

BUSINESS & HUMAN RIGHTS IN CONFLICT ZONES: THE ROLE OF HOME STATES

SUMMARY REPORT OF CONSULTATION CO-CONVENED BY SRSG AND GLOBAL WITNESS BERLIN, NOVEMBER 5, 2007

I. BACKGROUND

The Special Representative of the UN Secretary General on Business and Human Rights (SRSG), John Ruggie, is mandated to consider, among other subjects, “the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.” Because the most egregious human rights violations, including those associated with companies, take place in conflict zones, the SRSG convened a consultation on the subject of business operations in such zones. And because the roles that the “home states” of companies could or should play has not been extensively explored in the business and human rights debate, the consultation focused on the actual or potential roles of home states when “their” companies operate in conflict zones abroad.¹ The 1-day expert session was held at the Berlin Center for Civil Society on 5th November 2007, co-convened with Global Witness as part of its collaboration with the SRSG’s mandate, and was funded by the *Die Zeit* Foundation and the Vodafone Foundation.

II. OBJECTIVES

The meeting addressed three core questions:

- What if anything do home states currently do to prevent or deter human rights abuses by their corporations operating in conflict zones?
- What could home states do to prevent or deter such abuses?
- How could states deal with wrongdoing by their companies in conflict zones?

¹ Simply defined, home states are considered those states in which a corporation is registered or incorporated.

III. CONSULTATION CONCLUSIONS

Overall, the meeting concluded that home states should play a bigger role in addressing business and human rights concerns in conflict areas. There was general consensus that:

- Home state policies and practices in relation to this challenge—where they exist at all—are limited, fragmented, mostly unilateral and ad hoc.
- Many home states seem to lag behind international lending institutions and also responsible businesses themselves in grappling with these difficult issues.²
- Many if not most home states appear to assign considerably greater weight to promoting exports and foreign investments than to human rights concerns.

Participants agreed that home states should perform at least some level of due diligence before encouraging “their” companies to operate in conflict zones. This would include:

- Ensuring that existing laws are properly enforced.
- Ensuring that officials in all government agencies promoting foreign investments are aware of the human rights situation in the conflict zones where an investment is proposed.
- Ensuring that those agencies provide companies with current, accurate and comprehensive information of the local human rights context so that companies can act appropriately, particularly when engaging with local parties accused of abuses.
- Providing meaningful advice to companies 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.
- Having Export Credit Agencies require adequate human rights due diligence before providing loans to companies operating in conflict zones.

² On the latter, see International Organization of Employers, International Chamber of Commerce, and the Business and Industry Advisory Committee to the OECD submission to the SRSG’s mandate, “Business and Human Rights: The Role of Business in Weak Governance Zones, Business Proposals for Effective Ways of Addressing Dilemma Situations in Weak Governance Zones” (December 2006), available at <http://www.reports-and-materials.org/Letter-to-Ruggie-from-IOE-ICC-BIAC-21-Dec-2006.pdf>.

- Cooperating with other governments to ensure that investments comply with human rights standards.

Both corporate and civil society participants expressed the need for clear and concise guidance from home states regarding what are and are not acceptable practices in conflict zones from a human rights perspective.

The group also reached a general consensus that a “red flags” approach would be an important guiding tool, that is, a set of indicators signaling grounds for business and human rights concerns, which would also indicate the need for home state engagement.³

IV. SESSION SUMMARIES

Session 1 asked whether situations creating a need for home state engagement can be identified *ex ante*. Many participants noted that the definition of conflict zones is currently unclear. Thus, when identifying triggers for home state action they believed that focusing on actual situations on a case-by-case basis is more effective than relying on definitions of conflict zones drawn from international law. Doing so is particularly helpful in cases of sporadic violence that do not meet international definitions of conflict zones. One participant suggested that a case-by-case assessment of whether the home state should act would need to include an analysis of whether the local population would benefit or suffer more from the company’s presence.

Participants generally agreed that home states should ask more questions, and to ask them earlier in the investment cycle, concerning the possible impacts of their companies in conflict zones. At minimum, the questions should include whether the investments are likely to strengthen an oppressive host state regime and thereby minimize benefits to the population; and whether companies should be permitted to participate in business ventures that plausibly could lead to their being complicit in violations of international humanitarian law, war crimes, or crimes against humanity.

