



global witness

Global Witness Submission to the ICJ Expert Legal Panel on Corporate Complicity in International Crimes

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I Summary

Global Witness is a London-based non-governmental organisation that exposes the corrupt exploitation of natural resources and international trade systems, to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. (see www.globalwitness.org). We aim to promote improved good governance, transparency and accountability in the management of the natural resource sector to ensure that revenues from resource use are mobilized for peaceful and sustainable development rather than to finance or fuel conflicts, corruption or state looting. We were nominated for the 2003 Nobel Peace Prize for our work on conflict diamonds and also campaign on illegal logging and the misappropriation of state revenues from oil, gas and mining.

The international community claims to be concerned about the links between the exploitation of natural resources, the corrupt use of the wealth created by it and related human rights abuses, particularly in pre and post conflict countries. However, attempts to improve the governance of these natural resources continue to be undermined by geopolitical and business interests which benefit from weak governance and, in practice, enjoy impunity for their actions.

The reasons for this continued impunity are numerous and often highly complex– with different institutions, individuals and governments that benefit supporting each other.

Global Witness seeks to end impunity for all entities involved in funding and facilitating natural resource wars and corruption by bringing to an end the belief and reality that individuals, companies and governments are above the law. One of the single biggest obstacles to ending this impunity is the lack of a clear definition in international law of corporate complicity in human rights abuses. Natural resource exploitation is essentially a commercial activity in which corporations play a central role: in today's global society, corporations are able to operate with ease beyond the boundaries of their home country, including in unstable states where international crimes are common.

II. Overview of Global Witness' Submission

Global Witness has conducted numerous on-the-ground investigations into corporate activities in conflict zones, and this experience has given us a first-hand understanding of the difficulties in establishing in law that corporate activity has contributed to serious human rights abuses, even where there is strong evidence to suggest that this is so. And so we would like to offer this submission as a guide that the ICJ Expert Legal Panel ("Panel") can use to help it consider its legal analysis, within the context of carrying out on the ground investigations.

In this submission, Global Witness will :

- A. describe the limitations of the existing legal situation as we have encountered it during our investigations; and
- B. respond to the six questions posed by the Panel in its Call for Submissions.

III. Details of Global Witness' Submission

A. Barriers to conducting on the ground human rights investigations

Global Witness' work is often restricted by the lack of consistent and uniform legal definitions of corporate complicity.

Global Witness conducts investigations in many of the most conflict-devastated countries in Africa and Asia, gathering evidence that provides strong reasons to suspect corporate complicity in human rights abuses and corruption. Yet in the course of our work, we continue to come across obstacles which make such complicity difficult to establish in law.

Key challenges include:

- *Inconsistency or a dichotomy between 'moral' complicity and 'legal complicity'* – is this a battle of semantics or do clear distinctions exist?
- *Definition of evidence* - a lack of clear and consistent definition of what type of evidence Global Witness should seek to attain in order to prove legal accountability.
- *Lack of clarification around 'knowledge'* – when are civil society letters, pleas etc enough to attract legal accountability? At what point can a corporation be said to have 'knowledge' of the potential human rights consequences of its actions, such that if continues these actions, it can be said to be doing so knowingly? To what extent, from a legal perspective, can letters or pleas to a corporation from civil society be construed as putting that corporation in a position of knowledge.
- *Supply chain actors* – how far along the supply chain of natural resource production and exploitation does culpability travel? Where does the culpability stop? For example, are purchasers immune from liability even where they buy products from those who use the profits to commit international crimes? Or should legal accountability be attached to those that economically gain from illegal agreements and concessions?
- *Evidentiary clarification coupled with a realistic perspective* - clarification regarding the type of evidence needed to prove knowledge and substantial contribution. In unstable areas, for example, legal requirements for strict documentation do not exist and a lack of transparency is often encouraged by the governments themselves.
- *The ownership web* -The use of diversified ownership structures, crossing multiple national jurisdictions, which complicate the process of establishing where ultimate legal liability should lie. In what situations should the parent company be held accountable in its home State for the actions of its subsidiaries?

