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EXTRACTING NATURAL RESOURCES: CORPORATE RESPONSIBILITY AND THE RULE OF LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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EXTRACTING NATURAL RESOURCES: CORPORATE RESPONSIBILITY AND THE RULE OF LAW

WEDNESDAY, SEPTEMBER 24, 2008

U.S. SENATE,
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:47 a.m., in room Sh–216, Hart Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin and Coburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman DURBIN. This hearing of the Judiciary Committee's Subcommittee on Human Rights and the Law will come to order. The subject of this hearing is "Extracting Natural Resources: Corporate Responsibility and the Rule of Law." After some opening remarks, I am going to recognize Senator Coburn, the Ranking Member of the Subcommittee, whom I expect to attend and be here very shortly. He will make an opening statement and then we will turn to our witnesses.

This could be the last hearing in this Congress of this Subcommittee. I want to thank especially Senator Patrick Leahy, the Chairman of the Senate Judiciary Committee, for establishing this Subcommittee and allowing me the opportunity to serve as its first Chairman.

We have accomplished a lot in a short period of time. We have held the first-ever congressional hearings on the law of genocide, child soldiers, crimes against humanity, sexual violence in conflict, and the U.S. Government's enforcement of human rights laws.

And, as I said when I became Chairman of this Subcommittee, we have focused on legislation, not lamentation. Last year, Congress unanimously passed and the President signed into law the Durbin-Coburn Genocide Accountability Act, which makes it a crime under U.S. law to commit genocide anywhere in the world. Last week, Congress unanimously passed the Durbin-Coburn Child Soldiers Accountability Act, which makes it a crime and violation of immigration law to recruit or use child soldiers.

Today we are breaking more new ground. This is the first-ever congressional hearing on the human rights responsibilities of American oil, gas, and mining companies.

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In recent days, we have been reminded that we live in the age of globalization. The state of the U.S. economy—and the actions of American companies—have repercussions around the world. That is especially true in extractive industries, like oil, gas, and mining.

American families, small businesses, and farmers are struggling with the increase in oil prices. The untold story is that people on the other end of the oil supply chain are also suffering. We import about two-thirds of the oil that we consume. American companies drill much of this oil in countries with high levels of corruption and poor human rights records. And this can lead directly to higher oil prices for Americans.

Nigeria, the fourth largest oil supplier to the United States, is a case in point. The country consistently ranks among the most corrupt in the world, and senior government officials have been implicated in human rights abuses and the theft of oil revenue.

Despite generating billions of dollars in oil revenue each year, the Niger Delta is the poorest region in the country. Today we will hear how human rights violations, extreme poverty and environmental destruction have fueled tensions between local communities and oil companies in the Niger Delta for decades. The emergence of an armed conflict in the Niger Delta in 2006, with militants taking oil workers hostage and profiting from the trade in stolen oil, has sharply decreased Nigeria's oil production and driven oil prices up.

This is not a black and white issue. There is no doubt that American oil, mining, and gas companies operating in countries with poor human rights records face extremely difficult challenges in protecting their employees and operations. However, when American companies choose to go to these countries, they assume a moral and legal obligation to ensure that security forces protecting their operations do not commit human rights abuses.

Let me be clear: Governments are primarily responsible for protecting the human rights of their citizens. But extractive companies also have an important role and responsibility in preventing human rights abuses, and, as we will hear today, some have fallen short of this obligation on more than one occasion.

Today we will examine the legal responsibilities of extractive companies to protect human rights; voluntary industry standards for preventing human rights abuses; and whether Congress needs to consider additional legislation in this area.

The United States has long been a leader when it comes to the legal responsibilities of U.S. companies to protect human rights when they operate in foreign countries. The Alien Torts Claims Act, which was a part of the original Judiciary Act of 1789, allows civil suits in U.S. courts for human rights abuses that take place in a foreign country. We will hear more about cases relating to that law today.

The U.S. has also played a leadership role in establishing the Voluntary Principles on Security and Human Rights. This important initiative brings together governments, companies, and nongovernmental organizations to develop human rights standards for the extractive industries.

However, as we are going to hear today, the Voluntary Principles are difficult to enforce. It is also troubling that oil-producing gov-

ernments like Nigeria are not part of the process. This hearing will help us evaluate the effectiveness of the Voluntary Principles and consider whether Congress should make any of these standards mandatory.

Protecting human rights abroad is the right thing to do. As Martin Luther King said, "Injustice anywhere is a threat to justice everywhere." In a globalized world, we have even more at stake. American families are harmed when human rights abuses and instability in oil-producing regions result in higher oil prices. Our reputation suffers when U.S. companies are complicit in human rights abuses committed by their security forces.

I hope we can work together to address the critical human rights challenges extractive companies operating in repressive countries face.

Now I turn to my colleague and Ranking Member, Senator Tom Coburn. Welcome.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Thank you, Mr. Chairman, and, again, congratulations to your staff. Great work and great preparation.

Human rights are basic. They are basic everywhere, and as we face the global economy that we have, there cannot be an excuse for any company to not recognize the value of that in terms of their own future and their ability to do that.

I am thankful for some of the behind-the-scenes information that was given to us by some of the contractors. I am also somewhat disappointed that we will not have actual testimony, Mr. Chairman, for that. But I think that the purpose of this hearing is to bring to light where we fall short of what we stand for as a country and to make sure we make whatever corrective action is necessary so that we can continue to lead the world in terms of the preservation and protection of basic human rights. And for that I thank you.

And I also will apologize. Because of the nature of the end of the session, I will not be here for the whole hearing, but I appreciate you having the hearing. Thank you.

Chairman DURBIN. I want to thank Senator Coburn. We have accomplished a lot in this Subcommittee because of the extraordinary bipartisan cooperation. These bills would never have been passed or signed by the President were it not for that cooperation, and I want to thank you in particular, and also your chief counsel, Brooke Bacak, for her dedication and commitment to the issues that this Subcommittee has faced.

Next we are going to hear from two witness panels. At the outset, I want to say I am disappointed, as Senator Coburn has indicated, that ExxonMobil and Chevron declined our invitation to testify. I think it would have been helpful if they would have come forward to talk about the challenges that they face overseas trying to run a company on a global basis. But, unfortunately, they declined our invitation. I think it would have been valuable to have their perspective, and I hope they will consider at least submitting written statements that we can add to the record. Their absence is

going to detract from what we have to say this morning, but, fortunately, we have some extraordinary people testifying.

On our first panel, we have Jeffrey Krilla of the State Department. Mr. Krilla, you are going to have 5 minutes for your opening statement, and then we will ask you some questions. The tradition of the Committee is to swear in our witnesses, so if you would please stand and raise your right hand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KRILLA. I do.

Chairman DURBIN. Thank you. Let the record indicate Mr. Krilla has answered in the affirmative, and now we invite you to testify.

STATEMENT OF JEFFREY KRILLA, DEPUTY ASSISTANT SECRETARY, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPARTMENT OF STATE, WASHINGTON, D.C.

Mr. KRILLA. Mr. Chairman and members of the Committee, I am pleased to have the opportunity to testify on human rights issues in the extractive industries here today. Your interest in this important subject is certainly appreciated.

I ask that my full statement be included in the record.

Chairman DURBIN. Without objection.

Mr. KRILLA. I also wish to acknowledge the nongovernmental organizations that are here today as part of this hearing—in particular, Human Rights Watch, with whom we partner on many of our corporate social responsibility initiatives.

I would also like to take the opportunity to thank my predecessors in my position at State, including Gare Smith and Bennett Freeman, who is going to be testifying here today, who were instrumental in laying the groundwork for several of the corporate social responsibility efforts that we pursue in the Department's Bureau of Democracy, Human Rights, and Labor.

I also would have hoped that we could have heard from the corporate community today. For corporate social responsibility initiatives to succeed, we need engagement from the three stakeholders—governments, companies, and nongovernmental organizations.

The promotion of human rights and fundamental freedoms, as embodied in the Universal Declaration of Human Rights, is a cornerstone of U.S. foreign policy. We work very hard to promote and safeguard human rights for individuals the world over and believe that respect for human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises. Successfully combating human rights abuses requires a coordinated response from key stakeholders, which begins with governments, but also includes corporations and nongovernmental organizations.

We take a multi-stakeholder approach, recognizing that the expanding reach and influence of multinational corporations has led to increased demand for voluntary corporate social responsibility in general and more specifically as it relates to promoting respect for human rights. My Bureau, DRL, actively engages corporations, both multinational and domestic, on these priorities—encouraging

them in turn to adopt policies and practices that promote respect for key corporate social responsibility tenets.

Although abundant natural resources in developing countries can offer the promise of economic development and prosperity, they also provide the opportunity for corruption, exploitation, and conflict. These negative effects are certainly not unique to the oil, gas, and mining sectors. But given the focus of this hearing, I will focus my remarks today on human rights concerns relating to the extractives industry. We document these concerns in our Annual Country Reports on human rights practices.

For example, the challenges related to the oil and natural gas sector in Nigeria's Niger Delta have been well publicized. There have been problems in Angola's diamond-rich provinces and in the Democratic Republic of Congo's mining sector, including issues related to child soldiers. This is an issue in which we appreciate your leadership and applaud the recent passage of the Child Soldiers Accountability Act, a very helpful tool for us to use as a Government.

Human rights obligations rest with governments, and for human rights abuses in the extractives industries to be stopped, ultimately good governance is requisite—rule of law, transparency, and accountability. That is why we press governments to adhere to internationally accepted human rights standards and norms.

The international community has a role to play as well. Other governments and the multinational companies with extractive operations in these host countries must work together to promote good governance and respect for human rights.

One of the ways in which the Department of State has worked with U.S gas, oil, and mining companies on these issues is through voluntary corporate social responsibility initiatives such as the Extractive Industries Transparency Initiative and the Voluntary Principles on Security and Human Rights, or VPs. We have also worked closely with the diamond industry and civil society through the Kimberley Process to prevent rough diamonds from financing conflict. I believe most of you are familiar with these efforts, but I would like to focus on the VPs in particular.

The Voluntary Principles on Security and Human Rights were established in 2000 under the Clinton Administration to provide practical guidance that will strengthen human rights safeguards in company security arrangements in the extractive sector. The short-term goal of the VPs is to encourage extractive companies to better understand the environment in which they operate, improve relations with local communities through dialog, and uphold the rule of law. The long-term goal is to create a better environment for sustainable economic investment and human rights.

The VPs were negotiated and adopted in response to the concerns of governments, extractive companies, and civil society where difficult operating environments create challenges to both security and human rights.

Today, the VPs participants include four governments—the U.S., the U.K., the Netherlands, and Norway); 18 oil, gas, and mining companies; and seven international NGOs. The current four government participants are the home governments of the major oil, gas, and mining company VPs participants.

In these initiatives, participation of the international community is crucial but not sufficient. Participation of host governments is equally critical. For example, within the context of the VPs, many of the guiding principles to which companies commit with regard to their interactions with public security can only be truly effective with the support of the host government. Under the VPs, for example, companies volunteer to request that host government public security personnel receive human rights training and are vetted to ensure that they have not committed human rights abuses.

For these actions on the part of companies to be truly effective, host countries must embrace the Voluntary Principles. Let me be clear: Participation in the Voluntary Principles does not confer a "Good Housekeeping" seal of approval on a host country. The VPs were not created to be an exclusive or elite club, nor were they intended as a certification standard for human rights in the extractives industry. Membership in the VPs does not signify an endorsement of any participant's human rights practices, whether it be companies, governments, or NGOs.

The VPs are a process of mutual learning and improvement, yet are built on firm commitments embodied both in the Principles and in the unanimously approved Participation Criteria.

We are working closely with our fellow VPs members and hope to be able to welcome host governments to the table in the near term. I just returned from a trip to Nigeria and the Democratic Republic of Congo where I pressed the importance of adhering to internationally accepted human rights standards and norms. I raised the VPs in both countries and highlighted their value in serving as an additional tool available to those governments in addressing the grave issues I highlighted earlier concerning human rights in the extractives industry.

We can spotlight problems and draw international attention to human rights concerns, but without the commitment of host governments, no effort to address human rights concerns in the extractive sector, or any other, can be successful. As voluntary initiatives become more globally accepted, expectations for companies to adhere to the good corporate practices that they promote grow. That said, voluntary initiatives, like the VPs, are important complements to, but can never be substitutes for, the obligations of governments to meet their commitments under international law and to establish and enforce the rule of law domestically.

There are some who believe that in the face of poor human rights enforcement records of some governments around the world, the obligation to enforce human rights should be somehow transferred onto corporations. We strongly disagree. Yes, companies must bear responsibility for their policies and practices. But it is governments that ultimately must be held accountable.

Transferring the enforcement obligation onto companies would only lead governments to expect that they can opt out of their obligations because companies will do the job for them. The best option, and the key to ending exploitative practices by private sector companies or any other actor, is for governments to engage in good governance and thereby protect human rights enforcement and the rule of law.

We are committed to advancing our work in corporate social responsibility, and we certainly appreciate the opportunity that this hearing presents for us to share our views on this important issue. We look forward to continuing this dialog and our cooperation with Congress.

Thank you.

[The prepared statement of Mr. Krilla appears as a submission for the record.]

Chairman DURBIN. Thank you, Mr. Krilla, and I apologize for not reading your bio before asking you to speak. I just want to say for the record that you have served as Deputy Assistant Secretary for Democracy, Human Rights, and Labor in the State Department since January of 2006. You oversee the Office of International Labor Affairs and Corporate Social Responsibility, with primary responsibility for the Voluntary Principles. There is more to be read and we will put it in the record. I would like to get to the questions, if I could.

Mr. KRILLA. Absolutely.

Chairman DURBIN. So let's do a hypothetical here. Let's assume that I own an extractive company, and I want to do business in a country. As I might expect, I have to go to the leaders of the government of that country to get their permission in various ways—permits, follow their laws, and work through their process, whatever it may be—so that I can set up shop and start mining a mineral in this country. And then I find out that the security which will be provided to me at my workplace will be by that same government.

Now, I start my operations, and I quickly learn things are not going well. This government that is supposed to be providing security to me is engaging in things that would be absolutely outrageous and unacceptable in the United States: forced labor, rape, torture, kidnapping.

What is my responsibility at that point under the Voluntary Principles? And what do you think my responsibility is under the Alien Tort Claims Act?

Mr. KRILLA. Well, unfortunately, that scenario is not all that foreign to some companies that do work overseas, as I am sure you can imagine. The Voluntary Principles were created to give the companies that participate in this part of the process, first of all, a greater understanding of the environments in the countries in which they look to operate, ideally in advance of their engagement in those countries. So putting that aside, I think that is a very important piece of the puzzle, and the State Department feels fundamentally that we owe companies all the information that we put together in our Human Rights Report, all the information that our embassies compile on the human rights records of these governments, even in anticipation of going into these emerging markets.

But that being said, the Voluntary Principles is a very helpful tool for governments, for NGOs, and in this case for companies to better understand the environment and ways to deal with these situations.

The companies themselves can rely upon the NGOs and the governments to help better understand the environment and better understand what sort of training regimen should be implemented

for their security forces, starting off with risk assessments that are an integral part of the Voluntary Principles to better understand the environment. These trainings would better equip the security forces to understand the human rights situation as well as how they as security forces should deal with the environment. And I think this sort of training is fundamental. It is mostly done by the NGOs that are part of this?

Chairman DURBIN. I do not want to interrupt you.

Mr. KRILLA. Yes, sir.

Chairman DURBIN. You are giving me the preventive measures. I am describing a scenario where we are beyond that. My company is in business, and I look around and see the military forces of government doing things which are nothing short of outrageous. What is my obligation under the Voluntary Principles or under the Alien Tort Claims Act?

Mr. KRILLA. Your obligation is to pressure, to work with the other stakeholders in this, to work with the host government to ensure that the security forces, as you said that in some cases are out of your control, receive the training and are brought to justice, that the vetting occurs for human rights abuses so that individuals that are accused of human rights violations with credible evidence are removed from the employ of the government and from the facility.

Chairman DURBIN. So do I have an affirmative obligation to document what I have seen and notify the government of the conduct?

Mr. KRILLA. You have a committment under the Voluntary Principles to document your implementation of this, to stand up to the criticism that you would receive, and the assessments from the NGO and government pillars as to how you have implemented them, and in the case that you have highlighted, sir, to actually talk about how you have addressed it and then work with the other pillars to put pressure on the host government to implement this sort of regimen.

Chairman DURBIN. And if they fail to do anything and it continues, do I have any obligation beyond notification of my objection to their conduct?

Mr. KRILLA. Well, your committment under the Voluntary Principles is to address it through the means that are available, through the mechanisms of the Voluntary Principles, which we consider to be rather robust. Having the governments, not only the United States but the other three governments that are involved, raise these issues in bilateral as well as multilateral fora is a very strong tool that we have at our disposal and one that would not be available short of a Voluntary Principles mechanism.

So the company does have a committment to work through all means available within the VPs, and there are a number of levers through the VPs that are available.

Chairman DURBIN. So, finally, on the Alien Tort Claims Act, what kind of liability do I face if I have seen this outrageous conduct by the government forces that are supposedly responsible for my security? What kind of exposure do I have? If you were the attorney advising the company and they want to protect themselves from liability under the Alien Tort Claims Act, what should they do?

Mr. KRILLA. Well, I would answer that more generally, sir, in terms of what their obligations as companies are operating abroad under the expectations that we have as the State Department. I mean, we give them as much information as possible, and we expect them to not worsen the human rights conditions, not be complicit. We hope that they implement mechanisms such as the Voluntary Principles.

In terms of the alien tort statute, I am not as familiar with the U.S. application. If you would like, I could get you back an answer to that for the record, because I think it is an important one to address more fully for you, sir.

Chairman DURBIN. Thank you.

Senator Coburn?

Senator COBURN. Thank you. I just want to follow up on that.

Let's say I am drilling for oil—and I will not name the country—and I see human rights abuses, and then I raise those with the government and with the NGOs; and the human rights abuses I see are then perpetrated against my own employees. Then what do I do?

Mr. KRILLA. I will say that in a lot of these environments, there are well-documented, comprehensive challenges across the board for human rights, and the Voluntary Principles are not a cure-all for all of the challenges that we face.

In terms of addressing specifically the issue of human rights and security forces, this is a very helpful tool. If you are a company and are having challenges with your employees and the government or security forces—you have your own personal engagement with the government and you have the resources of the United States Government to engage with that government and express our concern.

In terms of the company itself, the Voluntary Principles may not be the best mechanism to address all of the treatment of your employees, but it is certainly one mechanism that would help highlight the challenges of the security forces and the human rights conditions of the security forces that in many cases are required to be employed by you.

Senator COBURN. OK. The point I am getting to is I have security forces. They are well documented. They believe in human rights. And rebel forces that are there were reporting what action—maybe they are rebel forces within the military of the country, but they are certainly not honoring human rights. I report that. Then my facility gets attacked because I reported it. OK? Because I have engaged in Voluntary Principles. Now what do I do? Where is moral dilemma? Do I pack up and go home? Or do I report again and expect to get attacked again?

In other words, what is the position—you know, what we are wanting to do is a very good thing, but without the rule of law, which we often take for granted in this country, which is very limited in many of these countries, without the rule of law to protect an extractive industry, what are they to do? Let's say they followed the Voluntary Principles to the "T" and all it has done is cost them their ability to produce. Then what do they do? Where are they from a moral standpoint? Do they continue to protect and have their business completely shut down? Or do they withdraw? Or do they just remain quiet because they have followed the Voluntary

Principles once and it has been very painful? What is your advice to me? I am an exploitative energy company.

Mr. KRILLA. Sure. Well, unfortunately, these challenges do continue to exist in a number of these countries, and I think the lesson that we have learned is that the Voluntary Principles do offer a very helpful tool. If you use them once and you have gone back to the government as a company and expressed your concern and not gotten satisfactory responses through inadequate rule of law, through inadequate attention to anticorruption, or whatever the issue is, you have the additional partners, the additional stakeholders of the governments and the NGOs that you can bring into the equation.

Truthfully, a lot of it is affected by community engagement, and in that respect, NGOs have been invaluable partners in this whole voluntary process, the Voluntary Principles process. So I would say if your first initial inquiries with the government are ineffective, you have many tools within the Voluntary Principles to bring to bear.

Now, that being said, if things continue to get worse and you feel as though your operations are hindered, certainly companies could choose to leave. But I think short of using all the mechanisms through the Voluntary Principles, there is certainly a lot of opportunity to bring other partners to help solve these problems.

Senator COBURN. One follow-up question. How many countries embrace these Voluntary Principles and then do not enforce them?

Mr. KRILLA. Well, right then, Senator, you have highlighted—

Senator COBURN. Give me a guess.

Mr. KRILLA. Sure. I would say we have four governments that are directly involved in the Voluntary Principles that embrace them wholeheartedly. It is the host governments that are the next step right now for us to work to engage. I think we have seen some engagement from governments like Colombia and Nigeria. They are not formally part of it, but we hope to welcome them at some point into the process more formally, and we think that having them at the table will help to strengthen and improve human rights conditions in those countries.

Senator COBURN. All right. Thank you. I do not have any other questions.

Chairman DURBIN. I would like to follow up, if I can. I understand Senator Coburn may not be able to stay, but I sure thank him for being here this morning, for being part of this hearing.

You testified that the participation of natural resource-producing countries in the Voluntary Principles is critical for their effectiveness, yet 8 years into the process, none of these countries has joined and there is not even a process in place to admit them. So why haven't they joined?

Mr. KRILLA. Well, as I did note, it is important to have them as part of this process. We have had a lot of engagement with these governments, but I think the important part of the process was several years ago when we actually created Participation Criteria for new entrants to understand what they were entering into. We have had governments—as I mentioned, Colombia and Nigeria—that have engaged the VPs to varying degrees—certainly Colombia has been very involved up to the highest levels. The Vice President

has been personally involved, Vice President Santos, in making sure the Voluntary Principles are implemented in all new contracts that the national oil company has signed.

So we have seen a lot of engagement, although these countries have not entered as formal VPs members because we are still working out new entry criteria for governments. It is something that, as I briefed your staff several months ago, we are actively working on right now. All the governments are hoping to involve new entrants, but at this point now, we do not have any more than the four governments that were initially formally involved.

Chairman DURBIN. Which four?

Mr. KRILLA. The United States, the U.K., Norway, and the Netherlands, sir.

Chairman DURBIN. Now, you mentioned Colombia as not formally part of the VP. They have some human rights problems that have been reported through the State Department and other sources, as do Indonesia and Nigeria. Should they be allowed to join?

Mr. KRILLA. Well, the majority of the participants in the Voluntary Principles see this process and this mechanism as one that is very inclusive. I would much rather have governments that are interested in improving their human rights records at the table with the NGOs, with other governments, and with the companies to understand greater the challenges that they face and be better prepared to put together a road map to address those challenges.

The country of Colombia is a perfect example of that, where there are well-documented human rights challenges that they still face, but their involvement in the Voluntary Principles leads to a much greater understanding and much greater ability to address certain problems. VPs will not solve all of their human rights problems, but certainly could lead to a much greater understanding and ability to address problems in human rights and security around the extractive sector.

Chairman DURBIN. Let's talk about Nigeria for a moment. It was one of the three original priority countries for the Voluntary Principles, but in the 8 years since they were created, the security and human rights situation in Nigeria has deteriorated significantly. Why were the Voluntary Principles not able to play a role in preventing this?

Mr. KRILLA. Well, unfortunately, as I said earlier, the Voluntary Principles are just one tool in our toolbox. That is not to say it is the only one that we are using in places like Nigeria. The United States Government—the State Department in particular—has a number of tools. Certainly, things like awareness raising through our Human Rights Reports, even through things like this hearing, are extremely helpful. Our engagement with the NGO community, our capacity building and support for civil society is a key part of raising awareness of the human rights challenges that the countries still face.

I will say I am disappointed that the Government of Nigeria has not been more engaged on Voluntary Principles. I think that we have seen some interest. We certainly could see more. Part of the purpose for my trip just last week was to get the Government of

Nigeria to more aggressively work to help implement these Voluntary Principles.

But I will say, despite the lack of aggressive implementation from the Government of Nigeria, we are seeing the companies implement the Voluntary Principles across the board in the country with the help of a lot of NGOs.

So I hold out hope that the companies and the NGOs and the home governments to these companies are going it alone. However, it is no substitute for having the Government of Nigeria as a willing partner.

Chairman DURBIN. For the record, you have mentioned NGOs generically. Are there specific NGOs that have been extremely helpful or extraordinarily helpful in implementing these Voluntary Principles?

Mr. KRILLA. Absolutely, and they play a key role. I myself come from an NGO background before I came to work at the State Department. Without helpful partners like Human Rights Watch, Amnesty International—we have got seven NGOs that are very critical in not only implementing but better understanding the challenges that we face, and I think they are very key stakeholders in this whole process.

Chairman DURBIN. I would appreciate it if you would enter their names for the record. I think they deserve that recognition.

Let me ask you, in the embassies around the world, particularly in countries with natural resources that are extracted and exported to the United States, are the Voluntary Principles an ongoing issue? Is it one where there are people within the embassy or consulate that work on this issue on a regular basis?

Mr. KRILLA. Yes, sir. In fact, one of the highlights within the State Department of working on the Voluntary Principles initiative is that it brings several different parts of the State Department and also several parts of the embassy together, whether it is our energy and economics officers or human rights officers or our political officers that more holistically follow the situation on the ground. So I think it is a real strength of this process within the Department, and then also within the embassy, that it brings all aspects of the embassy together to better understand and address this challenge.

Chairman DURBIN. Annually, the State Department issues a human rights scorecard. Is this whole issue of the conduct of extractive industries taken into consideration as a part of the grading or evaluation of countries overseas?

Mr. KRILLA. Sure. Well, I would not call it a scorecard so much as a very thorough, comprehensive report. I actually brought a copy of it here to show you just how extensive it is.

This report judges the human rights condition in countries and judges governments. There is certainly mention of companies, companies' behavior. Primarily—as I mentioned earlier and I think you noted as well, we hold governments accountable, but certainly the situation around corporate behavior is mentioned in the reports as well.

Chairman DURBIN. Do you hold companies responsible as well? If there is a company, an American company, that is not partici-

pating in Voluntary Principles or not doing the right thing, is that reported as well?

Mr. KRILLA. Absolutely. It is reported in the sense that we engage with those companies and try to better increase their understanding of the situation and encourage them to get involved in different initiatives like the Voluntary Principles. In other industries, there may be other sorts of industry best practices that certain companies are not complying with, and certainly better educating them and encouraging them to move toward those practices is our goal.

Chairman DURBIN. So if I read that evaluation, will I see the names of companies that you believe are not doing a good job when it comes to this?

Mr. KRILLA. You will see the names of facilities where human rights incidents have occurred. I think our report well documents situations which need to be addressed, and in some cases companies are mentioned.

Chairman DURBIN. I know that there are many companies that pride themselves on the sources of products that are sold in the United States—Whole Foods, Starbucks, companies of that nature. And it appears that they believe that this is something that American consumers will pay attention to. I think we have an ample history of those companies that have failed to pay attention being caught in the act, and they have to change their policies and practices. So I would think that that reporting might have a valuable impact on corporate conduct overseas.

This is an extremely complicated situation. I would hope that we can work together on this in terms of acknowledging the companies that are doing the right thing—I think they deserve a pat on the back and recognition—but also those that are not. And that might help the American consumer to decide. Sometimes that consumer decision can have more impact than any law we pass.

So I thank you, Mr. Krilla, for testifying today. We will have some follow-up questions we will send your way.

Mr. KRILLA. If I could just add one more thing, Mr. Chairman.

Chairman DURBIN. Of course.

Mr. KRILLA. I think we do do a great job of highlighting companies that are doing the right thing, best practices. I think the Secretary's Award for Corporate Excellence really helps highlight some of these companies. In fact, two of your Illinois companies last year were finalists: Motorola and Caterpillar.

Chairman DURBIN. Great.

Mr. KRILLA. So we are pleased to do more of that, and thanks again for having us up today.

Chairman DURBIN. I am happy that you mentioned some Illinois companies. I appreciate it. Thanks a lot for your testimony today.

Chairman DURBIN. We are now going to move to the second panel, and we are honored to have a distinguished panel of witnesses to share their views on this topic. Each of these witnesses will have 5 minutes for an opening statement. Mr. Bassey and Mr. Ka Hsaw Wa have both traveled a long way to be here, so we are going to give them a little more latitude in their testimony. Their complete written statements will be made part of the record.

Before the witnesses are seated, I am going to ask you for the purpose of administering the oath to please stand and raise your right hand, if you would. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BASSEY. I do.

Mr. GANESAN. I do.

Mr. FREEMAN. I do.

Mr. WA. I do.

Chairman DURBIN. Thank you. Let the record reflect that the four witnesses answered in the affirmative.

Our first witness, Mr. Ka Hsaw Wa, is the co-founder and Executive Director of EarthRights International and a member of the Karen ethnic nationality in Burma.

After leading peaceful student demonstrations in Rangoon in 1988, he was arrested and tortured by the Burmese regime. Mr. Ka Hsaw Wa fled the country after his release and has since traveled clandestinely to remote areas of Burma to interview witnesses and victims of human rights abuses committed by the military junta. Mr. Ka Hsaw Wa has documented human rights abuses, including forced labor, torture, killings, and rape resulting from the Yadana pipeline, which cuts through the Tenasserim region of Burma.

Mr. Ka Hsaw Wa has been honored for his work with the Goldman Environmental Prize, the Reebok Human Rights Award, the Sting and Trudie Styler Award for Human Rights and the Environment, and the Conde Nast Environmental Award.

Mr. Ka Hsaw Wa came all the way from Thailand to testify before the Subcommittee, and I thank you very much for doing that. It is an honor to have you with us today, and we look forward to your testimony. You may proceed. Make sure your microphone is turned on.

STATEMENT OF KA HSAW WA, CO-FOUNDER AND EXECUTIVE DIRECTOR, EARTHRIGHTS INTERNATIONAL, WASHINGTON, D.C.

Mr. KA HSAW WA. Thank you so much, Mr. Chairman and the rest of the members. This issue is extremely important for me because as I have been documenting human rights abuses committed by military, we have a corporation for 15 years. We all know the horrible human rights record of the Burmese military junta. This army has a contract with Chevron on the Yadana natural gas pipeline. That very same military who shot and killed monks on the street last September, who did not allow any humanitarian aid during the cyclone disaster in Burma, and who killed many of my friends and other demonstrators and tortured me for 3 days.

Chevron hired the brutal military dictatorship to provide security of the pipeline. Human rights abuses are happening before, during, and after construction and are still happening today.

The pipeline is the single largest source of income for the military. This revenue has allowed the military to dramatically increase the military budget and size over the last decade. My organization, EarthRights International, helps voiceless people of Burma to seek justice in U.S. courts against Unocal, which was bought by

Chevron in 2005, for slave labor, torture, rape, killing associated with this pipeline in the historic lawsuit called *Doe* v. *Unocal*.

It is so incredible for me to see that a U.S. corporation like Chevron is allowed to continue to contract with brutal military. Thousands of Burmese soldiers in the area, in the village, along the pipeline route committing human rights abuses against the local people. The military rape the women, children, and conscripting slave labor. They kill and abuse villagers anytime they want with total impunity. Villagers are forced to work the pipeline corridor, first for the repair and maintenance of infrastructure for the pipeline, and carry ammunition while military are taking security for the pipeline. While projects were being built, hundreds of people who were working as slaves built helipad, road, military barracks for the pipeline security forces.

I want you to understand the situation of my people in the pipeline region. Many of the people in the pipeline region are farmers, and then because the military do not allow them to go to their farm, they have not enough food. And at the place where they are allowed to go is very limited. And in order for you to go one place to another, you have to get permission from the military. The only way for you to get the permit is you have to bribe military with chicken, money, alcohol, things like that. If you cannot get any permit, if they see you in your farm, they could kill you, they could torture you. They will do anything they want to you.

I talked to a person, a family member of a person that his son was simply killed because he did not have permit from military in his farm. It just happened 3 weeks ago. And women were raped, children were raped, too. I talked to a witness who saw the rape of the soldier to the little young girl in the pipeline—the village in the pipeline, because the two little girls, one is about 7, one is about 9, were bathing and playing in the river near their village. Two military go down there and, you know, start to grab them, and one older sister could run away, but the younger sister, 7-year-old, being raped by the military that are taking security of the pipeline. And the corporation know that. They admit that. And they knew that this happened, and they don't seem to do much about that.

Last year, I personally took a village head from the pipeline region to the hospital in Thailand because he was beaten by the military simply because he was—military force him to provide timber for the military, and he and his villagers working for 6 weeks to provide timber for the military. And when military come and get timber, they found another pile of timber that villagers were collecting to build a school. But they want to take that, too. But he tried to stop it, and they beat him up really, really badly, and he was severely injured. And then because of help from his friend, he could come to Thailand because he couldn't get any medical attention in the area.

It is so difficult to see the situation because I have been there for many years. I have been talking to many, many people, and we have been systematically documenting those human rights abuses for many years. And I just think about if this happened to you, to your family, how would you do that? The only thing for those people is hopelessness. They have no voice. They have no power. That is why I am here to tell you this story, and then I would like to

give them hope. And, you know, if they know that somebody like you are doing something about this kind of horrible things to stop, they would be so happy. And I am so happy that—and, also, I would like to say that as you mentioned about Alien Tort statute, which corporations do not fancy that statute, and they want to take it away from—they want to take it away.

So, I mean, this law is so important for the victims of human rights abuses to get justice in U.S. court. This law allows people from my country to get justice in United States court. It is from, you know, slave labor, killing, rape, torture, and other abuses happening on the Yadana pipeline. I think also you should be proud of having this law that holds corporations accountable.

People in my country would welcome company if they know the corporation would respect the rights and the dignity as human beings. If a company like Chevron will not accomplish it in the kind of human rights abuses that I have described today, they wouldn't have to spend millions of dollars on public relationship campaign aimed at covering the truth. And people around the world would have more positive image of America. I mean, like it or not, corporations are perceived as representatives of the United States. When those de facto ambassadors are complicit in human rights abuses like Chevron still in my country, they see Chevron as American. It is an image that I believe we should not give to the world, that we will go anywhere, do anything, partner with the most brutal military to get whatever we need.

I saw in the news Chevron recently pressured the Bush administration to cancel or suspend Ecuador trade preferences, unless the court case again Chevron for massive environmental damage in the Amazon is dropped, and then when you see that the spokesperson even say that "we cannot let this little country screw around with big country like this," they treat people of the country horribly. They don't respect any human rights in the country that they are working in.

So, another thing EarthRights International fully supports is passage of the Extractive Industry Transparency Disclosure Act. While the act does not address specific human rights abuses by corporations, transparency and accountability go hand in hand in addressing the root cause of these abuses; therefore, solutions must address both issues.

