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Senate Judiciary Committee

Subcommittee on Human Rights and International Law

Written Testimony

**“The U.S. role in addressing complicity of companies in human rights abuses
in conflict areas”**

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Global Witness

Thank you, Mr. Chairman and members of this esteemed Committee, for the opportunity to share our views on the critical issue of improving the accountability of companies for human rights abuses arising from their operations in conflict zones.

Despite the scandals associated with blood diamonds in the 1990s, multi-national corporations today continue to be involved in transactions with armed groups from the Democratic Republic of Congo (DRC) to Burma to the Ivory Coast. In response to a Global Witness complaint, a British government agency just last month found that the UK company Afrimex through its associated company and suppliers had paid taxes and licenses to rebel forces in the DRC, thereby contributing to the ongoing conflict. This was in response to a Global Witness complaint to the OECD.

Currently, international momentum is growing with respect to distilling the ‘State Duty to Protect’ within the context of the human rights and business debate. In June 2007, the United Nations (UN) Human Rights Council adopted the “Protect, Respect and Remedy: a Framework for Business and Human Rights” put forward by John Ruggie, the Special Representative to the UN Secretary General. As articulated in that report, home states (*i.e.* countries in which companies are registered) need to play a greater role in minimizing human rights abuses caused or contributed to by their companies operating in volatile area.

As a home state, the United States must take a more proactive role in minimizing corporate-related human rights abuses that arise in volatile areas. Three important U.S.-led initiatives would make a significant impact to making this happen.

- First, the U.S. should lead an international initiative to regulate material transactions by companies with security forces. The Voluntary Principles process is currently not working as intended. This is one area where good law is better than good governance.

- Second, Congress should introduce legislation on due diligence that requires companies that source natural resources produced in conflict zones – for example, minerals from eastern Congo – to ascertain the exact location where the minerals are produced and date of extraction of the minerals. This would have an important impact on corporate due diligence in conflict areas.
- Third, the U.S. should help set up a UN-endorsed complaints mechanism that can make companies operating in conflict zones more accountable for committing human rights abuses.
- Fourth, the U.S. should support calls for a UN Secretary General’s report on natural resources and conflict which includes a consideration of human rights and business in conflict areas.

Together, these measures would act as a powerful tool to ensure that U.S. companies and companies that do business in the U.S. neither perpetrate nor are complicit in human rights abuses that may arise through their operations in foreign areas where there is volatility. The U.S. government should provide clear guidance to companies and identify the human rights risks of which they should be aware. Going an important step forward, there should be monitoring of corporate compliance to these standards and the U.S. should be prepared to sanction those companies that fall afoul of these standards, whether intentionally or otherwise.

1. The Problem

Currently, corporations are operating in conflict areas where there is anarchy, widespread repression and weak protections against human rights violations. These ‘volatile’ areas are not only situations of armed conflict, as defined by international humanitarian and criminal law, but also include circumstances from civil war, to brutal government regimes that seek to repress human rights, to post-civil war countries with sporadic violence, and to localised areas of civil unrest.¹

Armed conflict continues to be fueled by the exploitation of natural resources in several countries today, and corporations are complicit in this exploitation either directly or through their supply chains. Global Witness field research in eastern Democratic Republic of Congo in July and August 2008 uncovered substantial evidence of the involvement of armed groups, such as the predominantly Rwandan Hutu Forces démocratiques pour la Libération du Rwanda (FDLR), as well as units and commanders of the Congolese national army, in the exploitation and trade of cassiterite (tin ore), gold, and other minerals in North and South Kivu. These economic activities are perpetuating

¹ Conflict areas can be identified by the presence of a number of factors including:

- Violence, human suffering, or large numbers of displaced persons;
- Two or more armed factions competing for power and control; and
- Collapse of civil infrastructure; an absence of governance, legal structure and individual security.

instability in the region, and the minerals may be used in electronic products from cell-phones to digital cameras right here in the U.S.

Furthermore, Global Witness investigations in Ivory Coast earlier this year found that the Forces Nouvelles rebels are continuing raise revenue from the trade in cocoa passing through the territory they control. The economic agendas of Forces Nouvelles commanders are a serious impediment to meaningful reintegration of the two halves of the country as mandated by the March 2007 Ougadougou peace agreement. Much of the chocolate consumed in the U.S. comes directly from Ivory Coast, meaning that corporations are still not doing a proper job of due diligence.

Often in these volatile areas the host government (*i.e.* the country where corporate operations are being conducted) is unable or unwilling to assume its responsibility in safeguarding local human rights. Thus, protections are weak and companies are at a greater risk of committing and exacerbating human rights violations. In these areas, gross human rights violations take place and criminal activity often goes unchallenged by governments. Without regulation and targeted policy developments at the international level, and interventions made by the home states of these companies, corporate involvement in human rights abuses will continue.