³ One example discussed was the FAFO Red Flags paper (due for publication shortly) that identifies nine sets of serious liability risks for companies operating in high-risk zone. Depending on the situation, the existence of one or more of these red flags should raise concern within the company and also alert home states.

A number of participants noted that home states' reputations are also at stake, not only the reputations of companies. One indicated that home state embarrassment linked to corporate wrongdoing can trigger action, such as the Canadian government-commissioned report on Talisman's operations in Sudan, and the Canadian multi-stakeholder roundtable process that developed recommendations for that home government's policies regarding companies operating in conflict areas.

Participants agreed that when home states act at all, their approaches exhibit a lack of coordination among government departments, and a lack of collaboration with other states. All participants expressed the need for greater coherence within and across states. Participants suggested that governments will need to be persuaded to work together to define acceptable corporate and human rights benchmarks.

In order to introduce greater analytical refinements into the discussion, the next four sessions explored different scenarios. The first was possible "no-go" areas for business—where the human rights situation might pose such risks to the company and the home state that an investment simply should not go forward. The second depicted situations where companies knowingly contribute to conflicts that, in turn, lead to corporate related human rights abuses. The third addressed the situation where companies may do unintended harm through their operations in conflict zones. And the fourth examined how home states can facilitate and support positive contributions by companies to the respect for human rights in conflict zones.

Session 2 focused on whether there were circumstances so extreme that home states should advise companies against starting operations there, and advise those with existing operations to suspend them—or leave the companies to decide for themselves whether or not to continue with their investment, but without the home country providing any financial or diplomatic support. Participants felt that greater clarity was required on the no-go concept. For example, would it require divestment? Would it focus on a specific industry or region within the host country? Would it focus on doing business with specific parties who are known to commit human rights violations?

Participants suggested that ‘no-go’ indicators could be taken from United Nations Chapter VII sanctions and international humanitarian law, but they indicated that other signals would also be required. It was emphasized is that it may be difficult for a company to avoid complicity when operating in areas where massive human rights violations are committed. Thus, several participants argued that a ‘no-go’ warning should always exist for areas where war crimes and crimes against humanity are taking place.

Other participants expressed concern over how the ‘no-go’ concept would be applied when an area becomes a conflict zone only after a company arrives, or if the conflict becomes exacerbated by the company’s presence—as has been the case with numerous investments in the extractive sector.

In addition, some participants expressed apprehension about ‘no-go’ areas because of the global competition for resources from conflict areas, arguing that if one business pulls out due to human rights concerns or home state restraints, another private or state-owned-enterprise that does not face similar restraints will take over. It was suggested that companies from developed states are more willing to respect human rights than those from emerging markets, thus disadvantaging the former, but others argued that this remained an unproven assumption.

Several participants stressed that the home state’s decision in relation to a company operating in a conflict zone should not be unduly swayed by the company’s philanthropic efforts if its core operations do demonstrable harm.

In addition, participants involved in the FAFO “Red Flags” project expressed the view that home states should become involved when company operations include or result in displaced peoples, forced labor, the handling of looted assets, material transactions with abusive security forces, the financing of crimes, and corporate complicity including by providing the means to kill. A few participants also put forward that any trade in conflict resources should also act as a red flag that could give rise to a role for home states.⁴

⁴ Conflict resources have been defined as “natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from, or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law”; see: “The Sinews of War: Eliminating the Trade in Conflict Resources”, A Briefing Document by Global Witness dated November 2006.

Session 3 focused on the role of home states in preventing deliberate adverse effects of domiciled companies operating in conflict zones. Participants observed that the main problem in this area related to poor enforcement of laws by host states, where the judiciary may lack capacity or will, or be subjected to political pressures. Participants agreed, therefore, that greater engagement is needed by home governments, which have been extremely reluctant to act. For example, corporate breaches of United Nations Chapter VII sanctions are poorly enforced and infrequently punished. Some participants said that greater home state involvement might result if there were clearer international guidance as to whether states are required to protect against abuse by their citizens and corporations abroad. Indeed, the question was raised whether home states could encounter state responsibility under international law if they do not take certain preventative actions. At the very least, it should be made clearer that states are not prohibited from taking reasonable actions under international law.

