

Amnesty International's presentation at the Consultation on the Extractive Sector organized by the Office of the High Commissioner for Human Rights, Geneva, November 10-11, 2005.

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On behalf of Amnesty International I thank the Office of the High Commissioner for Human Rights for the opportunity to share our experience and insights on the extractive industry for this important consultation.

Human rights organizations have focused on the extractive sector for several reasons. The interplay between a company and the constituencies within and around it often leads to sharp tension and the human rights impact is often stark in this sector. The sector's influence is felt on almost all human rights and affects workers and communities. The interaction between companies and communities -- Shell, Chevron and Agip in the Niger Delta, BP in Colombia, and Freeport McMoRan in Indonesia -- raises important human rights challenges. Unocal and Total have faced lawsuits over alleged use of forced labour in Myanmar. Some companies have the host government as their partner, and if the revenue-sharing arrangement between them is not transparent, it fuels suspicion in host communities which are convinced they are discriminated against. Then, if they protest they face repression. All of this contributes to the undermining of and violations of human rights. Is it a coincidence that a large number of cases¹ filed under the Alien Tort

¹ Presbyterian Church of Sudan v Talisman Energy; Sarei v Rio Tinto; Doe v Unocal; Wiwa v Royal Dutch Petroleum Co., Bowoto v Chevron; John Does v Exxon Mobil Corp., Corrie v Caterpillar; and Beanal v Freeport-MacMoran Co are some examples of ATCA cases. Companies such as Texaco, Del Monte Foods, Dyncorp, Gap, Southern Peru Copper, Coca Cola, and Dow Chemicals also face ATCA cases. Plaintiffs

Claims Act in the United States concerning human rights have companies from the extractive sector as defendants?

Indeed there are examples of countries making good use of wealth from the extractive sector and many companies have initiated social development projects as part of their corporate social responsibility agenda. But that has not prevented abuses and therefore effective measures are needed to avoid the abuses.

Let me begin with a specific example: On 4 February 2005, soldiers from the Nigerian Joint Task Force fired on protesters from Ugborodo, a small community of the Itsekiri ethnic group, who had entered the high-security facility at first light, at Chevron Nigeria's Escravos oil terminal on the Delta State coast. Even as the demonstrators reportedly damaged property, including windows and helicopter windscreens, the use of force by security forces was excessive. One demonstrator was in fact shot and later died, and at least 30 others were injured, some of them seriously, by blows from rifle butts and other weapons. It was several hours before the injured protesters could reach a hospital, a lengthy boat journey away. Neither the security forces nor Chevron Nigeria provided adequate medical care or assistance to transport the injured. Chevron Nigeria said that 11 employees and security officers received minor injuries.

The protest was over a Memorandum of Understanding signed by Ugborodo community representatives and Chevron Nigeria in 2002. The protesters said that Chevron Nigeria had not provided the jobs and development projects they were promised. No independent

include union leaders, workers and residents from Ecuador, Indonesia, Papua New Guinea, Nigeria, Sudan, India, Saipan, Myanmar, Peru, Colombia and Guatemala.

inquiry has been carried out by the government or by Chevron Nigeria. The company said it could not control the actions of the security forces in any way.

This incident is drawn from Amnesty International's new report, *Ten Years On: Injustice and Violence Haunt the Niger Delta*.² The aim of narrating the incident is not to single out one company, indeed, we will be talking about more companies later in this presentation, but because that incident encapsulates the range of issues concerning extractive industries and human rights, in that it has similarities with many other areas where extractive industry operates.

- There is the minimal presence of the State, except in the form of security forces, in remote parts of the country;
- There are violations of economic, social and cultural rights, interfering with their progressive realization, leading to deprivation in the communities living in the immediate surroundings of industries, despite the wealth the industry generates for the State;
- Driven by a sense of corporate social responsibility and the desire to ensure that they can conduct business in a trouble-free environment, companies opt for informal, voluntary arrangements with communities to extend some services, to some communities, creating expectations.
- When these expectations are not met, some angry young men from frustrated communities resort to protests, and in some cases, abductions, sabotage and occupation of oil installations; and,

² (AI AFR 44/022/2005), published Nov 3, 2005.

- Security forces – state or private – put down these protests with disproportionate force, leading to widespread and systematic violations of civil and political rights. Instead of building effective assets, the operational practices of the industry and the state have created a cycle of violence. In fact, in the Nigerian context, two major companies have acknowledged publicly that their activities have contributed to violence.

