

Business & Human Rights In Conflict Zones: The Role Of Home States

November 5th, 2007, Berlin

Background Paper[Ⓢ]

Purpose

The purpose of this background paper is to prompt discussion for the 1 day expert consultation in Berlin by highlighting issues relevant for considering the role of home states in minimizing human rights abuses caused by businesses domiciled in their jurisdictions but operating in conflict zones. It is necessary to identify policy options they have or could develop to prevent and deter such abuses in the first place, including keeping companies informed of the risks of doing business in conflict zones.

The Berlin workshop is a sub-component of a larger two-day meeting that will be held in Copenhagen on November 8th and 9th also organized by the SRSB and which will look at the role of states in regulating their companies with respect to human rights, including legal dimensions of host state and home state roles.

The Issue

Arguably, the most egregious human rights violations take place during armed conflicts, nowadays mostly internal or regional civil wars. In many countries, companies operate in regions of violent conflict where government security forces or other armed groups may carry out killings of civilians and other serious abuses of human rights. How can a foreign company that operates in a conflict zone ensure that its activities do not contribute to human rights abuses?

The challenge of breaking links between business operations and negative impacts on human rights applies to companies involved in different types of trade. In conflict zones or in areas where there is a high risk of armed conflict breaking out, companies engaged in natural resource extraction, mineral trade, infrastructure or financing projects are most commonly present because many of the world's deposits of oil, gas and other minerals are buried under such regions. Further, the relationship between natural resource wealth and conflict is not accidental. The desire of rival political factions to control resource rents can become a cause of conflict and a means of continuing it, as armed groups (whether government or rebel) capitalize on their control of resources to fund their war effort and enrich themselves. . But extractives are not the only industry at risk, as demonstrated by issues faced by companies operating in the textile or in the food and beverage sector, but more illustrative of the relevance of human rights issues to a wide spectrum of businesses generally.

The UN Security Council has adopted a number of resolutions dealing with this issue, and it has been addressed by such initiatives as the Voluntary Principles on Security and Human Rights, and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

A relatively neglected area in the debate, however, has been the actual and potential roles of home states of companies active in zones of conflicts. Simply defined, home states are considered those states with jurisdiction over transnational corporations, generally through incorporation or registration. In his 2007 report, the SRSB elaborated on the nature of state duties but many

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important questions remain unanswered. They include what due diligence requirements states may have when they provide material or other assistance to firms operating in conflict zones, and what if any duties they may or should have to “regulate and adjudicate” human rights abuses by “their” multinationals in these zones.

Three most important questions to explore include:

1. What *do* home states do to prevent or deter abuses?
2. What *can* home states do to prevent or deter abuses?
3. *How can states deal with wrongdoing* by their companies in conflict zones

Workshop objectives

The workshop will explore key existing or desirable policies and tools home states have to reduce the risk that corporations may find themselves likely to directly or indirectly contribute to human rights abuses, and to influence positively the behavior of corporations in the context of conflicts either in sanctioning, regulating, advising, or supporting companies.

In order to do this, the objectives of the workshop include determining the role of home states in:

1. Identifying conflict zones in operational terms by examining warning signals or ‘red flags’ that should trigger a reaction from home states;
2. Identifying potential ‘no-go’ zones for businesses, where circumstances are so extreme that home states should advise their companies to cease operations in these areas and encourage them to leave;
3. Eliminating deliberate adverse effects caused by domiciled companies operating in conflict zones;
4. Avoiding unintended harm caused by domiciled companies operating in conflict zones; and
5. Supporting positive involvement by domiciled companies in conflict zones and positive contributions to respecting human rights.

It is anticipated that the workshop will result in recommendations at the end of each session that reflect advisory, facilitative and regulatory means home country governments have available, or could develop, to prevent and deter abuses in the first place, and to punish wrongdoing by companies where it does occur. These recommendations will be considered by the SRS in preparing his final submission to the Human Rights Council in spring 2008.

Questions to consider in preparing for the expert consultation

1) What types of conflict zones are relevant for this discussion?

International humanitarian law recognizes instances of international and internal armed conflict to which Common Article 3 would apply to ensure safeguards for the treatment of Protected Persons from war crimes, crimes against humanity and genocide. But beyond this legal threshold, conflict zones exist in varying degrees and there are instances that may fall below the international legal standard, but where a role for home states in minimizing corporate human rights abuses would still be desirable. Conflict zones exist at local, sub-national, national and global levels and can involve various parties seeking power and control such as government militias and rebel groups, two or more insurgent or rebel groups, or other armed groups threatening local populations. They reflect a range of circumstances from civil war, to brutal government regimes that seek to repress human rights, to post-civil war countries with sporadic violence, to localised areas of civil unrest. Conflict areas may include riots or sporadic acts of violence occurring in the absence of the rule of law, transparency of government transactions or rampant corruption. Corporate transactions in these areas may be

enough to offset a power imbalance and strengthen control of violent groups that may then lead to an escalation of human rights abuses.

