corrupt Practices Act* (FCPA) legislative history is referred to as the "head in the sand" problem; See "Legislative History – House Report 100-418 (1988).pdf," <http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf>. Under the FCPA culpability also attaches where a third party's actions are likely to result in corrupt practices. Also see: FCPA Definitions 15 U.S.C. § 78dd-3(f)(3): "A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if – (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. (B) When knowledge of the existence of a particular circumstance is required for an offence, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." <http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>. The prosecution is required to provide evidence of corrupt intent (*mens rea*) in the event of bribes paid directly by the business. Evidence of intent might include a pattern of payments or gifts, unnecessarily complex business entity structures, or payments through third parties.
- 25 Under the *UK Bribery Act (2010)* (c.23) http://www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1 expected to come into force in April 2011.
- 26 The *UK Bribery Act (2010)* moves away from the controlling mind test used by the FCPA for establishing liability and towards strict liability based on an obligation of due care.
- 27 There are, of course, challenges to such prosecutions, not least the challenges of pinpointing responsibility in an often murky transnational organisational structure and operating environments, or the risk that traditions of sentencing companies are not accustomed to serious crimes, etc. However, within the realm of anti-corruption law, prosecutors are well versed in these challenges and it seems that both law and legal practice – e.g. the recent *UK Bribery Act (2010)* – are evolving accordingly.
- 28 Under customary international law, as well as under the International Criminal Tribunal for The Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the accessory must have knowledge that "his actions assist the perpetrator in the commission of the crime." *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, P236 (December 10, 1998). *Prosecutor v Kvočka et al.*, IT-98-30/1-A, Judgement, para. 261 (Feb. 28, 2005) ("the act or omission was committed with intent to kill, or in the knowledge that death was a probable consequence of the act or omission"); *Boškoski Trial Judgment*, para.358 ("indirect intent may be expressed as requiring knowledge that destruction was a probable consequence of his acts."), para. 382 ("indirect intent, i.e. in the knowledge that cruel treatment was a probable consequence of his act or omission"); *Limaj Trial Judgment*, para. 509 ("The requisite *mens rea* is that the accused acted with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.").
- 29 For example, in the case of Frans van Anraat, LJN: BA4676, *Gerechtshof 's-Gravenhage*, 2200050906 – 2.
- 30 See: e.g., "Business and International Crimes". <http://www.fafo.no/liabilities>.
- 31 The statement is made in endnote 43 of "Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework," A/HRC/14/27, 9 April 2010 http://www.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf. See also "Clarifying the Concepts of "Sphere of influence" and "Complicity", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie A/HRC/8/16, 15 May 2008 <http://www.unhcr.org/refworld/topic,459d17822,466942422,484d1fe12,0.html>.
- 32 E.g. Australia, Belgium, Canada, France, Germany, India, Japan, The Netherlands, Norway, South Africa, Spain, Ukraine; see Thompson, *et al supra* endnote 16.
- 33 Such as the FCPA, *Canadian Corruption of Foreign Public Officials Act* or *UK Bribery Act (2010)*.
- 34 For example, "a U.S. parent corporation may be held liable for the acts of foreign subsidiaries where they authorised, directed, or controlled 25 the activity in question, as can U.S. citizens or residents ...who were employed by or acting on behalf of such foreign-incorporated subsidiaries;" see: U.S. Department of Justice website: <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.
- 35 The *UK Bribery Act (2010)* applies to a body incorporated under the law of any part of the United Kingdom operating overseas.
- 36 Adopted 1997; ratified by 30 OECD member countries and 8 non member countries.
- 37 See: GA Resolution 58/4, 31 October 2003, entered into force 14 December 2005; Article 26 for requirement of liability of legal persons for bribery; document located at: http://www.uncac.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
- 38 See: GA Resolution 55/25, 15 November 2000; 150 parties to treaty, 100 ratified; Article 10 states that legal persons will be liable for serious crimes relating to transnational organised crime such as money laundering, participation in criminalised group, corruption, and obstruction of justice.
- 39 The distinction between "extraterritorial jurisdiction", where direct jurisdiction is exercised by a state, and measures with extraterritorial effect – i.e. "domestic measures with extraterritorial implications" – are discussed by Professor John Ruggie in "Keynote Presentation at EU Presidency Conference on the 'Protect, Respect and Remedy' Framework", Stockholm, November 10-11, 2009. Both are relevant for our discussion.
- 40 At least 38 countries have enacted extraterritorial laws to prosecute their citizens for child sexual abuse crimes committed abroad including: the UK, U.S., India, France, Canada and Australia.
- 41 See: endnote 36.
- 42 Paraphrasing from the U.S. Department of Justice website, an "issuer" is a corporation that has issued securities which have been registered in the United States, or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, jointstock company, business trust, unincorporated organisation, or sole proprietorship which has its principal place of business in the United States, or which is organised under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