Effect on rights

- **Security of Person and the risk of complicity:** There have been several cases of companies assisting armed forces, paramilitary forces, or police, by providing the means, materials, and even infrastructure which the forces have used to commit human rights violations: building an airstrip, providing aviation fuel to bombers, providing physical infrastructure to armed groups, sustaining armed groups by purchasing raw materials from them or paying them royalty, providing transport and equipment to security forces, lobbying before home governments to resume sale of weapons or offer financial support to host governments. These developments significantly raise the risk of making companies complicit in the conduct of the forces. Rights violated include the right to *free association and expression*, the right to *life, liberty and security of person*, as well as *freedom from torture, and cruel, inhuman or degrading treatment or punishment*, and *freedom from arbitrary arrest*.
- **Forced Displacement:** Companies in this sector want to operate where resources exists. If people live or work in that area, the company wants to relocate them. Unless this process is handled properly, there are violations of the right to *prior*

informed consent, freedom of expression, the right to *seek, receive and impart information*, the right to *compensation and restitution* if it is inadequate or delayed. If the people are unwilling to move, security forces use disproportionate force, which in an extreme case like in Sudan, has led to forced displacement through aerial bombardment.

- **Non-discriminatory Treatment:** This takes two forms. Companies often operate in areas which are remote, where protection by the state is weak, and where communities are isolated. In such circumstances, companies must not discriminate against vulnerable, marginalized, impoverished groups. At workplace, its recruitment policies must be non-discriminatory.
- **Undermining rights:** There are human rights issues about the way consultation is carried out with communities – these issues relate to timeliness and adequacy of consultation, as well as whether the principle of prior informed consent, *the right to seek, receive and impart information*, and *freedom of expression and opinion*, particularly of those who may oppose the project, are respected. Some companies have sought to exempt themselves from local jurisdiction, which has an impact on the *right to remedy*. If the terms that affect the communities in a host government agreement are not made public, it affects the *right to take part in the conduct of public affairs*.
- **Impact on ESC rights:** Any compensation paid for the use of land or other public assets, or for the destruction of crop, must be assessed fairly, paid promptly, and should be adequate. Inadequate compensation can affect the right to an *adequate standard of living*, displacement affects the right to *property* and

- adequate housing*. Increased pollution, or discharge from mines or oilfields can affect a range of rights – *health, food, water, and clean and healthy environment*. Companies must conduct a human rights risk assessment.
- **Workers’ rights:** Companies using labour provided by the State without ensuring that the state respects labour rights may be using workers without protection from *forced or child labour*. Furthermore, companies have direct responsibilities to respect their workers’ right to *free association and assembly, collective bargaining*, provide a *safe and healthy working environment*, and provide a remuneration that ensures an *adequate standard of living*.
 - **Transparency:** Companies should ensure that not only is their conduct transparent in making payments to the government, but also within the community. The contracts they award must be on a non-discriminatory manner.

1. Identification and Clarification of Responsibilities

Governments have the primary obligation to respect, protect and fulfil human rights and no one is suggesting that this primary responsibility should shift to business. As Scott Jerbi and Andrew Clapham have argued:

*Corporations, even as they agree to take on greater responsibility in the human rights field, do not have the same legal duties as states under international law and cannot be expected to substitute for the role of governments.*³

³ Clapham, Andrew and Jerbi, Scott. *Categories of Corporate Complicity in Human Rights Abuses*. Published in the *Hastings International Comparative Law Journal*. Vol 24, pp. 339-349.

Business has the responsibility to respect human rights, particularly where the state is unable or unwilling to govern or regulate effectively. Due to the nature and scale of economic globalization, the power and influence of companies have increased, and the willingness and ability of states to regulate corporate conduct in international space, have diminished. This transformation has created an impression among some that the role and responsibilities of companies have changed or become ambiguous.

After an extensive process, the *UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*⁴ have clarified:

*States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. **Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.***

⁴ U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). The full text of the Norms can be accessed at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>. See also *Towards Legal Accountability* AI IOR 42/002/2004

In other words, within its sphere of activity and influence, a company is responsible for the human rights consequences of its activities; and where the impact on human rights is due to its own conduct, or assistance it provides through its contribution. Companies have clear obligations to comply with national laws, which should include legislation implementing the country's international human rights treaty obligations. Where these laws exist, companies must comply. Regardless, if host state is unable or unwilling to protect human rights, then companies have a responsibility to respect human rights as well.

We accept that there are more than two views about the *Norms*. But the human rights considerations I have mentioned earlier are all covered by the Norms. In fact, if we scrutinize the human rights incidents and crises that many companies have faced, we will find that the Norms provide the benchmark and framework for operations, as they are drawn from international law.