Global Witness requests that the Panel consider these key challenges and addresses the ambiguity of terms and concepts surrounding corporate complicity that stifle our investigative work. This will strengthen in-country investigations and assist companies, civil society and governments in ensuring high human rights standards.

B. Global Witness submissions to specific questions posed by ICJ

In responding to the six questions posed by the Panel, Global Witness has considered the fact scenarios previously submitted and discussed by the Panel, in addition to our ongoing work in this area.

1. How can companies ensure that their actions and omissions do not contribute to international crimes?

Corporations should protect against the risk of committing international crimes in the Host States where they operate. This should be as a prior condition of their activity and not as an afterthought of doing business across borders or they risk becoming complicit in such crimes.

Global Witness submits a three-step process for companies:

i) Companies must do their international crimes homework

Companies must familiarize themselves with the local socio-political context of national and international human rights laws and treaties. Research must be done to ascertain whether international crimes such as crimes against humanity, genocide and/or war crimes are alleged to be happening in these areas. Where companies chose to operate in conflict areas and unstable States characterised by weak governance and/or no operating rule of law, they are responsible for exercising a higher degree of awareness. This translates into a company having a better understanding of the local socio-political context, particularly in regards to the State's human rights record.

Companies must evaluate if the host State's recognition, protection and enforcement of human rights meet universally accepted human rights standards as captured in the Universal Declaration of Human Rights and International Criminal Law. Where the company discovers there are weak or non-existent laws and poor governance, they should be required to take extra measures to ensure their involvement does not exacerbate the situation. If local populations are known to suffer from the commission of international crimes, companies must consider how their business practices will enable this to continue and should seek to use their influence and power to positively affect the situation.

ii) Companies must conduct a mitigation of international crimes risk assessment - can links to the commission of international crimes be mitigated?

As a result of carrying out Step 1 above, a company should then assess which of the two Host State contexts are applicable to it:

Context 1: Areas that are off limits since human rights risks cannot be mitigated.

These are areas which have been identified in the public domain by the United Nations, leading human rights organisations and other authoritative sources as suffering from endemic and severe international crimes. In such areas, there is neither an accountable system of government nor functioning rule of law and as such, a company – regardless of its intentions – cannot mitigate the risk that its presence will facilitate or condone international crimes and could therefore be presumed to be complicit. For example, if a state depends on revenues from oil and is known to be using these revenues to finance the commission of international crimes against civilian populations, then a company which pays such revenues should be presumed to be complicit in these crimes.

Context 2: Permissible areas where certain human rights risks can be mitigated.

These are areas where international crimes may be taking place, but where a company is effectively able to separate itself from this risk (for example, in an area where armed groups outside the control of the government are committing such crimes, but the company is able to avoid any interaction with them.) In this context, a company must demonstrate that it has a mitigation plan and that it is likely to succeed. The mitigation plan must include assertive

and positive actions to sever links with international criminal activities committed by alleged perpetrators. For example, a company should not be able to avoid liability simply by asking the alleged perpetrator to desist from such crimes if the company has reason to believe that such a request is likely to be ignored by the recipient. The company should then be legally accountable for the success or failure of the mitigation plan, with respect to process and result.

iii) All Home States of corporations should require that those of their companies which operate in unstable areas abroad should complete a risk mitigation analysis for international crimes, and this analysis should be required to be published and companies should be accountable for their actions in regards to this analysis..

The regulatory regimes of securities markets in the industrialised countries typically require listed companies to publicly disclose any risk which might materially affect their operations and finances, so this is an extension of current practice, not a new one.

Global Witness affirms the need for an external regulatory framework that subsumes the principles of requisite knowledge and ability to mitigate as discussed above. External regulation is essential where companies are unwilling to take the steps required to mitigate human rights harm.