Participants agreed that home states should take the following actions to deal with domiciled companies that deliberately cause harm: increase their own commitment and capacity to hold such corporations accountable, provide adequate resources to carry out investigations in foreign countries, and strengthen intra-state policy alignment as well as intergovernmental cooperation among states. A few participants raised the possibility of using property crimes and cases focusing on pillage and plunder as alternatives to attract governments that may feel uncomfortable supporting “human rights actions.”

Session 4 focused on the role of home states in preventing unintended harm by companies in conflict zones. All participants agreed that there was an important home state role in increasing corporate awareness of the risks of doing business in conflict zones.

Participants also agreed that if companies do go into conflict zones, home states should act proactively by flagging their concerns. Many participants believed that informing companies of the possibility that their operations may cause harm would set the standard for operations and help companies reduce harm to human rights from the beginning. Some participants expressed the view that companies need a form of reassurance or direction from home states on how to carry out operations, including suggestions of human rights sensitive activities that could be undertaken in conflict areas. It was also suggested

that home governments are in a position to monitor human rights risks posed by companies in conflict zones and should do so.

Similarly, some participants suggested that home states could share information in order to create a more level playing field between more and less experienced companies. It was suggested that this could assist new companies to learn from problems already faced by more experienced companies. Other participants observed that home states could enter into dialogue with host governments to confirm and create clear expectations regarding human rights benchmarks for their company's operations within a conflict area. A few participants noted that this could have greater benefits for human rights since company operations in host countries are often part of joint ventures with national firms, which may hold operating control.

Many participants emphasized that there should be no tolerance for ignorance within a company for the human rights implications of its operations, especially after it has been warned by reputable internal or external sources.

Session 5 focused on the role of home states in supporting positive contributions by companies to the respect of human rights in conflict zones. Several participants stated that it was essential for companies to have their own policies and processes that respond to different types of conflict situations and the escalating problems that may be encountered during operations. But home states could provide support for such efforts.

To support business operations in conflict zones, some participants suggested that home states help develop clearer standards for companies. Most participants agreed that a clearly developed home state policy would make company operations more predictable and clarify expectations for businesses.

One participant suggested that home states also could provide advice to business on pressing dilemmas. These include what a company should do when some stakeholders want them to divest and others want them to stay, and how a level playing field can be established for companies if civil society pressures on them vary depending on where investors are located and where the company is incorporated. These are not issues that companies can solve on their own.

Finally, **Session 6**, addressed the impact of existing initiatives aimed at supporting positive business involvement in conflict areas. Discussing the Voluntary Principles on Security and Human Rights (VPs), one participant noted that the VPs had sent the right signals to relevant audiences in conflict situations by indicating that the international community now is less permissive of corporate related human rights violations, while also building a corporate culture that respects human rights. Participants indicated that home states could contribute to such initiatives by ensuring that the analyses of the human rights situations in conflict zones are properly conducted, accurate and up to date.

In addition, one participant discussed a role for home states in identifying records of host state security forces and advising on the identities of human rights abusers. Participants discussed other measures that could be used including: the ability of home states to draw upon and learn from the OECD National Contact Points in creating new complaints mechanisms specific to conflict zones, and requirements to improve disclosure laws and listing requirements for companies.

V. NEXT STEPS

The consultation wrapped up by suggesting the following steps for home states:

- Recognition of the unique circumstances that prevail in conflict zones, including sporadic or sustained violence, breakdown of governance, coupled with the absence of the rule of law, making it essential for home states to engage with host states and develop consistent policies regarding business and human rights.
- Specific guidance for companies interacting with security forces and belligerent militia in problematic areas.
- Better provision of information and advice to businesses operating in conflict zones.
- Identification of simple indicators that trigger action for home states with respect to their companies operating in conflict zones.
- Better policy alignment between government departments in home states, such as finance, foreign affairs, trade and international development.
- Cooperation among home governments to define minimum standards of corporate and human rights benchmarks.

Business & Human Rights In Conflict Zones:

The Role Of Home States

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