For example, Art 3 says companies must not engage in or benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced and compulsory labour, and other violations of international humanitarian law. The implications of such language in the context of the conflict in the Democratic Republic of Congo or Sudan are clear. The DRC conflict has killed three million people and more than 2.5 million have been driven from their homes in mineral-rich lands. Combatants have killed or tortured independent miners and traders for their minerals or money.⁵ Several companies in eastern DRC have provided resources in the form of taxation, or provide services, or

⁵ Amnesty International: *Democratic Republic of Congo: Our Brothers who help kill us: Economic exploitation and human rights abuses in the East*. AFR 62/010/2003.

otherwise contribute to the warring factions' revenues, otherwise they cannot operate in the area. Consistent testimonies show that in some instances such contributions are the major, if not the sole, source of finance with which armed groups acquire weapons which are then used to commit human rights abuses against civilians. The link between companies and the war is clear, and the companies are indirectly contributing to the cycle of violence. In other instances, the contributions and assistance to armed groups has been relatively marginal, but the fact that it exists often provides legitimacy and status to an armed group that it otherwise would not have. For example, earlier this year, Human Rights Watch pointed out the assistance Anglo Gold Ashanti provided to armed groups in the area.⁶

Consider the case of Mbuji Mayi, where in a government-controlled mine, serious abuses directly connected to the diamond trade went unchecked. Dozens of people were being shot dead in the diamond fields; still more were being wounded, often seriously. Dozens more were being held without charge in appalling conditions by security forces who had no formal authority to detain them. Most victims were suspected to be responsible for illegal mining. The shootings occurred mainly within the concessions, where most of the victims had no legal right to be. But none of that diminished their right to life and the right to a fair trial. Not a single state agent has ever been prosecuted for the unlawful killing of a suspected illegal miner in Mbuji-Mayi.⁷ Neither the Kimberley Process nor the Voluntary Principles apply in this case. Kimberley Process, because the diamonds are

⁶ Human Rights Watch: *Democratic Republic of Congo: The Curse of Gold*. HRW Index 1564343323. (2005)

⁷ Amnesty International: *Democratic Republic of Congo: Making a Killing: The diamond trade in government-controlled DRC*. AFR 62/017/2002.

from government-controlled territory; VPs, because the company concerned, De Beers, is not a member of the process. The Norms, however, deal with situations of this nature.

Let us turn to Art. 4, which requires security arrangements for companies to observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate. In a report last year,⁸ Amnesty International found that Occidental Petroleum, a signatory of the Voluntary Principles, had lobbied the US government to provide financial and military assistance to the Colombian military, and may have paid, together with other companies, the army for protection. The troops deployed to protect the area had soldiers drawn from the XVIII Brigade, who have a record of intimidating trade union leaders and human rights defenders, were protecting assets.

Art 5 calls upon companies not to use forced labour, an issue that Unocal and Total had to confront in Myanmar, a situation which other existing initiatives did not deal with adequately. In the Unocal case, the plaintiffs alleged that the Myanmar military forced them to work on and serve as porters. The military ordered summary executions of those who refused to participate, or of those too feeble to work. The case was settled out of court, with the company paying an undisclosed sum without admitting any wrongdoing. The Voluntary Principles cannot address the situation, because Unocal is not a member of the process, and the principles have no disciplining mechanism or authority.

⁸ Amnesty International: *Colombia: A Laboratory of War: Repression and Violence in Arauca*. AMR 23/004/2004.

Art 10 calls upon companies to recognize and respect applicable norms on transparency, accountability and prohibition of corruption, addresses many of the objectives of EITI.

Art 11 goes further, in calling upon companies not to engage in any corrupt activity, nor to offer such incentives to armed forces. Art 18 specified that companies should provide prompt reparation for any damage done or property taken, an issue of concern for extractive industries in many parts of the world.

2. Assessment of Existing Standards and Initiatives and Identification of Responsibilities and Gaps

To address these concerns, the industry has participated in several initiatives. Amnesty International has been closely involved with some and has observed the progress of other initiatives. The initiatives discussed yesterday say little, if anything, in clarifying human rights responsibilities applicable to companies in the extractive sector under international human rights standards. These initiatives were specific responses to particular events or incidents, and were not intended to be comprehensive mechanisms to ensure that companies act responsibly and respect human rights. None is comprehensive, in that none applies to all companies or sets of human rights issues; only a few have a weak monitoring mechanism or method of implementation; and many apply only to companies that participate in the process. This leaves huge gaps in human rights protection.

The Voluntary Principles for Security and Human Rights⁹ are “voluntary” only as they apply to companies. The state’s obligations remain mandatory. The process turns

⁹ www.voluntaryprinciples.org. Sixteen oil, gas and mining companies from four countries have participated in the VP process which began in December 2000, which were developed to guide companies

five years old this year. Have the principles been effective? On the positive side, one company has made adherence to the principles a pre-requisite for some of its investments, and the principles have gained a quasi-legal status. The experience of implementation of other countries remains varied. On the negative side, violence continues in the Niger Delta and Colombia. Violence in the Niger Delta is widespread, and involves militia groups with such sophisticated weapons, that one security consultant argues that adherence to the VPs may endanger security providers.