Corporations can act as "...vehicles to earn the needed revenue and establish the required international connections to access military arms and continue fighting" (p.999)¹. In volatile circumstances a company's presence may "...provide a source of self-enrichment for ruling elites, which in many cases has magnified the political and social grievances that brought conflict in the first place".

2) What are the warning signals to which governments should react?

It is important for home states to be able to distinguish the character of the conflict being assessed and its severity since this influences their role and the appropriate response to "their companies" operating there. At the outset, participants should note that the focus of the consultation is on what states can and should do in relation to companies registered or incorporated under the home state's jurisdiction. This requires that home states ask important questions relating to the stability of the host government and prevailing human rights situation, existing UN Sanctions, and the activities and mind-set of the company involved.

The trigger points for when a role for home states arises must be identified, in other words 'red flags', which seek to identify factors or indicators for which caution or abstinence with respect to corporate operations is required. Red flags include warning signals such as: the forced displacement of local populations, forced labour, handling of questionable assets, conflict resources, illicit payments to security/paramilitary forces, weak governance and rule of law, and the presence of UN Chapter VII sanctions, insurgents, belligerents, and rebel groups.

3) Why a focus on the role of home states rather than host states?

Host states in this context are the places where the business actually operates and therefore may have an impact on the human rights in question, whereas home states are those countries where the foreign company is registered or otherwise domiciled. This focus of the workshop is not intended to imply an absence of a role for host states in upholding human rights within their territories. Instead the intention is to explore the additional advisory, facilitative and regulatory options home states can exercise based on their influence over national companies operating extra-territorially and in a global economy.

It is important to note though that if a conflict is ensuing in the host state, this often infers a prevailing situation defined by weak governance and possible absence of an operating rule of law. Within these contexts home states are often in the best position to play an effective role in minimizing negative impacts on human rights by their companies. This advantageous positioning necessitates a role for them.

4) What types of human rights abuses are involved in these situations?

The workshop will discuss concrete examples of human rights abuses drawn from various conflict situations from around the world. Based on the backgrounds and expertise of the participants involved, it is anticipated that contributions will be made with reference to in-country experiences from Liberia, the Democratic Republic of the Congo, Nigeria, Indonesia and Colombia. In general terms, examples of human rights abuses that occur in conflict areas include: displacement of local people, threats and intimidation, loss of liberty and housing.

5) What are current state practices regarding assistance for or regulation of domiciled companies in conflict zones?

This requires clarification on what is currently being done and what should be done by home states in the future to prevent abuse by companies in conflict zones. It is currently unclear what policy position states are taking independently with respect to these issues and at the national level,

¹ Luke Anthony Patey, "State Rules: oil companies and armed conflict in Sudan" *Third World Quarterly*, Vol. 28, No. 5, 2007, pp. 997 – 1016.

particularly in relation to preventive activities as opposed to action “after the fact.” The effectiveness of states’ participation in international mechanisms such as the OECD Guidelines, EITI and the Kimberly process will be discussed, specifically the states’ role in enforcing these guidelines and processes. Direct engagement with policy advisors at the workshop is intended to provide an opportunity to share experiences and learn from best and worst practices in this area.

Three relevant questions to consider are:

- i) Do any States currently warn corporations as to whether a situation is likely to become a conflict situation? If so, how do they do so and how have corporations reacted?
- ii) Do any States advise corporations to take care when operating in conflict zones or to stop doing business there?
- iii) Have there been any instances of States regulating the ability of corporations to operate in conflict zones?

6) What do companies operating in conflict zones expect from their home governments?

Ambiguity exists around company practice and expectations that they have of home states. This includes questions regarding how companies engage with their home state embassies in the host country, and what type of advice and information they do seek when choosing to operate in conflict areas. The discussion will identify if companies are seeking guidance and leadership from home states, and what types of tools they find or might most useful from home states in order to decide whether to start or continue operating in a conflict zone.

7) What is the spectrum of responses available to home states for their companies in conflict zones?

The expert consultation will explore concrete options that are range from soft in nature to instructive depending on the degree of conflict or degree of intentionally bad behaviour exhibited. Pre-emptive and preventative actions by home states will be considered as well as their effectiveness in addressing the foreseeable human rights risks .