Most importantly, laws that regulate corporations and prevent them from committing human rights abuses give people hope—hope that one day they will not be victims of human rights violations by anyone, and especially for American corporation who claim they are improving people's life. And I want to believe that one day, but for now what Chevron gives us is hopelessness, sadness, and suffering.

Thank you so much for listening to us, and I believe that together we can help stop some suffering of the world.

[The prepared statement of Mr. Ka Hsaw Wa appears as a submission for the record.]

Chairman DURBIN. Thank you. Thank you for coming such a great distance, and I will have some questions for you after the panel has had a chance to testify. But I really do appreciate your being with us today.

Our second witness, Mr. Bennett Freeman, is a Senior Vice President for Social Research and Policy at Calvert. From 2003 to 2006, he led Burson Marsteller's Global Corporate Responsibility practice, advising multinationals on policy development and communications strategies related to human rights, labor rights, and sustainable development. As Deputy Assistant Secretary for Democracy, Human Rights, and Labor from 1999 to early 2001, he led the development of the Voluntary Principles. He received a bachelor's degree from the University of California at Berkeley and a master's degree in modern history from Oxford.

Mr. Freeman, thank you for being here today, and please proceed.

STATEMENT OF BENNETT FREEMAN, SENIOR VICE PRESIDENT FOR SOCIAL RESEARCH AND POLICY, CALVERT GROUP, WASHINGTON, D.C.

Mr. FREEMAN. Thank you, Mr. Chairman, for the chance to testify today, and I do hope that my full statement can be entered into the record.

Chairman DURBIN. It will be.

Mr. FREEMAN. Thank you very much.

The theme of my testimony is the critical, indispensable role that governments—especially the U.S. Government—must play in leading the Voluntary Principles on Security and Human Rights, a corporate responsibility initiative which has yet to meet its potential but which, in my view, remains more necessary than ever.

After the launch of the Voluntary Principles in December 2000, the process drifted without clear direction and in 2006 descended into a crisis of accountability and credibility—a crisis that has threatened the survival of the initiative in its present form but now appears to be very close to positive resolution. The near breakdown of the global plenary process has not only diluted focus on the imperative of strengthening implementation in key countries, but has obscured much of the concrete progress that is being made by a number of companies on the ground in many countries. That progress must now in turn be reinforced by stronger outreach to host country governments and security forces, which has seriously lagged due to insufficient priority, focus, and resources on the part of the U.S. and the other Voluntary Principles convening governments.

The Subcommittee's focus on the Voluntary Principles is especially timely for four reasons that I will use to frame very briefly specific recommendations.

First, the Voluntary Principles are more important than ever, not only to protect human rights and to promote corporate responsibility, but also to support U.S. foreign policy and energy security goals. There are a growing number of countries and regions where vital oil and gas and mining operations are in close proximity to active, latent, or potential new conflict zones in which a combustible mix of conditions and incidents threaten both human rights and the ability of companies to operate.

As has been observed already in this hearing, Nigeria, Indonesia, and Colombia were the original three priority countries for the initiative. They appropriately remain so, but I want to underscore the

urgency of accelerating and deepening Voluntary Principles implementation in Nigeria, where an upsurge in violence since late 2005 has put U.S. companies at greater risk, and especially the human rights of the peoples and communities of the Niger Delta. This has indeed become one of the most dangerous operating environments for business in the whole world and one in which the Voluntary Principles, unfortunately, should be invoked on almost a daily basis. Just over the past weekend, further incidents occurred that underscore the urgency of driving Voluntary Principles implementation forward in Nigeria.

My full statement includes a partial list of the many, many other countries around the world where I believe the Voluntary Principles are highly relevant. It is a far longer list even than we had in mind back in 2000 when the original process was put together.

The second reason I want to underscore briefly why this hearing is so timely is that the Voluntary Principles have become a lightning rod in the important global debate over the efficacy of voluntary versus legally binding standards bearing on the human rights responsibilities of business, far beyond the oil and mining industry. The ability of the Voluntary Principles to demonstrate their effectiveness, their credibility, will go a long way to bolstering confidence on the part of companies in other industries, including the Internet companies, which have been a focus of an earlier hearing of the Subcommittee, that, in fact, voluntary approaches can make a positive difference.

The imminent agreement I referred to with respect to "participation criteria" for the VPs would nearly, but not totally, complete the architecture of accountability which has been so long in the formation.

A final element of that architecture is the completion of the long delayed reporting criteria for the initiative, which is absolutely essential as a baseline for any accountability whatsoever.

The third reason I would like to highlight the importance and timeliness of the hearing is to underscore the strong leadership that is so necessary now on the part of the original convening governments to fulfill the initiative's potential by engaging much more directly and effectively with host country governments whose security forces are its most critical operational focus. And at the same time, I believe that the addition of new governments to the global plenary process can make the VPs both more inclusive and accountable at the same time.

The embassies of the convening governments can and should play more active roles in facilitating dialogs with those governments and security forces to support implementation efforts by the companies.

The final reason that I want to underscore why this is such a timely hearing is, frankly, the approach of a new administration which gives us the opportunity to renew and revitalize the State Department's leadership of an initiative which urgently needs greater focus, resources, and momentum to achieve its original and still vital objectives. It is so important for the next administration to strengthen focus here because the Voluntary Principles are far more than a corporate responsibility initiative. They are closely linked and must be even more so to a more strategic and com-

prehensive U.S. approach to energy security in a world of continuing conflict. I believe that there are a number of very specific steps that the new administration should take without delay, building on some of the recent progress that Deputy Assistant Secretary Krilla mentioned. I will not go through the entire list of the recommendations I make in my full statement. I would just highlight several quickly before concluding.

One is to elevate the diplomatic priority attached to VPs implementation with key countries, especially Nigeria as well as Indonesia and Colombia, and to tie that implementation more closely to support for related initiatives such as the Extractive Industry Transportation Initiative, particularly in Nigeria where only a comprehensive approach can begin to ease the violent tensions and achieve structural reform in the Niger Delta.

A second recommendation I would like to highlight is to add staff and assistance resources to embassies and USAID missions in priority implementation countries to support outreach to the host country governments, as well as to civil society and local communities.

Two others I will just highlight very quickly before concluding. One is to adapt human rights training for security forces, both military and police, in priority implementation countries to cover Voluntary Principles content, programs such as IMET in particular. And, finally, to add elements related to the Voluntary Principles to OPIC loan guarantees and Ex-Im Bank projects in the extractives sectors in relevant countries.

Mr. Chairman, let me conclude by emphasizing that renewed and revitalized State Department leadership of the Voluntary Principles can connect corporate responsibility and human rights to stronger governance and rule of law in countries that are critical to our foreign policy and energy security goals. While the Voluntary Principles address what are usually narrow issues and situations, they touch on some of the largest problems and challenges that our companies face in the world—ones which cannot be solved without greater leadership, diplomacy, and resources from the U.S. Government consistent with our broader interests.

Thank you very much.

[The prepared statement of Mr. Freeman appears as a submission for the record.]

Chairman DURBIN. Thank you very much.

Our next witness is Arvind Ganesan, who is the Director for Business and Human Rights at Human Rights Watch. He works with governments, companies, and multilateral organizations on many issues involving business and human rights, and has authored a number of publications on the subject. He has focused on human rights issues related to energy development in countries such as Angola, Burma, Colombia, the Democratic Republic of Congo, Indonesia, and Nigeria. He testified previously at the Subcommittee's hearing on "Global Internet Freedom." I thank you for joining us again, Mr. Ganesan.

STATEMENT OF ARVIND GANESAN, DIRECTOR, BUSINESS AND HUMAN RIGHTS PROGRAM, HUMAN RIGHTS WATCH, WASHINGTON, D.C.

Mr. GANESAN. Thank you, Mr. Chairman, for the opportunity to speak today on natural resources, human rights, and corporate responsibility.

As you noted earlier, energy prices are at all-time highs and have strained consumers and companies, and as policymakers are searching for ways to wean the U.S. from foreign oil, we are missing a part of the debate, and that is, who receives the money and what actually happens on the ground. And the picture is not a pretty one.

Over 60 percent of U.S. oil comes from abroad. But, sadly, corruption is rife in many of these countries, and these governments are often undemocratic and abusive.

We have seen the creeping autocracy in Russia and Venezuela by governments who are emboldened by billions of petrodollars. And on September 19th, Venezuela expelled our staff from the country after we issued a report critical of President Chavez.

U.S. companies are major investors in many of these countries, and U.S. consumers pay for this oil.

In Angola, we documented how the government, ruled by the same president for almost 30 years, could not account for oil revenue equivalent to about 9.25 percent of the country's annual GDP between 1997 and 2002. By comparison, it would be as if the Government "lost" $1.2 trillion a year for 5 years here in the U.S.

At the same time, Angola had some of the world's worst human development indicators and was considered among the most corrupt. Angola is the sixth largest supplier of oil to the United States.

Equatorial Guinea is an extremely repressive country, ruled by a dictator who seized power from his brutal uncle in 1979. Oil has fueled an almost 13,000 percent increase in the country's GDP since 1992, but the State Department, IMF, and others have repeatedly noted how the Government does not spend adequate money on its own people. However, the president and his family lead lavish lifestyles. The most brazen example is the president's son, Teodorin, who has purchased multimillion-dollar houses and exotic sports cars throughout the world—apparently on a government official's salary of about $4,000 a month. In April 2006, he bought a 15,000-square-foot mansion on an estate in Malibu for $35 million, the same year the government only spent about $12 million for social service infrastructure. The U.S. imports about 66,000 to 101,000 barrels of oil per day from this country.

In many parts of the world, oil and other natural resources are located in the midst of conflict or have become flashpoints for other disputes. Government and companies have legitimate reasons to safeguard their employees and operations, but in too many cases, security for the extractive industry has meant human rights abuses in countries such as Burma, the Democratic Republic of Congo, Nigeria, Indonesia, and elsewhere.

To help address these problems, we have worked with industry, governments, and other human rights organizations to develop the Voluntary Principles on Security and Human Rights. But even with

the new procedures in place that people have discussed, we do not really know whether companies are fully implementing the VPs since there are no meaningful reporting criteria, no monitoring mechanisms to assess compliance, and because at the end of the day they are voluntary. And we are concerned that current or new member governments will not actually change their practices or meet their responsibilities because the standards so far are too weak to actually compel them to do so.

In order to address these problems, the State Department and other agencies should have and should dedicate the resources to fulfill their responsibilities under the VPs, and, crucially, they should be required to report on company and government compliance regularly to Congress.

Other steps that the U.S. can take to ensure better implementation of the VPs is, like Bennett Freeman said, ensuring that the Export-Import Bank and Overseas Private Investment Corporation require extractive companies to have effective policies to address security and human rights and monitor their compliance; ensure that military assistance programs are contingent on respect for human rights and that there is accountability for violations; and consider legislation to ensure that extractive companies and private security providers follow human rights standards. I think we see over and over again where trusting companies to voluntarily do the right thing oftentimes falls short. And to combat the corruption and the misuse of funds that often accompany these abuses, Congress should support the Extractive Industries Transparency Disclosure Act, which, on behalf of a number of people, I would like to thank you for your leadership on this issue. But also ensure that the SEC and Department of Justice aggressively investigate violations of the Foreign Corrupt Practices Act, and strengthen the U.S. anti-kleptocracy initiative first announced by President Bush in 2005. In particular, ensure that the relevant branches of Government aggressively identify corrupt officials and use existing anticorruption and anti-money-laundering laws to thwart them.

And, finally, start a program to identify assets in the U.S. obtained by corrupt means and work to freeze them and repatriate them to their rightful owners: the citizens of those countries.

These actions will send the message to companies and corrupt officials that their illicit activities and abuses will not be tolerated, and it will send the message to the citizens of those countries that the U.S. will stand with them so that they can hold their governments accountable.

Now is the time to change things so that these problems do not come back to bite us through instability, skyrocketing prices, corrupt governments, abusive security forces, or corporate excess.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Ganesan appears as a submission for the record.]

Chairman DURBIN. Thank you, Mr. Ganesan.

Our final witness in this panel is Mr. Nnimmo Bassey. He is the co-founder and Executive Director of Environmental Rights Action, a Nigerian advocacy organization. He has documented environmental and human rights abuses involving the oil and gas industry in Nigeria and campaigned for peaceful resolution of environmental

and human rights challenges. Mr. Bassey is an architect by training and has published four books of poetry.

Thank you for traveling so far to be with us today, Mr. Bassey. Please proceed.

STATEMENT OF NNIMMO BASSEY, EXECUTIVE DIRECTOR, ENVIRONMENTAL RIGHTS ACTION, LAGOS, NIGERIA

Mr. BASSEY. Thank you, Mr. Chairman, for this opportunity to address your Committee on the issue we are focusing on.

I come from the Niger Delta, and over the past 15 years, I have worked on human rights issues and environmental rights abuses in the Niger Delta. Oil has been exploited in commercial quantities in the Niger Delta for about 50 years now, and there have been 50 years of dashed hope, 50 years of environmental degradation, and 50 years of human rights abuses. These abuses heightened in the last two decades, and we have noticed that this has been as a result of big corporations of the United States not being willing to engage in dialog with communities.

Now, before I speak further on that, I would like to say that the oil industry activities are inherently challenging to any environment, especially the Niger Delta environment, because right from the exploratory stages where seismic lines are cut, we have the experience of heavy deforestation and invasion by opportunistic people who want to take advantage of the opening up of the land for them to exploit also. And when oil exploitation actually starts drilling, it is accompanied by a discharge of radioactive waste into the water bodies and onto the land.

And then we have a series of oil spills. Industry sources place it at about 300 oil spill incidents every year, but independent observers suspect that we have up to 1,000 oil spill incidents every year in the Niger Delta. Most of these spills are not reported, and most of the spills are not ever cleaned adequately. And so this makes the land and the water bodies unproductive for people who depend on water, natural streams and creeks for potable water, and who depend on the land for agriculture on which they subsist.

Besides this, we have massive cases of gas flaring. The gas that comes out when oil is extracted could either be reinjected into the ground or harnessed for use as liquified natural gas. But it is more cheaper for the industry to just set the gas on fire, and so for decades, about $15 million worth of gas goes up in smoke in the Niger Delta every day—day and night, no break. And this gas flares up right in the communities where people live, and some of them in the middle of the communities. If it were just economic wastage, that would not be so much of a challenge for us. But it is a very big environmental issue because the gas flares release a whole lot of greenhouse gases into the atmosphere. They release other toxic elements that cause blood disorders, cancer, bronchitis, asthma, and also acid rain which challenges the corrugated iron sheets that community people use to roof their houses. They have to replace these roofs, and so we have a situation where the economic life is completely dislocated by oil spills, seismic lines being cut, and also this gas flaring that goes on continually.

Now, over the years, the community people in the Niger Delta have always sought avenues for dialog with the corporation and the

state, but over the years we have noticed also that whenever they make this move, they are visited with disproportionate use of force, human rights abuses, and by the use of the military. And the U.S. Department has repeatedly reported that the industry did not address it and the military are engaged in extrajudicial killings and also do not show any form of accountability.

By 2003, the Niger Delta region was already characterized as a high-fatality region in the world, comparable then to Iraq and Afghanistan. I do not think that is the case now. Further, recently we have got a rise in militancy in the Niger Delta, and we condemn the use of violence by any people on any side of the debate, either from the communities or from the military or from the corporations. And we call for dialog, which is what the community people have been asking for over the years, and greater transparency in dealings between the corporations and the military in Nigeria through the government.

Now, I would like to give two examples of where communities have sought dialog and have been met with violence. The first case would be the Ogoni people. The Ogoni in early 1990s organized themselves under the Movement for the Survival of the Ogoni People under the leadership of Ken Saro-Wiwa, one of Nigeria's foremost poets, playwrights, environmentalists, and minority rights activists. He was murdered by the state in 1995, after a trial at which Shell had a watching brief, after the kangaroo trial at which he was found guilty. And really to underscore the fact that this was an illegal act of extrajudicial killing, the Nigerian Government has only this week named a street in the Federal capital after Ken Saro-Wiwa.

Now, the Ogoni people engaged in a model peaceful mode of agitation by producing the Ogoni Bill of Rights in which they highlighted what they wanted from the state and how they wanted to negotiate and how they wanted respect and dignity to live as citizens in the country. But that was not respected, and with the very serious and active engagement of Shell and the Nigerian state, the people were visited with extreme violence that led to many environmental refugees, some of whom have not returned to Ogoniland even as I speak.

Now, moving over to 1998, which was long before the emergence of militant activities in the delta, we had an issue that occurred on a Chevron facility known as the Parabe platform. This was in May 1998. Community leaders from the Ilaje community had gone to the platform in a peaceful demonstration and said they would sit there until Chevron officials go to the village on shore to discuss with community elders about simple things they were complaining about—lack of employment and also environmental degradation. And a few days later, they received information that there was some kind of progress in the discussions on shore in the village with the community leaders. And the youth said, "Well, if that is the case, we are ready to go back. We are ready to leave the platform." And they would leave the following morning because they got the message late in the evening. But by the time they woke up in the morning, Chevron conveyed troops with the helicopters onto the platform, and the resulting attack—the attack that followed resulted in the death of two youths, injury to many, and others were

hauled away into detention in very inhumane conditions. And we are grateful that that case eventually is going to trial next month in a Federal high court in San Francisco.

Now, just 2 months ago, I decided to visit Ilajeland to see whether things have changed 10 years after that attack. When I got through the creeks and got to the community, I was received by the leader of Awoye village in Ilajeland, and he told me in discussion that usually they welcome visitors by presenting two things: one, a glass of water; and, two, fish to eat. And I said, "I love to drink water and I like to eat fish." He told me, "Well, we don't have any fish," because the canal dredged by Chevron to move in their equipment has brought salt water from the ocean and polluted the entire freshwater system and also degraded their farmlands and the people were more or less destitute. I said, "OK. If you don't have fish, give me water to drink." And he brought me water that did not have this color, water that was not even as clean as green tea. And I said, "I would not be able to drink this, with all due respect. Where did you get this water from?" And he told me that they fetched that water from the Chevron facility. And I said, "How could you fetch this kind of water from the Chevron facility? Why would you drink it?" They said they have no option. I said, "Don't you know that this is not healthy?" And they said, "Even Chevron tell us it is not healthy to drink the water, but we have no option." And that is what they are drinking.

And so we have over the years seen cases where communities demand simple things, demand for dialog, and they are met with indifference. And when there is a response, it is a lethal response using the military and attacking the people.

I would like to conclude, Mr. Chairman, by saying that as far as the environment and human rights are concerned, we all live downstream. And it is important to note that this is one world that we live in, and abuses anywhere must be exposed everywhere. I believe that the Voluntary Principles I have heard so much about is something that should be made into something mandatory and legislated upon, because industries are not, as we have experienced, willing to take any voluntary action that diminishes their profit margins.

I thank you, Mr. Chairman.

[The prepared statement of Mr. Bassey appears as a submission for the record.]

Chairman DURBIN. Thank you, Mr. Bassey. I appreciate the sacrifice that you and Mr. Ka Hsaw Wa and all of the witnesses made to be with us today.

You noted that the State Department's Human Rights Report found that Nigeria's human rights record is poor, that Nigerian security forces committed extrajudicial killing and used excessive force. You also testified that Chevron "directly requested the intervention of the Nigerian forces, regularly houses and feeds those forces, and pays them above their government salaries."

What should Chevron do to address this situation?

Mr. BASSEY. Mr. Chairman, I believe that Chevron, No. 1, has to be a responsible corporate citizen in Nigeria. They have to operate in a way that is not characterized by double standards, and they have to stop doing things that further worsen the human

rights situation in the oil fields. They should deal with the military in a more transparent way and report their dealings clearly. We do not need to scream and struggle before we get information about how they are dealing with the military. They have to show very good examples following the principles to which I believe they are already endorsing, the Voluntary Principles. They have to put this in practice in their daily dealings in Nigeria. Otherwise, the situation is that nothing has changed and it is the same old story.

Chairman DURBIN. One of your recommendations is that Chevron and others directly report the payments they make to the military forces and security forces of other nations. I assume that would be one of the starting points for this issue. The other would be that they put money into the actual training of the security forces regarding the standards of acceptable human conduct. I think both of those things are very obvious.

I am sorry that Chevron is not here today. I would love to hear their side of the story, if they have one to give us. It would have been very interesting to hear their response to this.

Mr. Ka Hsaw Wa, I have basically the same question for you. You have testified that Chevron has employed the Burmese military to provide security on the Yadana pipeline and that, as a result, there have been horrific human rights violations. How do you believe that Chevron should address this?

Mr. KA HSAW WA. From my perspective, Chevron can address this issue by really committing to change the situation. For example, with regard to the military, they can train them, or monitor the situation very closely, or let independent groups monitor the situation. For example, when I talked to the villagers, they always said that the military tells them if the corporation goes, you will be in trouble. When Chevron and corporation people closely monitor the situation, the human rights situations decrease, and, could disappear—but the thing is they just simply are going around, they don't put the staff member on the ground as, according to some of the villagers I talked to. But they do not monitor human rights violations very closely. That is one thing.

The other thing is they do have influence over military government—I strongly believe that—because when I talked to the villagers, they were telling me that whenever they talk to the corporation employee, the soldiers around there always come and listen. They do care about that. And later those, military behave better.

And so my perspective is Chevron could simply commit to human rights, to changes, and then just simply to monitor the situation of the pipeline very closely.

Chairman DURBIN. Mr. Bassey, you also testified very eloquently about the environmental damage caused by oil production in the Niger Delta—oil spills, gas flares, and dredging. I was particularly struck by a quote in your testimony from a man—I hope I pronounce his name correctly—Bola Oyinbo—and I know I will not pronounce this correctly—an Ilaje—is that correct, Ilaje community?

Mr. BASSEY. Bola Oyinbo, Ilaje community. That is fine.

Chairman DURBIN. That was pretty close. An Ilaje community leader, who said, and I quote—"Go to Awoye community and see

what they have done." This quote goes on to say, "Everything there is dead: mangroves, tropical forests, fish, freshwater, wildlife. All killed by Chevron."

Can you elaborate on this environmental damage? And do you consider this to be a human rights violation?

Mr. BASSEY. Mr. Chairman, let me begin by saying that, unfortunately, Bola Oyinbo died a few years after the Parabe attack, Bola that we are quoting in this testimony. He was one of the leaders of the demonstrating youths who went to the platform. And if he had been alive, he would have been in the United States next month testifying in the court case.

Now, the sort of environmental degradation we have in the Niger Delta is nothing short of human rights abuses. We cannot distinguish between the kind of environmental abuses we face and any other form of human rights. I believe personally that the environmental violence is just as grave as violence by the gun, because this violence completely cuts people off their means of livelihood. They just do not have a way—they struggle. Fishermen depend on imported fish just to eat because the waterways are polluted and the oil spills are hardly ever cleaned. You should visit the Niger Delta. You will find that the best technological advanced methods used by these high-tech corporations is just buckets and spades to clean spills. And when they are tired of cleaning the spills, they simply set the rest on fire. So we have got fires being burned, and even the river is on fire. So when you visit the Niger Delta, we always advise people if you see fire don't drop into the water, because the water may be the next to be on fire, because spills are so massive and so frequent. And so we have aquatic life, animal life, and everything just being so challenged by the activities of Chevron, Shell, ExxonMobil, and the other corporations. It is really—there is no other way to characterize this than to say that this amounts to enormous human rights infringement.

In fact, in the case of gas flaring, some communities sued the corporations, especially Shell, and asked the court in Nigeria to declare if gas flaring is illegal activity and what it means about human rights. And the judge did agree with the communities in November 2005 in a judgment in the Federal high court in Benin City where I live, that gas flaring in Nigeria is an illegal activity; No. 2, that it is a human rights affront and that it should be stopped. But the particular gas law which judgment was given, which is run by Shell Corporation, gas flaring is still continuing there. About 3 weeks ago, when community people went on an environmental site visit just to see the flare, Shell ordered troops to arrest them, and 25 community people, environmental NGO members, and journalists were detained for over 5 hours by military on behalf of Shell for just going to look at the gas flare.

Chairman DURBIN. Are you allowed to travel in this area, Niger Delta?

Mr. BASSEY. Yes, anybody can travel in Niger Delta, but you just have to be ready for whatever you meet on the way.

Chairman DURBIN. Mr. Freeman, you were nodding when I talked about environmental damage and human rights violations. It is hard to separate the two. If you are endangering the lives of people, cutting them off from their livelihood, destroying the envi-

ronment they live in, this certainly reaches a level of assault and battery at least.

Mr. FREEMAN. I would agree, Senator. I had the opportunity to visit the Niger Delta in July of 2000 when I was still serving in the State Department with the specific purpose of consulting on what was to become the Voluntary Principles. And I traveled to a number of communities and villages in the region and was struck by the obvious pollution visible while traveling by motorboat through the mangrove swamps.

I would also note the dramatic but really degrading effect of the gas flaring that has been mentioned, which continues, and, unfortunately, Shell has not met its full commitment to diminish that gas flaring.

It is very difficult to be on the ground for any period of time in the Niger Delta with any human rights sensibility whatsoever and to observe the environmental degradation that is everywhere, not to view that as a human rights abuse.

Chairman DURBIN. Let me ask you this: Mr. Bassey has suggested, Mr. Freeman, that Congress should consider enacting legislation creating criminal penalties for American companies that are complicit in human rights abuses in conflict zones or countries with repressive governments. I would like to ask both you and Mr. Ganesan what is your reaction to this suggestion. Is the Foreign Corrupt Practices Act a possible model?

Mr. FREEMAN. The Foreign Corrupt Practices Act is indeed a possible model, as are the provisions which have been the basis of lawsuits over the last decade in the Alien Torts Claims Act. I believe that unless companies can demonstrate their commitment to and implementation of the Voluntary Principles on the ground in key countries such as Nigeria, such legislation might be necessary.

That said, I have believed in the voluntary approach here taken explicitly by the Voluntary Principles, but have been dismayed by the failure of the process to fully achieve the potential positive contribution to human rights. I could envision, if not explicit legislation around criminal penalties, I could at a minimum envision explicit legislation to bolster implementation of the Voluntary Principles. One way to do so would be to require reporting by companies participating in the process. I think that kind of legislation would be necessary and appropriate unless the Voluntary Principles process can finally, after almost 8 years after its launch, finalize the reporting criteria.

I also suggest in my testimony that Ex-Im Bank projects and OPIC guarantees require Voluntary Principles commitment and implementation for certain projects in certain countries. I think that would be an appropriate objective for legislation.

But criminal penalties I think may be necessary, but I do think that at least the Alien Torts Claims Act provides a basis for those lawsuits, and I look forward to a next administration that will not repeat the efforts of the current one to defenestrate the use of Alien Torts Claims Act as a basis for these kinds of complaints in extreme situations.

Chairman DURBIN. The Defenestration of Prague I remember from my history.

Mr. Ganesan, could you comment on that?

Mr. GANESAN. Yes, I think the Foreign Corrupt Practices Act would be extremely useful in the context of this type of legislation for a couple of reasons. One is the Voluntary Principles actually lay out a process that is very similar to the FCPA in that a company is supposed to—is required to do a risk assessment to determine whether there are risks of abuses, to actually intervene or deal with state governments and private security forces. And contrary to what the State Department said earlier, if an abuse occurs, they are actually required to investigate the veracity of the case, report it to law enforcement authorities, and follow up on the proper resolution of those cases. It is not simply a roundtable discussion with the State Department, NGOs, and others. There is a path it can go down.

The FCPA does the same thing in that it requires a company to have accounting processes in place to prevent bribes from being paid, and it can also punish them if their systems break down and they actually pay bribes. So it is a very useful model because both would require some kind of risk assessment, both would require an assessment of whether they have policies and procedures in place, and both could potentially hold companies culpable if they did not have the systems in place or, in fact, if abuses occurred and they did nothing about it. So I think it would be quite useful and would be quite complementary to how the Voluntary Principles are laid out.

Chairman DURBIN. I find it hard to understand why a corrupt practice such as bribery would be prohibited under American law even if it is done overseas and we do not treat human rights abuses and environmental abuses the same way. That would seem to me to be at least morally comparable.

Mr. Ka Hsaw Wa, you have been pretty critical of the Voluntary Principles. In your testimony, you suggested that there is no mechanism for enforcement, no remedy for infraction, and no government that will monitor these corporations' compliance, and that failure to comply will subject these companies to the court of public opinion, but no other court. And that is assuming the public learns about the infractions. You say we must develop laws, not voluntary standards.

So you do not seem like you are a big fan of Voluntary Principles.

Mr. KA HSAW WA. I came from a country like Burma, and then I see what happened on the ground. I see what corporations are doing and ignoring stuff. So those voluntary mechanisms are not going to work. I believe that the only thing that is going to work for those corporations working in a country like Burma is only clear law, like Alien Torts Claims or other law that, you know, hold them accountable for their behavior. But voluntary in a country like Burma, they just do not care. They do not even put their energy resources on the ground.

Chairman DURBIN. You mentioned Chevron. Are there any other oil companies based in America that do business in Burma other than Chevron?

Mr. KA HSAW WA. No. Texaco was there, but they pull out of Burma after a while.

Chairman DURBIN. Mr. Bassey, Shell, ExxonMobil, and Chevron are the largest oil producers in Nigeria. In addition, I believe that

the French company Total and Italian company Agip operate in Nigeria. the three largest companies—Shell, ExxonMobil, and Chevron—are all participants in the Voluntary Principles. Shell and Chevron have been involved from the start of the process, and ExxonMobil since 2002.

So based on your experience on the ground in Nigeria, how effective have the Voluntary Principles been in preventing human rights abuses and environmental abuses committed by public and private security forces and other employees of these companies?

Mr. BASSEY. I would say, Mr. Chairman, that the principles have not worked on the ground in Nigeria. Chevron is a signatory to it, and I would give you one example. In just July of this year, one community that was complaining about Chevron's gas flare, Chevron used the military to intimidate the community people, and they had to write a petition to the Governor complaining about Chevron using the military to intimidate and harass community members.

So I would say very safely that these principles are yet to take root in Nigeria.

Chairman DURBIN. That is the best I can see at the moment, too. It seems to be a statement of principles, some aspirations, but without enforcement or even publication of violations, it does not take us very far.

I am just struggling with the notion that bribery is a form of conduct that we find reprehensible and the things that have been described here in terms of human rights abuses and environmental degradation are not. I cannot follow the logic behind that.

I want to thank you for coming, all of you, and for your testimony today. I would like to place into the record statements from Senators Leahy and Brownback and statements from the following organizations and individuals: Amnesty International, Business for Social Responsibility, East Timor and Indonesia Action Network, the Fund for Peace, Global Witness, International Council on Mining and Metals, International Labor Rights Fund, Jubilee South Africa, Oxfam America, Abigail Abrash Walton of Antioch University. And since there is no one here to object, they will be put in the record.

I also want to give special thanks to my staff for all the work that they have done for this hearing and so many others. I was concerned, as we undertook this mission of a Human Rights Subcommittee, that we would not accomplish much and nobody would notice what we had done. Well, I do not know if notice has been taken, but I think we have accomplished a few important things, and this hearing is an example.

I will tell you that we are going to follow through with letters to these oil companies. We are going to send them your testimony. We are going to ask them point-blank to respond to them. And if they fail to respond, we will assume that they have no defense to offer. I find their conduct as described here absolutely objectionable, and if they have a defense or more facts to share with us, I wish they would have joined us. If not, I hope they will provide them now. I think there is much work to be done.

I am going to bring this hearing to a close by thanking our witnesses. I want to urge everyone to reflect on the testimony of all of our witnesses, but especially Mr. Bassey and Mr. Ka Hsaw Wa,

about the devastating impact that extracting oil, gas, and other natural resources has on the people in poor countries around the world. How can we ignore this? I mean, we set our trash out 1 day a week and hope to never see it again. But to buy our gasoline and oil and these products and not acknowledge the price that is being paid to bring them to us I think is something that does not speak well of our country. We can do better. We cannot ignore the human toll that is being taken.

As was highlighted today, governments have a responsibility to prevent human rights abuses. For countries that are home to the largest companies, like the United States, this also includes a responsibility to ensure that our companies are taking appropriate steps to prevent human rights abuses. And that will be the focus of this Subcommittee as we move forward.

I will entertain any statements from my colleagues and share questions with you as submitted. I thank you all for being here today, and this hearing stands adjourned.

[Whereupon, at 12:20 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Written Testimony of Amnesty International USA
to the Senate Committee on the Judiciary Subcommittee on Human Rights and the Law

Human Rights Impacts of the Extractives Industry and the Role for the US Government

September 24, 2008

Introduction

Thank you, Senator Durbin, for this opportunity to submit written testimony on behalf of Amnesty International USA. Amnesty International USA applauds your leadership on this issue and appreciates your exemplary efforts to fight for human rights.

Amnesty International (AI) is a Nobel prize-winning human rights organization with over 2.2 million members worldwide and over 300,000 in the United States. For over 40 years, AI has worked to promote and defend internationally recognized rights encompassed in the Universal Declaration of Human Rights (UDHR). Under the UDHR, all companies, as organs of society, have a direct responsibility to respect human rights in their own operations. Amnesty International believes that the business community also has a wider responsibility—moral and legal—to use its influence to promote respect for human rights.

It is with these understandings that Amnesty International USA testifies today about the human rights responsibilities of extractives companies operating in conflict zones or countries with repressive governments, with a particular focus on the roles for governments, especially the United States government, in both voluntary initiatives and regulatory measures.

The testimony that follows provides:

I. a brief background on human rights abuses tied to the extractives industry,

II. an examination of issues relating to legal accountability for these abuses and the role for governments in addressing them,

III. an overview of the Voluntary Principles on Security and Human Rights (VPs) and our concerns with the process,

IV. the role of governments in the VPs and

V. a conclusion summarizing Amnesty International's (AI) main recommendations for the US government.

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I. Human Rights and the Extractives Industry

The extractive and energy sectors (oil, gas, mining, hydro-electric power, biofuels/agrofuels) are widely associated with human rights violations, including forced evictions and forced displacement, violations of the right to an adequate standard of living, including adequate food, housing, water and sanitation, and violations of the right to health.

These sectors are also associated with torture and other ill-treatment, discrimination, harassment, suppression of peaceful assembly and violations of the right to life, including extrajudicial execution as a direct result of the manner in which security operations (whether public or private) associated with the industry are carried out. The communities most frequently negatively affected by the extractive and energy sectors are poor, vulnerable or marginalized groups, including indigenous people.

A number of factors have led to abuses by security forces hired to protect extractive company operations:

- The vast majority of extractive commodities are found in poor countries where systems of accountability are often weak, offering considerable opportunity for corruption;
- Security forces, whether private or public, are directly involved in extractive and energy projects, in a manner not seen in most other industries;
- There is frequently a lack of appropriate and effective regulation and legislation at the national level in countries where energy and extractives are found; and
- There is often a lack of political will to effectively regulate the extractive and energy sectors.