2. What kinds of business actions and omissions may contribute to international crimes?

Global Witness' experience shows that the business actions and omissions that contribute to international crimes include, but are not limited to:

- Purchasers who have been put on notice that they are purchasing goods from a source credibly suspected to be committing international crimes, but continue to purchase from that source, thereby financing the commission of such crimes;
- The use of middlemen in order to purchase, distribute or transport goods that come from such a source, in order to protect an individual or corporation from direct culpability;
- Payment of taxes and royalties to host governments that are known to be systematically committing international crimes;
- The provision of money or other services, such as equipment or logistical support, to state security forces which carry out such crimes;
- The provision of money or other services to rebel groups which carry out international crimes;
- Turning a blind eye to the misdirection of taxes, royalties or other payments or services to parties who carry out international crimes.

3. Do you think there are ways in which businesses can contribute to international crimes through passive involvement in, or benefit from, a situation?

A business can contribute to international crimes by knowingly financing an international crime, or by wilfully keeping itself in a state of ignorance about such crimes in order to protect its profits. The latter could be described as "passive involvement" and it should become a crime when the following exist:

- Knowledge: once a company has been put on notice by a reputable source that its actions are contributing to an international crime. As soon as this occurs, a company has an obligation to commission an impartial investigation: if the investigation concurs that the company is indeed contributing to an international crime, then the company

must take immediate steps to stop this contribution, up to and including suspending or withdrawing from its activities in the area concerned. Reputable sources include a widely publicized UN Expert Panel Report that is presented to the company or information received from a reputable civil society organisation. Corroborating and independent sources serve as stronger evidence that knowledge can reasonably be imputed to the company.

- **Facilitation:** the company is doing something that makes the commission of the international crime, by a third party, easier or more widespread

Businesses can substantially benefit from a situation by:

- The use of forced labour – which lowers the cost of production and can thus increase the companies profit margin;
- Fear and intimidation of labour prevents problems and delays occurring due to staff grievances and industrial action; and
- The operating climate may be such that other companies with stronger ethics may be discouraged from working the area and thus a monopoly situation arises where a business is the sole purchaser and can therefore demand the lowest price.

4. What kinds of business actions and omissions contribute to international crimes should attract legal liability? Why?

Global Witness believes that the actions and omissions stated in our submission under Question 2 should attract legal liability. Legal liability should be incurred once a company is defiant and refuses to change its business practices regardless of an awareness of the implication that its business is facilitating international criminal activity.

5. What kinds of business actions and omissions that contribute to international crimes should not attract legal liability? Why?

Global Witness believes that legal liability should not follow in situations where:

- Companies have undertaken strong preventative measures to ensure that its business practices do not contribute to an international crime. This includes completion of a mitigation risk analysis and the enforcement of a standard of practice that identifies human rights protection as a measurable to protect.
- Companies take action to investigate allegations that their business activities are contributing to an international crime. This should occur on a timely basis once they have been provided with notice and sufficient knowledge. In doing so, businesses should contact their home governments immediately and engage them in the process of finding a resolution.

6. What sanction, if any, would be appropriate for a company that has contributed to an international crime? If you do not consider any sanction appropriate please explain why.

Global Witness believes that a company that has contributed to an international crime should be held responsible for its activities either in a financial or punitive way (the latter for the directing minds of these companies).

There should be, as there is with individuals, different sanctions available, determined by the level of culpability and involvement of the companies and including a fair assessment of any

mitigating factors. Any punishments must be strong enough to raise the risk of working in such environments to a higher level.

Punishment should reflect the gravity of the crime including both punitive and financial reparation where possible.

IV. In Closing

We would like to thank the ICJ for this opportunity to submit our views to the Expert Legal Panel on Corporate Complicity in International Crime.

As a result of the lack of clear legal guidelines regarding corporate complicity in international crime, companies have been able to act with impunity and without fear of legal recourse for too long.

The devastating affect of this is all too apparent and Global Witness supports clarification of the law in this area, improved corporate self-subscription and external regulation through laws that are enforced. We look forward to the final guidelines.

Thank you.