In our experience, practical implementation has been insufficient, as seen in several countries. The principles only apply to companies that agree to adhere to them, which means they cannot deal with situations like the one Unocal found in Myanmar. And the principles deal with a narrowly-focused range of issues, which means they cannot provide guidance in times of conflict. Amnesty International had opposed direct logistical support of oil companies to the Sudanese government which helped to commit human rights violations. The Sudanese Air Force used as a base the airstrip of Heglig, an oilfield infrastructure built for GNPOC, and was able to fly and remain operational because of fuel supplied by oil companies for its planes who launched deliberate and indiscriminate aerial bombardment of civilians. VPs could not address that situation, nor can they address the current one, where the investors are from China, India and Malaysia, countries which are not part of the process.

in balancing the needs for safety while respecting human rights and fundamental freedoms. The tripartite model included companies from the United States, the United Kingdom, the Netherlands, and Norway, the governments of the four countries, and seven Non-Governmental Organizations.

Again, in the context of the Kimberley Process,¹⁰ it offers little guidance where the state is the abuser. The Extractive Industry Transparency Initiative¹¹ focuses more on the federal government, whereas the experience from the Niger Delta also shows that opaque payment systems and contract awards on the ground often leads to violence. Global Compact is not designed to have an enforcement mechanism. And while the OECD Guidelines for Multinational Enterprises¹² have a complaints mechanism, the officials assessing the complaints are not necessarily trained in human rights.

Filling the Gaps

If there is one common thread through these initiatives, it is this: Voluntarism is the first step, and voluntary processes are valuable in raising awareness of key issues among companies, but they are not able to reduce the negative human right impact of business, and hence they cannot be considered sufficient. Existing initiatives are well-meant, but do

¹⁰ www.kimberleyprocess.com. The Kimberley Process is a joint initiative of governments, international diamond industry and civil society to stem the flow of conflict diamonds - rough diamonds that are used by rebel movements to finance wars against legitimate governments. The trade in these illicit stones has contributed to devastating conflicts in countries such as Angola, Cote d'Ivoire, the Democratic Republic of Congo and Sierra Leone. The Kimberley Process Certification Scheme is a voluntary system that imposes requirements on Participants to certify that shipments of rough diamonds are free from conflict diamonds. Kimberley Process Participants account for approximately 99.8% of the global production of rough diamonds.

¹¹ www.eitransparency.org. The EITI aims to ensure that the revenues from extractive industries contribute to sustainable development and poverty reduction. It supports improved governance in resource-rich countries through the publication and verification of company payments and government revenues from oil, gas and mining. Some twenty countries have either endorsed, or are now actively implementing EITI across the world.

¹² The Guidelines are recommendations addressed by OECD governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. The OECD is a group of 30 industrialized countries, and the guidelines can be found at http://www.oecd.org/department/0,2688,en_2649_34889_1_1_1_1_1,00.html. Critique of the Guidelines can be found at www.oecdwatch.org.

not go far enough, and are not comprehensive. In some instances, they may restate human rights obligations, making what's mandatory appear voluntary.

By definition, voluntary initiatives apply only to those who accept them. We have noted several cases where companies not bound by existing initiatives may be responsible for assisting abuses. Voluntary codes of conduct are made up of what the industry considers best practices and have been seen as the starting point in building consensus around some issues. There is a need now for a common, authoritative and global statement of human rights and an effective mechanism that ensures all companies' adherence to it and for these standards to become the minimum that all companies are expected to respect. The sources should be the existing body of international human rights norms. Like many NGOs, Amnesty International believes the UN Norms do provide the most comprehensive list of the human rights responsibilities of companies, and that most of the provisions of the Norms are drawn from existing international law and standards. They are not legally binding, although they are drafted as if they were.

In conclusion, it is our view that human rights responsibility of companies in the extractive sector must be drawn from existing human rights standards and human rights law and treaties, and not from the business's interpretation of human rights. Ultimately, this is not about what business can live with, but about what business must do. This is not about an *a la carte* approach to human rights. The longer term aim is not to tie down businesses in procedures, but to ensure that all companies respect human rights. To borrow from a phrase of yesterday, human rights responsibilities apply to all companies

from Timbuktu to Shanghai, Stavanger to Houston, Lagos to London. The goal is to enhance global human rights protection in situations where the state is unwilling or unable to protect its people. A binding mechanism will provide clarity and it will apply to everyone. To borrow from a phrase businesses like, the playing field will then be level.