II. Legal Accountability and the Role of Governments

Amnesty International believes stronger mechanisms are necessary to hold extractive companies accountable for their negative impacts on human rights and to ensure that appropriate sanctions are imposed. Such accountability may involve, as appropriate, criminal, civil, or administrative sanction, and to be effective, will have to confront challenges related to company structure and transnational operations.

Domestic Measures with Extraterritorial Application

Company structures and the globalized nature of their operations often undermine and frustrate the protection of human rights by evasion of state jurisdiction, a point that has been well documented by the UN Special Representative of the Secretary General (SRSG) on Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. Much of this jurisdictional evasion has been enabled by lopsided development of law and regulation of transnational corporations: trade, tax and "private" law has developed to increasingly protect economic interests of companies, while regulation of the impacts of company operations on local communities and the environment has not kept pace.

The most recent report of the SRSG notes that the *"permissible scope of national regulation with extraterritorial effect remains poorly understood."* Amnesty International agrees that national legislation and other regulatory measures with extraterritorial effect must be better clarified and implemented, and welcomes government attention to how they can be developed to address the current gap in oversight and accountability of companies with transnational operations. States, such as the United States, should develop clear criteria and requirements for companies to receive state support of trade and investment projects. For example, Amnesty International endorses the SRSG's suggestion that Export Credit

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Agencies require clients to perform adequate due diligence on their potential human rights impacts. Such a requirement should be underpinned by domestic legislation to ensure enforceability and actual implementation by companies.

Amnesty International (AI) welcomes greater US government involvement in the development of extraterritorial oversight and accountability measures in relation to corporate actors, including extractive companies. AI's research has highlighted the difficulties in holding transnational corporate actors accountable outside the country where they are headquartered, and the difficulties victims face when trying to access justice. Among the problems are lack of capacity in the host state and the fact that the state and the company are both implicated in the violation. In the latter case, there is little political will to hold the company to account. For example, oil companies in the Niger Delta have failed to obey court orders and have been able to act with impunity as a consequence of the very weak regulatory framework. In Papua New Guinea and Philippines, powerful Australian and Canadian interests have shaped the regulatory environment, undermining human rights.

Building Oversight and Accountability into US Government Investment Support

AI is currently looking into cases where companies that allegedly have been involved in human rights abuses are recipients of state investment support or support through international financial institutions, for instance OPIC and the Export-Import Bank (Ex-Im). States, including the United States, should build human rights protections into investment support, which could include:

- Clear guidance to companies on what they must do in terms of human rights due diligence and reporting if they receive state support,
- Effective monitoring by the home state of projects it has supported, and how embassy staff could potentially fulfill this role[1],
- Access to remedial mechanisms for people whose human rights are harmed by a state-supported investment project[2], and
- Sanctions: if a company that receives state support is implicated in serious human rights abuses there should be effective sanctions, including withdrawal of support or prohibition of future support.

Changes in a state's investment framework should be underpinned by domestic legislation mandating appropriate due diligence and monitoring of their investment support.

Cooperation with Foreign Governments and Potential Inter-State Models

The state duty to protect in the context of transnational corporations and globalization requires much greater cooperation between states,[3] and we encourage states to consider cooperation in terms of accountability and enforcement.[4] There are some useful models for international cooperation to address problems which cannot be easily or adequately addressed solely in the state context, including in the

[1] Diplomatic staff often promote investment and assist companies in their investment in foreign countries, and their role could also encompass some form of monitoring.
[2] This should include enabling access to courts in the home state.
[3] For example, the state in which the harm occurred should be able to request the assistance of the state in which the company is headquartered, with an expectation that such help would be forthcoming if certain basic conditions in terms of credibility of the allegation were met. In cases of serious or systemic allegations of abuse or complicity in violations, the home state should provide facility for investigation through diplomatic missions, etc.
[4] While the OECD Guidelines represent international cooperation, the Guidelines and associated National Contact Points provide little or no meaningful mechanisms for enforcement or accountability.

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areas of corruption, illegal drugs and trade in specific commodities. There may also be lessons to be learned from developments in international law, for instance trade law, which increasingly depends upon international legal agreements and supra-national enforcement mechanisms.

III. The Voluntary Principles on Security and Human Rights (VPs)

Recognizing the widespread abuses connected to the use of both public and private security forces, and related challenges and gaps in accountability mechanisms, the Voluntary Principles for Security and Human Rights (VPs) were introduced eight years ago "to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms." Nonetheless, abuses connected to the expanding use of security forces in the extractives industry persist, demonstrating the inability of the VPs to effectively address root causes or provide meaningful accountability mechanisms.

Amnesty International (AI) has participated in the VPs process since its inception as an expert advisor on human rights. This advisory role is important to the development of the Principles themselves, along with specific implementation guidelines, credible reporting criteria and an effective governance structure.

AI believes that the VPs have merit and have played a key role in advancing the issue of human rights and security within the extractives industry. Yet, the Principles are voluntary, and AI has significant concerns about the failure of the VPs to be translated into meaningful action, in particular by the participant companies (the initiative was set up to help companies, first and foremost). It is unacceptable that after eight years, no formal implementation framework exists, let alone criteria for governance and accountability. Noting that the VPs process is governed by Chatham House Rules, we cannot speak to particular initiatives so far undertaken by companies, though we can say that vast gaps exist from one company to another. There are indeed a few companies that seem to be making notable effort to establish internal policies and processes, and fully engage their supply chain, while many others have done little or nothing.

It is regrettable that not a single corporate participant is testifying today, and it is telling of a major obstacle holding up progress with the VPs—fear that even basic measures of transparency will lead to increased legal liability. Amnesty feels strongly that for the VPs to be credible, companies can and must strike a balance between reporting on implementation efforts, including challenges they are facing, without compromising their legal standing in ongoing lawsuits or introducing new legal risks. Eight years into this process, it is unacceptable for companies to point to participation in the VPs as evidence that they are adhering to more responsible practices in the procurement and use of security forces, and then refuse to report on this implementation in a way that is independently verifiable.

AI Concerns with the VPs: Implementation, Monitoring, and Lack of Resources

Among the shortcomings of the VPs, a major one is that most participant companies do not consistently include the VPs—or VP clauses—in their contracts and agreements with public and private security across their global operations.

It is widely assumed that the NGO participants in the VPs are capable of monitoring compliance and impact within the process. However, the reality is that, without exception, the NGOs participating in the VPs do not have the capacity or resources to monitor an expanding initiative, which currently includes nearly twenty extractives companies operating in dozens of countries, in anything more than a very cursory manner. As a result, in the vast majority of cases, no one is monitoring the implementation of the

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VPs. The credibility of the VPs will continue to be undermined until effective monitoring mechanisms are established.

Ultimately the mettle of the VPs will be measured by the reduction and elimination of abuses in vulnerable communities where extractive companies are exploring and operating. Using that criteria, the VPs do not appear to have made widespread or tangible differences. The violence that is continually erupting in the Niger Delta provides a particularly grim example.

IV. The Role of Government in the Voluntary Principles and Beyond

States, companies and NGOs are all "participants" in the VPs, but there is no clarity on the respective roles and responsibilities of the three groups. The Principles address companies[5] almost exclusively, leaving unclear the roles of governments and NGOs. AI welcomes Senator Durbin's interest in the Voluntary Principles and this opportunity to consider how the role of the US government, in particular, could be strengthened.

Without a doubt, participating governments can play a key role in helping to ensure the VPs are implemented robustly. In discussing the role of governments in the VPs, it is first important to differentiate between home governments such as the US, where extractive company participants are based, and host governments like Nigeria or Colombia, where operations are taking place. The VPs were established with the recognition that host states have in large part failed to live up to their international legal obligations. A clear example would be repeated failure by a government to investigate and prosecute public or private security personnel implicated in human rights violations around extractive industries. The most important role of host governments within the VPs must be to move as swiftly as possible to comply with their human rights obligations. Otherwise, it is hard for AI to reconcile a government's membership in the VPs with the same government's failure to take action to address core VP-related issues.

Historically, extractive companies operating abroad have largely relied on government military, police or paramilitary forces for security protection. However, there is an emerging trend toward the use of private security companies for these services, including US firms, which must be considered in any effort to regulate this industry. Given the widely reported abuses connected to private security companies in countries like Iraq and Afghanistan, it is imperative that strong and effective legislation exist to hold private security companies accountable in all circumstances, including when contracted by extractive companies.

Role for the US Government

As a founding member of the Voluntary Principles, the US government (along with other founding home governments) has a special responsibility to lead by example. To date, the US has in many ways sat by the sidelines in a process that is desperate for resources and lacking the teeth to ensure effective implementation. If the US is not willing to demonstrate a meaningful commitment to the VPs, it is impossible to expect meaningful participation by host countries like Nigeria and Colombia, which have demonstrated decades of concerted unwillingness to conform to international human rights standards.

AI believes that the US government could play a much stronger leadership role within the VPs process, as well as play a key role in enforcement and oversight of US extractive company compliance with the Principles, by, for example, requiring third-party monitoring and reporting by US companies. Outside of

[5] The Participation Criteria state that: "the core objective of the VPs is to guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms".

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the VPs process, as discussed above, AI supports a legislative framework that reflects the responsibilities laid out in the VPs or is designed to support their implementation, which could better ensure that US companies do not become complicit in human rights abuses when contracting private or public security forces. Specifically, AI supports the development of legislation requiring a commitment to the VPs by all extractive companies that receive state financing, for instance through OPIC and Ex-Im Bank.

One example of proposed legislation relating to this industry is the recently introduced Extractive Industries Transparency Disclosure Act (S. 3389), which would require companies registered with the Securities and Exchange Commission (SEC) to disclose payments to foreign governments for the extraction of natural resources. AI supports S. 3389, which would greatly assist efforts to fight corruption in resource-rich countries, and help ensure that revenues from extractive industries truly benefit communities.

V. Conclusion

Amnesty International's recommendations for the US government may be summarized as:

- Participation within the VPs process to provide oversight and enforcement functions, particularly relating to the compliance of US companies with the Principles and their implementation;
- Development of domestic law and regulation that links US government investment support to clear prerequisites for, monitoring of, sanctions on US extractives companies when their operations negatively impact human rights, as well as remedial mechanisms for people impacted by the operations of these companies;
- Development and clarification of extraterritorial application of such law and regulation to ensure adequate oversight and accountability of US companies operating abroad;
- Cooperation with foreign governments and consideration of inter-state bodies as models for comprehensive regulation of the industry

AI is happy to work closely with Senator Durbin and other Members of Congress to further develop these efforts aimed at improving legal accountability and ensuring extractive companies do not become complicit in human rights abuses.

If you have any additional questions, please feel free to contact Amy O'Meara, Director, Business and Human Rights, Amnesty International USA, aomeara@aiusa.org, 212-633-4288.

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The Oil Industry and Human Rights in the Niger Delta
Testimony of Nnimmo Bassey[1]

United States Senate Judiciary Subcommittee on Human Rights and the Law
24 September 2008

Mr. Chairman, Ranking Member Coburn, and members of this subcommittee, thank you for inviting me to testify on this important and timely topic.

Overview

This submission describes the deleterious human and environmental impacts of the operations of multinational oil companies in the Niger Delta in Nigeria. It provides information about the population of the Niger Delta and the harmful effects of the oil industry on the region's delicate environment. Oil companies, including Chevron and Shell, have repeatedly used the Nigerian military to violently repress Delta inhabitants' peaceful protests, causing deaths and injuries, and creating an environment in which ordinary citizens are unable to exercise their rights to free expression. Finally, recommendations are presented for improvements in corporate practice by extractive industry companies, as well as suggestions for further inquiries by the Subcommittee.

Background

The Geographical, Economic, and Cultural Context

The Niger Delta region is a coastal plain covering approximately 70,000 km^2 in southeastern Nigeria. Over 12 million people live in the states of the Niger Delta; a large percentage of the inhabitants come from diverse minority ethnic groups like the Ijaw, Ilaje, Urhobo, Ibibio and Itsekiri, who have been marginalized historically in Nigerian political and economic life. Farming and fishing are key livelihood activities for the region's inhabitants.

The area is a treasure trove of biodiversity; it is mostly forested, with mangrove forests in the immediate coastal regions and tropical rainforests and freshwater swamps dominating further inland. Much of these forests have been degraded except in protected areas.

The Oil Industry in the Niger Delta

The Niger Delta region is also the heart of Nigeria's oil production, with production estimates at approximately 2.4 million barrels daily. Oil companies have been producing petroleum in the Niger Delta for more than fifty years, but production has greatly

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intensified since the 1970s. The oil companies have built thousands of miles of pipelines, hundreds of well heads, and many rigs, refineries, and flow stations across the Delta.

Since the 1970s, the Nigerian government has required all foreign oil companies to create joint ventures with the state-owned Nigerian National Petroleum Corporation (NNPC). NNPC allocates oil blocs as concessions to each joint venture partner. NNPC owns 60% of each venture, giving the Nigerian government a controlling stake and power over changes in production policy. Five multinational corporations participate in these joint ventures. The Anglo-Dutch conglomerate Royal Dutch/Shell has long been the largest oil producer in Nigeria; the American companies ExxonMobil and Chevron are the next largest, and other oil fields are operated by France's Total and Italy's Agip. The foreign partner such as Shell or Chevron is the operator of each joint venture, controlling the day-to-day operations.

One consequence of the joint venture arrangements is that the Nigerian state ends up shouldering the majority of costs incurred by the enterprises, even though the foreign company controls operations and modes of production. For example, while oil companies pay a fine for flaring the natural gas that is generated in the course of oil production, 60% of this fine is actually paid by the government. When oil companies use community development projects to publicize themselves as good corporate citizens, they often do not mention that the Nigerian government typically pays for 60% of these projects.

Petroleum remains the mainstay of the Nigerian economy. Oil and gas operations are estimated to account for about 35% of Nigeria's GDP and over 80% of government revenue. At the same time, our own anti-corruption officials have estimated that 40% of the oil revenue is lost to corruption.[2]

Poverty and Under-Development in the Delta

In total, Nigeria has received more than $350 billion in oil revenues since 1970.[3] Nonetheless, almost three-quarters of all Nigerians live in desperate poverty.[4] This level of poverty and deprivation for ordinary citizens is intensified in the Niger Delta region, where most of Nigeria's oil wealth is produced.

Studies by human rights groups conclude that the average income of Delta residents is *lower* than the GNP per capita for the country as a whole. Unemployment stands at about 75% and reaches 95% in some areas.[5] Life expectancy is 40 years—substantially lower than the national figure of 46.7 years—child mortality rates are shocking, and the

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[2] Reuters, "Corruption costs Nigeria 40 percent of oil wealth, official says," *The Boston Globe* (Dec. 17, 2004).
[3] Expert Report of Michael J. Watts in *Bowoto v. Chevron* at para. 33 (October 30, 2005) (hereafter "Watts Report").
[4] World Bank, *Nigeria: Country Brief 2005* (2005), available at http://www.worldbank.org.
[5] Watts Report at para. 68.

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instance of malaria and waterborne diseases is extraordinarily high.[6] Transportation, education, and health infrastructure are practically non-existent in much of the region.

The Delta lags far behind the rest of Nigeria in economic and human development for several reasons. Chief among these are:

- Nigeria's laws and federal system give complete ownership of all petroleum to the federal government, which redistributes revenues away from the oil-producing states. The Delta is only guaranteed to retain 13% of the revenues from oil produced within its borders, up from 1.5% before 1992.
- Rampant corruption and mismanagement have led to the loss of much of the oil revenue, as well as the dismal performance of the Niger Delta Development Commission (NDDC), a special agency established to provide for development in the Delta region. Earlier agencies set up in this mold performed even worse.
- The Delta is inhabited by minority tribes with limited political power, who have been historically marginalized in Nigerian political life. This allows the federal government and states dominated by more powerful groups to capture a higher percentage of revenue that might otherwise be allocated to the Delta.

Environmental and Human Impacts of Oil Production

Oil production in the Niger Delta has had severe negative impacts on the sensitive environment of the region, resulting in many hardships for the inhabitants, whose traditional livelihood relies on the health of their local ecosystem. The following impacts are among those that have been documented in the Niger Delta.

Oil Spills

Largely because of the lack of adequate regulatory capacity in Nigeria, many oil production operations are carried out under sub-standard conditions. Spills, accidents, leaks and waste discharges have had a significant impact on the Delta ecosystem, causing destruction of vegetation, die-off of land animals and aquatic life, and the contamination of farmland. For Delta inhabitants who rely mainly on agriculture and fishing to meet their nutritional needs, these effects can be devastating. Spilled oil spreads quickly over water, and it can be carried into the streams, where it kills many fish, along with trees and other vegetation.

After a crude oil spill from Shell operations near the communities of Ikarama and Zarama Nyambiri in Bayelsa state, three residents described the impacts:

> This [spill] has prevented us from eating. Since we do not have water flowing in our taps, the river is the only source of water for drinking, cooking, washing and bathing. Since the spill on the creek, we no longer use it as we used to. Our children, who are ignorant, often go to swim in it only to come out crying and scratching their eyes and other parts of their bodies, besides becoming feverish.[7]

[6] *Id.*, at paras. 71-73.
[7] ERA Interview with Mrs. Penninah Ivelive.

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> The oil is affecting the fishes in the creek, fishing activities are no more and even the cassava our people usually soak in the river for the purposes of preparing foofoo were badly affected as the spill took us by surprise. Our only source of drinking has been polluted with adverse health conditions as a consequence.[8]
>
> Last week when I was ill and went to a clinic in Port Harcourt , I was told that my illness is related to the water I drank. Apart from this spill affecting fishes and cray fish, even the fishing gears are affected and damaged by the spill.[9]

Summing up, a local leader, Chief Esau Bekewei, stated: "The spill has affected my people both in health and economic terms. Shell should own up to her responsibility and save us further problems."[10]

Dredging Mangroves for Canals and Waterways

The estuarine mangrove forests constitute a key habitat for marine life and are thus important both for biodiversity and for human food systems. Furthermore, they play an essential role in regulating the presence of fresh and salt water in coastal areas, thereby shaping agricultural possibilities and other human livelihood strategies.

In order to allow deep-hulled ships to access terminals and production sites for the transport of crude oil, mangrove forests in the Delta region have been dredged and narrow waterways have been transformed into canals. In addition to destroying forests and disrupting important breeding grounds for aquatic life, these practices have created connections between previously isolated bodies of fresh and salt water. As salt water encroaches further inland, it upsets delicate ecological relationships that allow plants and animals to flourish, kills freshwater fish and vegetation, and degrades the fertility of farmland.

Monday Omosaye, a fisherman and community leader in the Delta, described the impacts after canals were dredged by Chevron:

> I discovered that the whole lagoon that is formerly fresh has become salt water. The riverine fish that were used to freshwater were no longer there. Like . . . mud fish, aro, agbadagiri, oteke, ohanrin. They're no longer there.
>
> And the water is no longer drinkable to the people. And the lagoon becomes dry land, becomes silted up as a result of mud, silt, soil coming in from the channel dug into the Atlantic Ocean by Chevron.
>
> [And] some of the grasses [around the lagoon] are very useful. . . we have a type of grass that we use in making mats. And these type of grasses also do not survive in salt water. As a result of existence of salt water . . . the grasses, they disappear from the area. . . .

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[8] ERA Interview with Justice Ikah.
[9] ERA Interview with Jonah Zagunu.
[10] ERA Interview with Chief Esau Bekewei.

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> People were put out of jobs because of the condition of no fish in the riverine area, and that the lagoon becomes silted up, becomes dry. And . . . there was no job opportunity for the indigene in the community.[11]

The saltwater incursions also kill other useful plants, as related by Chief Nicholas Omomowo:

> Before the canal was dug . . . we are felling timbers. When timber logs are felled, we used to bring them to Lagos for sale, [and use] the wood for the construction of our houses. Because that type of wood does not germinate under salty water, the wood, the trees, were destroyed. . . .
>
> [In addition to] the trees and the timbers . . . there's other things that we call the palm tree poles. We use the poles of palm trees for the construction of our houses. But we find that those things are not used to salty water, they've been entirely destroyed and we don't have them for the construction of our houses again.[12]

This pattern has been observed in many communities, resulting in disruption of traditional lives and livelihoods.

Gas Flares

After its extraction, pipelines carry petroleum to a flow station, where gas is separated out for refining or flaring. In Nigeria, most gas extracted through the oil production process is flared – gas which, if refined, would have a total value of $15 million each day. Gas flaring creates large quantities of soot, smoke, and other air pollutants. Mercury, benzene and lead are common contaminants, which are often released into the environment if the gas is flared at temperatures that are too low. This cocktail of chemicals causes cancers, respiratory diseases and blood disorders. Flaring also releases nitrogen oxide and sulfur dioxide, creating acid rain that kills fish and defoliates vegetation. These impacts are intensified when the gas is flared from flare stacks, some of which are horizontal and at ground level.

Philemon Ebiesuwa, a community leader with college-level scientific training, described the effects of Chevron's gas flaring near his home in the community of Awoye:

> What I observe is that there is constant gas flaring from the flow station, Opuekeba, which releases into the atmosphere around Awoye some dangerous hydrocarbon particulates, like hydrogen sulfide, sulfur dioxide, nitrogen dioxide. And when this one mixes with rainwater, it changes to weak acid, maybe sulfuric acid and some other weak acid, which makes the roofing of the people, those who use corrugated iron, to go bad quickly, to rust. Because this weak acid from acid rain corrodes the building around the area. . . .

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[11] Deposition of Monday Omosaye in *Bowoto v. Chevron Corp.* at 17:3-14, 19:13-20 (Aug. 18, 2005).
[12] Deposition of Chief Nicholas Omomowo in *Bowoto v. Chevron Corp.* at 342:15-344:10 (Jan. 28, 2005).

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> [In] Nigeria, there's a lot of gas flaring all over the country. . . . They don't want to produce the gas with the oil, they will flare it, they will burn it into the atmosphere. So that is what happens in Opuekeba flow station. . . . For all the periods that I've visited Awoye, I've seen it on. Even if you are not there, if you are far away, you can also see the flare. It illuminates the skies, lighting the skies. . . .
>
> I know that carbon monoxide is also released with this. And carbon monoxide is poisonous, because if it's inhaled, it can deoxygenate. . . it can reduce the supply of oxygen to the blood. So it lowers blood oxygen to the hemoglobin. To someone in a critical state, it can lead to some—a serious health hazard. Apart from that, it can also cause some respiratory diseases. It can cause maybe irritation to the upper respiratory tract and some other associated respiratory disease which can be associated with burning of gas within the vicinity of Awoye or other oil producing communities in the Niger Delta.
>
> There is also . . . change in the vegetation. Around the place too, you have change in the coloration. And some of the gaseous emissions . . . can damage some plants . . . there are dead and dying vegetation around the area.[13]

In 2005, Delta communities brought suit against Shell and other oil companies to stop the practice of gas flaring. The court agreed, declaring gas flaring to be an illegal practice and a violation of human rights.[14] This decision, however, has not been implemented, and the judge who handed down the decision was transferred to a faraway region of Nigeria.

Release of Drilling Wastes into Water

Drilling for oil requires the injection of a mixture of clay, chemicals, and water through a pipe, and the eventual ejection of this mixture, along with excavated material. The waste material, which can be radioactive, is often dumped in the rivers and sea, where chemicals and particulate matter can contaminate water supplies and degrade water quality. Up to 300,000 gallons of drilling waste can be ejected each day in the process of oil production.[15]

Seismic Tests and Line Cutting

In the initial stages of oil exploration, areas are cleared of vegetation, and explosives are detonated to send seismic waves into the earth's crust. This process can cause long-term deforestation; it also depletes populations of fish and land animals who are harmed or scared off by the repeated vibrations.

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[13] Deposition of Philemon Ebiesuwa in *Bowoto v. Chevron Corp.* at 152:18-157:12 (July 12, 2005).
[14] Julie Ziegler, Bloomberg News, "Nigerian court orders an end to gas flaring," *Houston Chronicle* (Nov. 15, 2005).
[15] Watts report at para. 48.

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All Costs and Few Benefits: a Bad Deal for Delta Residents

Inhabitants of the Niger Delta receive little in return for the environmental degradation and destruction that jeopardizes their traditional livelihoods. Instead of reaping benefits in education, employment, and health, their fishing stocks have declined, their fields have lost fertility, and their children have been denied opportunities to improve the economic circumstances of their communities. Meanwhile, foreign oil companies have flourished in their midst, protected and supported in their disputes with the locals by government resources in the form of armed security personnel.

Human Rights Violations in the Military Suppression of Oil Protesters

While five multinational corporations operate oil fields in Nigeria, most reported human rights abuses have been associated with two of them: Shell and Chevron. Most of the complaints concerning Shell relate to the Ogoni crisis in the 1990s, although sporadic incidents of violence have been reported in recent years. Abuses tied to Chevron are generally more recent, and Chevron, unlike Shell, does not appear to have changed its relationship with the Nigerian security forces.

Oil Companies and Nigerian Security Forces

Nigeria has one of the largest standing armies in Africa, with an estimated 94,000 soldiers in the armed forces[16] and more employed by paramilitary and police forces. The Nigerian security forces are widely known to be corrupt, undisciplined and characterized by an abysmal human rights record.[17] The paramilitary mobile police have an especially brutal reputation; they are known locally as the "kill and go." Nigeria was under direct military rule from 1966 to 1979, and again from 1983 until 1999; in 1993, the Nigerian Army's own retiring Chief of Staff, Lt. Gen. Salihu Ibrahim, condemned the breakdown of professionalism among the armed forces, describing the military as "an army of anything is possible."[18]

In 1999, with the return to civilian rule, an attempt was made to clean up the military.[19] Yet even this year's Country Report on Human Rights Practices for Nigeria, published by the U.S. Department of State, concludes that the human rights record remains "poor" and the national police, army and security forces "committed extrajudicial killings" and "used excessive force" while the police were "poorly trained . . . and poorly supervised" and

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[16] D. Farah, "U.S. to Help Nigeria Revamp Its Armed Forces, *Washington Post* (April 29, 2000).

[17] S. Adejumobi, "The military and the national question," in A. Momoh & S. Adejumobi (eds)., *The National Question in Nigeria* at 155-83 (2002); Amnesty Int'l, *A 10 point Program for Human Rights Reform* (1996); Amnesty Inernational, *Nigeria: Releases of political prisoners - questions remain about past human rights violations* (1999); Amnesty International, *Nigeria: Security forces constantly fail to protect and respect human rights* (2002); U.S. Dep't of State, *Country Reports on Human Rights Practices: Nigeria* (multiple years).

[18] Jane's Information Group Ltd., *Jane's World Armies* at 628 (J.C. O'Halloran, A. Oppenheimer, & M. Stenhouse eds., June 2004).

[19] UN Office for the Coordination of Humanitarian Affairs, *Nigeria: Moves to Clean Up Military* (1999).

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"were rarely held accountable."[20] The three principal security and intelligence agencies, the State Security Service (SSS), the National Intelligence Agency, and the Directorate of Military Intelligence (DMI), operate, according to the International Crisis Group, "without oversight."[21] Former President Olesegun Obasanjo admitted in 2005 that Nigerian police and security regularly tortured and killed prisoners in their custody, acknowledging earlier reports by Human Rights Watch and others of systematic abuses by security forces.[22]

Unfortunately, despite this record, the Nigerian security forces have been regularly used to protect oil installations and to respond to perceived threats, with varying degrees of involvement by the corporations themselves. In the early 1990s, Shell was known to have called on the mobile police to respond to demonstrations;[23] multiple witnesses have stated that Col. Paul Okuntimo, who was at the time the head of a joint military-police security task force, stated that he was paid or directed by Shell.[24] Shell also admitted that it had procured firearms for the Nigerian police, a fact that was revealed when one of Shell's arms suppliers sued the oil company for breach of contract.[25] Through litigation, even more details of Chevron's relationship with the Nigerian security forces have emerged, demonstrating that their connections go far beyond the ordinary relationship between civilians and police. Like Shell, Chevron has directly requested the intervention of the Nigerian security forces.[26] Chevron regularly houses and feeds the security forces, including Army, Navy, and police, and pays them above their government salaries.[27] Chevron personnel have reported "leading" or "supervising" Nigerian security forces in the course of their duties.[28] Chevron provides transportation to the military and police in Chevron-leased helicopters and boats.[29] And Chevron has the ability to investigate and demand the removal of problematic officers,[30] but has apparently rarely exercised this power in response to human rights abuses. All of the companies have employed Nigerian supernumerary or "spy" police for their security, but Total has denied that it uses the Nigerian military for security operations or in response to demonstrations.[31]

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[20] U.S. Dep't of State, *2007 Country Reports on Human Rights Practices: Nigeria* (2008); *see also* Centre for Law Enforcement (Lagos), *Police-Community Violence in Nigeria* (2000).
[21] International Crisis Group, *Nigeria: want in the midst of plenty* (2006) at 27.
[22] T. Dagne, Congressional Research Service, "Nigeria in Political Transition," *CRS Issue Brief for Congress*, at 9 (2005).
[23] Shell Petroleum Development Co. of Nigeria, "Response to Human Rights Watch/Africa publication — The Ogoni Crisis: A Case Study of Military Repression in Southeastern Nigeria, July 1994" (1995).
[24] Geoffrey Lean, "Shell 'paid Nigerian military,'" The Independent (London) (Dec. 17, 1995); Deposition of James N-Nah in *Wiwa v. Shell*, at 38:14-50:24 (Oct. 16, 2003) (Okuntimo said soldiers were "sent in by Shell"); Deposition of Monday Gbokoo in *Wiwa v. Shell*, at 14:7-9, 61:11-67:25 (Oct. 19, 2003) (Okuntimo stated "I was directed by Shell to kill all of you").
[25] P. Ghazi & C. Duodu, "How Shell tried to buy Berettas for Nigerians," *The Observer* (Feb. 11, 1996).
[26] Interview with Chevron Nigeria Public Affairs Manager Sola Omole, "Drilling and Killing," *Democracy Now!* (July 11, 2003) ("Q:Who authorized the call for the military to come in? Omole: That's Chevron's management.").
[27] Order re: Defendants' Motion for Summary Judgment on Plaintiffs' Claims 10 Through 17, *Bowoto v. Chevron Corp.*, at 21 (Aug. 13, 2007).
[28] *Id.* at 20-21.
[29] *Id.* at 20.
[30] *Id.* at 21.
[31] Human Rights Watch, "The Price of Oil," at 105 (Jan. 1999).

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The oil companies' role in the military's abuses has been acknowledged by the Nigerian government itself. With the transition to civilian rule came an attempt to account for the human rights abuses of the military era, in the form of Nigeria's truth commission, the Human Rights Violations Investigation Commission chaired by Justice Chukwudifu A. Oputa (popularly known as the "Oputa Commission"). The Oputa Commission, which was created by an act of the Nigerian legislature, submitted its findings in a report to President Obasanjo in May of 2002. The Oputa Commission concluded that "the protection given to oil Companies . . . . led to the systematic and generalized violations and abuses, which occurred in the Niger-Delta during the dark period of military rule in the country."[32]

Shell and the Ogoni Crisis

Umuechem and Bonny: Prelude to Ogoni

The first documented major case of violence against oil protesters was against people from the Etche community in the village of Umuechem, Rivers State, in the fall of 1990. As documented by the Oputa Commission, "youths from Umuechem in Ikwerre local government area of Rivers State protested at a [Shell oil] facility. On November 1, police, in a bid to stop the demonstrations, invaded the community."[33] In fact, a Shell manager had expressly requested that the notorious mobile police respond to the demonstrations.[34] It is generally accepted that eighty people were killed in this attack and that nearly 500 houses were destroyed.[35]

A subsequent Judicial Commission of Enquiry found that the demonstrators were neither violent nor armed, and that the Nigerian security forces displayed "'a reckless disregard for lives and property.'"[36]

Another protest against Shell two years later brought a similar response. In 1992, according to a report by Greenpeace, "one person was killed, 30 shot and 150 beaten when local villagers from Bonny demonstrated against Shell."[37] Human Rights Watch similarly reported that Nigerian security forces "responded with indiscriminate shootings and beatings" on this occasion.[38]

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[32] Human Rights Violations Investigation Commission (HRVIC), "Synoptic Overview of HRVIC Report: Conclusions and Recommendations," at 13 (May 2002) (hereafter Oputa Commission Report").
[33] Oputa Commission Report, vol. 3 at 50.
[34] Human Rights Watch, "The Price of Oil," at 162 (Jan. 1999).
[35] *Id.* at 123; Amnesty Int'l, "Freedom in the Balance: Nigeria/Kenya," at 2-3 (1995); A. Rowell, J. Marriott & L. Stockman, *The Next Gulf* at 69 (2005).
[36] Human Rights Watch, "The Price of Oil," at 123-23 (Jan. 1999); Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria," at 9, 51 (July 1995).
[37] A. Rowell, Greenpeace Int'l, "Shell-shocked: The environmental and social costs of living with Shell in Nigeria," at 19 (July 2004).
[38] U.S. Dep't of State, *1998 Country Reports on Human Rights Practices: Nigeria* (1999).

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The Ogoni Crisis

The military campaign against the Ogoni people of Rivers State, which became violent beginning in 1993, was one of the major campaigns against oil protesters of the 1990s, involving thousands of victims and at least hundreds of deaths.

The Ogoni homeland is home to a large number of onshore oil facilities and has seen severe environmental damage from oil spills, gas flaring, and other activities. In 1990, the Movement for the Survival of the Ogoni People (MOSOP), led by author and activist Ken Saro-Wiwa, presented its Ogoni Bill of Rights to the military government.[39] In 1992, MOSOP sent a letter with several demands, including compensation for and stoppage of environmental degradation, to three oil companies. In reaction to these demands, the Nigerian government issued a decree declaring that disturbances at oil installations would be considered treason, punishable by death.[40]

In 1993, MOSOP stepped up its protests, with a corresponding increase in repression. Ken Saro-Wiwa spoke at Ogoni Day, January 4, 1993, and said the Shell was not welcome in Ogoni.[41] In April 1993, thousands of people demonstrated against Willbros, a Shell contractor, in Ogoni. Nigerian security forces responded with violence, shooting at least 10 people and permanently maiming at least one; in subsequent protests at least one protester was shot and killed by the Nigerian military.[42] Beginning in 1993 the security forces also began raiding Ogoni villages in a generalized campaign of violence designed to intimidate the Ogoni. In August 1993, government security forces attacked the Ogoni village of Kaa, killing at least 35 people.[43] Human Rights Watch documented interviews with military personnel who described being ordered to attack Ogoni communities, opening fire indiscriminately on the village of Kpea and then looting and burning it.[44] In October 1993, a conflict between Shell and villagers at the Korokoro flowstation in Ogoni resulted in one villager being killed and two others shot by security forces.[45]

In 1993, Shell suspended production in Ogoniland.