- 43 See: *supra* 24; a precedent for this standard of knowledge can be found in the FCPA Definitions 15 U.S.C. § 78dd-3(f)(3); also see: *U.S. v. Green* (2009) for reference to wilful blindness; also in *United States v. Bourke*, the federal district court in the Southern District of New York explained how conscious avoidance of actual knowledge might satisfy this standard; see Jury Charge, *United States v. Bourke*, No. 05- CR-518 (S.D.N.Y. 2009).
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- 44 Leading sources suggest this standard for the crime of pillage, e.g. where the business acted purposefully, or with knowledge of a substantial likelihood that an offence would occur; see: Professor James Stewart and Ken Hurwitz, "Corporate War Crimes", Open Society Justice Initiative, published in October 2010.
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- 45 *Ibid* at paragraph 113 it is stated that "...the phrase 'probably stolen' for ease of reference in describing indirect intent, conscious that the actual legal test will vary from jurisdiction to jurisdiction."
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- 46 For example: five employees of the U.S. Security firm Blackwater were indicted on 14 counts of manslaughter and weapons charges in connection with the 2007 shooting of 17 Iraqis. The firm said its guards acted in self-defence when they opened fire while defending a convoy of U.S. diplomats. A U.S. Judge dismissed the case in late 2009 on the grounds that U.S. Department of Justice prosecutors had improperly used sworn statements <http://www.redflags.info/index.php?topic=security>.
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- 47 "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.
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- 48 Cases include: *U.S. v. Krauch et al.* (The I.G. Farben case) VIII Trials of War Criminals before the Nuremberg Military Tribunals, iii-iv (1952).
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- 49 Special consideration may have to be given to the question of financial or monetary support. The fact patterns on the ground indicate that there is a range of possible transactions that could be captured under this category and would require distinction: for example, on its face, financing might theoretically include legitimate taxes or direct payments to state armed groups that may or may not be illegal, as well as so-called "booty futures" to finance rebel groups and illicit financing of corrupt or abusive regimes.
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- 50 "High probability of the existence of wrongdoing" is the standard used in the FCPA; instead we have opted for the "probability" standard because of the different nature of the offences involved i.e. violent or predatory crimes.
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- 51 See: *supra* 24 and 43.
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- 52 Examples of previous cases include Chiquita in Colombia (see: http://www.redflags.info/index.php?topic=financig&style_id=0); see also the charges in *Prosecutor v. Felicien Kabuga* (ICTR- 98-44B-1, Amended indictment, 1 October 2004); *United States of America v. Friedrich Flick et al.* (Case V) March 3, 1947-December 22, 1947.
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- 53 See: UN Group of Expert Reports s/2008/773 and s/2009/603.
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- 54 In December 2008, the UNSC extended existing targeted sanctions to cover 'individuals or entities supporting the illegal armed groups in the eastern part of the Democratic Republic of the Congo through illicit trade of natural resources.' UN Security Council Resolution 1857 (S/Res/1857), adopted 22 December 2008. Global Witness believes that UN member states should have a clear and consistent policy for putting forward entities and individuals for listing to the UN Sanctions Committee.
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- 55 In 2009 and 2010, the OECD developed the "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" and the attached "Supplement on Tin, Tantalum and Tungsten". The Guidance and Supplement were "the result of a wide and inclusive multi-stakeholder process held through the OECD-hosted working group on due diligence in the mining and minerals sector" <http://www.oecd.org/daf/investment/mining>. At the time of writing, the Guidance and Supplement had yet to be approved.
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- 56 Provisions of the *U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act* (passed 26 July 2010) at *Excerpt of U.S. Financial Reform Act 2010, Sec. 1502* (also known as the *Financial Reform Act*); it will require companies whose products contain cassiterite (tin ore), coltan (tantalum ore), wolframite (tungsten ore) and gold to disclose to the Securities and Exchange Commission whether they are sourcing these minerals from the Democratic Republic of Congo (DRC) or adjoining countries. Companies will have to detail the measures they have taken to avoid sourcing these minerals from Congolese armed groups, which are guilty of massacres and other atrocities.
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- 57 By seeking to exclude particular commodities of a specific origin from global markets, the UNSC sends a clear signal to governments, industry and consumers about what not to buy. More importantly, they demonstrate how economic decisions can affect international peace and security and human rights. However, it is critical that they be properly implemented and well timed, and allow sufficient flexibility to match the agility of their targets, who may have access to other sources of income.
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- 58 *UK Bribery Act* (2010) (c.23), *supra* 25.
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- 59 Under Prohibitions 1 and 2, such proof might be considered as mitigation when assessing the appropriate penalties.
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- 60 For direction on the Corporate Responsibility to Respect and due diligence practices, see Professor John Ruggie's "Protect, Respect and Remedy: a Framework for Business and Human Rights", endorsed by the UN Human Rights Council A/HRC/8/5 7 April 2008.
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- 61 A number of best practice models currently exist, see: Business and Human Rights Resource Centre at <http://www.business-humanrights.org/Home>.
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- 62 See: Global Witness publication "Do No Harm", *supra* at 4 and OECD due diligence guidance on responsible supply chain management of conflict minerals due to be approved at the end of 2010. Also see: *supra* at 55.
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- 63 For example, international standards for incorporation to do business in international commerce: "If a state wants to let its companies do anything and behave irresponsibly then those companies have no place in international trade. They should be limited to their home territory. Further some prohibitions should be written into corporate charters which will give shareholders the right to act against managements that violate the prohibitions" (Jack Blum, US corruption expert, in correspondence with Global Witness).

Global Witness is a UK-based non-governmental organisation which investigates the role of natural resources in funding conflict and corruption around the world.

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