In these instances, the home state, including countries such as the United States, needs to intervene and assume a proactive and reactive role in ensuring that their companies neither perpetuate nor are complicit in human rights abuses arising by virtue of operations in these areas.

2. The Solution and the U.S. Role

The United States can play a leading role on the international regulation of the conduct of companies operating in conflict zones. Unfortunately, host states often lack the capacity or political will to undertake such efforts, and on the corporate side, there is the potential for complicity in human rights violations. As home to many of the largest corporations involved in, or potentially involved in, transactions in conflict zones, the U.S. can play a critical role.

The United States should lead the call for targeted policy approaches at the international level to support the implementation of regulation. For example, a complaints mechanism will improve corporate accountability for human rights violations arising in conflict zones and ensure access for affected groups. As well, a UN Secretary General's Report addressing the correlations between economic actors engaged in conflict zones, the trade of natural resources and prevalence of human rights violations will provide a global benchmark for corporate and state actors.

While international regulation combined with policy action is necessary, it will take time to develop. In the short to medium term, the United States should take proactive steps to minimize human rights abuses in conflict zones caused by companies registered in their jurisdiction by enforcing applicable minimum legal standards. In addition, it is essential

that that U.S. adopt new regulations to ensure that corporate accountability and human rights issues in conflict zones are adequately addressed.

In addition to regulation, the United States should adopt a series of policy and due diligence measures, and issue public statements to minimize corporate related human rights abuses.

3. Recommendations for the U.S. to consider

The recommendations below include the four identified above as well as present others based on lessons learned and best practices sourced globally.

International Level – Regulatory Actions

1. The United States to champion the call for regulation for companies operating in conflict zones at the international level, which sets a global standard with legally binding norms and standards of legal accountability that companies are required to fulfil to avoid contributing to human rights abuses.

Specifically, legal regulation to address material transactions that companies are engaged in with security forces in conflict zones is required. Material transactions include: the provision of transportation, financial support and logistical support. Currently, voluntary principles guiding these transactions exist but there is neither a binding system of accountability nor framework in place at the international level that addresses this relationship.

International Level - Policy Actions

2. Congress should introduce legislation that requires companies that source natural resources produced in conflict zones – for example cassiterite, gold and other minerals from eastern Congo – to ascertain the location where the minerals are produced and date of extraction of the minerals. This would have an important impact on corporate due diligence in conflict areas.
3. The United States should lead calls for a UN endorsed complaints mechanism that can make companies operating in conflict zones more accountable for committing or exacerbating human rights abuses. The complaints mechanism must be credible, representing the highest level of adjudication and equipped with professional expertise. The mechanism should include a ‘clearing house’ and review committee including independent advisors from business, civil society and government. To access the mechanism, complainants should be able to demonstrate that national avenues for redress have been attempted, but failed.
4. The United States should call for a UN Secretary General’s Report on the role of resources in conflict, and the relationship between their exploitation and human rights violations. The report should examine the UN’s experiences of addressing the role of

natural resources in conflict and post-conflict scenarios, the lessons that can be learned, and the ways in which existing UN approaches may be strengthened. The report should also clarify what constitutes a conflict resource in order to provide a basis for identifying cases that require action by the Security Council. The report will simultaneously establish a set of red flags for companies operating in or trading in commodities sourced from conflict zones, while guiding home states' efforts to hold companies to account.

In June last year the UN Security Council convened a first ever thematic debate on natural resources and conflict and called for more international action to address the issue. The Belgian government is now proposing that the UN General Assembly convenes a debate on the same topic. The immediate objective would be a UNGA resolution calling for a UN Secretary General's report. The U.S. government should support this initiative.

National Level - Regulatory Actions

5. The United States should recognize and enforce current legal standards that minimize human rights abuses caused by registered companies operating in conflict zones.
 - The U.S. should focus on improved enforcement and prosecution of individuals and companies that violate UN Chapter VII sanctions. These are guiding norms of international law and their application needs to be prioritized at the national level.
 - The U.S. should compel compliance around the *Red Flags* published by FAFO and International Alert.² The *Red Flags* represent nine liability risks for companies operating in high-risk zones that are based on legal breaches sourced from national and international law. The United States should compel compliance by their companies and sanction those caught violating a Red Flag that leads to human rights violations.
 - The U.S. should better integrate prosecute companies for engaging in economic crimes such as pillage or plunder (*i.e.* theft) during periods of internal armed conflict.³ Jurisprudence has established that non-state actors, such as companies, can also be liable for these crimes.

The United States should adopt new regulation that applies extra-territorially to minimize human rights abuses caused by registered companies acting in conflict zones.

² The FAFO and International Alert, *Red Flags*, due for publication 2008; Red Flags are stated to exist when actions result in: displaced peoples; forced labour; the handling of questionable assets; making illicit payments; engaging with abusive security forces; trading goods in violation of UN international sanctions; providing the means to kill; and the financing of crimes.