In May 1994, Ken Saro-Wiwa and fifteen other MOSOP leaders were arrested on charges of murdering four Ogoni leaders, without any credible evidence connecting them to the

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[39] Human Rights Watch, "The Price of Oil," at 124 (Jan. 1999); O. Ibeanu, "Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria," 6 *Environmental Change & Security Project* 19, 26 (2000).
[40] Oputa Commission Report, vol. 2, at 29-30.
[41] Deposition of Michael Vizor in *Wiwa v. Royal Dutch Petroleum Co.*, at 222:8-224:7 (May 28, 2004).
[42] A. Rowell, Greenpeace Int'l, "Shell-shocked: The environmental and social costs of living with Shell in Nigeria," at 19 (July 2004); O. Ibeanu, "Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria," 6 *Environmental Change & Security Project* 19, 27 (2000).
[43] Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria," at 13 (July 1995).
[44] Id. at 12 (July 1995).
[45] A. Rowell, Greenpeace Int'l, "Shell-shocked: The environmental and social costs of living with Shell in Nigeria," at 20 (July 2004).

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murders.[46] Following the arrests of the MOSOP leadership, security forces attacked at least 60 Ogoni villages to punish them for supporting MOSOP, including Oloko I, Oloko II, Gbaeken, Tumbe, Mumba, Eemu, Agbeta, Nwenkova, Boobee, Ledor, Nomaban, Gaagoo, Kemkora, Nweol, Giokoo, Biara, Barako, Deeyor, Bera, Nwebiaru, Deken, K-Dere, B-Dere, Mogho, Kpor, Lewe, Bomu, Bodo, Chara, Barobara, Bunu, Koroma, Itoro, Kpite, Korokoro, Ileken, Gbenue, Botem-Tai, Semi, Bane, Bori, Wiyakara, Kono-bue, Buan, Yeghe, Okwali, and Uegwere/Bo-ue. During these raids, soldiers shot indiscriminately as people fled, raped women, detained and beat people, including children, and looted villages.[47] At least 50 people were killed overall in these attacks.[48] At least several hundred were detained.[49] The detainees were beaten, often severely.[50] Amnesty International estimated that, in 1994, at least 50 people were extrajudicially executed by the security forces in their campaign against the Ogoni, 600 people were detained, and "scores of villages razed and destroyed."[51]

Incidents of violence against the Ogoni continued into 1995. In November 1995, after a sham trial before a special tribunal which was denounced by the international community, Ken Saro-Wiwa and eight other Ogoni leaders were executed. The U.S. State Department's human rights report described this execution as a denial of due process.

Ken Saro-Wiwa's final statement to the tribunal is a testament to his cause:

> I am a man of peace, of ideas. Appalled by the denigrating poverty of my people who live on a richly endowed land, distressed by their political marginilization and economic strangulation, angered by the devastation of their land, their ultimate heritage, anxious to preserve their right to life and to a decent living, and determined to usher to this country as a whole a fair and just democratic system which protects everyone and every ethnic group and gives us all a valid claim to human civilization, I have devoted my intellectual and material resources, my very life, to a cause in which I have total belief and from which I cannot be blackmailed or intimidated. I have no doubt at all about the ultimate success of my cause, no matter the trials and tribulations which I and those who believe with me may encounter on our journey. Nor imprisonment nor death can stop our ultimate victory.

He was 54 years old when he was executed, leaving behind his wife and several children. The Oputa Commission described the executions as the "high point" of a campaign of "state sponsored violence" against perceived enemies of the military regime, especially in

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[46] Human Rights Watch, "The Price of Oil," at 125 (Jan. 1999).
[47] Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria," at 15 (July 1995); Amnesty Int'l, "Freedom in the Balance: Nigeria/Kenya," at 3 (1995).
[48] Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria," at 17-18 (July 1995).
[49] *Id.* at 18.
[50] *Id.* at 19-21.
[51] Amnesty Int'l, "Freedom in the Balance: Nigeria/Kenya," at 3 (1995).

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resource rich areas such as the Niger Delta.[52] The Commission summarized the state repression against the Ogoni as follows:

> The resistance of the Ogoni people . . . to exploitative relations with the federal and state governments and multinational corporations attracted state repression. In the aftermath of the murder of 4 Ogoni leaders in 1994, the state government set up the Rivers State Internal Security Task Force (Joint Task Force). The leader of the force, Major Paul Okuntimo, was reported to have told the media that they had only used 9 out of the several ways of killing people in Ogoniland. The communities in Ogoniland experienced several raids aimed at fishing out the Ogoni activists. In the process, several people lost their lives and property. Many Ogoni people had to go into exile . . . after the murder of Ken Saro Wiwa by the junta. Several Ogoni activists . . . have on various occasions been arrested. In the heat of this repression, violent clashes suspected to have been instigated by the state security erupted between the Ogoni and their neighbours such as the Andoni, Okrika and Afam. The death toll of the clashes, which is enormous, is yet to be ascertained.[53]

On the subject of the Rivers State Internal Security Task Force – one of the major security forces used by the Nigerian government to suppress Ogoni protests – the Oputa Commission concluded that:

...[T]he establishment of some institutions like the Rivers State Task Force on Internal Security though purposely established for the sake of maintaining peace was counterproductive because the Security Agents (i.e. Nigerian soldiers) abused their positions to illegally arrest and detain innocent people and also raped women in the name of maintaining peace and order.[54]

Unfortunately, the abuses in Ogoniland were not exceptional. Throughout the 1990s, numerous other communities who protested against Shell or demanded compensation were met with severe force by the Nigerian security forces.[55]

Shell's Response

While not accepting responsibility for any of these abuses, Shell has acknowledged that it has taken steps to prevent the recurrence of violence connected with its operations. According to Human Rights Watch, after the Umuechem massacre, Shell stated that it had "learned from the 'regrettable and tragic' incident at Umuechem, so that it would now never call for Mobile Police protection."[56]

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[52] Oputa Commission Report, Synoptic Overview, at 98-99.
[53] Oputa Commission Report, vol. 3, at 50-51.
[54] Oputa Commission Report, vol. 4 at 149.
[55] *See generally* Human Rights Watch, "The Price of Oil" (Jan. 1999); Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria" (July 1995).
[56] Human Rights Watch, "The Price of Oil," at 162 (Jan. 1999).

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In 2002, Human Rights Watch noted that Shell had "undertaken a major review of its attitude toward communities and issues of human rights and sustainable development" following the execution of Ken Saro-Wiwa.[57] However, although "Shell has made serious efforts to improve its performance in Nigeria . . . these efforts have in too many areas yet to yield meaningful results on the ground. . . . For the villager living near Shell's facilities in the Niger Delta, little if anything has changed: too often, oil spills still destroy farming land or fishing grounds and remediation is poor; state security forces deployed to Shell's facilities continue to harass people indiscriminately; and the benefits of the oil industry are still channeled to a small elite."[58] Shell has yet to resume oil production in Ogoniland.

Chevron and the Parabe Incident

Following the Ogoni crisis, one of the best-documented incidents of abuses against oil protesters is the 1998 attack on a demonstration at Chevron's Parabe platform. In this incident, Chevron did precisely what Shell vowed never to do after Umuechem—it expressly called on the military and the mobile police to respond to a demonstration.

Chevron had previously had its own direct experience with the military's use of force against protestors. In May 1994, when protestors used boats to blockade Chevron facilities at Opuekeba in Ondo State, the Nigerian security forces responded by sending a barge in that sunk sixteen boats, killing three people by drowning and causing other injuries.[59] When Ilaje communities engaged in protests several years later, Chevron knew of the security forces' propensity to violence.

The Ilaje are a small ethnic group of Nigerians, many of whom live in relatively remote swamplands and river areas in Ondo State in the southwest Niger River delta region. Many of these communities can only be accessed from the air or by water. Ilajeland, as it is called, has been severely disrupted by Chevron's operations and the environmental damage it has caused; the destruction of the local environment has meant great hardship and unemployment for many Ilaje people, as well as the loss of traditional food supplies. Saltwater incursions have devastated freshwater fish stocks, killed vegetation, and destroyed sources of potable water.[60] Gas flaring has caused dangerous air pollution and acid rain that eats through metal roofs.[61] Bola Oyinbo, an Ilaje community leader, described the impacts: "Go to Awoye community and see what they have done. Everything there is dead: mangroves, tropical forests, fish, the freshwater, wildlife. All killed by Chevron. . . . At Abiteye, Chevron discharges hot effluent into the creeks. Our people complain of 'dead creeks.'"[62]

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[57] Human Rights Watch, "The Niger Delta: No Democratic Dividend," at 30 (Oct. 2002).
[58] *Id.* at 31.
[59] Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria," at 33 (July 1995).
[60] Deposition of Monday Omosaye in *Bowoto v. Chevron Corp.* at 17:3-14, 19:13-20 (Aug. 18, 2005); deposition of Chief Nicholas Omomowo in *Bowoto v. Chevron Corp.* at 342:15-344:10 (Jan. 28, 2005).
[61] Deposition of Philemon Ebiesuwa in *Bowoto v. Chevron Corp.* at 152:18-157:12 (July 12, 2005).
[62] Interview with Bola Oyinbo.

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In 1998, an Ilaje community organization made up of representatives from nearly all of the 42 affected communities sent a series of letters to CNL detailing the problems facing the Ilaje communities, including environmental and economic degradation. This group, the Concerned Ilaje Citizens, was led by a group that included Larry Bowoto and Bola Oyinbo. Chevron did not respond, and even when the local government authorities attempted to set up a meeting between the villagers and Chevron, Chevron did not attend.[63]

Finally, on May 25, 1998, over 100 unarmed and peaceful Ilaje protesters went to the Chevron offshore Parabe oil platform and barge. Nigerian Navy and mobile police stationed at the platform, who were armed, allowed the protesters aboard, and remained at Parabe and in control throughout the protest.[64] As Chevron's personnel later acknowledged, the protesters were seeking compensation including environmental reparations, jobs, medical assistance and scholarships.[65] The protesters told CNL to negotiate with their elders on shore, and the company representatives eventually did meet with them to begin discussions on their grievances. At the end of that time, on May 27, 1998, the elders believed that Chevron had begun to address their concerns and sent messengers out to the protesters on the platform instructing them to come home the next morning, which the protesters told Chevron they would be doing. The protesters prepared to leave.[66]

At the same time, despite the fact that the protesters had agreed to leave the next morning, Chevron convened a joint military and mobile police task force and directed them to go to the Parabe platform. Very early on the morning of May 28, 1998, when the protesters were just waking up, CNL and its lead security officer flew members of the Nigerian security forces, including army and mobile police, to Parabe in Chevron-leased helicopters. Chevron had told the workers on the platform to hide. The mobile police and soldiers opened fire on the unarmed civilians; one of the helicopter pilots confirmed that the security forces began shooting from the helicopters even before they landed.[67] Chevron's own security officer later wrote that CNL "closely supervised" the security forces.[68] The mobile police and soldiers shot and killed two people, Arolika Irowarinun and Jolly Ogungbeje.

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[63] Declaration of Larry Bowoto in Opposition to Defendants' Motion for Summary Judgment in *Bowoto v. Chevron Corp.* at 6:12-14. (April 1, 2003).
[64] Deposition of Taiwo Irowaninu in *Bowoto v. Chevron Corp.* at 615:12-18 (June 25, 2005); deposition of Adebesi Atimise in *Bowoto v. Chevron Corp.* at 83:6-85:10 (June 29, 2005); deposition of Johnson Boyo in *Bowoto v. Chevron Corp.* at 26:25-27:19; 29:2-30:15 (June 28, 2005); deposition of Harrison Ulori in *Bowoto v. Chevron Corp.* at 60:12-68:1 (June 20, 2005).
[65] Deposition of Deji Haastrup in *Bowoto v. Chevron Corp.* at 209:3-214:12 (Aug. 27, 2002).
[66] Deposition of Larry Bowoto in *Bowoto v. Chevron Corp.* at 493:15-494:23 (Oct. 20, 2004); deposition of Chief Nicholas Omomowo in *Bowoto v. Chevron Corp.* at 410:7-14; 423:1-25 (Jan. 28, 2005).
[67] Deposition of Cristopher Crowther in *Bowoto v. Chevron Corp.* at 150:20-152:2, 154:18-156:9 (Oct. 6, 2005).
[68] Memo from J. Neku to M.E. Uwaka (June 2, 1998), produced in *Bowoto v. Chevorn Corp.* and stamped C0050-53.

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Although Chevron has since claimed that the protesters became violent before Chevron called in the military, the oil company's officials reported to the U.S. Embassy at the time that "the villagers were unarmed and the situation has remained calm since their arrival."[69] Chevron has also suggested that the slain protesters were attacking the soldiers who shot them, and that the protesters were wielding heavy objects in close range that could have caused serious injury. Again, the evidence suggests otherwise. In particular, the pathologist's report indicates that Mr. Irowarinun was shot in the side and that Mr. Ogungbeje was shot in the back. Furthermore, according to the pathologist, both men were shot at a range of 4-10 meters—about 12-30 feet.[70]

Other protesters were also shot, including Larry Bowoto, who was shot multiple times and nearly died. Even Chevron does not dispute that Mr. Bowoto was unarmed when he was shot,[71] and no one has ever suggested that Mr. Bowoto attacked any of the security forces.

After the attack, a number of protesters were locked in a small container on the Chevron platform and held without food or water, while Chevron Nigeria officials looked on. They were subsequently taken in Chevron boats to jails onshore where they were imprisoned, tortured, and beaten by the police and military. One of the detained protesters, Bola Oyinbo, was hung from a ceiling fan and repeatedly beaten to the point where he could not stand and blood was coming from his mouth. Another described how, immediately after the shootings, the security forces beat him with a gun and a horse whip, until he fell down and bled through his nose. The protesters were kept in inhumane jail conditions for weeks. During their imprisonment, the beatings and torture continued.

ExxonMobil, Total, and Agip

Compared with Chevron and Shell, there have been fewer reported incidents of abuse in connection with the operations of Agip, ExxonMobil, and Total. Nonetheless, these companies have still been guilty of severe environmental damage, sometimes precipitating abuse as security forces respond to community protests. The following accounts of such incidents are representative, not comprehensive.

Agip

In November 1993, when thousands of protestors from the town of Brass held a peaceful demonstration outside a local Agip terminal, the Nigerian security forces attacked them with teargas and fired into the air, beating protestors with clubs. The security forces

[69] Fax from T. Schull to S. Chalvsky (May 27, 1998), produced in *Bowoto v. Chevron Corp.* and stamped C17526.
[70] Deposition of Dr. Williams Ajewole in *Bowoto v. Chevron Corp.* at 63:18-24, 66:2-67:15, 76:8-10 (Dec. 14, 2005).
[71] Order re: Defendants' Motion for Summary Judgment on Plaintiffs' Claims 10 Through 17, *Bowoto v. Chevron Corp.*, at 28 (Aug. 13, 2007).

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blocked the access road and the protestors were forced to escape through a drainage ditch filled with oil and water. Access to the village was blocked for the next nine months.[72]

In 1996, the Rivers State Internal Security Task Force—the military force responsible for most of the repression against the Ogoni—was also implicated in an incident involving Agip:

> In Egbema . . . . community members came together in 1996 to demand that Agip, the operator of a flow station close to the village, provide electricity to the village. The delegation was led by Chief COB Aliba, and met with Agip's community relations officer, who stated that it would be too expensive to purchase the necessary transformer. Following the meeting, youths from the village, dissatisfied with the result, began impounding Agip vehicles as they passed through the community. While the matter was still under negotiation, members of the Rivers State Internal Security Task Force, led by Major Umahi, came to Chief Aliba's house and arrested him, with nineteen others, taking them to one of the Task Force's premises in Ogoni. They were held two weeks from June 26, 1996, and released without charge upon petition from other community members. Community members said that they believed that the Task Force, which is usually deployed in Ogoni, several hours drive away, must have been summoned at the request of Agip.[73]

ExxonMobil

On January 12, 1998, a massive oil spill of over 40,000 barrels occurred from ExxonMobil's Qua Iboe terminal in Akwa Ibom State. This spill devastated numerous communities and affected up to a million people. On January 19th and 20th, hundreds of local youths protested near the Qua Iboe terminal, and were subsequently detained by security forces. ExxonMobil stated that the arrests had "nothing to do with" the oil company.[74] According to Human Rights Watch, "In July 1998, it was reported that police shot dead eleven people during further demonstrations in Warri, Delta State, over compensation payments resulting from the spill."[75]

Total (Elf)

In February 1994, Nigerian security forces entered the Egi community of Obagi, allegedly to retrieve equipment taken from the Elf (now Total) oil company in October 1993. A melee ensued, resulting in the death of one officer and injury to a villager, and the Nigerian security forces then went into the village shooting indiscriminately,

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[72] Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria," at 35-36 (July 1995).
[73] Human Rights Watch, "The Price of Oil," at 131 (Jan. 1999).
[74] *Id.* at 16.
[75] *Id.* at 135.

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destroying and looting houses, beating villagers and driving them into the bush. At least two people were shot, and villagers fled for months.[76]

In 1998, Elf was again involved in the use of force against protesters in communities in Egiland. According to the Oputa Commission, in June of 1998 the Egi communities were "protesting against the neglect and exploitation of their area." Elf and two of its contractors collaborated with the Rivers State Internal Security Task Force in moving against the protesters, resulting in at least eleven protesters being "arrested, tortured, and detained." One protester was apparently killed, "stabbed to death by a mobile police officer. His crime was that he confronted the officers who indecently dispersed protesting Egi women."[77] Human Rights Watch reported that one of the protesters who had been previously detained, the youth leader Prince Ugo, was subsequently attacked again:

> On October 11, 1998, Prince Ugo . . . was attacked by individuals he believed to be guards employed by Elf at its Obite gas project and by Mobile Police deployed at the facility. He was severely beaten, suffering injuries requiring hospitalization, including a punctured left lung.[78]

Attempts at Accountability: *Bowoto v. Chevron* and *Wiwa v. Royal Dutch Petroleum (Shell)*

The families of the executed Ogoni leaders, including Ken Saro-Wiwa, as well the victims of the Parabe incident, did not believe they could obtain justice in Nigeria, and had no other local remedies against Shell or Chevron. Thus, these families and surviving victims brought lawsuits against Shell in 1996 and against Chevron in 1999.

Wiwa v. Royal Dutch Petroleum (Shell)

The families of Ken Saro-Wiwa and several other Ogoni victims brought suit against Shell in U.S. federal court in New York, claiming violations of international law under the federal Alien Tort Statute as well as various common law claims.[79] The case was initially dismissed, because the court found that it should be heard in England, where one of the Shell parent companies was headquartered, rather than in the United States. This decision was subsequently reversed by the U.S. Court of Appeals for the Second Circuit, which found that the Torture Victim Protection Act of 1991 "expresses a policy favoring receptivity by our courts to" human rights lawsuits.[80]

In 2002, the federal district court allowed the case to proceed further, finding that the plaintiffs' allegations were sufficient to constitute crimes against humanity, torture, summary execution, arbitrary detention, cruel, inhuman, and degrading treatment, and

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[76] Human Rights Watch / Africa, "Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria," at 34 (July 1995).
[77] Oputa Commission Report, vol. 3 at 50.
[78] Human Rights Watch, "The Price of Oil," at 138 (Jan. 1999).
[79] *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 KMW (S.D.N.Y.).
[80] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000).

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other violations of international law. The case remains in litigation; no trial date has been set.

Bowoto v. Chevron

The case against Chevron was filed by several of the Ilaje victims of the Parabe incident, including Larry Bowoto, Bola Oyinbo, and the family of Arolika Irowarinun. The case, known as *Bowoto v. Chevron*, has been litigated in federal court in San Francisco.[81] The plaintiffs have sued under the Alien Tort Statute as well as bringing claims such as wrongful death, assault, battery, and negligence.

Chevron has never taken any responsibility for the deaths and injuries at Parabe. Instead, Chevron's CEO has called Larry Bowoto a "criminal"[82] and its lawyers have likened the protestors to terrorists,[83] despite the fact that Chevron's own documents show that they knew the protesters were unarmed, that the situation on the Parabe platform was calm, and that there were Nigerian military personnel on board the platform during the entire protest. In a recent ruling the U.S. District Court judge found that Mr. Bowoto had presented evidence that Chevron Nigeria's personnel "were directly involved" in the Parabe attack, transporting the soldiers to the attack site, despite knowing that they were "prone to use excessive force."[84] The Court concluded that the evidence could allow a jury to find not only that Chevron Nigeria assisted the soldiers knowing that they would attack the protesters, but also that Chevron Nigeria actually agreed to the military's plan.[85]

Larry Bowoto has also filed suit in state court in California against Chevron, seeking an injunction to stop the practices that contribute to Chevron's complicity in abuses by the Nigerian military, and to force Chevron to initiate practices that will reduce such abuses in the future.[86]

Lawsuits such as *Bowoto v. Chevron* and *Wiwa v. Royal Dutch Petroleum* represent the best hope for redress against the human rights abuses in which Chevron and Shell are complicit. When multinational companies are involved in human rights abuses overseas, it is critical that the U.S. courts remain open to the victims of those abuses.

The Persistence of Abuses Against Protesters Under Civilian Rule

In 1999, democratic elections in Nigeria finally marked the end of over a decade of military rule. Nonetheless, the Nigerian military remains a brutal and largely unprofessional force, and abuses against those challenging the oil companies continue. In

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[81] *Bowoto v. Chevron Corp.*, No. C 99-02506 SI (N.D. Cal.).
[82] D.R. Baker, "Chevron CEO attacks critics at meeting," *San Francisco Chronicle* (May 29, 2008).
[83] Overview of Defendants' Dispositive Motions re: First Cause of Action, and Statement of Facts, filed in *Bowoto v. ChevronTexaco Corp.*, at 2 (June 15, 2006).
[84] Order re: Defendants' Motion for Summary Judgment on Plaintiffs' Claims 10 Through 17, *Bowoto v. Chevron Corp.*, at 19 (Aug. 13, 2007).
[85] *Id.*
[86] *Bowoto v. ChevronTexaco Corp.*, No. CGC 03-417580 (S.F. Sup. Ct.).

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particular, Chevron's close relationship with the Nigerian military appears to continue, the military presence in the Delta has intensified, and reliance by the oil companies on armed soldiers and policemen to respond to perceived threats has repeatedly led to the death and serious injury of peaceful protesters.

The consequences have been perverse for personal security and freedom of expression in the region. As the oil companies and the Nigerian security forces continued to overreact to peaceful protests from 1999 through 2005, leading to a number of deaths and serious injuries, nonviolent activity began to wane due to fear of a violent response. Conversely, increasingly militant and violent groups who say they are protesting the environmental damage caused by the oil industry and the poor conditions in which Delta inhabitants live have gained in strength and visibility in recent years.

Again, the incidents described below are representative, not comprehensive.

September 20, 1999, Bonny

The continuation of military repression even after the transition to civilian rule was demonstrated forcefully in September 1999, when members of the Bonny community protested against a natural gas facility run by Nigeria Liquified Natural Gas (NLNG), a Shell affiliate. In response to the pollution caused by Shell's plant, the Bonny people blocked an intersection near the facility and demanded dialogue. Community leader Goddy Jumbo described the pollution and related his experience at the protest:

> Experts told us that anyone who drank the water could contract some fatal diseases, including cancer. . . . in Bonny now you cannot distinguish day from night and the NLNG's doing nothing about this. . . .
>
> [W]e approached them for discussion. They refused to come. As gentle, civilized people we made efforts to reach them to dialogue on these developments. They did not budge, so the entire Bonny community . . . call for a meeting with the officials of the NLNG. This invitation was ignored. This went on for two days so an agreement was reached by the community that the entire Bonny people should move to the LNG location in a procession, wearing white 'esibo' (jumper) and wrapper. We chose white because it symbolizes power.
>
> Before we knew what was happening . . . the American security manager for . . . the consortium of contracting firms handling the construction of the LNG plants, fired into the crowd. Then he ordered the team of mobile policemen to shoot. At first, the mobile policemen refused, probably seeing that . . . the people were running for their dear life and not out to harm. . . . He shot two people down, then he ordered the mobile policemen who had come towards us . . . They also started shooting and throwing tear gas at us. I had been shot in the leg and went down bleeding profusely. When my people saw me down and bleeding—there was blood everywhere, even my shoes were full of blood—they carried me away.

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> People like me were assigned the responsibility of crowd control so I was out there in front, so if the people had been unruly, I would have seen it. They were not.[87]

The mobile police denied that any foreign security officer had been involved and maintained that several police were wounded.[88]

October 17, 2000, Olugbobiri

According to Amnesty International, a protest in Olugbobiri, Bayelsa State, in October 2002 was met by violence from security forces. Protestors approached an Agip flow station in boats, intending to demonstrate at the facility and shut down production. Soldiers guarding the facility fired on the protestors, killing at least eight people.[89] There has been no accountability for this incident.[90]

August 10, 2002, Warri

In July 2002, a series of peaceful protests at Chevron oil facilities by members of the Ugborodo and Gbaramatu communities had led Chevron to conclude agreements in which it promised that in return for a peaceful working environment, it would hire local community members, help to develop infrastructure, and open dialogue with community leaders in the event of problems of mutual concern.[91]

Less than a month later, early on the morning of August 10, protests broke out again as 3,000 Ilaje, Ijaw, and Itsekiri women arrived at the operational headquarters of Shell and Chevron affiliates in Warri and barricaded the doors. The women were unarmed, and their protest was peaceful. They carried placards, waved green leaves, and sang solidarity songs.[92] Police and soldiers responded by firing tear gas at the demonstrators to induce them to disperse. In addition, according to some reports, security forces raped some of the women; others were whipped or beaten severely with gun butts. One report described 10 serious injuries, including one Itsekiri woman who was beaten "to a state of coma" in front of Shell's Warri office.[93] At least one pregnant woman may have lost her child due to the beatings, and "a particular lady's breast was chopped off."[94]

Independent confirmation by Amnesty International shows that as a result of the violent repression of the protest, severe wounds were inflicted on elderly women, including a 70

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[87] A. Maja-Pierce, Civil Liberties Organisation (Lagos), "Blood Trail: Repression and Resistance in Niger Delta," at 46-47 (2002).
[88] *Id.* at 48.
[89] Amnesty Int'l, "Nigeria: Time for justice and accountability" (Dec. 2000).
[90] Amnesty Int'l, "Nigeria: Ten years on: Injustice and violence haunt the oil Delta," at 26-29 (Nov. 2005).
[91] PANA Daily Newswire, "Nigerian women protesters vacate oil terminal after accord" (July 17, 2002); "Oil company, Gbaramatu leaders sign pact on seized flow stations," *Vanguard (Nigeria)* (July 26, 2002).
[92] "Some 3000 Women Seize Oil Producing Companies," *Vanguard (Nigeria)* (Aug. 10, 2002).
[93] *Id.*
[94] "Fresh crisis looms in N-Delta, as women threaten showdown with Shell," *Vanguard (Nigeria)*, (Nov. 11, 2002).

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year-old woman whose lower limbs were badly beaten and an 89 year-old woman who was whipped by security personnel.[95] More than a year later, participants in a workshop for victims of state torture described themselves as victims of police brutality and insisted that they still had not recovered from the psychological and physical damage.[96]

August 21, 2002, Ugborodo

Soon after the Warri protests, Ugborodo women took over the production platforms at the Ewam and Isan oil fields and the Opuekeba flow station, in the Ilaje region of Ondo State. According to the protesters, armed Mobile Police and other security personnel hired by Chevron attacked the protesters, "pouring hot water on the women, flogg[ing] them with horse tail, capsiz[ing] their boats" and firing at them. Allegedly, four women were killed, two others detained, and six were treated for injuries. Chevron denied the allegations.[97]

Several days later, Chevron reported that the protesters at Ewam had vacated the premises of their own accord.[98] Neither the protesters' allegation of deaths nor the company's account of the end of the occupation was confirmed by independent reports.

January 15, 2003, Escravos

Members of the Maritime Workers Union of Nigeria went to the jetty at Chevron's Escravos oil platform to engage in peaceful protest of the company's refusal to hire union members for work on its private jetties. According to the dockworkers, anti-riot police and armed soldiers attacked them, "thrashing us with horse whips and releasing their dogs on the unarmed workers."[99] Protesters ran from the security forces, and two drowned when they jumped into the Escravos River to escape arrest. Others were beaten or arrested.[100]

February 4, 2005, Escravos

Frustrated with what they perceived to be Chevron's failure to honor the terms of the 2002 agreement, three hundred Ugborodo residents entered the Escravos oil terminal to engage in peaceful protest. Security personnel from the Joint Task Force (JTF)—consisting of soldiers from the army and navy along with mobile, regular, and supernumerary police—responded to suppress the demonstration. In the ensuing violence, over thirty protesters were injured and one was shot dead.[101]

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[95] Amnesty Int'l, "Repression of Women's Protests in Oil-Producing Delta Region," at 4 (2003).
[96] "Group donates to police brutality victims," *Vanguard (Nigeria)* (Oct. 29, 2003).
[97] "Unconfirmed Reports Say Four Women Killed in Ilaje Oil Clash," *Vanguard (Nigeria)* (Aug. 21, 2002); PANA Daily Newswire, "Nigerian Oil Community Alleges Attack on Women Protesters" (Aug. 21, 2002).
[98] BBC Monitoring Int'l Reports, "Protesters at Chevron Oil Facilities Voluntarily End Nine-Day Picket," (Aug. 26, 2002).
[99] "Two Dockworkers Drown During Protest Against Chevron, Union Alleges," *Vanguard (Nigeria)* (Jan. 24, 2003).
[100] "Dockworkers Threaten Showdown Over Missing Colleages," *This Day (Nigeria)* (Jan. 24, 2003).
[101] Amnesty Int'l, "Nigeria: Ten years on: Injustice and violence haunt the oil Delta," at 6 (Nov. 2005).

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Video records, eyewitness testimony, and the photographic evidence of injuries treated in the emergency section at Warri General Hospital provide dramatic proof that the JTF engaged in unnecessary and illegal brutality in suppressing the protests. Male protesters suffered open head wounds, major lacerations, and injuries to their limbs.[102] A videotape shows security personnel beating a man whose hands are tied, using the butt of a rifle.[103] Protesters reported receiving beatings to the head and other parts of the body, even while trying to surrender.[104]

One protester told investigators:

> "[The soldiers] had big guns, but they used tear gas, and some of the security staff had iron rods and knives, too. When soldiers began shooting, I bent down begging to be spared, and that was when I was hit by the bottom of a gun by three men. I fainted... since then my head is really sore and it hurts."[105]

Conversely, Chevron never made public any evidence to support their allegations that the protesters were armed, or that they injured security personnel and caused widespread damage to Escravos facilities.[106]

The record is clear that Chevron had a good deal of control over the operation of the JTF during this time period in general, and during the protest in particular. JTF often operated at Escravos, and members received allowances and transportation from Chevron that often amounted to as much or more than a soldier's daily wage.[107] In 2004, Chevron had invited the leadership of the JTF at Escravos to participate in its training for security personnel; attendance was not required, however, even though the JTF formed an integral part of Chevron's security procedures.[108] In fact, the intervention of the JTF during the Escravos protest was not unplanned—once the facility's security had been breached on the morning of February 4, established security protocols went into effect that included the return of all employees to their residential units and the transfer of control over security at the facility to government forces.[109]

July 2008, Aja-Omaetan Community

In July 2008 the Aja-Omaetan community in Warri North of Delta State petitioned the Delta State Governor, accusing Chevron of deploying heavily armed security forces to the area following agitation by local people. The community was protesting against the detrimental human and environmental impacts of gas flaring from Chevron's Dibi Field. They urged the state governor to urgently intervene to stave off imminent bloodshed in

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[102] *Id.* at 9.
[103] *Id.* at 7-8
[104] *Id.* at 7.
[105] Id., at 7.
[106] *Id.* at 8.
[107] *Id.* at 13.
[108] *Id.* at 11.
[109] *Id.* at 6.

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the area. They complained that the security operatives were intimidating, beating, molesting and driving the people away from their homeland.[110]

September 2, 2008, Iwherekan Community

On September 2, 2008, the Iwherekan community in Delta State held a community forum on gas flaring, focusing on the local operations of Shell. The forum included journalists and representatives of Environmental Rights Action/Friends of the Earth Nigeria, as well as community elders, women, and children. Without apparent cause, Nigerian soldiers arrested and detained the forum participants, about 25 people, for about five hours. They were released later that day. Although no injuries were reported, this most recent incident is troubling because it suggests that the government and the oil companies may be adopting the tactics of former military regimes, intimidating nonviolent meetings of groups challenging the oil companies.

The Chilling of Peaceful Protests and the Rise of Violent Militancy

In recent years, the Niger Delta has seen an increase in militarization. And despite the signing of a Global Memorandum of Understanding with Delta communities in 2005, Chevron's tight collaboration with the Nigerian armed forces continues.[111] Given this increased military presence, communities are hesitant to engage in peaceful protests against the oil companies. Unfortunately, armed groups are increasingly filling the void left as the nonviolent protests dwindle.

The Chilling of Protests in Ilajeland and Elsewhere

The environmental problems faced by the Ilaje communities have continued long after the Parabe incident. Before Parabe, the communities' primary environmental complaints against Chevron were gas flaring and saltwater incursions, but in recent years Ilajeland has experienced several major oil spills as well. The first oil spill in the Ilaje waters apparently from Chevron facilities occurred in Ewan Field on May 13, 2000. Another occurred on June 24, same year, followed by three others in 2004, on July 31, September 30, and December 7. On June 24, 2007, another major spill occurred offshore, blackening many Ilaje communities. Researchers observed streets laced with large quantities of crude, damaged fishing nets and canoes; the residents complained that the handful of fish they had managed to catch since the spill were not edible because they had turned blackish and smelt of crude. One local resident described the damage:

> The crude oil spill on Aiyetoro, which is made up of six communities, has impacted badly on fishing which is our major profession. Worse is the fact that we no longer breathe fresh air in the area because of the pollution. Instead, we

[110] E. Arubi, "Community accuses Chevron of intimidation", *Vanguard (Nigeria)* (July 30, 2008).
[111] For example, a series of attacks on the city of Port Harcourt in 2007 "led Chevron . . . to change their regular security from police to military men drawn from the Joint Military Task Force." A. Ogbu & J. Taiwo, "'We Won't Use Excessive Force in Delta,' Says Military," *This Day (Nigeria)* (Aug. 10, 2007).

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> inhale the poison that the crude spill emits.
>
> The river was the only source of water for drinking, cooking, washing and bathing until the spill took place but that is no longer possible because those who drank the water started vomiting and coming down with various internal and external diseases. Our children suffer more because some of them still drink the water in ignorance.[112]

Nonetheless, the Ilaje have engaged in little collective protest against the devastation of their environment. Larry Bowoto, a leader of the Concerned Ilaje Citizens' organization who was severely wounded by Chevron's security forces during the Parabe protest, believes that the circumstances are too dangerous for unarmed civilians to continue protesting against oil companies. He has observed Chevron's willingness to use disproportionate force, even against women and the elderly, and has seen no discernible change in Chevron's use of the military in the Delta region. As a result, despite his previous role as an organizer of community protests among the Ilaje, he has continually advised against organizing further protests against Chevron in the area. As a leader who opposes any form of armed or violent activity, he has been left with no options for pursuing grievances.