Four specific questions will be raised to identify appropriate home state responses:

- i) Should “no-go” conflict zones exist and if so, how should home states respond to their companies operating in these areas? The discussion will identify the proactive and reactive roles home states could or should play in responding to these extreme circumstances including: sanctioning; using early warning systems for conflict zones and conflict sensitive training; and the role of economic agents connected to the home state, such as export credit agencies, in these situations.
- ii) What is the home state’s role in eliminating **deliberate** adverse effects caused by companies in conflict zones? This discussion will focus mostly on the regulatory role home states could or should play to prevent and stop this conduct, including sanctions, enforcement of voluntary initiatives, and civil and/or criminal legal actions. or
- iii) What is the home state’s role in avoiding **unintended** harm caused by companies in conflict zones? This discussion will consider negative impacts unintentionally caused by companies and identify the regulatory or advisory role home states play and can play in minimizing corporate related human rights abuses. It will also explore how corporate knowledge regarding human rights risks in the area, as well as understanding about options to reduce them, could be guaranteed, for instance through the types of guidance and assistance states could or should deliver. Home states could play a role with respect to implementing of Human-Rights-Impact-Assessments by their companies.
- iv) What is the role of home states in supporting positive involvement by domiciled companies in conflict zones and positive contributions to guarding human rights?

This discussion will discuss ways to reward good company practice in conflict zones and conflict sensitive protocols as well as the success and challenges of state participation or facilitation of relevant multi-stakeholders initiatives such as the Kimberly Process and EITI and to identify room for improvement in the role of governments.

8) What is the home state role in relation to their State Owned Enterprises in conflict zones?

The increasing activities by State Owned Enterprises ("SOEs") abroad, including in conflict zones, and the role of home states and their influence over these activities require better understanding. SOEs are government corporations, government-owned corporations or government business enterprises created as separate legal entities.

Over the past 20 years Chinese SOEs have transformed from being merely passive arms of governments to competitive players in the international markets. It is commonly highlighted that there are 800 Chinese SOEs active all over Africa² being led by large SOEs such as: the China National Offshore Oil Company (CNOOC), Sinopec, China Minmetals, and China Non-Ferrous Metals Company.³ Other national SOE energy companies and firms currently operating in conflict zones are from countries such as Malaysia and India⁴. But Asian states are not the only ones with SOEs operating abroad. This discussion will consider recent trends and changes in SOEs extending beyond these examples, and identify actions that have been taken by home states of SOEs to curb human rights violations. The discussion will address whether or not policy recommendations for home states of SOEs should be distinct from those for home states of private enterprises based on additional factors such as a higher degree of leverage or political interest in the business entity.

9) How can home states underpin voluntary initiatives and ensure their effectiveness in protecting human rights?

There are a variety of voluntary initiatives that have been put forward to protect human rights abuses by companies. Some of these involve voluntary engagements by governments themselves, such as through inter-governmental and multi-stakeholder initiatives, and others reflect corporate codes of social responsibility that businesses undertake independently and on an ad hoc basis.

These voluntary initiatives have their both strengths and weaknesses. Relatively successful multi-stakeholder initiatives such as the Kimberly Certification Process and Extractives Industries Transparency Initiative (EITI) play an important role in enhancing the responsibility and accountability of states and corporations alike. Through these, signatory states often enforce regulatory measures against companies. Other voluntary initiatives applied in conflict zones include:

- Voluntary Principles of Security and Human Rights
- OECD Guidelines for Multinational Enterprises
- Global Reporting Initiative
- UN Global Compact

It has been argued that the capabilities of these voluntary instruments falls short of regulating material support, such as payments, logistics and transportation, to security forces in conflict zones where they engage in human rights abuses. The position has been taken that these voluntary instruments fall short of establishing a process for objectively measuring a company's performance on human rights and that they do not provide a comprehensive and credible answer to the question.⁵ The home states' role in underpinning voluntary initiatives such as these and ensuring their effectiveness in protecting human rights needs to be addressed.

² Keith Campbell, "China in Africa", *Publication Mining Weekly* (28 Sep 07 - 10:15) accessed on 30 October 2007 at http://www.miningweekly.co.za/article.php?a_id=117833.

³ Ibid.

⁴ "Georgette Gagnon, Audrey Macklin, and Penelope Simons, "Deconstructing Engagement, Corporate Self-Regulation in Conflict Zones: Implications for Human Rights and Canadian Public Policy", *Relationships in Transition, A Strategic Joint Initiative of the Social Sciences and Humanities Research Council and the Law Commission of Canada*, (January 2003) accessed on 30 October 2007 at www.law.utoronto.ca/documents/Mackin/DeconstructingEngagement.pdf

⁵ Global Witness Briefing Paper "Oil and Mining in Violent Places" accessed on 23 October 2007 at www.globalwitness.org.