³ Pillage or plunder refer to the unjustified appropriation of property during armed conflict.

- The U.S. should require that companies operating in or buying from conflict areas conduct due diligence in their supply chain to ensure that they do not commit or contribute to human rights abuses. This obligation extends to supply chain actors, where the company is in a position to influence any unfriendly human rights practices used by them. The Government must also assess the level of due diligence carried out by a company when providing advice, financial support or insurance to registered companies operating in conflict zones.
- Congress is already moving on important new legislation relating to the creation of new standards for financial transparency, calling for oil, gas and mining companies to disclose payments made to foreign governments. Introduced in the Senate by Senator Chuck Schumer and co-sponsored by Senators Durbin, Feingold, Leahy, Lieberman, and Cantwell, and introduced in the House by Financial Services Committee Chairman Barney Frank, the Extractive Industries Transparency Disclosure Act, the EITD Act, provides exactly that opportunity. The bill, S. 3389, provides for a low-cost, high impact SEC rule change requiring the disclosure of payments to foreign governments by oil, gas, and mining companies. Under the bill, all extractive industry companies that are listed on U.S. capital markets – including foreign corporations – would publish their revenue payments to all foreign governments on a country-by-country basis through their regular annual filing reports to the SEC.
- The EITD Act is critical for establishing freedom of information and a global standard for transparency in the oil sector, at a time when oil company profits are reaching record levels. It would promote U.S. interests by combating corruption and improving the stability of U.S. investments abroad through improved governance in oil-producing countries. Importantly, the bill is a powerful tool for poverty reduction, as the transparency will enable oil revenues to be managed in a more accountable manner. A lack of transparency enables repressive regimes to maintain power and control over a country, act unaccountably and commit human rights abuses without scrutiny.

National Level - Policy Actions

6. The United States should take proactive steps to clarify expectations and principles relevant to business behaviour and human rights in conflict zones.
 - The Government should formalize and monitor the implementation of existing voluntary codes such as the Voluntary Principles. The U.S should protect against companies that sign up to voluntary initiatives, but fail to implement them. The Government should also provide incentives for companies to comply with these human rights standards and not allow these to be weakened or undermined.
 - The U.S. should make use of tools available to the government in exercising leverage over companies breaching human rights. As one method, home states should recommend when appropriate, that their public financial agencies divest

from companies that are found to violate human rights standards. To achieve this, home states should replicate and customise current best practice models such as the Norway Pension Fund. A second method to exercise leverage would be for home states to strengthen the human rights components of the OECD Guidelines, which are currently very general.

- The U.S. needs to make more effective use of the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank by requiring that they explicitly state that human rights are operational principles applicable to companies seeking financial support and insist that red flags are adhered to as minimum criteria for insurance.
- The U.S. needs to ensure that officials in government agencies who promote foreign investments are aware of the human rights situations in volatile areas where an investment is proposed and explicitly require that corporate human rights related due diligence be performed. This should be assessed by the official before approval is provided.
- The U.S. needs to ensure that those same agencies provide companies with current, accurate and comprehensive information of the local human rights context so that the companies can act appropriately, particularly when engaging with local parties accused of abuses.
- The Government needs to provide meaningful on-the-ground advice to companies, for example, through their embassies in host countries, on whether they should continue to conduct business in conflict areas or how they should manage human rights risks.

The United States should acknowledge through public policy statements that companies can harm human rights when operating in conflict zones and that they must take steps to ensure that they do no harm.

- The Government should adopt and express a ‘no-go’ position where it is determined that direct or indirect violations of human rights cannot be mitigated by the company. In these instances the U.S. should take a public position stating its reasons for concern and calling for companies to cease economic activity until human rights conditions improve. This would be short of sanctions, but can be helpful in some cases, as the British government’s stand against companies operating in Zimbabwe has shown. This is a position of last resort, but takes from a trend developing among some states.

In conclusion, the time is ripe for the United States to address the ‘governance gap’ that exists in overseeing and holding accountable American companies that violate human rights through operations in conflict areas. Although the *Alien Torts Claim Act (ATCA)* allows an avenue for civil redress for crimes against humanity and war crimes, the scope

of the problem is larger than that. At the international level, efforts are needed to level the playing field among today's global actors and leading states are needed to start this effort. At the national level, preventative measures that are both regulatory and policy-oriented will supplement the ATCA and help to provide better protections in the first place. As past investigations and cases relating to natural resources demonstrate, the incidence of gross human rights violations arising as a consequence of natural resource extraction in conflict zones is common.

We are now at an important crossroads and urgent action is required by the United States to act as a leading nation. The U.S. should show leadership and help set a global standard by holding domestic companies accountable for corporate related human rights abuses arising in conflict areas where impunity would otherwise be the norm. Thank you.