Other leaders have come to similar conclusions. In 2007, forty communities prepared to stage massive protests over Chevron's refusal to assess damage to their lands from a 2006 Abiteye oil spill. Elders intervened, however, to scale back the protesters' plans. Knowing well the likely consequences if the activists were perceived as a threat to the smooth continuation of Chevron operations, the elders insisted that rather than demonstrating at Chevron facilities, the protesters should confine their activities to the communities themselves in order "to avoid a bloodbath."[113]

There are signs that the increasingly restrictive space for airing grievances is radicalizing once-peaceful protesting groups. Whereas Ijaw women once entered oil company facilities carrying nothing but banners and threatening to strip naked in order to shame the oil companies, last year saw a group of Ijaw women march onto a Chevron drilling station armed with machetes and clubs to protest delays in compensation for an oil spillage.[114] Incidents like this are even more likely than peaceful protests to provoke security forces and to lead to carnage.

Leaders of peaceful protests certainly have come to understand the consequences of the alliance between Nigerian security forces and the oil companies: unarmed and non-violent expressions of grievances against oil companies in the Delta region are met with the disproportionate use of force and often lead to injury and death, irrespective of the age, gender, or social status of the protester.

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[112] ERA Interview with Mr. Aiyedatiwa Taiwo, Abreke Community.
[113] BBC Monitoring Int'l Reports, "Nigeria: Forty Niger Delta Communities Protest Chevron Oil Firm Neglect" (Feb. 13, 2007).
[114] F. Okwuonu, "Women's Protest Closes Chevron Plant", *This Day (Nigeria)* (May 9, 2007).

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Violent Militancy and the "Oil War"

In the past three years the pattern of protests against the oil companies in the Niger Delta has shifted from unarmed, largely peaceful demonstrations to increasingly violent action by armed militants, especially the Movement for the Emancipation of the Niger Delta (MEND). Along with other human rights and environmental organizations, Environmental Rights Action/Friends of the Earth Nigeria condemns the use of violence in the strongest terms, and recognizes that there are legitimate security concerns for oil operations in the Delta, as well as for the people and the environment.

Unfortunately, the rise of groups such as MEND is traceable to the lack of space for peaceful opposition movements and the lack of progress in bringing the benefits of oil production to the people of the Niger Delta. It would be a grave error to use the decision by some individuals to embrace armed struggle in order to justify greater repression against those who use peaceful means to work toward progress. Instead, the oil companies and the Nigerian authorities should welcome nonviolent opposition groups; elevating these groups and respecting their positions is one method of combating the support for armed resistance and guaranteeing the security of company facilities. If the people of the Delta see nonviolence delivering better results than violence, the constituency for violence will rapidly diminish.

Recommendations

Numerous steps that oil companies can take to increase transparency and limit the potential for future human rights abuses are outlined below. Other measures described below are possible ways forward for this Subcommittee as it investigates extractive industries and human rights abuses.

Recommendations for Changes in Corporate Practice

Line Item Reporting of Payments to Security Forces

Changes in externally or internally mandated accounting procedures could help to improve transparency and thereby allow the public to hold corporations accountable for their security arrangements with foreign governments. In the case of Chevron, line item reporting of payments to the Nigerian government and, in particular, the military would make it possible to trace the flow of cash as human rights situations develop and are resolved.

Companies are already required to review each payment to foreign governments for the purposes of compliance with the Foreign Corrupt Practices Act; the requirement to report those payments would not be unduly burdensome.

Review of Security Operations to Eliminate or Reduce Dependence on Government Security Forces

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The Voluntary Principles on Security and Human Rights (VPs) – an initiative in which both Chevron and Shell take part – tend to assume that in the normal course of business, primary responsibility for corporate security will fall on public security forces. It is imperative, however, that Chevron and other Delta oil companies reconfigure their relationship with the Nigerian military and police, which have such a deep history of abuse that resorting to them to protect company facilities is demonstrably likely to lead to serious human rights violations.

This situation can be at least partly remedied by a comprehensive review of security procedures to determine whether public security forces are appropriate partners, and if not, to develop a feasible plan for eliminating or reducing dependence on them for protection. Furthermore, compliance with the findings of such a review should become one of the criteria by which the job performance of managing directors and security personnel is evaluated.

In Chevron's case, such a review was conducted in 1999.[115] Evaluators found that Nigerian security forces were actually more of a liability than a benefit, and that they were prone to cause great harm both to Delta residents and company employees. Chevron did not, however, implement the recommendations of this review. Similarly, in 2003, Shell consultants submitted a report in which they found that Shell's policies contributed to violence and conflict in the community.[116]

Effective Communication of Human Rights Principles to Security Forces and Proper Training, and Screening of Known Human Rights Abusers

The Voluntary Principles recognize that corporations and public security forces are often tied together in mutually dependent arrangements whereby governments take primary responsibility for security and the private entity provides resources and logistical support. The VPs provide extensive guidelines for how the two sides should interact, and places obligations on corporations to insist on conduct that abides by human rights law.

In the event that it is not feasible to disengage from public security forces, companies should communicate clearly and effectively to security personnel and responsible government officials the imperatives of human rights and ethical conduct. They should also provide the resources and training to inculcate and enable more ethical practices. For example, this could include provision of rubber bullets and tasers rather than live ammunition; implementation of weapons transportation protocols that discourage the use of loaded firearms; and conduct of awareness-raising programs and other training courses for security personnel, their commanding officers, and responsible government officials.

Furthermore, companies can implement screening procedures in order to ascertain whether any of the security personnel either directly hired by them or assigned to them by

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[115] *See* Declaration of Scott Davis in *Bowoto v. Chevron Corp.*, para. 41 (filed Nov. 22, 2006).
[116] WAC Global Services, *Peace and Security in the Niger Delta: Conflict Expert Group Baseline Report - Working Paper for SPDC* (2003). Available at http://www.npr.org/documents/2005/aug/shell_wac_report.pdf.

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cooperating armed forces have committed human rights abuses or are known to have used excessive force in the completion of their duties. All efforts should be made to prevent such individuals from providing security services to the company.

Tracking of Human Rights Abuses and Holding Individuals Accountable

Chevron, like most companies, keeps a security log that records all security incidents as they occur at its facilities in Nigeria. It would be a reasonable and useful step in promoting accountability and deterring future abuses if companies were required to keep full records of incidents in which local residents are injured, killed, or otherwise harmed in confrontations with government security forces. In such cases, if security personnel individuals are found to be responsible for human rights abuse, then their employment should be terminated. If termination is not an option, then the company should request that the individuals no longer provide security services to the facility.

Publication and Prompt Investigation of Proven and Alleged Incidences of Human Rights Abuse

Companies should strive for transparency with regard to their responses to human rights abuses. Transparency can help corporations to reduce the incidence of abuse and also to maintain their reputation for ethical conduct. Companies should be expected to make public any incident in which local residents are injured, killed, or otherwise harmed in confrontation with government security forces, within a reasonable time after the occurrence of the incident. In the case of Chevron, deliberate deception and publication of false information about the Parabe incident hindered efforts to hold the company accountable for years.

Similarly, companies should be expected to make public any credible allegations of human rights abuses by their security personnel or by government security forces acting in the service of the company. They should investigate all such allegations within a reasonable time frame and make public the steps taken and the results of the investigation.

If companies are unwilling to voluntarily take these steps to increase transparency and limit the potential for future human rights abuses, Congress should consider requiring them to do so.

Recommendations for the U.S. Government

Conduct a Systematic Review of Corporations' History of Compliance with VPs

The U.S government should conduct a systematic survey of corporations' experience with the Voluntary Principles on Security and Human Rights. This survey could include the responses of corporate officers and field representatives, cooperating government officials and security personnel, and delegates from local communities. The responses could be compiled into a report that summarizes and analyzes the challenges all parties

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have encountered in implementing the VPs, identifies weaknesses and omissions, and spotlights the successes and areas of convergence of interest among parties.

Much has been learned about the relationship between corporations and government security forces, as well as the consequences of that relationship, since the VPs were first promulgated in 2000. The review process should hear witnesses who can testify to the successes various multinational corporations have achieved in developing effective security protocols that incorporate a respect for human rights and ethical conduct. This testimony can be compiled into a report on best practices in security arrangements for corporations operating in the developing world.

Identify Provisions of the Voluntary Principles and Other Practices for Legislative Consideration

The results of this review may be used to identify ways in which the United States legislative process may help to prevent human rights abuses by companies employing government security forces. This could entail identifying key provisions of the Voluntary Principles for enactment into law, with a focus on those portions that have been neglected by signatory parties.

Expanding Criminal Jurisdiction in the United States for International Human Rights Violations

The 1998 Parabe incident, in which Chevron called in the Nigerian military to respond to nonviolent protesters, leaving two dead and others wounded and tortured, has been reviewed by experts in the United States. In particular, Hugh McGowan, the former head of the New York Police Department's Hostage Negotiation Team, reviewed the events and determined that it was not a hostage situation, that the use of military force was not warranted, and—most importantly—that in his opinion, he would refer the attack to the proper authorities for possible prosecution.[117] Of course, there have been no prosecutions of anyone at Chevron involved in the Parabe incident, and it is not clear who would have the authority to engage in such prosecutions. The U.S. Congress should look into expanding the reach of United States courts, to grant them greater criminal jurisdiction over corporations that are complicit in human rights abuses in violation of international human rights law and U.S. domestic law.

Conclusion

Extractive industries such as oil and gas companies must learn to listen to the complaints of the local people in whose territories they carry out their business. They need to understand that the environment is the life of the people and that continual degradation of the environment directly affects the means of livelihood of the people. The Ogoni, the Ilaje, and their fellow protesters chose the best route out of the mire that the Niger Delta

[117] Expert Report of Hugh McGowan in *Bowoto v. Chevron Corp.* para. III(2)(g) (Oct. 31, 2005); deposition of Hugh McGowan in *Bowoto v. Chevron Corp.* at 271:14-273:8 (Nov. 4, 2005).

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has become: through nonviolent dialogue. This is what was demanded ten years ago. This demand still remains to be answered.

By reforming their relations with security forces, increasing transparency, and introducing practices that respect human rights and the environmental rights upon which those rights are dependent, Chevron and other extractive industry companies can combine sound business practices, effective security protocols, and respect for the rights of those who are directly affected by their operations. They will improve community relations, burnish their corporate image, and potentially boost profit margins. Similarly, by implementing common-sense legislation based on widely accepted standards, this country has the opportunity to increase its capacity to help bring corporate practice in line with human rights and ethical norms worldwide.

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Senator Sam Brownback on Extraction of Natural Resources
Subcommittee on Human Rights and the Law- 24 Sept. 2008

The extraction of natural resources in many developing countries serves more as a hindrance for the people of those nations than it does as an asset towards economic growth within those countries. Many of these natural resources in the mist of conflict, known as "conflict resources", have fueled wars in Sierra Leone, Liberia, Angola and today we see them in the Democratic Republic of Congo.

These natural resources found in the heat of conflicts range from diamonds, gold, cassiterite, coltan (columbite-tantalite), timber, copper, cobalt, and oil. The smuggling and extraction of these conflict resources is not only at the heart of many conflicts around the world, but can also be linked to the issues child soldiers, rape and sexual violence, trafficking, poverty, and displacement within certain conflicts.

Specifically in the Democratic Republic of Congo we see cassiterite, coltan, and gold at the heart of the conflict. There the control of the mining areas of these minerals is an economic sanctuary. Pillaging, raping, abducting women and young children to be used as laborers, child soldiers, or sex slaves, rebels seize and extract the resources from these lucrative mining areas. In Congo, rebel movements are motivated more by economic incentives rather than the pursuit of political ideals. Middlemen are then hired to form relationships with clients and then facilitate transactions between those who control the resource and foreign corporations without the question of legitimacy.

In a world immersed in technology where tantalum, a component of coltan, is found in nearly every cell phone on this globe, how can the corporations and industry be so irresponsible in the legitimacy of where the raw materials of they use for their products originate from?

And in a country, such as the Congo, where 5.4 million have died in the past 10 years due to this conflict and 1,500 people continue to die a day, directly and indirectly from the conflict, where rape and sexual violence run rapid as a tool of war, where impunity reigns over justice, where children are harbored as child soldiers, sex slaves and laborers, corporate responsibility of the components which make up their products is essential in this matter. When concerning the lives touched by the components they are putting into the components that produce and make their products.

We have come to a point where we cannot live without certain minerals and the components they produce for certain products and goods. However, neither can nor will we sit idly by while others suffer. While we need to be responsible as a nation and as consumers, we must hold our supplier's accountable. Corporate responsibility should not be a question but a distinct fact.

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Submission of **Dennis Brutus, Jubilee South Africa**

Subcommittee on Human Rights and the Law hearing: **Extracting Natural Resources: Corporate Responsibility and the Rule of Law"**
September 24, 2008

On behalf of Jubilee South Africa, Johannesburg I wish to respectfully make the following submission to the Subcommittee on Human Rights and the Law:

The people of South Africa, having successfully emerged from the long years of oppression by a minority, based primarily on racist discriminatory legislation, find themselves, after fourteen years, in a situation of even greater levels of poverty for the mass of the people, as all reliable reports indicate. I wish to speak specifically about the role multinational corporations have played, particularly in the extractive industry, in contributing to the increased levels of poverty and human rights abuses inflicted on the people of South Africa by plundering the resources of the country and greatly damaging the environment. The business practices of these multinational corporations, many of them U.S. based, historically and currently adversely effect the lives and livelihoods of the people, particularly those in rural communities.

Multinational corporations in the extractive industry need to be held accountable for their actions abroad and the U.S. government should to play a role in requiring U.S. based corporations to follow the basic demands of social responsibility, demands that could easily be met while still maintaining a profit.

The blatant disregard for human rights while doing business abroad calls for urgent and rigorous scrutiny - particularly by U.S. legislators, where legislation is being flouted, and no appropriate legislation exists. And since many in the United States are complicit in this appalling situation, I am making an urgent plea to legislators in the United States to give this their urgent and immediate attention so that effective remedies can be found.

Respectfully submitted,

Dennis Brutus
Honorary Professor
Centre for Civil Society
University of Kwazulu-Natal
Durban South Africa

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Statement by Chevron
Human Rights and the Law Subcommittee of the
Senate Committee on the Judiciary
"Extracting Natural Resources: Responsibility and the Law"
September 24, 2008

We believe companies can play a positive role in contributing to the protection and promotion of human rights, together with governments, which bear primary responsibility for safeguarding human rights, and civil society, which advocates the interests of the communities in which we operate. Chevron is committed to supporting security and human rights everywhere we operate. This commitment is not based on a single activity, rather through the totality of the company's efforts – internally and externally. This includes our corporate values and policies, management processes and practices, executive involvement, stakeholder engagement, community programs, and participation in voluntary initiatives, such as the *Voluntary Principles on Security and Human Rights*. For the purpose of this statement, we have summarized our commitment to the Voluntary Principles.

I. Summary of Chevron's Commitment

- ***Founding member of the Voluntary Principles***. Chevron participated in drafting the Voluntary Principles and was among the original participants to join the newly established Voluntary Principles, which were announced in December 2000 by then Secretary Albright and UK Foreign Minister Cook.

- ***Participation and promotion***: Chevron has actively participated in each *plenary* meeting since 2004 and has on a number of occasions shared with the Participants the Company's roll-out of the Voluntary Principles. Chevron helped to develop the formal criteria for participation into the Voluntary Principles, and is currently part of a multi-stakeholder working group – NGOs, governments, and industry – developing the guidelines for all participants to report on their implementation efforts. Chevron continues to engage with and share its experiences among industry, government, and NGOs through participation in various multi-stakeholder events: (i) regular meetings with the US State Department's Bureau for Democracy, Labor and Human Rights; and (ii) security and human rights workshops organized by the Social Responsibility Working Group of the International Petroleum Industry Environmental Conservation Association (IPIECA), of which Chevron is a member.

- ***Our beliefs, values and supporting policies***: Our support for human rights begins with *The Chevron Way*, a statement of values that guides our actions, including integrity, trust, partnership, diversity, and protecting people and the environment. Chevron's *Human Rights Statement* is linked to our internal and external websites, and was incorporated into our *Business Conduct and Ethics Code* in 2008, which all 59,000 employees must read and acknowledge. The Statement reaffirms that Chevron operates in a manner consistent with human rights principles applicable to business, and also that we recognize and adhere to the Universal Declaration of Human Rights (United Nations) and the Declaration on Fundamental Principles and Rights at Work (International Labor Organization). Chevron recently established practical *Company Guidelines on the Voluntary Principles on Security and Human Rights*, which, at the specific request of our Vice-Chairman, is being disseminated

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throughout the corporation and our in-country management. These internal Guidelines discuss the promotion of human rights in the provision of security for our personnel and assets, and are consistent with the Voluntary Principles.

- ***Internal reinforcement***: Educating and training our employees on security and human rights, including the Voluntary Principles, is ongoing. Our general Human Rights training program is made available throughout the company and in-country business units, which was launched in 2006. In June 2007, an online training module on the Voluntary Principles was developed. The module is intended to be used by our Management, embedded business unit Security Managers and Coordinators and employees for internal guidance and informational purposes. In September this year, Chevron convened a three-day workshop for its Global Security Advisors , which included sessions on emerging security and human rights issues.

- ***In-country support of the Voluntary Principles***: Our in-country support of security and human rights includes communicating our guidelines, which are consistent with the Voluntary Principles, to host governments and their security forces where we operate, our business partners, and private security companies with whom we sometimes work. The business units are committed to support the Voluntary Principles in accordance with local laws and conditions. We also actively engage in multi-stakeholder briefings and information-sharing activities of good practices regarding the Voluntary Principles.

II. Status of Chevron's Investment in the Yadana Project

The Yadana Project helps meet the energy needs of millions of people in the region. Total is the operator of the Yadana project and majority interest owner, and a subsidiary of Chevron has a minority, non-operated interest. Through PACT, a US-based NGO, Chevron supports community health programs, including the prevention of HIV/AIDS and other infectious diseases. Additionally, the consortium supports other community programs including education, training, and economic development (e.g. loans to new small business projects, agriculture and livestock programs). Since 2002, CDA Collaborative Learning Projects – an independent, US-based nonprofit organization has conducted five site visits to the Yadana area. CDA's reports have noted that many of the project's initiatives have had a positive impact on local communities along the pipeline corridor. Their five public reports, including the most recent report on a February 2008 site visit can be viewed at: http://www.cdainc.com/cdawww/publication_searchresult.php.

Total has reported that it has never paid the army, supplied it with arms, provided it with logistical support, transported troops or provided vehicles for this purpose, or given it instructions. In a statement issued on May 5, 2008, Total indicated that it "strongly repudiates the allegations made against the consortium as a result of ERI's (EarthRights International) wrongly linking the Yadana Project and human rights abuses." Total has also publicly stated that it has never had a contractual relationship with the Myanmar army. Total's full statement is posted to its website: http://burma.total.com/en/news

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III. Chevron's Operations in Nigeria.

Chevron Nigeria Limited, ("CNL") has operated successfully in Nigeria since the early 1960's. CNL's ability to operate in the country over four decades is grounded on the productive relationships that CNL has developed – and continue to improve – with the federal and state Governments of Nigeria, local communities, civil society organizations and NGOs, and local businesses. We are particularly proud of CNL's participatory approach to community development programs in the areas where CNL operates . Many programs that CNL supports go beyond providing access to productive opportunities and assets, such as micro-finance loans to local entrepreneurs, but also support capacity building in conflict mediation, development management and project accountability.

We disagree with the inaccurate statement by Mr. Bassey regarding events at the Parabe Platform. However, rather than trying that case before this Subcommittee, we believe the only appropriate forum is the federal court where the plaintiffs will finally be required to present admissible evidence and a jury will decide who is telling the truth.

IV. Concluding Note

Chevron recognizes that the issues of security and human rights are varied and complex. The Voluntary Principles is not a panacea, rather a building block where success is measured in increments. And, its success cannot be guaranteed by a single actor – there must be concerted efforts made by each of the three pillars aided by mutual support and reinforcement. Continued leadership by the United States and other Government participants, particularly the US's bilateral engagements with host countries, is critical to the success of the Voluntary Principles. Chevron has demonstrated its willingness to work with the United States and host governments in very challenging circumstances: from post-conflict development and re-integration of ex-combatants and internally displaced persons in Angola, to post-disaster, long-term economic recovery in Aceh.

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Business for Social Responsibility

September 22, 2008

U.S. Senator Richard J. Durbin
Senate Judiciary Committee
Chairman, Subcommittee on Human Rights and the Law

By email: Heloisa_griggs@judiciary-dem.senate.gov

Dear Senator Durbin:

We appreciate the opportunity to provide a statement regarding the Voluntary Principles on Security and Human Rights (VPs) in conjunction with the Wednesday, September 24, 2008 Senate Committee on the Judiciary hearing before the Subcommittee on Human Rights and the Law on "Extracting Natural Resources: Corporate Responsibility and the Rule of Law."

As you may already know, the Voluntary Principles on were launched in 2000, during a period that marked the emergence of many new initiatives intended to expand and provide guidance on corporate social responsibility (CSR) performance. Although companies participate in a range of CSR initiatives, the VPs are human rights guidelines designed specifically for oil, gas and mining companies.

The Voluntary Principles process is an international, tripartite initiative that identifies ways to assist companies in balancing the need for safe operations while respecting human rights and fundamental freedoms. As its name suggests, participation in the initiative is purely voluntary.

Business for Social Responsibility has co-managed the Voluntary Principles on Security and Human Rights Secretariat with the London-based International Business Leaders Forum (IBLF) since 2004. We submit this statement solely in our capacity as one participant in the process, not on behalf of the Secretariat.

Official participants include 17 European and North American extractives companies, 8 non-governmental organizations (NGOs), the Dutch, Norwegian, U.S. and UK governments, and 3 "observers." Additionally, the International Finance Corporation (IFC) references the Voluntary Principles in its "Performance Standards on Social and Environmental Sustainability," while the Organization for Economic Co-operation and Development (OECD) includes them in its "Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones."

The Voluntary Principles process has, overall, been a success in that it has created a platform for addressing complex human rights issues through collaboration between government, business and civil society organizations. The Voluntary Principles illustrates how a cross-sector partnership can help to successfully address issues that are difficult for any single actor to address in isolation. While these different stakeholder groups may not always readily agree

with each other, they have nonetheless been able to identify and work together on a set of critical issues of common concern.

Governance of the Voluntary Principles process, however, remains a constant challenge. Since its inception, participants have relied on each other to act in good faith and have used consensus to guide decision making. Recently, participants concluded that formal participation criteria would, in combination with ongoing efforts to reach consensus on key issues, add legitimacy and support wider application of the Principles.

To that end, a series of steps has been adopted to strengthen the governance of the process.

In 2005, participants expressed a desire to improve transparency -- including formal reporting -- to help maintain credibility and increase the integrity of the Voluntary Principles. The group is working towards issuing more formal VPs reporting guidelines appropriate to the challenging nature of the issues and parties involved.

In 2006, the requirement was eliminated that allowed companies and NGOs to join only if their home governments also joined. It was a move intended to encourage greater participation by extractives companies, NGOs and host governments that supported the VPs but had to date been excluded.

In 2007, formal participation criteria were adopted that are intended to strengthen the VPs by articulating the responsibilities of current and future VPs participants, strengthening implementation of the VPs, and encouraging more robust and constructive dialogue among participants. Some of the key features of the new criteria include: minimum requirements for participation; a complaints process; filing of annual implementation reports; and more transparent procedures for accepting new members.

This year, efforts began to develop a set of entry requirements for governments seeking to join the Voluntary Principles that would be specific to the concerns of the VPs and as far as possible objective and measurable and that would address the roles and responsibilities of governments, including possible variations in the manner in which they might participate. This work is ongoing.

In retrospect, we believe that it would have been preferable to address some of the key governance issues when the principles were originally established.

Going forward, therefore, the Voluntary Principles process should evolve in a manner that promotes the widest possible adoption of the VPs. Every effort should be made to expand the number of companies and countries implementing the VPs, as well as the number of governments and NGOs supporting their efforts while expanding the multi-stakeholder process for seeing that implementation is undertaken effectively and credibly.

This means developing participation criteria that enable additional companies and countries (including governments with poor human rights records that express an interest in receiving VPs guidance and tools and that indicate a willingness to improve) to enter the process, including clarification of reporting and implementation guidelines. It also means refraining from making the VPs overly prescriptive or too complex. The VPs should be structured to

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encourage dialogue and practical information sharing among participants (including imperfect ones) in order to achieve progress on the ground; a complex or punitive set of criteria or processes would detract from that goal. Successful implementation efforts require support, simplicity, and practicality.

In addition, we would like to see home country governments take a more active and prominent role in promoting the VPs to other home and host country governments.

Finally, the participants of the Voluntary Principles on Security and Human Rights should be acknowledged and congratulated - companies, governments, and NGOs alike - all of whom have voluntarily stepped forward to help make progress on this sensitive issue. In dedicating their organizations' expertise, staff and resources, they have demonstrated concrete support for being part of a solution.

Should you have any questions or require additional information, please contact me at +1 415 984 3214, or by email at acramer@bsr.org

Sincerely,

Aron Cramer
President & CEO
Business for Social Responsibility

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Visit www.voluntaryprinciples.org or the websites of the participants:

Governments:
Netherlands (www.minez.nl or www.mvonederland.nl)
Norway (http://odin.dep.no/ud/engelsk/)
The United States of America (www.state.gov/g/drl/rls/2931.htm)
The United Kingdom (www.societyandbusiness.gov.uk/voluntary.shtml)

Corporations:
Anglo American (www.angloamerican.co.uk)
BG Group (www.bg-group.com)
BHP Billiton (www.bhpbilliton.com)
BP (www.bp.com)
Chevron (www.chevron.com)
ConocoPhillips (www.conocophillips.com)
ExxonMobil (www.exxonmobil.com)
Freeport McMoRan Copper and Gold (www.fcx.com)
Hess Corporation (www.hess.com)
Marathon Oil (www.marathon.com)
Newmont Mining Corporation (www.newmont.com)
Norsk Hydro (www.hydro.com)
Occidental Petroleum Corporation (www.oxy.com)
Rio Tinto (www.riotinto.com)
Shell (www.shell.com)
Statoil (www.statoil.com)
Talisman Energy (www.talisman-energy.com)

Non-Governmental Organizations:
Amnesty International (http://amnesty.org)
The Fund for Peace (www.fundforpeace.org)
Human Rights Watch (www.hrw.org)
Human Rights First (www.humanrightsfirst.org)
International Alert (www.international-alert.org)
Pact, Inc. (www.pactworld.org)
Pax Christi Netherlands (www.paxchristi.nl)
Oxfam (www.oxfam.org.uk)

Observers:
International Committee of the Red Cross (www.icrc.org)
International Council on Mining & Metals (www.icmm.com)
International Petroleum Industry Environmental Conservation Association (www.ipieca.org)

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Opening Statement of Senator Dick Durbin
Chairman, Subcommittee on Human Rights and the Law
Hearing on "Extracting Natural Resources:
Corporate Responsibility and the Rule of Law"
September 24, 2008

This hearing of the Judiciary Committee's Subcommittee on Human Rights and the Law will come to order. The subject of this hearing is "Extracting Natural Resources: Corporate Responsibility and the Rule of Law."

Human Rights and the Law Subcommittee

This might be our last hearing of the 110th Congress, so I would like to begin with a few words about the Human Rights and the Law Subcommittee. I would like to thank Senator Patrick Leahy, the Chairman of the Judiciary Committee, for establishing this Subcommittee and giving me the chance to be its first Chairman.

We have accomplished a lot in a short period of time. We have held the first-ever Congressional hearings on the law of genocide, child soldiers, crimes against humanity, sexual violence in conflict, and the U.S. government's enforcement of human rights laws.

As I said when I became Chairman of this Subcommittee, we have focused on legislation, not lamentation. Last year, Congress unanimously passed and President Bush signed into law the Durbin-Coburn Genocide Accountability Act, which makes it a crime under U.S. law to commit genocide anywhere in the world. Just last week, Congress unanimously passed the Durbin-Coburn Child Soldiers Accountability Act, which makes it a crime and violation of immigration law to recruit or use child soldiers.

Today we are breaking more new ground. This is the first-ever Congressional hearing on the human rights responsibilities of American oil, gas, and mining companies.

High oil prices and instability in oil-producing countries

In recent days, we have been reminded that we live in the age of globalization. The state of the U.S. economy – and the actions of American companies – have repercussions around the world. That is especially true for the extractives industry, i.e., oil, gas, and mining companies.

American families, small businesses and farmers are struggling with the increase in oil prices. The untold story is that people on the other end of the oil supply chain are also suffering. We import about two-thirds of the oil we consume. American companies drill much of this oil in countries with high levels of corruption and poor human rights records. This can lead directly higher oil prices for Americans.

Oil and human rights in Nigeria

Nigeria, the fourth largest oil supplier to the United States, is a case in point. The country consistently ranks among the most corrupt in the world and senior officials have been implicated in human rights abuses and the theft of oil revenues.

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Despite generating billions of dollars in oil revenues each year, the Niger Delta is the poorest region in the country. Today we will hear how human rights violations, extreme poverty and environmental destruction have fueled tensions between local communities and oil companies in the Niger Delta for decades.

The emergence of an armed conflict in the Niger Delta in 2006, with militants taking oil workers hostage and profiting from the trade in stolen oil, has sharply decreased Nigeria's oil production and driven oil prices up.

Extractive industry responsibility to respect human rights

This is not a black and white issue. There is no doubt that American oil, gas, and mining companies operating in countries with poor human rights records face difficult challenges in protecting their employees and operations.

However, when American companies choose to go into these countries, they assume a moral and legal obligation to ensure that security forces protecting their operations do not commit human rights abuses.

Let me be clear: governments are primarily responsible for protecting the human rights of their citizens. However, extractive companies also have an important role to play in preventing human rights abuses, and, as we will hear today, they have fallen short of this obligation on more than one occasion.

Human rights obligations of American extractive companies

Today we will examine:

- the legal responsibilities of extractive companies to protect human rights;
- voluntary industry standards for preventing human rights abuses; and
- whether Congress needs to consider additional legislation in this area.

The United States has long been a leader when it comes to the legal responsibilities of U.S. companies to protect human rights when they operate in foreign countries. The Alien Torts Claims Act, which was a part of the original Judiciary Act of 1789, allows civil suits in U.S. courts for human rights abuses that take place in a foreign country. We will hear about some of these cases today.

Voluntary initiatives related to security and human rights

The United States has also played a leadership role in establishing the Voluntary Principles on Security and Human Rights. This important initiative brings together governments, companies and nongovernmental organizations to developing human rights standards for the extractives industry.

However, as we will hear today, the Voluntary Principles are difficult to enforce. It is also troubling that oil-producing governments like Nigeria are not part of the process. This hearing

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will help us evaluate the effectiveness of the Voluntary Principles and consider whether Congress should make any of these standards mandatory.

Conclusion

Protecting human rights abroad is the right thing to do. As Martin Luther King said, "Injustice anywhere is a threat to justice everywhere." In a globalized world, we have even more at stake. American families are harmed when human rights abuses and instability in oil-producing regions result in higher oil prices. Our reputation suffers when U.S. companies are complicit in human rights abuses committed by security forces.

I hope we can all work together to address the critical human rights challenges extractive companies operating in repressive countries face.

Testimony of Bennett Freeman

**Former U.S. Deputy Assistant Secretary of State—
Democracy, Human Rights and Labor**

**Senate Judiciary Subcommittee on Human Rights and the Law
Extracting Natural Resources: Corporate Responsibility and the Law**

September 24, 2008

Mr. Chairman and members of the Subcommittee, thank you for the chance to testify today. I am Bennett Freeman, Senior Vice President for Social Research and Policy at the Calvert Group, the largest family of sustainable and responsible mutual funds in the U.S. Instead of testifying on behalf of Calvert, I am speaking today in my personal capacity as former Deputy Assistant Secretary of State for Democracy, Human Rights and Labor. I will also draw from my experience advising a number of the companies, NGOs and governments on the specific policy and operational issues that are the focus of this hearing.

During 1999-2000, I had the opportunity to lead the development of the Voluntary Principles on Security and Human Rights on behalf of the State Department, together with the British Foreign Office, major oil and mining companies, and human rights NGOs. A consensus was forged around a set of principles to address situations that in the Nineties had made major U.S. and UK flag companies appear complicit in human rights violations, and in turn subjected them to reputation damage and in some cases litigation under the Alien Tort Claims Act. Underpinning the State Department's initiative was a conviction that even the appearance (if not the legally proven fact) of such complicity, together with the tough realities and dilemmas of operating in conflict zones, required a response. Also underpinning the Department's initiative was a recognition that those tough realities and dilemmas were playing out above all in three countries of strategic interest to U.S. foreign policy and energy security: Indonesia and Nigeria, two countries both pivotal in their regions and at the time undergoing fragile transitions to democracy; and a third, Colombia, an embattled democracy in our own hemisphere. So while the Voluntary Principles were launched as a narrowly focused multi-stakeholder corporate responsibility and human rights initiative, broader U.S. interests were and remain clearly at stake.[1]

The theme of my testimony today is the critical, indispensable role that governments—especially the U.S. Government—must play in leading an initiative which has yet to meet its potential but remains more necessary than ever. After its launch in December 2000, the Voluntary Principles process drifted without clear direction and in 2006 descended into a crisis of accountability and credibility—a crisis that has threatened the survival of the initiative in its present form but now appears to be very close to positive resolution. That near-breakdown of the global plenary process has unfortunately not only diluted focus on the imperative of strengthening implementation in key countries, but has obscured much of the concrete progress that is being made by a number of companies on the ground in many countries. That progress must now in turn be reinforced by stronger outreach to host country governments and security forces.

The Subcommittee's focus on the Voluntary Principles is especially important and timely for four reasons that I will use to frame specific observations and recommendations:

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First, the Voluntary Principles are more important than ever, not only to protect human rights and promote corporate responsibility but also to support U.S. foreign policy and energy security goals. There are a growing number of countries and regions where vital oil/gas and mining operations are in close proximity to current, latent or potential new conflict zones in which a combustible mix of conditions and incidents threaten both human rights and the ability of companies to operate.

Conceived and written as a global generic standard, the initial focus of Voluntary Principles implementation was on Nigeria, Indonesia and Colombia. The incidents and conditions addressed by the Voluntary Principles continue to pose human rights and broader operating risks to companies in Indonesia and Colombia. But they are far more acute today in Nigeria than even in the mid-to-late Nineties when violence in the Niger Delta, impunity on the part of security forces and serious allegations of complicity on the part of major oil companies were so apparent.

Since late 2005 the oil industry has faced a significant upsurge of violent disruption, and over the last three years attacks by organized criminal gangs and now the increasingly well-armed Movement for the Emancipation of the Niger Delta (MEND) have far overshadowed sporadic unrest from impoverished communities. Stepped up attacks in recent weeks (including this past weekend) against company and military installations have continued to disrupt the industry, with oil production down by various estimates by 150,000 barrels per day. This "oil war" has reduced overall output by approximately 20% to less than two million barrels per day from the world's eighth-largest oil exporter and the fourth-largest supplier to the U.S. It also poses heightened risks for U.S. and other oil companies in one of the world's most dangerous business operating environments, and underscores the need to ensure that necessary security arrangements are combined with human rights safeguards consistent with the Voluntary Principles.

As anticipated in 2000 at the launch of the initiative, the Voluntary Principles have also become relevant well beyond Nigeria, Indonesia and Colombia as extractive companies continue to search for resources in unstable parts of the world. Significant implementation is well underway by the BP-led Baku-Tiblisi-Ceyhan pipeline consortium. Other regions and countries should now be on the Voluntary Principles map as well: the five countries of Central Asia to the east of the Caspian; the Democratic Republic of the Congo; Equatorial Guinea and Angola, among many others in West and Central Africa; Peru, Ecuador, Bolivia and Venezuela in the Andean region; as well as Papua New Guinea and others in the Asia-Pacific. It is therefore more important than ever that the Voluntary Principles are implemented by the companies that are already committed to them and are embraced by others that have yet to do so—backed by the necessary combination of their home country governments and the host country governments where they operate.

Second, the explicit name and the mixed history of the Voluntary Principles have made them a lightning rod in the important global debate over the efficacy of voluntary versus legally binding standards bearing on the human rights responsibilities of business, beyond the extractives sector companies operating in zones of conflict. The ability of the Voluntary Principles to demonstrate success in advancing their goals will affect the credibility of the multi-stakeholder approach to a range of difficult human rights challenges.

The Voluntary Principles are making positive contributions to protecting and promoting human rights in communities surrounding company sites in many countries, as companies both inside and even outside the official process are taking

significant steps to implement them. Yet the failure of the global plenary process until recently to resolve fundamental governance and accountability issues has undermined the credibility of the entire initiative, and in turn contributed to the "accountability deficit" that UN Special Representative on Business and Human Rights John Ruggie identified as a particular challenge for such voluntary multi-stakeholder initiatives in his second interim report delivered in early 2007.

Unlike other such initiatives focusing on human rights, the development of basic governance structures was delayed for far too long. The wrenching debate over "participation criteria" since 2006 has been necessary in order to determine reasonable standards by which companies and governments alike may join or, when challenged in certain circumstances, remain in the process. An imminent agreement with respect to "participation criteria" to be applied to potential new governments in particular would nearly complete the architecture of accountability that is essential to the future continuity and credibility of the Voluntary Principles.

A final element of that architecture is the completion of the long-delayed reporting criteria for the initiative. The lack of reporting criteria agreed and used by all participating companies, NGOs and pillars/participants undermines the accountability of the process, as well as the consistent company implementation and the dissemination of best practices that solid reporting encourages and makes possible. Criteria must be concise, reflecting and reinforcing the best practices established by many companies on key issues such as training of security forces, communications with key company personnel and contractors, and stakeholder relations with the local communities for whom the implementation of the Voluntary Principles matters most.

Completing the Voluntary Principles' architecture of accountability is essential to finally achieving the credibility that is so critical to any voluntary initiative that largely operates outside the strictures of legislation and regulation. Yet in certain country and project-specific circumstances, the Voluntary Principles have in fact taken on a mandatory, legally-binding character. For example, the Voluntary Principles were annexed to the BP Tangguh LNG project contract in West Papua, Indonesia and became the basis of the host government agreements regarding security arrangements for the BTC pipeline consortium. The Voluntary Principles can become an unusual if not unique hybrid model in the business and human rights arena: a standard and a process that remain voluntary in letter if not in spirit, but gain a dynamism and momentum which blur the distinctions and transcend the debate between voluntary and mandatory approaches. An increasingly accountable Voluntary Principles on Security and Human Rights can illuminate that sparkling grey zone between the unnecessarily stark black and white voluntary and mandatory poles of the spectrum.

Third, now that the accountability architecture finally nears completion, stronger leadership on the part of the convening governments is essential to fulfilling the initiative's potential by engaging much more directly and effectively with host country governments whose security forces are its most critical operational focus. At the same time, addition of new governments to the global plenary process can make the Voluntary Principles more inclusive and accountable at the same time.

The current convening governments (the UK, Norway and the Netherlands as well as the U.S.) have too often managed rather than led a process that has from the outset required consistent, focused leadership to move forward. Besides letting the process drift into crisis and then paralysis over governance issues, insufficient efforts have been made to support implementation in priority countries. That government

leadership is more necessary than ever to focus on supporting and strengthening implementation on the ground not only in the three original priority countries of Colombia, Indonesia and above all Nigeria, but also in the widening circle of countries where the situations they address are presenting clear risks to security and human rights alike.

The essential interaction among the convening and host country governments remains the weakest link in the entire Voluntary Principles process. Among the top priority countries, relatively encouraging progress is being made with the government of Colombia, less with the governments of Indonesia and Nigeria. Now the entire Voluntary Principles process must accelerate and deepen that on-the-ground implementation with the direct cooperation of host country governments and security forces. Nigeria must become the most urgent priority given the rising violence and constant threat to company security and human rights alike. The embassies of the convening governments—especially those of the U.S. and the UK—can and should play more active roles in facilitating dialogues with those governments and security forces to support implementation efforts by the companies.

Adding key host country governments to the global process—consistent with the new participation criteria—is essential to the vitality and even the fundamental logic of a process aimed at promoting in-country implementation by companies in direct cooperation with those host country governments. Stepping up implementation efforts with host country governments will strengthen the constructive contribution they make to the global plenary process when that commitment can be made.

At the same time, the overall process would gain from inviting Brazil, Canada, Chile, and South Africa to assume observer if not full status very soon. These countries have relatively few major domestic extractives-related human rights issues but are serious players in the extractives industry. Their inclusion can build a bridge to other home country governments of companies operating in zones of conflict, even those operating in the most repressive countries in the world. At some point soon a way should be found to align the Chinese government and oil companies with the Voluntary Principles on an inclusive yet accountable basis.

These implementation efforts will require not only more focused leadership from the home country governments but also a much better resourced Secretariat to focus on coordinating implementation and outreach activities. The Voluntary Principles process has lacked the adequate implementation, coordination and communications resources which have become indispensable to the basic functioning of contemporary multi-stakeholder initiatives such as the Extractive Industry Transparency Initiative (EITI) and the Fair Labor Association.

Finally, the approach of a new Administration offers the opportunity to renew and revitalize the State Department's leadership of an initiative which urgently needs greater focus and momentum to achieve its original and still vital objectives. The Voluntary Principles can not only do more to advance specific country-by-country security and human rights objectives, but should be more closely linked to a more strategic and comprehensive U.S. approach to energy security in a world of continuing conflict.

The next Administration and the State Department should undertake a series of steps beginning in early 2009, focused on accelerating concrete implementation of the Voluntary Principles and linking it to other initiatives aimed at strengthening the governance and development foundations of secure energy supplies. Drawing from

the observations and recommendations offered above for Voluntary Principles' home country governments, the State Department should specifically:

1. Allocate significant new resources to expanding the external Voluntary Principles Secretariat to focus on non-sensitive implementation tasks, especially plenary planning, best practice dissemination, outreach, communications and reporting.

2. Elevate the diplomatic priority attached to Voluntary Principles implementation with key countries, especially Nigeria as well as Indonesia, Colombia and others, in conjunction with related initiatives such as the EITI.

3. Add staff and assistance resources to embassies/USAID missions in priority implementation countries, above all Nigeria, to support outreach to and coordination with host country governments, participating companies, civil society and local communities.

4. Adapt human rights training for security forces (military and police) in priority implementation countries to cover Voluntary Principles content through IMET, ICITAP and other programs.

5. Reach out to other potential home country governments to construct a more global, inclusive and credible Voluntary Principles process.

6. Add elements related to the Voluntary Principles to OPIC loan guarantees and Ex-Im Bank projects in the extractives sectors in relevant countries.

7. Link Voluntary Principles and EITI implementation support in Nigeria as key elements to stabilize the Niger Delta, generate more equitable distribution of oil resources, and strengthen overall governance and the rule of law.

8. Support the development of the non-extractives version of the Voluntary Principles recently launched in Colombia, with a particular focus on the agriculture/food/ beverage and heavy energy-related infrastructure structures.

Renewed and revitalized State Department leadership of the Voluntary Principles on Security and Human Rights can connect corporate responsibility and human rights to stronger governance and rule of law in countries that are critical to our foreign policy and energy security goals. While the Voluntary Principles address what are usually narrow issues and situations, they touch some of the largest problems and challenges that our companies face in the world—ones which cannot be solved without greater leadership, diplomacy and resources from our government consistent with our broader interests.

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[1] The original dialogue in 2000 focused exclusively on the clash between security and human rights. The central challenge was how to balance the companies' legitimate need to meet real security threats in certain countries (particularly but not exclusively on Nigeria, Indonesia and Colombia), with the insistence on the part of local communities and international NGOs alike that company security arrangements respect human rights. An unprecedented consensus was built around the fundamental premise that company security arrangements in zones of conflict are indeed legitimate—but that human rights safeguards are imperative. The result was what became and remains not only the first widely agreed human rights standard for the extractives sectors, but also the first and only concrete, operational standard developed for any sector to address the roles and responsibilities of business in zones of conflict.

The Voluntary Principles are framed around three sets of issues: the criteria that companies should consider as they assess the risk of complicity in human rights abuses in connection with their security arrangements, including their relationships with local communities and diverse other stakeholders; company relations with state security forces, both military and police; and their relations with private security forces. Specific principles provide practical guidance to companies on how to incorporate international human rights standards and emerging best practices into policies and decisions that sometimes have life and death consequences.

Extracting Natural Resources: Corporate Responsibility and the Rule of Law

Written Testimony of Arvind Ganesan
Director, Business and Human Rights Program, Human Rights Watch
To the Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law

September 24, 2008

Mr. Chairman, Senator Coburn, and members of the Subcommittee:

Thank you for your leadership on this issue and for the opportunity to speak before you today on the important issues related to energy, human rights, and corporate responsibility.

Just as energy prices are at all time highs, putting tremendous strain on consumers, companies, and institutions, policymakers are searching for ways to wean the United States from foreign oil and to achieve energy security. But missing from the debate is a greater assessment of exactly who receives the money that so many must pay for energy. The picture is not a pretty one.

About 60 percent of US oil comes from abroad. Sadly, corruption is rife in many countries with ample oil reserves, and their governments are often undemocratic and unable or unwilling to invest in the country or their citizens' welfare.

We have seen the creeping autocracy in Russia and Venezuela that is fueled in part by governments who are emboldened and enriched by the billions they are receiving in oil revenue. On September 19, 2008, Venezuela expelled Human Rights Watch staff from the country because we released a report criticizing the government's efforts to undermine and control democratic institutions.

In other countries, money that could be used to realize citizens' rights to education and health by investing in schools and hospitals is wasted or stolen, while democratic

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participation in government is stifled. Energy wealth does not necessarily lead to better standards of living, increased democratic participation in government, or a better climate for human rights. Instead, economic, social, and political conditions may stagnate or even deteriorate. US companies are major investors in many of these countries and US consumers end up paying for their oil. For example:

- In Angola, Human Rights Watch documented how a government, ruled by the same party and president since 1979, could not account for approximately US$4.2 billion between 1997 and 2002. This is equivalent to roughly 9.25 percent of the country's Gross Domestic Product (GDP) disappearing annually. By comparison, it would be as if the US government "lost" $1.2 trillion a year for five years. At the same time, Angola had some of the lowest human development indicators in the world, ranking 161st out of 176 countries in the United Nations Development Program's (UNDP) Human Development Index (HDI). Transparency International also at the time named Angola as one of the five most corrupt countries in the world. Angola is currently ranked 162nd out of 177 countries in the HDI and is still one of the world's most corrupt countries. The main change is that the country is now the largest oil producer in sub-Saharan Africa and has billions more in revenue due to the skyrocketing price of oil. Angola is the sixth largest supplier of oil to the United States.

- Equatorial Guinea is an extremely repressive country; it is ruled by a dictator who seized power from his brutal uncle in 1979 and has ruled the country with an iron fist ever since. Because of oil the country's GDP has skyrocketed: in 1992, it was about $150 million, but by 2007, it had increased over 12,000 percent to almost $20 billion. Considering there are only about 500,000 people in the country, the government has the means to be a model of development in Africa and throughout the world. In fact, the country has a per capita GDP high enough to be on par with some of the most developed countries in the world. However, the State Department, International Monetary Fund (IMF), and others have repeatedly noted that the government does not spend adequate money on its own people. As of 2007, Equatorial Guinea had the largest gap between its per capita GDP and its HDI score. Life expectancy is low at 51 years, while infant mortality is high at 124 deaths per 1,000 live births. Nineteen percent of children under the age of five are moderately to severely malnourished. Only 43 percent of the population uses safe water.

  Instead, the president, his family, and their associates lead lavish lifestyles at the expense of the desperately poor people of Equatorial Guinea. In 2004 the Senate Permanent Subcommittee on Investigations detailed how the Equatorial Guinean

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government questionably used millions of dollars with the help of Riggs Bank. Some of their lavish expenditures included two multimillion dollar homes in suburban Maryland. This investigation led to one of the largest fines against a US bank, and Riggs was subsequently bought out by PNC Bank. But perhaps the most brazen and troubling examples of corruption are repeated instances of the Equatorial Guinean president's eldest son, Teodorin Nguema Obiang, purchasing multimillion dollar houses and exotic sports cars throughout the world—on a government official's salary. Teodorin's official title is minister of forestry for Equatorial Guinea, and from that position he earns a salary of approximately $4,000 per month. Nonetheless, Teodorin has been able to buy homes in Los Angeles, Cape Town, and perhaps also in Buenos Aires and Paris. In March and April 2004, for example, Teodorin purchased two luxury homes in Cape Town worth $7 million. He also spent about $1 million on luxury automobiles. In April 2006, he followed up these expenses with the purchase of a 16-acre estate with a 15,000 square foot property at the Serra Retreat in Malibu, Los Angeles, for $35 million in cash. This same year, the government promised to spend around $48 million for social services infrastructure, but fell $36 million short in their promise and only spent about $12 million. In other words, they fell short the cost of a Malibu mansion.

Equatorial Guinea is the third largest oil producer in sub-Saharan Africa, and the US imports between 66,000 to 101,000 barrels of oil per day from the country.

Security

Security and respect for human rights is a major issue for Human Rights Watch. In many parts of the world, oil and other natural resources are located in the midst of conflict, become flashpoints for environmental, land, or employment concerns, or are considered so important and strategic that abusive military, police, or private forces are called on to guard these operations. These are strategic commodities, and governments and companies have legitimate reasons to keep their employees and operations safe. But in too many cases, security has meant human rights abuses. For example:

- In Burma, a pipeline project in which Chevron is an investor was plagued by allegations that the military guarding the project committed widespread human rights abuses.

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- We documented in 2005 how a notoriously abusive rebel group in the Democratic Republic of Congo received thousands of dollars in support from AngloGold Ashanti as it tried to develop a gold project in the country.

- Since the mid-1990s, we have regularly documented how Nigerian security forces who provide security for companies such as Shell Oil have committed abuses and reprisal attacks against local communities. For example, in 2007 we documented an instance in which members of the Nigerian Joint Task Force who were charged with guarding oil operations killed and detained local community residents who were protesting the activities of a Shell contractor.

- These abuses take place around the world. We reported how the now-defunct Enron Corporation paid police in India who subsequently committed abuses against local residents who protested the company's project. In Colombia, we have documented how companies paid the military tens of millions of dollars for security without instituting adequate human rights protections.

To help address these problems, we worked with the oil, gas, and mining industry, the US, UK, Norwegian, and Dutch governments, and other human rights organizations to develop standards on security and human rights. Those were launched in 2000 as the Voluntary Principles on Security and Human Rights in the Extractive Industries (VPs). These principles outline the steps companies should take in conducting a risk assessment, dealing with public security forces, controlling private security, and addressing allegations of abuse. To their credit, they have become the industry standard for human rights and security, and it is the only standard that addresses this particular problem.

Nonetheless, there are shortcomings. The principles are voluntary. No company is required to uphold them, or even be part of the process. The only mechanism to compel compliance is public criticism that could emerge if a company does not follow their guidance. This, in turn, could lead to further problems such as shareholder actions, lawsuits, or other activities aimed to improve corporate behavior.

It is only in the last two years that some procedures have been put into place to make it more likely that companies who are formally part of the Voluntary Principles will comply with the standards set out therein. And we are still waiting to strengthen procedures to ensure that abusive governments who might want to join the initiative are actually going to improve the conduct of their security forces. We believe that the VPs are a valuable initiative that

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needs to be supported, but it also needs to demonstrate to the public that companies and governments who join are in compliance with it.

What the US Government Can Do to Improve Corporate Responsibility and Human Rights

There are two key areas where more can be done to address the excesses of corruption and human rights abuses that plague natural resource extraction. First is to strengthen efforts to increase transparency and combat corruption in resource-rich states. The US has supported voluntary initiatives such as the Extractive Industries Transparency Initiative (EITI), but there are several steps to promote this agenda.

- Support the Extractive Industries Transparency Disclosure Act (S.3389). This bill would require companies registered with the Securities and Exchange Commission (SEC) to publish their payments to foreign governments for oil, gas, and minerals. This would inject much-needed transparency into how much undemocratic and opaque governments earn from their natural resources and would further strengthen efforts to fight corruption and mismanagement.

- Provide more resources to the SEC and Department of Justice to aggressively investigate violations of the Foreign Corrupt Practices Act (FCPA), in order to ensure that companies do not become part of the cycle of corruption that plagues so many resource-rich countries.

- Strengthen efforts to implement the US anti-kleptocracy initiative. This initiative was first announced by President Bush in 2005. Later, the US Congress put some of these initiatives into law, such as denying visas to corrupt officials. But now, the Congress can insist that the relevant branches of government aggressively identify corrupt government officials and deny them visas to the US, and increase use of existing anti-money laundering and anti-corruption laws particularly in respect to resource-rich states and the extractive industries.

- Initiate a program to identify questionable assets, such as real estate or other assets, in the US held or obtained by corrupt means and work to freeze them and repatriate them to their rightful owners—the citizens of the countries who have seen their wealth lost.

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We have seen the value of voluntary initiatives like EITI and the importance of highlighting the issue of corruption. But the crucial component is an aggressive law enforcement response. The Riggs Bank case put US business on notice that complicity in corruption is unacceptable. It also demonstrated just how important law enforcement is in exposing and curtailing corruption. On September 3, 2008, for example, the Justice Department announced a guilty plea by Albert "Jack" Stanley who paid as much as $182 million in bribes over a decade to secure business in Nigeria while an employee for Kellogg, Brown and Root, Inc.

These actions, and a more aggressive response to corruption as outlined above, will send the message to companies and corrupt officials that their illicit activities will not be tolerated. And it will send the message to the citizens of those countries whose wealth has been squandered or stolen that the US will stand with them to help identify how much money they have, so that they can hold governments accountable and ensure that their money is invested in their future.

Companies and governments also have an important opportunity to advance the issue of security and human rights. We have seen the development of standards for the industry, but we have not seen adequate implementation. In fact, we do not really know whether companies are fully implementing the Voluntary Principles or similar policies, since there is no reporting or monitoring mechanism to verify this. As a result, some companies in some projects may do the right thing, but many other situations are opaque—until something goes wrong. Nor have we seen the State Department or other parts of the executive branch devote sufficient diplomatic efforts on the ground to ensure governments respect human rights and to insist that US companies follow high standards of corporate responsibility. Eight years after the launch of the VPs, these basic measures are not in place. However, some institutions, such as the World Bank, have put such standards into place and made them a condition of lending to companies in the extractive industries.

To remedy the problem Congress should strengthen the Voluntary Principles and make certain elements of the VPs mandatory, and provide the guidance and resources to the executive branch to fully implement these standards.

- Strengthening the Voluntary Principles will mean providing some dedicated funds to the State Department to fulfill its responsibilities under the VPs and a directive to the State Department to report back on company and government compliance to Congress in a regular and timely manner.

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- Congress should mandate that the Export-Import Bank (ExIm) or Overseas Private Investment Corporation (OPIC) require extractive companies who receive funding or political risk insurance from them to show that they have effective policies and procedures to address security and human rights and give those companies the capacity to monitor compliance with those standards.

- Bilateral military assistance and training programs that involve security forces that also provide security to the extractive industries should include components to ensure that funding is contingent on respect for human rights and accountability for violations when they provide such security.

- Congress should examine how to ensure private security contractors, who may provide services to the government and also to extractive industries, follow human rights standards.

- Congress should examine what steps can be taken to ensure that extractive companies adequately follow human rights standards.

- Finally, Congress should provide adequate resources and guidance to the State Department, Department of Defense, and other relevant agencies that require them to raise human rights issues related to the provision of security with foreign governments and address the conduct of companies operating abroad.

These are modest but critical steps that Congress could initiate to enhance corporate responsibility, improve respect for human rights, and potentially reduce some risks of natural resource extraction that can ultimately contribute to price volatility that affects consumers in the US and elsewhere.

Consider Nigeria, where the theft of oil and sabotage have contributed to production cuts in the world's eighth largest oil exporter. Forty-two percent of Nigeria's oil exports come to the US, making it the fifth largest supplier to this country. For over a decade, we have documented how companies have paid local leaders for "security" which ends up funding criminal behavior; how security forces commit abuses while ostensibly providing security for companies; and how billions of dollars in oil revenue which should legally be used to fund schools and hospitals has been squandered or stolen by local government officials. Most recently we documented how political "godfathers" who have access to government funds, including oil revenue, have sponsored and paid for criminal gangs that were used to rig votes and secure election victories for favored politicians through violence. Many of the

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criminal gangs operating in the Niger Delta that have threatened oil production got their start as beneficiaries of these godfathers. They have also unleashed an unprecedented wave of violence in Port Harcourt, the capital of Rivers State, Nigeria's largest oil-producing state.

The result is chaos. This is what can happen when governance and respect for human rights are ignored: people are marginalized, officials become corrupt, violence grows, and ultimately the repercussions are global for communities and consumers.

It may be difficult to solve all of the problems associated with natural resource extraction quickly, but it is possible to start addressing the dimensions of the problem related to human rights and corruption. This is the part of energy policy that has been too weak for too long. Now is a good time to start strengthening this aspect of policy to help ensure that it does not come back to bite us in the form of skyrocketing energy prices or funding for a corrupt autocrat who enriches himself at the expense of his people or pays for an abusive security force to wreak havoc on a local community.

Thank you and I look forward to your questions.

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global witness

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"

September 2008

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.

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- 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 aeas.

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.

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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

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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

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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.

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[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.

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- 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

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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 ensue 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

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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.

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Multistakeholder Initiatives to Guide Natural Resource Extraction in Conflict Zones: The Case of the Voluntary Principles on Security & Human Rights

By Krista Hendry, Director, Human Rights & Business Roundtable, The Fund for Peace

Statement for the Record to the Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

September 22, 2008

Extractive Companies Increasingly Operate in Conflict Zones
For a host of reasons, natural resource extraction companies are increasingly operating in complex, conflict-sensitive environments. Due to a convergence often of ethnic tensions, weak state institutions, high levels of poverty, lack of infrastructure development, and poor governance, these companies can become the target of attacks. As they are operating in the host countries with the permission of the central governments and extracting nationally owned resources, those governments have the sovereign right to determine the method of protection, usually the national military or police. In some cases, these public security forces have been implicated in human rights abuses in the past, while in others they may not be properly trained or have access to non-lethal weapons. This has had violent, and sometimes fatal, consequences.

The Voluntary Principles are a Critical Tool to Address Those Challenges
Formalized in 2000, the Voluntary Principles on Security and Human Rights (VPs or Voluntary Principles) provide companies with a critical tool for guiding their development of strategies and programs to ensure that workers and investments can be secure and human rights are protected. The VPs are a set of guidelines for companies that focus on three key areas: the criteria that companies take into account as they assess the risk to human rights in their security arrangements; their relationships with state security forces, both military and police; and company relations with private security forces. The VPs are also a multistakeholder process in which representatives from companies, governments, and non-governmental organizations work together to ensure that security arrangements are consistent with international standards on human rights.

The Fund for Peace is a U.S.-based non-governmental organization whose mission is to understand and alleviate the conditions that cause war, with a focus on internal conflicts. Primarily through our Human Rights & Business Roundtable, we have been looking at the issue of security and human rights for the last decade. We have been a participant in the Voluntary Principles process since its inception, including helping in its original conceptualization. Our organization has also worked to develop tools, such as our Failed States Index, to help companies, and others, understand the complex environments, identify the potential conflict drivers, and monitor the likelihood of violence over time. We have also been investing time and resources to introduce the VPs to the private security industry, as the VPs extend to them as well as to public security forces. We believe the Voluntary Principles are an important tool for governments, NGOs, and corporations to work together to develop best practices that can ensure

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the security of both the local population and the companies. A secure environment in which human rights are respected is vital to promoting economic growth, which can alleviate poverty and other conflict drivers.

Examples of the Potential of the Voluntary Principles Going Forward

Some have criticized the VP process over the last of couple of years because it has appeared to stagnate as the number of participants in the formal process remains rather small and select. The multinational companies, international NGOs, and home governments in the process have been grappling with major challenges regarding the governance structure, public reporting on progress, and membership criteria, before opening the group to wider participation. There has, however, been progress made in countries in which participants of the VP process and others have worked towards implementation. Below two such examples are briefly highlighted. As we all learn through pilot projects such as these, replication in other countries can take place and the full potential value of the VPs on the ground realized.

The leading example of VP implementation by a host government is Colombia. The Colombian Ministry of Defense agreed to include language on human rights protection, including a commitment to the Voluntary Principles, in agreements that the state-owned oil company, Ecopetrol, signs with the Colombian Armed Forces. The national oil association, the Asociación Colombiana del Petróleo, formed a committee for the implementation of the VPs in 2004, which included the Colombian Vice President Francisco Santos, the Foreign Affairs Ministry, the Defense Ministry, and the governments of the UK, the U.S., and Netherlands along with BP, Chevron, and Occidental. International Alert, an international NGO participant in the VP process, has worked with a local partner to create indicators to track the implementation and success of the Voluntary Principles on the ground. While there will still be a lot of work to do and reforms within security structures are slow to show impact, the efforts of the Colombian government and others are evidence of the potential positive impact the VPs can have at the local and national levels.

In the Democratic Republic of the Congo, monthly meetings of security managers from mining companies in Katanga province provide a forum for dialogue on security and human rights. Organized by the newest NGO member of the Voluntary Principles, Pact, Inc., this dialogue includes representatives of the UN security forces and private security companies. Multi-stakeholder dialogues at the local level, such as this, are a critical step to identifying the challenges and best practices, and developing policies and programs to address the challenges. The VPs provide a framework for this vital discussion.

Beyond the Formal Voluntary Principles Process

A real sign of success of the VPs is that they have already gone far beyond the actual participants of the formal VP Process. Companies that are not part of the formal process have also publicly stated their commitment to uphold the Voluntary Principles. These include companies within the extractive sector but also private security companies and companies in other sectors. While not legally binding, such a commitment can be a powerful tool for local NGOs to engage with companies on the ground, where it matters most. Ideally, there will be an international reporting and monitoring process so that those who claim to support the VPs can be held accountable. But most importantly, those on the ground, where the abuses would occur should a protest turn

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violent, can use the VPs to proactively engage their own governments and the companies operating in their communities.

Our Recommendations

While an international mechanism is valuable to share lessons learned and identify resources for implementation, The Fund for Peace believes the greatest value of the VPs will be achieved by focusing on local implementation and through engagement with the widest appropriate circle of stakeholders, including host governments and local civil society. Since the challenges are varied and complex, they need to be addressed in a manner that is inclusive, voluntary, and flexible. This ensures deeper engagement by the host governments and local civil society, so that local challenges towards implementation can be met with local solutions.

The Fund for Peace strongly recommends that additional resources be allocated to support in-country processes for implementation of the Voluntary Principles. For the U.S. Government, as well as the other government participants, we hope to see high-level attendance at key meetings, an increase in resources available to those working on the VPs, and greater engagement by the embassies in the countries where the VPs are most needed. We encourage investment in the development of local civil society's capacity to participate in VP implementation. We understand there are many issues being addressed by the U.S. Government that compete for the limited time, attention and resources available. We believe, however, that the VPs can play a critical role in helping create greater security in challenging environments. This would have a positive impact on the effectiveness of investments by development agencies, on the ability of the host governments to undertake appropriate security sector reform, and the prospects for local civil society to hold their governments accountable, all of which could help to alleviate the conditions that can lead to human rights abuses and potentially violent conflict.

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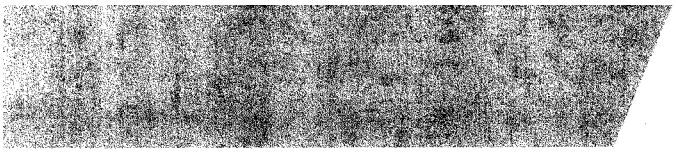

ICMM
International Council
on Mining & Metals

Submission of the **International Council on Mining & Metals (ICMM)** to the **Senate Committee on the Judiciary** hearing before the **Subcommittee on Human Rights and the Law** on **Extracting Natural Resources: Corporate Responsibility and the Rule of Law,** Wednesday 9/24/2008,10.45am, Room 216, Senate Hart Office

Chaired by: **Senator R. Durbin**

"There is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors – States, businesses and civil society – must learn to do many things differently."

John Ruggie
Protect, Respect and Remedy: A Framework for Business and Human Rights, 2008

Context

The ***'Protect, Respect and Remedy'*** framework of John Ruggie[1] provides the clearest and most widely accepted articulation of the distinct yet complementary roles of governments and business with respect to human rights. It comprises: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for better access to more effective remedies.

The corporate responsibility to respect human rights, however, is particularly challenging in weak governance zones, where governments cannot or will not assume their roles in protecting human rights, as well as other related aspects of public duties or service provision. Such zones are often characterized by weak public institutions, an absence of the rule of law and a prevalence of corrupt practices. They may also be host to civil conflicts, where potentially serious violations of human rights may occur.

Unilateral action on the part of a company (or companies collectively) is likely to have limited success in resolving the challenges of weak governance zones, where governments must play the primary role in fulfilling their obligations to serve and protect their citizens. However, there is also a potentially important role for collaborative action – between governments, companies and civil society organizations. The ***Voluntary Principles on Security and Human Rights*** (VPs) represent one such initiative.

Origins of the VPs and participation of ICMM and its members

The VPs were initially developed through a process of dialogue between the Governments of the United Kingdom and the United States, extractive and energy sector companies, and NGOs with a common interest in human rights and corporate social responsibility. This was catalysed by the experience of a number of major companies who found themselves accused of complicity in human rights abuses committed by State security forces. The VPs were, thus, an attempt to

[1] Report of Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG), John Ruggie, to the 8th Session of the Human Rights Council. ***Protect, Respect and Remedy: A framework for Business and Human Rights.*** April 2008

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establish a greater consensus about what the boundaries of corporate responsibility were in this highly sensitive area and to engage the home governments of the leading companies into dialogue about the issues.

Launched in early 2000, the VPs establish a framework for managing the relationship between extractive industry companies and security providers (government and private) so as to ensure respect for human rights and fundamental freedoms. Eight years after they were launched, the VPs remain the only initiative/guidance with cross-sectoral backing and commitments in place in the complex area of security and human rights.

The VPs provide guidance on the attributes of effective risk assessments, and the interactions between companies and public or private security providers. Eighteen oil, gas and mining companies are participants in the VPs, including six ICMM member companies, i.e. Anglo American, AngloGold Ashanti, BHP Billiton, Freeport McMoRan, Newmont Mining and Rio Tinto. Some ICMM member companies have been participants from the outset and contributed to the development of the principles.

In 2006, ICMM was granted observer status to the VPs: the International Committee of the Red Cross (ICRC) and the International Petroleum Industry Environmental Conservation Association (IPIECA) were afforded similar status. In developing the ICMM Sustainable Development Principles[2], the VPs were one of a number of standards or guidelines considered, and many of the core concepts (if not the specific requirements) are embodied in ICMM Principle 3[3].

Challenges and achievements

The VPs have not been without their critics and have had to resolve a number of governance challenges. A long-standing disagreement over participation criteria was resolved in May 2007, although the criteria for host government participation subsequently became contentious - an issue that is the subject of ongoing resolution efforts. This has prompted a somewhat broader reflection on the roles and responsibilities of participating governments and future models of participation in the VPs, i.e. broadening the initiative to embrace new participants or deepening the engagement of existing participants, or both. There have also been differences of opinion over the reporting criteria that should apply to participants, as well as an absence of guidance on implementation for non-participating companies in particular.

Yet such differences of opinions are perhaps inevitable with any voluntary multi-stakeholder initiative in a potentially highly charged area of policy, and the benefits of the VPs greatly outweigh any of the residual challenges. Benefits include:

- The VPs have provided a comprehensive framework for corporate action in the complex area of security and human rights. They depart from the conventional notions of security, which deals with securing the safety and well-being of personnel and assets, to recognize that poorly controlled or trained conventional security provision can, in and of itself, present risks to the well-being of communities.
- The VPs remain the only initiative and source of guidance in the complex area of security and human rights with cross-sectoral backing and commitment, and have provided an important forum for the exchange of ideas and good practice and sharing of dilemmas since their inception.
- The challenge posed by the absence of a credible source of guidance on implementation is recognised, and a scoping exercise for a practical guidance document was initiated in May 2008 (with financial support from the International Finance Corporation). Assuming broad

[2] http://www.icmm.com/our-work/sustainable-development-framework/10-principles
[3] ICMM Principle 3: Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities

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support for the development of an implementation guidance tool, the hope is that this can be advanced to play an important role in helping to overcome practical implementation challenges (e.g. in areas such as the conduct of risk assessments).
- The participation of home-country and host-country governments is seen as central to the longer-term success of the VPs, and provides much-needed support to companies and civil society in effectively implementing the VPs in weak governance zones in particular.

In addition to these broader benefits which accrue to all participants, and ultimately to the intended beneficiaries (i.e. the communities in the vicinity of the operations of extractive companies), a number of ICMM members have undertaken specific initiatives in support of the VPs. These include:

- One mining company has developed a manual and training seminar at the corporate level to support its implementation of the VPs, and has integrated reporting on compliance with the Principles into the group's main assurance process. A business unit in South Africa has funded the development of a human rights training course for the national police force, with 1000 officers expected to receive training in 2008.
- The personnel of another ICMM member in Indonesia undergo regular training on the VPs, as part of an ongoing human rights training programme. The company is also taking steps to promote their broader implementation in-country and has organised a series of meetings with government officials and local business partners on the subject.
- Another ICMM member has developed and successfully piloted a human rights training guide, and distributed it to all operations. This guide is reinforced by training to ensure that security personnel and contractors, worldwide, understand the context and importance of human rights in their responsibilities. In four countries where the VPs are considered critical, over 95% of employees and contractors have undertaken human rights training.
- One company has developed a Human Rights Self-assessment Toolkit to assist sites in appraising their potential exposure to human rights issues. The toolkit is aligned with the company's corporate risk management approach, which ensures that human rights issues are readily identifiable and comparable, together with the company's social, environmental and financial risks. In addition, the company has developed a toolkit to assist operations in implementing the VPs. Twenty-seven of the company sites have security forces operating, of which 18 have undertaken human rights training.
- Another ICMM member company, which was one of the tri-partite group responsible for drafting the VPs, was able to put them to immediate use, by cross-referencing and drawing heavily on them in the production of its own group-wide Human Rights guidance. Compliance with this company guidance is mandatory for all business units, and is formally monitored each year in the same way as longer-established requirements in the legal and financial fields.
- Following its admission to the VPs, one ICMM member company undertook a global security review of its operations and is putting in place integrated management structures, training programs, and reporting processes in line with its undertakings as a participant to the roundtable process.

Conclusion

While challenges remain and are progressively being resolved, the VPs are one of the few examples of collaborative action between governments, companies and civil society that are attempting to respond to the 'institutional misalignments' alluded to in the quotation from John Ruggie at the beginning of this submission. ICMM would greatly welcome any support that the Sub-committee on Human Rights and the Law of the Senate Committee on the Judiciary can bring to bear in pursuit of ensuring the long-term success of the VPs.

ICMM Secretariat, September 24th 2008

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Extracting Natural Resources:
Corporate Responsibility and the Rule of Law
Testimony Prepared for the Senate Judiciary Subcommittee on Human Rights and the Law
September 24, 2008

The International Labor Rights Forum (ILRF) is an advocacy organization dedicated to achieving just and humane treatment for workers worldwide. Since our founding in 1986, we have worked with labor and human rights advocates around the world, including many focused on the extractive industries, to expose abuses and advocate for binding protections against serious human rights violations. Two specific cases on which we have worked – Exxon/Mobil operations in Aceh, Indonesia and the Colombia mining operations by an Alabama-based company, Drummond Mines – exemplify the need for stronger regulation to ensure transparency and human rights protections in the extractive sector globally.

INDONESIA

ExxonMobil has operated a natural gas extraction and processing facility in the Aceh province of Indonesia since the 1970s. This is one of the largest and most profitable natural gas projects in the world. Decades ago, Indonesia's dictator, General Suharto, assigned Indonesian military units to provide security for the ExxonMobil project in Aceh because of its unpopular status in the community. While ExxonMobil was well aware of the Indonesian military's public record for extreme brutality, as well as specific acts of terror and violence committed by the units assigned to their facility, the company continuously provided extensive logistical and material support to these troops.

Even after the end of the Suharto regime, it is alleged that Exxon/Mobil continued to use similarly repressive security forces. Abuses committed against Indonesian citizens included murder, torture, rape, kidnapping, unlawful detainment and many other widely-documented abuses. ExxonMobil also allegedly provided general support to the Indonesian military beyond those security forces hired in connection with its operations in Aceh. The company appears to have done this in the belief that a movement for independence in Aceh would be detrimental to the company's political relationship with the Indonesian government. In 2001, ExxonMobil briefly shut down the facility in Aceh claiming it could no longer guarantee the security of the facility.

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ExxonMobil played an extensive role in supporting human rights abuses in Indonesia, as a result of which the company is embroiled in a lawsuit filed in 2001 in US courts under the Alien Tort Claims Act (ATCA). Although the company has a voluntary human rights policy, and although it claims good standing through support of such voluntary initiatives as the Extractives Industry Transparency Initiative (EITI), the company has aggressively fought this and other efforts to hold it accountable legally for gross violations of human rights. The company's initial defense against the claims of extreme abuse documented in the ATCA litigation were not to deny the claims, but rather to use influence with the Bush Administration to have the case dismissed. In 2002, ExxonMobil succeeded in convincing the US Department of State's Legal Advisor to intervene in the case before a Federal District Court, in an attempt to have the case dismissed. The State Department letter opined that legal action against a US company on the grounds of extreme violations of human rights would interfere with US foreign policy aims.

The opinion was sufficiently outrageous that it generated heated editorial responses in the New York Times, Washington Post and other journals. It is precisely to counter such discretionary intervention that clearer standards of legal accountability for US corporations' human rights practices around the world are sorely needed.

Despite this intervention the case has proceeded in federal court. Exxon Mobil's recent efforts to have the Supreme Court dismiss the case have failed, and the trial court just weeks ago has denied the company's motion for summary judgment. A trial is expected in early 2009, but forcing villagers to litigate against Exxon and its legions of lawyers for over nine years to get to trial is not a sustainable plan for corporate accountability.

COLOMBIA

According to the International Trade Union Confederation, Colombia is the most dangerous country in the world for trade union organizing as labor advocates often face death threats and assassination by paramilitary groups for their advocacy efforts. Forty-two workers (42) have been killed in Colombia so far this year, already exceeding the 39 killed in all of 2007.

It is in this context that the Alabama-based Drummond Coal Company has operated a coal facility in La Loma, Colombia. It has been alleged that Drummond hired, contracted with or directed paramilitary forces to utilize extreme violence, including torture and murder, to silence trade union leaders of the SINTRAMIENERGETICA union in Colombia. Valmore Lacarno Rodriquez and Victor Hugo Orcasita Amaya, two of the top union leaders at the Drummond facility, were both murdered. Despite requesting security from the company when they received death threats, the company refused to help the union leaders. In 2001, Lacarno and Orcasita were taken off a company bus by paramilitary during contract negotiations and killed. The paramilitary group responsible for the murders was allegedly supported by Drummond management. Drummond is also the subject of an ATCA case currently on appeal in US courts.

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Sadly,the Drummond case is just one of many examples of multinational corporations' involvement in human rights abuses in Colombia. In 2007, Chiquita admitted to providing payments to AUC paramilitary groups to offer protection to their facilities in Colombia. Labor leaders in Colombia maintain that all major companies in the extractive sectors or plantations necessarily maintain close ties to AUC terrorist groups and provide major support to them. The ongoing Justice and Peace process there reveals almost daily new links between US companies and AUC terrorists.

In Colombia, it is already unlawful to support terrorist groups. This administration has failed to enforce this law in its "war on terror" because US companies, like Chiquita, are profiting from their relations with right wing terror groups. As we learned in the ExxonMobil case, the current Administration is all too eager to protect multinational business interests at the expense of human rights. Companies, in turn, have embraced the alternative of voluntary commitments rather than binding human rights norms. "Voluntary" programs have proven to be a farce. A company that operates in places where there is lawlessness is there ay least partly because there is no regulation. To assert that, despite this choice, a given company will regulate itself is simply not evidenced anywhere in the world.

These cases from Indonesia and Colombia exemplify a larger problem in extractive industries globally with which the ILRF remains concerned. In order to ensure that there is transparency in the operations of extractive companies and that companies respect human rights in their global operations, increased US regulation is desperately needed. ILRF has seen throughout its work with extractive companies operating in conflict zones and countries with repressive governments that in general corporations have not taken those steps appropriate and necessary to ensure the rights of workers and communities are protected in the absence of stronger legislation and enforcement.

We thank Senator Richard Durbin and the Senate Subcommittee on Human Rights and the Law for highlighting this important issue and we are happy to offer any assistance we can to protect human rights globally.

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Statement of Jeff Krilla
Deputy Assistant Secretary of State for Democracy, Human Rights and Labor

before the
Senate Judiciary Subcommittee on Human Rights and the Law

Wednesday, September 24, 2008

Mr. Chairman and Members of the Committee, I am pleased to have the opportunity to testify on human rights issues in the extractives industry. Your interest in this important subject is certainly appreciated.

The promotion of human rights and fundamental freedoms – as embodied in the Universal Declaration of Human Rights – is a cornerstone of U.S. foreign policy. We work very hard to promote and safeguard human rights for individuals the world over and believe that respect for human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.

Successfully combating human rights abuses requires a coordinated response from key stakeholders – which begins with governments, but also includes corporations and non-governmental organizations.

We take a multi-stakeholder approach, recognizing that the expanding reach and influence of multinational corporations has led to increased demand for voluntary corporate social responsibility (CSR) in general and more specifically as it relates to promoting respect for human rights. DRL actively engages corporations, both multinational and domestic, on these priorities – encouraging them in turn to adopt policies and practices that promote respect for key corporate social responsibility tenets.

Although abundant natural resources in developing countries can offer the promise of economic development and prosperity, they also provide the opportunity for corruption, exploitation, and conflict. These negative effects are certainly not unique to the oil, gas and mining sectors. But, given the focus of this hearing, I will focus my remarks today on human rights concerns relating to the extractives industry. We document these concerns in our Annual Country Reports on human rights practices.

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Since 2006, militant groups in Nigeria's Niger Delta increasingly employed violence, including kidnapping of oil company workers and relatives of prominent politicians, to demand greater control of the region's resources. Fighting connected to the theft of crude oil, known as oil bunkering, also continues. Over 200 persons (Nigerian nationals and expatriates) were kidnapped in approximately 60 incidents during 2007. Oil facility guards and soldiers were among those killed in these incidents. Government authorities responded to a number of these incidents by deploying the Joint Task Force, or JTF, soldiers to the region. The JTF, a unit composed of the various military branches that was established by the government in 2003 to restore stability in the Niger Delta region, reportedly used excessive force and engaged militants and criminals in gun battles, which occasionally resulted in civilian casualties and worsened security.

In Angola, abuses by private security forces have increased in the diamond-rich provinces of Lunda Norte and Lunda Sul in 2006. In the past national police and immigration officers had been responsible for most of the human rights abuses perpetrated against Congolese and West African migrant miners. Following large-scale deportations and violence associated with Operacao Brilhante, a government operation to stem illegal migration, these abuses by the national police and immigration officers declined after the operation ended in February 2005. The detention and expulsion of illegal miners continued, but private security contractors hired by diamond companies to protect their concessions from illegal exploitation were responsible for most of the violence. *Operation Kissonde: The Diamonds of Humiliation and Misery*, a report by local human rights activist Rafael Marques, documented 66 cases of abuse of civilians, most of whom were illegal miners, by private security companies in the Cuango municipality of Lunda Norte during 2006. Another human rights activist reported that private security companies hired to protect diamond concessions in the same area killed 10 persons between January and June 2006. In 2007, reports of killings by private security companies in Lunda Norte and Lunda Sul areas continued, but declined significantly and we are hopeful that the trend will continue, according to Partnership Canada Africa's Diamond Industry Annual Review.

In the Democratic Republic of Congo's mining sector, middlemen and dealers acquired raw ore from unlicensed miners in exchange for tools, food, and other products. Miners who failed to provide sufficient ore became debt slaves, forced to continue working to pay off arrears. The government has not attempted to regulate this practice.

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While there are laws in the Democratic Republic of the Congo to protect children from exploitation in the workplace, government agencies have not effectively enforced child labor laws. Child labor remained a problem throughout the country, and there continued to be reports of forced child labor, particularly in mining. Security forces and armed groups used children, including child soldiers, for forced labor in mines. For example, from November 13-17, 2007, a United Nations Human Rights Office field team in Misisi, South Kivu Province, observed several children working in illegal gold mines for soldiers of the Armed Forces of the Democratic Republic of Congo (FARDC) of the 115th Battalion. Children make up as much as 10 percent of the work force in the informal ("artesianal") mining sector. In mining regions of the provinces of Katanga, Kasai Occidental, Oriental, and North and South Kivu, children performed dangerous mine work, often underground.

From the taking of lives to the exploitation of children, these incidents not only pose serious concerns but, in many instances, violate the host country's own laws. In some cases, a host government allows these abuses to take place by not enforcing their own laws or not conducting investigations of abuses and not prosecuting appropriately. In the worst cases, a host government commits the abuses when its own security forces perpetrate the acts. Additionally, host government's failure to address root-causes of discontent and misery can contribute to a climate of lawlessness. For example, many of the kidnappings I referenced in the Niger Delta were perpetrated by militant groups trying to force the government to develop local economies and increase local control of oil revenues—a result of the federal and state governments' inability to turn the region's significant oil revenues into meaningful economic development for the people of the Niger Delta.

Extractive industries may also feed an ongoing conflict, such as in the eastern Democratic Republic of the Congo, where numerous illegal armed groups control mines, use local labor (sometimes forcibly) and then export the mined ore through neighboring countries, using the profits from such sales to buy additional arms and otherwise support their movements.

Human rights obligations rest with governments, and for human rights abuses in the extractives industry to be stopped, ultimately good governance is requisite – rule of law, transparency, and accountability. That is why we press governments to adhere to internationally-accepted human rights standards and norms.

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The international community has a role to play, as well. Other governments and the multinational companies with extractive operations in these host countries must work together to promote good governance and the respect of human rights.

One of the ways in which the Department of State has worked with U.S. oil, gas, and mining companies on these issues is through voluntary corporate social responsibility initiatives such as the Extractive Industries Transparency Initiative and the Voluntary Principles on Security and Human Rights. We've also worked closely with the diamond industry and civil society through the Kimberley Process to prevent rough diamonds from financing conflict. I believe most of you are familiar with these efforts; so, I will just touch on them briefly.

The Extractive Industries Transparency Initiative, or EITI, is a multi-stakeholder effort to increase transparency in transactions between governments and companies within extractive industries. The initiative supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining. Participants include supporting governments, implementing governments, extractive industry companies, civil society organizations, and international financial institutions. The underlying principle of EITI is that transparency over payments and revenues increases accountability and therefore the likelihood that the revenues generated by the development of natural resources are used in an efficient and equitable manner.

The USG has been an EITI-supporting country since the initiative's inception. The USG provides support and assistance to implementing countries and participates in EITI's internal governance, self-regulation, and policy development. The USG also engages in outreach to encourage EITI participation by other governments, industry, and civil society.

The Department of State has the interagency lead in the support and guidance of the EITI. We also benefit from strong interagency cooperation with the Treasury Department and Department of Commerce. USAID Missions take the lead in managing funds that support civil society and governments by strengthening and improving capacity, good governance, and revenue transparency. A Department of State representative currently sits on the EITI Board of Directors and, starting this year, on the EITI Multi-Donor Trust Fund (MDTF) Management Committee.

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State representatives actively participate in Board meetings, calls, and discussions and encourage other countries to join the initiative.

Additionally, we have provided foreign assistance aimed at meeting EITI's objectives. In response to a Congressional directive, USAID is administering almost $3.0 million in FY2008 to the EITI Multi-Donor Trust Fund. In FY2006-2007, USAID administered almost $2.0 million in Economic Support Funds (ESF) to support EITI implementation, primarily in Nigeria, Peru, and the Democratic Republic of Congo, and to strengthen the role and capacity of civil society organizations in the EITI process.

Support for the EITI is just one part of a much larger effort to combat corruption and promote good governance. Our USAID Missions around the world work to make the most effective use of development assistance funds to support efforts to increase transparency and accountability and promote good governance. Additionally, USAID's Global Development Alliance has been active in working with governments, industry and civil society in the development of equitable, transparent and environmentally sound extractive industries.

Similarly, the U.S. has supported the highly successful efforts of the Kimberley Process Certification Scheme to monitor and control the world's trade in rough diamonds. Last year, the 73 countries which participate in the Kimberley Process monitored $38 billion in diamond trade in an effort to prevent the horrific human rights abuses witnessed in the 1990s in countries such as Sierra Leone, Angola and the Democratic Republic of Congo.

The Kimberley Process has an active monitoring process whereby participant countries agree to open their doors and books to peer review visits. More than 60 review visits have been conducted. This kind of transparency is remarkable in an industry in which few receipts were ever kept just a few years ago. By monitoring rough diamond trade and production statistics, we hope the Kimberley Process will detect anomalies in the trade and help us prevent future conflict.

The Voluntary Principles on Security and Human Rights (VPs) were established in 2000 to provide practical guidance that will strengthen human rights safeguards in company security arrangements in the extractive sector. The short-term goal of the VPs is to encourage extractive companies to better understand the environment where they operate, improve relations with local communities

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through dialogue, and uphold the rule of law. The long-term goal is to create a better environment for sustainable economic investment and human rights.

The VPs were negotiated and adopted in response to the concerns of governments, extractive companies and civil society where difficult operating environments create challenges to both security and human rights.

Today, the VPs participants include four governments (the U.S., the United Kingdom, the Netherlands, and Norway); eighteen oil, gas, and mining companies; and seven international NGOs. The current four government participants are the home governments of the major oil, gas and mining company VPs participants.

The U.S. government led the establishment of the VPs, along with our colleagues in the United Kingdom, and we have continued to play a leadership role in the initiative. We encourage U.S. companies and other governments to support and participate in the initiative. We have also played an integral part in developing a framework to encourage implementation of the principles and accountability. Through USAID, the U.S. government supports the Extractive Industries Network (EIN) in the Democratic Republic of Congo. EIN includes companies that are committed to implementing the VPs and who engage regularly with other stakeholders on this issue. Together, they are working to create protocols relating to the comportment of public security forces in mines and to find constructive ways to support government efforts to improve these services. Additionally, EIN projects have provided VPs training materials for private and public security actors.

In these initiatives, participation of the international community is crucial but not sufficient--participation of host governments is equally critical. For example, within the context of the VPs, many of the guiding principles to which companies commit with regards to their interactions with public security can only be truly effective with the support of the host government. Under the VPs, for example, companies volunteer to express their desire to host governments that security be provided in a manner consistent with their human rights policies and that security personnel should have adequate and effective training. Companies also volunteer to request that host government public security personnel credibly implicated in human rights abuses not provide security services for the company.

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For these actions on the part of companies to be truly effective, host countries must embrace the VPs. Let me be clear: Participation in the VPs does not confer a "Good Housekeeping" seal of approval on a host country. The VPs were not created to be an exclusive or elite club, nor were they intended as a certification standard for human rights in the extractives industry. Membership in the VPs does not signify an endorsement of any participant's human rights practices – companies, governments, or NGOs.

The VPs are a process of mutual learning and improvement, yet are built on firm commitments embodied both in the Principles and in the unanimously approved Participation Criteria. These Participation Criteria include a comprehensive complaints and suspension procedure that applies to all VPs participants – again companies, governments, and NGOs.

We are working closely with our fellow VPs members and hope to be able to welcome host governments to the table in the near term. I just returned from a trip to Nigeria and the Democratic Republic of Congo where I pressed the importance of adhering to internationally accepted human rights standards and norms. I raised the VPs in both countries, and highlighted their value in serving as an additional tool available to those governments in addressing the grave issues I highlighted earlier concerning human rights in the extractives industry. The feedback on my VPs message from governments, companies, and civil society in both countries was positive, and we will work with fellow VPs members on efforts to further engage those two governments.

We can spotlight problems and draw international attention to human rights concerns, but without the commitment of host governments, no effort to address human rights concerns in the extractive sector or any other, can be successful. As voluntary initiatives become more globally accepted, expectations for companies to adhere to the good corporate practices they promote grow. These voluntary initiatives are particularly helpful in providing guidance to multinationals that do not have a history of deliberate attention to social responsibility. For example, in several of my bilateral dialogues with other governments, they have expressed a need for their national companies that work abroad to have the guidance provided in these initiatives. That said, voluntary initiatives, like the VPs, are important complements to, but never can be substitutes for, the obligations of governments to meet their commitments under international law and to establish and enforce the rule of law domestically.

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There are some who believe that in the face of poor human rights enforcement records of some governments around the world, the obligation to enforce human rights should be somehow transferred onto corporations. We strongly disagree. Yes, companies must bear responsibility for their policies and practices. But, it is governments that ultimately must be held accountable. Transferring the enforcement obligation onto companies would only lead governments to expect that they can opt out of their responsibilities because companies will do the job for them. The best option, and the key to ending exploitative practices by private sector companies or any other actor, is for governments to engage in good governance and thereby protect human rights enforcement and rule of law.

We are committed to advancing our work in CSR. We appreciate the opportunity this hearing presents for us to share our views on this important issue. Thank you again for the opportunity to speak today. We look forward to continuing this dialogue and cooperation with Congress.

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Jeffrey Krilla
September 24, 2008
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Chairman Durbin: Are there specific NGOs that have been extremely helpful or extraordinarily helpful in implementing these Voluntary Principles?

Mr. Krilla. The names of the NGOs that are participants in the Voluntary Principles on Security and Human Rights are: Amnesty International, The Fund for Peace, Human Rights Watch, Human Rights First, International Alert, IK Pax Christi, Oxfam and Pact.

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Statement of Senator Patrick Leahy
Chairman, Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law Hearing on
"Extracting Natural Resources: Corporate Responsibility and the Rule of Law"
September 24, 2008

I am pleased that the Subcommittee on Human Rights and the Law is addressing the critical issue of human rights abuses related to extractive industries, and the responsibility of corporations involved in these activities. I thank Chairman Durbin for his leadership on this issue and the witnesses for their testimony. I know some have travelled long distances to be here.

The extraction of natural resources – whether oil and gas, minerals, timber, or other valuable resources – has often had devastating consequences for people and the environment, particularly in the world's poorest countries. Public, private and state-owned companies from the United States, United Kingdom, Russia, France, China and elsewhere operate in resource-rich countries, many of which are ruled by corrupt and repressive governments. Instead of using the revenues earned from lucrative concessions to these companies to improve the lives of their people, these foreign leaders bolster their armies to thwart any internal challenge to their grip on power and steal the money for themselves.

Some of these corporations have also made a practice of hiring local soldiers and police to serve as their own private security forces to protect the company's property and assets. Many of these foreign security forces have long histories of corruption and human rights violations. While these are business arrangements for the companies, the impact on local people can be devastating.

I am reminded of Ken Saro-Wiwa, a courageous Ogoni leader in the delta region of Nigeria who spoke out against foreign oil companies that poisoned the water and soil of the already impoverished Ogoni people, and that paid Nigerian soldiers to brutally suppress peaceful demonstrations.

Ken Saro-Wiwa was eventually arrested on trumped up charges and, despite an international campaign to save his life including by myself and other Members of Congress, hanged by Nigeria's former military dictator Sani Abacha. It was a travesty that many of us have not forgotten, and it was directly related to the greed and abuses associated with oil extraction.

There are many other examples, from the forests of Ecuador, where indigenous communities have suffered similar health and environmental harm from the pollution caused by U.S. oil companies, to Angola, where the government skims an estimated $1 billion from oil revenues annually while the people of that country remain among the world's poorest. In Indonesia and the Democratic Republic of the Congo, mining

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companies, backed up by local soldiers and police, have destroyed and polluted the environment with impunity.

In February 2000, the United States and the United Kingdom met with extractive companies and human rights organizations to develop the Voluntary Principles on Security and Human Rights. The Voluntary Principles raised the bar for corporate accountability by setting a standard for companies to maintain the security of their operations in a way that does not threaten the human rights of local people. While this was a first step, it is clear that far more needs to be done. Human rights violations are still prevalent and tolerated in many countries where local people have challenged the greed and destructive practices of extractive industries.

We have a responsibility to seek accountability for human rights violations by foreign security forces, but we should also lead by example by insisting on the highest standards of conduct by U.S. companies that engage in extractive industries abroad. Each year, I include funding in the State and Foreign Operations bill for a U.S. contribution to the Extractive Industries Transparency Initiative, which seeks to bring more transparency to extractive businesses and to make it more difficult for corrupt governments to steal with impunity. Natural resources are owned by the people, not by whoever happens to occupy the presidential palace, and it is the people who should benefit when the country's resources are extracted and exploited.

This Subcommittee has already held nine hearings on human rights issues. Two important pieces of legislation considered by this Subcommittee have been signed into law. The Genocide Accountability Act closed a loophole that until now allowed those who commit or incite genocide to seek refuge in our country without fear of prosecution for their actions, and the Child Soldiers Accountability Act that would make it a crime to recruit or use child soldiers. I commend Chairman Durbin for his work and look forward to continuing to work with him and Ranking Member Coburn on these issues.

None of us want American companies to lose investments, but making a profit and respecting human rights and protecting the environment are not mutually exclusive. We and other governments have paid too little attention to the irresponsible, and in some cases criminal, conduct of extractive corporations. This hearing is one way for us to begin to change that.

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Written Submission of

Tarek Farouk Maassarani

September 26, 2008

Written Statement by Tarek Farouk Maassarani, International Human Rights Fellow, Cohen Milstein Hausfeld & Toll, for the September 24, 2008, Senate Judiciary Subcommittee on Human Rights and the Law hearing entitled, "Extracting Natural Resources: Corporate Responsibility and the Rule of Law."

Introduction

I applaud the Subcommittee for its work in general and the subject matter it has chosen to take on with this hearing in particular: corporate responsibility and the rule of law. Traditionally, it is up to states – the entities primarily obligated to uphold human rights norms – to craft a corpus of workplace health and safety, constitutional, civil, environmental, labor, public nuisance, consumer protection, anti-discrimination, and disclosure laws to honor universal human rights guarantees. Unfortunately many states, especially in the developing world, remain unwilling or unable to uphold these standards. Foreign commercial partners looking to exploit these countries' resources, at best, negotiate a position that does not upset the status quo. At worst, these companies may capitalize on the repression and corruption to gain favorable access to resources and labor.

The witness testimony and member statements presented at the hearing generously added to the public record of the concrete linkages between the extractive industry and persistent, large-scale human rights abuses. The hearing also focused on domestic and international efforts that have been, or need to be, advanced to address the lack of accountability for corporate human rights violations – lest such problems threaten the stability of host countries, the viability of oil markets, and the legitimacy of corporate-led globalization. Although states have primary responsibility for the human rights of their citizens, the influential role of corporations has inspired global innovations to internalize human rights such as the Voluntary Principles on Human Rights and Security in the Extractive Industries and the Extractive Industries Transparency Initiative. Notably, effective information disclosure is a common leitmotif amongst these approaches, as well as other corporate accountability measures articulated by the government-, private-, and non-profit sector witnesses at the hearing.

As an attorney actively litigating against multinational companies for complicity in widespread human rights abuses, I can appreciate both the necessity and shortcomings of legal proscriptions in directly enforcing human rights norms. However, I make this submission for the record in my personal capacity, as a human rights advocate who has thought and published about a non-proscriptive disclosure mechanism known as the Human Rights Impact Assessment. Broadly speaking, impact assessments, including environmental and social impact assessments, are

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common throughout the world and have proven effective at home and abroad in regulating the local, social, and environmental effects of development activity by promoting information disclosure, public participation, and informed decision-making. A Human Rights Impact Assessment brings this tried and true tool into the international realm of the extractive industry where traditional social and environmental criteria are not enough.

What exactly is a Human Rights Impact Assessment?

A Human Rights Impact Assessment incorporates the human rights rubric into the decision-making processes of under-regulated operations of multinational companies in the developing world. It focuses on human rights impacts occurring within a corporation's sphere of influence, which may either contribute to or detract from the fulfillment and progressive realization of internationally-recognized human rights standards. Unlike narrow domestic regulation, HRIA considers human rights "indivisible and interdependent," subsuming environmental, economic, transparency, and fiscal concerns into one dynamic whole. Alongside the increasing legal and normative authority of human rights standards, a growing body of scholarship and jurisprudence is bringing to bear a more sophisticated and salutary understanding of their substance.

Adding form to substance, a Human Rights Impact Assessment should be guided by seven important and intertwined operating principles. These are grounded in the successes of environmental and social impact assessments, which have been a keystone of environmental and social protection in wealthy, developed countries. Their effectiveness arises not out of centralized command and control regulation, but from their functional role in importing oft-neglected information about the effects of a given project or policy into the deliberative decision-making process, while at the same time expanding the circle of actors in the decision making process to include those that are adversely affected.

1. Involve the Public: Identifying all potentially affected and under-represented stakeholders, especially, workers and members of the local community. This becomes increasingly demanding and essential the more a country politically marginalizes its minorities or lacks accountable, democratic governance. In the latter case, a large-revenue project calls for public consultation throughout the country.

2. Assess Equity of Impacts: Recognizing and addressing the uneven distribution of positive and negative impacts is consonant with the spirit of non-discrimination underlying all human rights. It also helps avert the hostility engendered or reinforced by the perception of unfairness between ethnic groups or economic classes.

3. Identify Relevant Definitions, Methods, & Assumptions in Advance (Set Parameters): Reflecting ahead of time on what constitutes significance, reversibility, and potential for mitigation, as well as the methods and underlying assumptions, will strengthen and legitimize the impact assessment and advance transparency of results.

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4. Internalize the Impact Assessment in Decision Making: It goes without saying that the results of the human rights feasibility study (however unappealing) should not be treated as a mere formality, but rather as an integral source of feedback in the decision-making process. Moreover, the study and its lessons should be institutionalized into corporate practice through internal codes of conduct and explicit policies addressing discrimination, labor, security, and indigenous peoples. This includes mechanisms for monitoring, non-retaliation, appeals, staff training, and enforcement with contractors.

5. Use Competent Practitioners: Feasibility auditors should exhibit independence, familiarity, and willingness in their dealings with human rights impact assessments and corporate decision makers. Financial and institutional independence is imperative for avoiding both true and the perception of "foul play." Familiarity and willingness call for the employment of and consultation with qualified and cooperative social scientists and human rights practitioners.

6. Employ Data with Integrity: For reliable and current information, use rigorous fieldwork along with credible sources of data from published social science literature and human rights reports. It is wise to plan for gaps in the data and take adequate precautions.

7. Transparency: Honestly disclosing both the process and results of a project's feasibility study, to the extent consistent with the protection of vital trade secrets, legitimizes both corporate decision-making as well as public participation.

With these principles in mind, a Human Rights Impact Assessment might entail the following process:

Step	Description	Applicable Principle(s)
Preliminary Review: Scoping & Screening	*Scoping* – conduct a preliminary assessment of what human rights impacts, if any, are likely to arise. *Screening* – assign coverage of the feasibility study accordingly.	Public Involvement; Parameter Setting; Internalization; Competent Practitioners; Data Integrity; Transparency
Baseline Assessment	Determine the current human rights situation from which potential impacts can be predicted and actual impacts gauged.	Public Involvement; Parameter Setting; Competent Practitioners; Data Integrity; Transparency
Impact Projection	Predict potential impacts (and responses to impacts), both positive and negative, and identify whether and how they are significant, reversible, and/or mitigatable.	Public Involvement; Impact Equity Analysis; Parameter Setting; Competent Practitioners; Data Integrity;

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		Transparency
Decision Making	First, use the above findings to formulate a set of alternatives and mitigation measures. Now, step back to consider all possible options, weighing the projected positive and negative human rights impacts as well as public input into the final business decision.	Public Involvement; Impact Equity Analysis; Parameter Setting; Internalization; Transparency
Implementation	Implement the best option, including the "no project option", along with all associated mitigation and policy measures.	
Post-Implementation: Ongoing Monitoring, Mitigation, and Evaluation	Once the project has been initiated, follow through with ongoing monitoring of unanticipated human rights impacts and appropriate mitigation measures to deal with them. In order to improve upon them, evaluate the performance and parameters of the feasibility study in assessing impacts and enriching decision-making.	Public Involvement; Impact Equity Analysis; Parameter Setting; Internalization; Competent Practitioners; Data Integrity; Transparency

Precedents for the Human Rights Impact Assessment

In an address to the World Economic Forum on January 31, 1999, U.N. Secretary-General Kofi Annan extended an invitation to business leaders to join an international initiative – the Global Compact – that would bring companies together with U.N. agencies, governments, labor, and civil society in support of ten principles to address the challenges of globalization. More than 2,000 major companies operating in over 70 countries have signed up. Most important for our purposes, the first two principles read: "Businesses should (1) support and respect the protection of internationally proclaimed human rights and (2) make sure they are not complicit in human rights abuses."

The first principle highlights key issues in the corporate sphere of influence such as compliance with local and international laws, addressing consumer concerns, selecting appropriate business partners along the supply chain, increasing worker productivity and retention, as well as building good community relationships, all aiming to bring human rights into the company policy and culture. The second principle characterizes different forms of business complicity: direct, beneficial and silent, as they relate to various contemporary issues such as globalization, the growth of civil society, transparency, and accountability. To measure progress on these abstract principles, the U.N.'s Global Reporting Initiative issued indicators that specifically look for "policies and procedures to evaluate and address human rights performance."

The United Nations further incorporated human rights issues into business practices when the Sub-Commission on the Promotion and Protection of Human Rights adopted the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

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with Regard to Human Rights in August 2003. Also known as the U.N. Human Rights Norms for Business, these guidelines are "soft laws" that offer a comprehensive vision of a company's responsibilities. The Norms provide more clarity and credibility than competing and vague voluntary codes. The Norms detail specific obligations vis-à-vis rights to equal opportunity, non-discriminatory treatment, security of persons, and labor. In their implementing provisions, the Norms note that "transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights" among various other obligations to "disseminate and implement internal rules of operation" and "periodically report on and take other measures" with a view towards compliance with the Norms. This language suggests a central role for the Human Rights Impact Assessment in meeting evolving human rights obligations.

In 2004, the Norms proceeded to the Office of the High Commissioner for Human Rights, who subsequently issued a report describing existing initiatives related to business and human rights and identifying any outstanding issues. One of the recommendations put forward by the High Commissioner states: "There is a significant need to develop 'tools' to assist businesses in implementing their responsibilities, in particular through the development of training materials and of methodologies for undertaking human rights impact assessments of current and future business activities." A month later, the U.N. Commission on Human Rights requested the Secretary-General to appoint a Special Representative on the Issue of Human Rights and Transnational Corporations with a mandate to follow through on this recommendation. In his March 28, 2007, report, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" and companion report (A/HRC/4/74), special representative John Ruggie identified Human Rights Impact Assessments as an important instrument of accountability and laid out some of their basic principles and characteristics.

In October 2002, acknowledging the crucial role of financial institutions in supporting the extractive sector in developing countries, the International Finance Corporation convened ten major banks in London to draft the Equator Principles, an industry-wide framework for addressing environmental and social risks in project financing. The Equator Principles require developers to prepare assessments addressing involuntary resettlement, the impact on indigenous peoples and communities, human health, pollution, and socioeconomic factors, and then fully incorporate their results into project decisions by crafting management plans. The Equator Principles also contemplate mitigation, monitoring, baseline studies, participation of affected parties (including indigenous peoples and local NGOs, in the design, review and implementation of the project), and consideration of environmentally and socially preferable alternatives

In June 2007, the International Business Leaders Forum, the International Finance Corporation, and the United Nations Global Compact jointly produced a draft of their Guide to Human Rights Impact Assessment and Management to be road tested by businesses and finalized by mid-2009. Other noteworthy initiatives: the Canadian organization, Rights and Democracy, is piloting a Human Rights Impact Assessment methodology in five different countries; the Danish Institute for Human Rights has produced a valuable Human Rights Impact Assessment diagnostic tool; the Dutch organization, Aim for Human Rights, has established an online Human Rights Impact Assessment Resource Centre; BHP Billiton is testing their Human Rights Self Assessment toolkit; Anglo American has launched a Socio-Economic Assessment Toolbox; and the

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International Council on Mining & Metals has developed assessment tools for its Community Development Toolkit.

The business case for Human Rights Impact Assessment

"Business changes the environment it operates in," notes Donal O'Neill, a 36-year veteran of the Royal Dutch/Shell Group of Companies in some dozen countries. While this applies to every commercial venture, it is most striking in the extractive industries – mining, oil and gas. These projects, O'Neill continues, "represent enormous investments – with budgets of billions of dollars – and generate vast revenues over many decades for host governments and large profits, as well as risks, for the investors. Such undertakings impact massively on the host societies and economies – and some of the impacts carry the seeds of potential conflict – some immediate, some 'slow-burn' that may smolder for years before bursting into flames." What is more, extractive industries inherently take on long-term investments with high start-up costs and – left to the whim of geology – enjoy little choice over where to operate, making it very costly, if not impossible, to pull out of a troubled area.

Human rights impacts that burst into flames will exact heavy costs through long-term losses, decreased efficiency, and the dreaded law of unintended consequences. Predicting the latent risks related to human rights impacts should be a matter of good business judgment and essential to sustaining the bottom line. Unfortunately, the "human factor" involved in these risks is not easily incorporated into project planning and development. It is messy, irrational, and non-linear; yet it cannot be ignored. It creates unforeseen expenses and contingencies that threaten the project's viability. In the case of the extractive sector, typical risks include kidnapping, sabotage, civil war, and of course litigation. Before long, such conflict can take on a life of its own. Even when these problems are confronted successfully, it is not without the opportunity costs of diverting company resources and the executives' precious time.

Human rights are a dynamic concept and when folded into project feasibility studies, a Human Rights Impact Assessment offers the boardroom a relatively inexpensive, yet powerful, risk management tool that converts unintended consequences and long-term losses into sustained productivity. Moreover, a human rights approach not only cuts costs, but also raises revenue. Maximizing the positive impacts of operations on a host community allows the corporation to reap the benefits of a "good human rights record." This includes increased labor productivity, local consumer demand, word-of-mouth advertising, community support and participation, as well as an improved rule of law, corporate mandate, and stock of social capital. Beyond the host community, human rights remain a good public relations asset in an era with new expectations of "good corporate citizenship." A company's human rights footprint shapes the depth and character of its corporate image and this ultimately affects the bottom line.

Conclusion and recommendations

By promoting information disclosure, public participation, and informed decision-making, Human Rights Impact Assessments are a promising and cost-effective tool for business, especially in the extractive industry, to assess and control the impact of their development

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activity in places where host governments cannot be expected to safeguard their citizens' rights and wellbeing, much less adequately regulate the private sector.

Upon further examination of existing initiatives and the research literature, I recommend this Subcommittee develop legislation – parallel to the National Environmental Policy Act – that requires Human Rights Impact Assessments for relevant U.S. private- and public-sector overseas projects. The scope of this legislation may encompass extractive and other activities with significant human rights impacts undertaken, financed, or otherwise supported by corporations operating or registered in the United States, private lenders, the Overseas Private Investment Corporation, the Export-Import Bank, the U.S. military, USAID, and so on.

The Subcommittee can also use its authority to encourage the adoption of Human Rights Impact Assessment at the corporate level, in voluntary internal and cross-sector corporate codes such as urged by the Global Reporting Initiative indicators of the Global Compact human rights principles; at the supranational level, as guidelines for the World Bank, the International Monetary Fund, and other major institutions, such as advanced by the Equator Principles; and at the international level, as an agreement among states holding corporations directly liable for their Human Rights Impact Assessment obligations in the absence of domestic accountability.

Finally, in furtherance of any Human Rights Impact Assessment legislation, the Subcommittee can support the creation of an independent and competent board of human rights auditors and/or an auditor certification scheme to provide corporations with reliable and timely impact assessments. Here, it is advisable to establish a funding or payment mechanism that ensures the financial integrity of the process.

For a more detailed treatment of this subject, please refer to the article "Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment," published in the Cornell International Law Journal (http://organizations.lawschool.cornell.edu/ilj/issues/40.1/maassarani.pdf). For related tools, reports, publications, organizations, and other resources, I direct you to the Human Rights Impact Resource Center (http://www.humanrightsimpact.org). I thank you for your time and consideration.

United States Senate Subcommittee on Human Rights and the Law
Hearing on Extractive Industries, Corporate Responsibility and the Rule of Law
September 24, 2008

Written Comments Submitted by:
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Oxfam America is an international development and humanitarian relief agency committed to working for lasting solutions to poverty, hunger and social injustice. We are part of a confederation of 13 Oxfam organizations working together in over 120 countries around the globe with an annual budget over half a billion dollars.

For more than ten years, Oxfam has carried out a global program designed to reform the extractive industries --- oil, natural gas and mining --- to ensure they better respect the human rights of the communities they impact. Oxfam believes that the extractive industries can, if managed correctly, contribute to development and poverty reduction in developing countries. For this to happen, it is critical that oil and mining companies and their security contractors fully respect the basic human rights of individuals in communities in which they operate.

Oil and minerals such as gold and copper are the most important economic resources for many developing countries. More than half of the world's poorest countries are classified as "resource dependent", meaning that natural resource exports comprise more than five percent of their Gross Domestic Product. Many troubled resource-rich countries are also key suppliers of oil and minerals to the United States, including Colombia, Nigeria and Indonesia.

Unfortunately, in most countries, natural resource wealth has not contributed to substantial poverty reduction or economic development. Resource extraction areas have become the site of violent conflict and human rights abuses as armed groups have sought to gain control of oil and mining installations. This has occurred most notably in Nigeria, an important source of oil to the US, where armed groups have repeatedly attacked oil installations and taken oil workers hostage.

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To protect their operations, oil and mining companies have created security units and contracted with private security firms. They have also provided direct support to local and national police and military units. Clashes between security forces and armed groups have occurred in a number of high-profile cases. Less well-known, however, are the frequent smaller-scale conflicts that have arisen between company security forces and unarmed local community members protesting what they perceive as an unfair distribution of benefits, environmental damage or displacement from traditional agricultural land without their prior consent. These conflicts have led to human rights abuses against local community members. In countries like Ghana and Peru, both leading produces of gold and other minerals, such conflicts happen with disturbing frequency. A recent study by the Peruvian government found more than forty-five active community conflicts at mining operations across the country. A just-released study by a Ghanaian government agency found a widespread pattern of human rights abuses by security forces protecting mining operations in the West African country.

In many situations, security forces working directly for oil and mining companies, or police and military forces acting at their behest, do not have adequate training in human rights principles. In some situations, security forces, many of whom are former or current military members, have been directly implicated in human rights abuses, as has been the case at US company Freeport McMoran's massive mine in the Indonesian province of West Papua. Human rights investigators have documented numerous human rights violations – including rape, torture and extrajudicial killings – committed by Indonesian military forces against indigenous communities living near the mine. In 2005, Freeport was found to have paid $20 million to the Indonesia military to protect its operation. The company made these payments during a time when the US had cut off aid to the Indonesian military over human rights concerns.

Oxfam America believes that urgent action is needed to address the critical human rights issues posed by security operations at oil, gas and mining operations. We applaud the Subcommittee for taking up this timely and critical topic. We believe that the most important steps that can be taken now are to strengthen existing monitoring mechanisms, such as the Voluntary Principles on Security and Human Rights, increasing assistance to developing countries to strengthen human rights enforcement and the rule of law, strengthening civil society organizations' ability to monitor and publicize human rights and security issues, establishing human rights requirements in US trade and development assistance policy, and increasing transparency and disclosure.

The Voluntary Principles on Security and Human Rights

Oxfam America is an active participant in the Voluntary Principles on Security and Human Rights, a multistakeholder initiative created jointly by the US and United Kingdom governments in 2000 to address security and human rights issues in the extractive sector. We believe the VPs themselves are important statements of commitment to respecting human rights in the sector. We further believe that the VPs process can be an effective tool for exchanging information and building capacity around human rights and security issues.

Like many voluntary initiatives, however, the VPs suffer from an inability to enforce the commitments made by member companies. Thus, there is currently no penalty for companies

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that fall short in their implementation of the principles. This has created a situation in which companies may tout their adhesion to the VPs (and be publicly recognized for it) without making any significant efforts towards compliance.

Oxfam has worked with other participants to try to address this issue and last year a complaint mechanism was established allowing participants to raise compliance issues with the VPs Steering Committee. While representing a step forward, the mechanism – a compromise between NGO participants seeking effective oversight and a number of companies rejecting it – will be strained to consider more than a handful of complaints each year and has questionable capacity to resolve any of them. It is woefully insufficient to address the myriad failings of the dozens of extractive industries company members and their global operations.

An oversight mechanism commensurate with the size of the security problems in the EI industry would require (i) a strong, independent-minded secretariat with oversight responsibilities (ii) clear reporting guidelines for companies (iii) periodic verification of reports and (iv) effective sanctions for non-compliance, including expulsion from the VPs.

Strengthening human rights enforcement and the rule of law

Many extractive operations take place in remote areas of developing countries where state presence can be weak or virtually nonexistent. There may be very little oversight of poorly trained police or military forces operating in these regions. Victims of human rights abuses in such areas may also have little or no recourse to seek a remedy for harm they have suffered. Thus, there is a strong need in such areas to increase the training and professionalism of security forces, with particular attention to respecting human rights, and to strengthen legal systems so that victims have timely access to courts to seek compensation for human rights abuses.

Oxfam America believes that US aid programs for resource-dependent countries should include significant support for human rights training and strengthening legal systems in resource extraction areas. Such efforts can have the benefit of reducing human rights violations committed by security forces operating near oil and mining installations and provide effective remedies for individuals who suffer such abuses.

Additionally, existing US aid programs involving the extractive industries, including the United States Agency for International Development's Global Development Alliance, should establish comprehensive and transparent human rights criteria for the companies that participate in these programs. This would include demonstrated compliance with the Voluntary Principles on Security and Human Rights.

Strengthening civil society

In the absence of state capacity in many developing countries, nongovernmental organizations play a critical "watchdog" role over natural resource extraction operations. In a number of recent cases, however, members of such organizations have been the subject of threats, intimidation and violence for their role in monitoring and denouncing corruption and human rights abuses committed at our near extraction operations. This has created a climate of intimidation that has

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prevented some of these organizations from acting as effectively as they otherwise might. Such organizations have a strong need for basic security protections, increased access to electronic media for monitoring and disseminating information about human rights abuses, and resources to provide human rights education to communities located near resource extraction sites. Such trainings can help empower communities to know what their rights are vis-à-vis security operations and to avail themselves of legal remedies where they exist.

Oxfam America supports increased US assistance to nongovernmental organizations operating in resource extraction areas. Such assistance should be provided independently of US commercial or national security interests in associated resource extraction operations and developed in consultation with local nongovernmental organizations.

Establishing human rights requirements in US trade policy

US trade and investment policy can be an important venue for addressing human rights and security concerns relating to the extractive industries. It is in the interests of the United States to ensure that extractive operations that it directly or indirectly supports are in full compliance with internationally recognized human rights standards. Oxfam America believes that Congress should establish comprehensive human rights compliance requirements for projects financed by the Export-Import Bank and the Overseas Private Investment Corporation, both of which support extractive operations in developing countries. Such requirements would include obtaining the free, prior and informed consent of communities potentially affected by extractive operations before they commence and maintaining that consent throughout the life of a project.

US trade policy is another important venue for strengthening human rights protections as they relate to extractive operations. US bilateral trade agreements should incorporate provisions that ensure that implementation of such agreements do not undermine human rights protections. Protecting human rights should be considered a legitimate function of the state and not one that is anti-competitive or inimical to the principles of free trade.

Increasing transparency and disclosure

Extractive operations in remote areas often disclose very little information about their impacts on the environment, the payments they make to national and local governments and the security agreements they may have with local police and military officials. Disclosure of this information is an important means for increasing oversight and accountability of these operations. Disclosure can also be useful for increasing trust and deflecting potential conflict between companies and communities. Through disclosure, companies can demonstrate that they "have nothing to hide" and are dealing fairly and honestly with local communities.

To this end, Oxfam America strongly supports the Extractive Industries Transparency Disclosure Act (S. 3389) introduced in the Senate earlier this year. The bill will require disclosure of revenues paid by extractive companies registered with the Security and Exchange Commission. Congress should consider adopting similar disclosure requirements relating to payments by extractive companies to police and military officials of foreign governments.

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Conclusion

Oxfam recommends that the Senate:

- Support strengthening oversight mechanisms for the Voluntary Principles on Security and Human Rights through a stronger secretariat, verifiable reporting and effective sanctions.
- Increase support for human rights training and strengthening legal systems in resource-dependent countries.
- Increase assistance to nongovernmental organizations operating in resource extraction areas.
- Strengthen human rights requirements for ExIm and OPIC support for oil, gas and mining projects, including respect for the principle of free, prior and informed consent.
- Strengthen extractive industry disclosure requirements. As an initial step to address this issue, Congress should pass the Extractive Industries Transparency Disclosure Act of 2008 (S.3389).

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WRITTEN TESTIMONY OF

KA HSAW WA*
CO-FOUNDER AND EXECUTIVE DIRECTOR
EARTHRIGHTS INTERNATIONAL (ERI)

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

HEARING on Extracting Natural Resources: Corporate Responsibility and the Rule of Law

September 24, 2008

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EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of earth rights. We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, ERI seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work.

* Ka Hsaw Wa is a pseudonym used to protect his ability to investigate human rights abuses and to protect his family members still living in Burma.

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Mr. Chairman, Ranking Member Coburn, and members of this subcommittee, thank you for inviting me to testify before this body. I commend you for holding a hearing on the human rights responsibilities of extractive industry companies operating in repressive countries.

INTRODUCTION

Nowhere in the world do the issues of corporate complicity in human rights abuses and resource revenues leading to corruption, poor governance and human rights abuses, come together in a toxic mix more than in military-ruled Burma. In Burma, extractive projects are having a systemic, profoundly negative human rights impact on local communities, and foreign oil and gas companies are quite literally funding and propping up the notorious State Peace and Development Council (SPDC), who in turn commit widespread and systemic abuses against the people of Burma. We thank the Senate Judiciary Subcommittee on Human Rights and the Law for convening this hearing today on the important topic of *Extracting Natural Resources: Corporate Responsibility and the Rule of Law* and support the United States Congress' efforts to promote and protect mechanisms of accountability for corporate complicity in human rights abuses.

Holding corporations accountable for human rights abuses plays a critical role in changing corporate behavior, preventing abuses, and ensuring redress for victims, and the Congress should continue to support measures like the Alien Tort Claims Act (ATCA) that address just such issues. At the same time, Congress should also promote transparency and good governance to ensure that much needed resources do not end up fueling conflict and human rights abuses instead of alleviating poverty and promoting sustainable development.

BACKGROUND ON EXTRACTIVE INDUSTRIES IN BURMA

In military-ruled Burma, also known as Myanmar, large-scale resource extraction projects have directly and indirectly led to systemic and widespread violations of basic human rights by security forces, through the complicity of multinational corporate actors. Publicly held, private, and state-owned companies from China, India, the United States, France, Korea and elsewhere continue to benefit from and are responsible for abuses committed by the Burmese military connected to their investments. In particular, China, Thailand, and India—and by association, the national oil corporations under those governments— continue to rely on Burmese resources as components of their national energy strategies, and pay inadequate attention to the protection of human rights. These abuses are ongoing and there is an unreasonably high risk they will increase as more projects are developed.

BURMA: AUTHORITARIAN RULE AND RESOURCE EXTRACTION

Burma is a country of remarkable ethnic and geographic diversity with an abundance of natural resources, including oil, gas, timber, minerals such as gold, copper, and nickel, gems, and jade. Burma is the largest country in mainland Southeast Asia, with a relatively large western coastline on the Bay of Bengal (1,190 miles), and bordering Bangladesh, India, China, Thailand, and Laos. The country is home to approximately fifty-seven million people who occupy seven divisions and seven states. The ruling elite and the military largely represent the majority Burman ethnicity, while

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seven major ethnic nationalities—Arakan, Chin, Kachin, Karen, Karenni, Mon, and Shan—together with at least 130 smaller ethnic tribes[1] comprise approximately 40 percent of the population.[2] Burma's divisions are generally occupied by Burmans, while states are generally occupied by ethnic nationalities and tribes, although there is considerable diversity within some areas.[3]

Military rule in Burma began by coup in 1962 when General Ne Win disbanded Parliament, suspended the Constitution, and began the period of intransigent and repressive rule that continues today. The State Peace and Development Council (SPDC) is the state body run by the tatmadaw (military), and the tatmadaw is the country's main political actor— in some ways, the only political actor.[4] The country is ruled by Senior General Than Shwe.

After 1988, when the military opened fire on pro-democracy protestors, ultimately killing as many as 3,000 civilians,[5] the tatmadaw grew dramatically, turning the country into the formidable military state it is today. Most sources suggest that the regime spends at least 40% of its budget on the military.[6] By contrast, the junta's spending on health and education is at absurdly low levels. According to official figures, the SPDC allocated about 1.2-1.5% of its 2007 budget to the Ministry of Health;[7] this neglect over time has led to an exploding public health crisis.[8] Likewise, in 2007, the junta allocated little more—only about 4-5% of its budget—on public education,[9] with the result

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[1] Myan. Ministry of Hotels & Tourism, The 8 Major National Ethnic Races in Myanmar, http://www.myanmar.gov.mn/ministry/hotel/fact/race.htm (last visited May 11, 2008).
[2] Ethnic Nationalities Council (Union of Burma), http://www.encburma.org
[3] The Divisions are Irrawaddy, Bago, Magwe, Mandalay, Sagaing, Tennasserim, and Rangoon. The States are Chin, Kachin, Karen, Karenni, Mon, Arakan, and Shan.
[4] Mary P. Callahan, Making Enemies: War and State Building in Burma 2 (2005).
[5] See Human Rights Watch, Burma (1989), available at http://www.hrw.org/reports/1989/WR89/Burma.htm.
[6] E.g., Univ. Cal. at Berkeley Human Rights Center & Johns Hopkins Bloomberg School of Public Health Center for Health & Human Rights, "The Gathering Storm: Infectious Diseases and Human Rights in Burma" at 1 (July 2007) (available at http://www.hrcberkeley. org/pdfs/BurmaReport2007.pdf); Emanuela Sardellitti, "Myanmar: Courted by the Asian Players," Power and Interest News Report (Mar. 8, 2007) (available at http://www.pinr.com/report.php?ac=view_report&report_id=627&language_id=1); "Misery piled upon misery: Myanmar," The Economist (Oct. 6, 2007).
[7] The U.S. State Department reports that official figures show the Ministry of Health's 2007 budget at 0.3% of Gross Domestic Product (GDP). See U.S. Dep't of State, "2007 Country Reports on Human Rights Practices: Burma" (Mar. 11, 2008) (available at http://www.state.gov/g/drl/rls/hrrpt/2007/100515.htm) at 5. Because the SPDC's budget is about 20-25% of GDP, expenditures as a percentage of the budget would be four to five times their percentage of GDP, or about 1.2-1.5% of the budget for health care. See "CIA World Factbook: Burma," supra note 2 (calculating the SPDC's budget to be 24.5% of GDP at the official exchange rate); see also "Misery piled upon misery: Myanmar," The Economist (Oct. 6, 2007) (noting that the regime is estimated to spend less than 2% of its budget on health).
[8] See generally "The Gathering Storm: Infectious Diseases and Human Rights in Burma," supra note 1.
[9] "2007 Country Reports on Human Rights Practices: Burma," supra note 7, sec. 5 (noting that official figures show education expenditures at 1.1% of GDP); see also supra note 7 (explaining that budget figures are about four to five times the GDP percentages).

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that Burma ranks in the bottom 25 countries in the world for student enrollment ratios.[10] While some argue that contributing to Burma's economic development might help to promote democracy and respect for human rights, current and planned extractive projects and revenues simply do not do so. The billions of dollars flowing to the SPDC have enabled the generals to increase military spending, which is directly antithetical to the interests of the people of Burma. Indeed, this is unsurprising, given the wealth of research addressing the "resource curse" that has demonstrated that reliance by developing countries on oil and gas extraction often negatively affects economic growth, democratization and respect for human rights.[11]

In 2006, the SPDC's total budget was estimated at around $2.3 billion,[12] making the military's share around $900 million—enough to be completely funded by the Yadana Project's current revenues. Yadana is the single largest source of revenue for the junta, taking natural gas from the Andaman Sea, through a pipeline in southern Burma, to Thailand. Between 1995 and 2005, the time period when profits from Yadana began flowing in, , Burma's estimated annual military expenditures increased dramatically.[13] The regime maintains military forces disproportionate to its population and strategic dangers. Although it has had no external conflicts since its independence in 1948 and has no external enemies, it maintains the 12th largest active military in the world.[14] In 2005, Burma, with a population of about 56 million people, had an estimated 428,000 active troops in its armed forces.[15] By contrast, Burma's neighbor Thailand, with a population of 63 million, has only about 307,000 active duty troops. The major purpose of Burma's bloated military is not to combat any external security threat, but to suppress internal opposition and to ensure the regime's stranglehold on power through systematic human rights abuses.

This internal oppression was on display after August 2007, when the junta made an unexpected and fateful decision to remove state subsidies on natural gas, diesel, and other fuels. This led to dramatic price increases and significantly impacted the daily survival of people across the entire country, the

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[10] United Nations Development Programme, "Myanmar: The Human Development Index – going beyond income," at http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_MMR.html.

[11] See, e.g., Nancy Birdsall and Arvind Subramanian, "Saving Iraq From Its Oil," 83 Foreign Affairs 77 (July/Aug. 2004); Terry Lynn Karl , "Oil-led Development: Social, Political and Economic Consequences," CDDRL Working Paper (2007); Michael Ross, "Does Oil Hinder Democracy?," 53 World Politics 325, 342, 356 (Apr. 2001); Melissa Dell, "The Devil's Excrement: The Negative Effect of Natural Resources on Development," 26(3) Harvard Int'l Review (Fall 2004); Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz (eds.), "Escaping the Resource Curse" (2007).

[12] Burma's 2006 GDP was estimated at $9.3-9.6 billion. See Economist Intelligence Unit, "Country Report: Myanmar 2007-2008" (May 2007); U.S. Central Intelligence Agency, "CIA World Factbook: Burma" (2007) (available at http://www.umsl.edu/services/govdocs/wofact2007/geos/bm.html).

[13] Andrew Cordesman & Martin Kleiber, Center for Strategic & Int'l Studies, "The Asian Conventional Military Balance in 2006: Overview of major Asian powers" at 59 (June 26, 2006) (available at http://www.csis.org/media/csis/pubs/060626_asia_balance_powers.pdf).

[14] Ibid. at 32, 35; Jaffee Center for Strategic Studies, "The Middle East Military Balance at a Glance" (May 16, 2004) (available at http://www.tau.ac.il/jcss/balance/glance.pdf).

[15] Andrew Cordesman & Martin Kleiber, Center for Strategic & Int'l Studies, "The Asian Conventional Military Balance in 2006: Overview of major Asian powers" at 35 (June 26, 2006) (available at http://www.csis.org/media/csis/pubs/060626_asia_balance_powers.pdf).

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result of which was widespread popular protest led by the country's revered Buddhist monks. What followed was a forceful crackdown, widespread repression, and an unknown and disputed number of killings, some of which were captured on video and broadcast internationally over the internet.[16]

The U.S. State Department condemned the violent suppression of pro-democracy protests in September 2007 and the thousands of arrests that followed, as well as "custodial deaths...extrajudicial killings, disappearances, rape, and torture," "attacks on ethnic minority villagers," "forced relocations," and "forced recruitment of child soldiers." Human Rights Watch stated their belief that the death toll is "much higher" than the ten deaths originally reported by the regime,[17] and this view has been echoed by others, including the U.N. Special Rapporteur on human rights in Burma, Paulo Sérgio Pinheiro.[18]

This spring, the SPDC compounded the devastation of Cyclone Nargis, which wiped-out entire areas in the Irrawaddy Delta, by inhibiting foreign disaster assistance, leading to immense and continued suffering of hundreds of thousands left homeless after the storm.

Just this past week, the SPDC sentenced Thet Wai, an activist, to two years of hard labor in Burma after he gathered evidence for the United Nations about child soldiers and forced labor in Burma. The International Labor Organization, long a vocal critic of the widespread use of forced labor in Burma, has called for his release.

In short, the Burmese junta, one of the most brutal and authoritarian in the world, remains in power through revenues provided by extractive projects, and continues to use these revenues to strengthen its military, and its grip on power, and mercilessly oppress the people of Burma. The junta has systematically ignored the will of the people of Burma, who in 1990 elected a reformist party, the National League for Democracy (NLD), in elections that the junta has failed to honor. It has arrested the NLD's leader, Nobel Peace Prize winner Aung San Suu Kyi, who has spent over twelve years in detention, where she remains today. The SPDC has committed countless atrocities against democracy activists, ordinary Burmese citizens, and against the ethnic nationalities that comprise about 40% of the population, in long-running campaigns to suppress all forms of dissent.

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[16] For comprehensive accounts of the protests and the ensuing military crackdown, see Nat'l Coal. Gov't Burma Hum. Rts. Documentation Unit, Bullets in the Alms Bowl: An Analysis of the Brutal SPDC Suppression of the September 2007 Saffron Revolution (2008), available at http://burmalibrary.org/docs4/BulletsInTheAlmsBowl.pdf; and Human Rights Watch, Crackdown: Repression of the 2007 Popular Protests in Burma, 19 Hum. Rts. Watch Rep. 1 (2007), available at http://www.hrw.org/reports/2007/burma1207/burma1207web.pdf.

[17] Human Rights Watch, Burma: Crackdown Bloodier Than Government Admits (Dec. 7, 2007), available at http://hrw.org/english/docs/2007/12/07/burma17494.htm.

[18] See Burma Death Toll Much Higher: Downer, ABC NEWS, Sept. 29, 2007, available at http://www.abc.net.au/news/stories/2007/09/29/2046840.htm (quoting Australian Ambassador to Burma Bob Davis); UK Fears Burma Toll "Far Higher," BBC NEWS, Sept. 28, 2007, available at http://news.bbc.co.uk/2/hi/asia-pacific/7018920.stm (quoting British Prime Minister Gordon Brown).

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HUMAN RIGHTS ABUSES DIRECTLY ASSOCIATED WITH EXTRACTIVE PROJECTS

The Yadana Pipeline: Multinational Energy Companies, Security Forces, and Human Rights Abuses

In 1992, the French oil company Total signed the first contract with the Burmese military for the Yadana Project, which would develop offshore natural gas fields and pipe the gas overland to Thailand.[19] From the beginning, the contract provided that at least 50% of the profit would flow directly to the military regime,[20] through the Myanmar Oil & Gas Enterprise (MOGE), an arm of the military's Ministry of Energy.[21] Yadana was the largest foreign investment project in Burma's history and would become the largest source of hard currency for the junta. The advance preparations for the project had begun by 1991, as the military conducted offensives and forcibly relocated villages to ensure that the anticipated pipeline route was secured.[22]

The American oil company Unocal, which Chevron acquired in 2005, competed with Total for the original Yadana contract, and became a partner in the project shortly thereafter, in early 1993. It was subsequently joined in 1995 by PTT Exploration & Production (PTTEP), a subsidiary of Thailand's state-owned oil and gas company, PTT, and later that year by MOGE itself, participating as a partner in the project as well as the regulator of the consortium. As the project progressed, the Yadana consortium signed a contract with the buyer of the gas, PTT, to build a pipeline from the offshore field to the Thai border, including a 60-kilometer (40-mile) section across southern Burma.

In late 1997 and early 1998, the Burmese military regime was in a financial crisis. International efforts to isolate the junta economically were working. One reporter noted that the junta "was short of cash," and its foreign exchange reserves "shrank to less than the foreign-currency deposits they are supposed to cover."[23] In the summer of 1997 the Burmese kyat lost nearly half its value against the dollar in just a few months. By October of that year, foreign exchange reserves fell "to about $183 million." In early 1998, one of the junta's top generals was quoted as acknowledging that the

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[19] See generally "Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area Between Myanma Oil & Gas Enterprise and Total Myanmar Exploration & Production" (July 9, 1992), pages 2462-2553 of Ex. 1 to the partial trial of Doe v. Unocal Corp., BC 237980 (Sup. Ct. Cal., L.A. County) (admitted into evidence, Dec. 11, 2003).

[20] MOGE takes a 10% royalty from the project's revenues; the value of the gas is then divided between MOGE and the consortium, with MOGE taking a minimum of 40% (depending on price and volume). Of the consortium's share, the regime also takes 30% in income taxes after an initial three-year tax holiday. See "Memorandum of Understanding for the Moattama Gas Project" sec. 4(c) (July 9, 1992), pages UYP 2555-2572 of Ex. 1 to the partial trial of Doe v. Unocal Corp., BC 237980 (Sup. Ct. Cal., L.A. County) (admitted into evidence, Dec. 11, 2003). This is independent of MOGE's 15% participation in the consortium.

[21] Myanmar Ministry of Energy, "Organization Chart of Ministry of Energy," at http://www.energy.gov.mm/Organisation%20Chart.jpg.

[22] See EarthRights Int'l, "Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma" at 13-49 (2d. ed. 2003) (available at http://www.earthrights.org/files/Reports/TotalDenialContinues.pdf) at 38-52.

[23] Bertil Lintner, "Paper Tiger," Far Eastern Economic Review (Aug. 7, 1997).

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regime was "weak in foreign exchange savings and reserves." By March, The Economist magazine estimated that the regime's foreign exchange reserves had fallen below $100 million. This was a staggering drop from late 1996, when reserves were estimated at $663 million. While the junta could continue to feed and employ soldiers using the local kyat, without hard currency it could not finance imports of fuel, military hardware, or the luxury goods favored by some of the generals.

Then the Yadana Project came online, and everything changed. Initial payments were small because Thailand was not prepared to take the full gas supply; Thailand apparently paid over $50 million to the Yadana consortium in 1998. This increased to $230 million in 1999. By 2001, Thailand was importing about 570 million cubic feet of Yadana gas per day, which cost, at reported prices,[24] over $1.5 million every day, or over $550 million for the year. With the Burmese regime taking the lion's share of these receipts, Burma's foreign currency shortage ended—and, along with it, the best hopes that the junta might be isolated economically.

During the construction and early operational period of the Yadana pipeline, reports from refugees and human rights workers in the region indicated that the pipeline area was experiencing a massive increase both in military presence and the human rights abuses that the Burmese military regularly commits. However, the oil companies never fully acknowledged, and in some cases denied that the Burmese military provides security for the Yadana Project. But evidence that surfaced in *Doe v. Unocal* leaves little room for doubt that Burmese army battalions are assigned the task of pipeline security. In an early project memo, a Unocal Vice-President described discussions with Total about "the option of having the [Burmese] Military provide protection for the pipeline construction and operation."[25] A 1996 memo from a Total executive to Unocal acknowledged the "forced labour used by the troops assigned to provide security on our pipeline project."[26] ERI has documented at least fourteen different infantry battalions that have regularly performed pipeline security duties: battalion nos. 25, 104, 273, 282, 401, 402, 403, 404, 405, 406, 407, 408, 409, and 410.[27] Battalions 273 and 282 in particular have been widely known as "Total battalions."[28] Several other battalions

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[24] Yadana gas has a known heating value of about 712 BTU/cf. See ibid. The price of gas was reported at 175 Thai baht per million BTU (mmBTU) in 2001, see Yuthana Praiwan, "Thai Industry Official Says Unocal's Gas Price Cut Is Not Enough," Bangkok Post (Oct. 4, 2001), which at then-current exchange rates was about $3.92/mmBTU, or about $2800 per million cubic feet of gas.

[25] *Doe v. Unocal Corp.*, 395 F.3d 932, 940 (9th Cir. 2002), vacated upon grant of en banc rehearing, 395 F.3d 978 (2003).

[26] Ibid. at 942.

[27] "Total Denial Continues," supra note 22, at 29 (all battalions, especially 273, 401, 402, 403, 404, 405, 407, 408, 409), 72 (battalions 273, 282), 94-95 (battalions 273, 401, 403, 407, 408, 409); "Total Denial," supra note 22, at 13-14 (battalions 273, 401, 406, 407, 408, 409, 410); "Supplemental Report: Forced Labor Along the Yadana and Yetagun Pipelines," supra note 23, at 3 (battalions 273, 282); Confidential Interview #23 (2002), on file with ERI (defector confirming pipeline security duties of battalions 104, 273, 282, 401, 403, 405, 409).

[28] EarthRights Int'l, "Total Denial Continues: Earth Rights Abuses Along the Yadana and Yetagun Pipelines in Burma" at 29 (2d. ed. 2003) (available athttp://www.earthrights.org/files/Reports/TotalDenialContinues.pdf) (all battalions, especially 273, 401, 402, 403, 404, 405, 407, 408, 409), 72 (battalions 273, 282), 94-95 (battalions 273, 401, 403, 407, 408, 409); EarthRights Int'l & Southeast Asia Information Network, "Total Denial: A Report on the Yadana Pipeline

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have also operated in the pipeline region, although whether they perform pipeline security functions has not been established.

What is certain is that the pipeline security force was routinely conscripting villagers for severe forced labor projects, including building infrastructure for the project and portering heavy loads for military patrols, as well as committing torture, rape, and murder. These abuses were catalogued in EarthRights International's first report on the Yadana Project, *Total Denial*, in 1996. The abuses continued as gas began to flow in 1998, and ERI has released several additional reports over the years documenting the harms (including the comprehensive *Total Denial Continues*, released in 2000, and updated and reissued in 2003, along with the most recent report in 2008, *The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma (Myanmar)*). These reports included extensive on-the-ground documentation of human rights abuses committed by the military in direct connection to the construction and operation of the pipeline project, including forced labor, rape, torture, and extrajudicial killings.

With no access to justice in Burma, fifteen villagers, represented by ERI and a team of lawyers, sued Unocal in U.S. courts under the Alien Tort Claims Act (ATCA) for complicity in human rights abuses connected to the pipeline project. The strength of the case against Unocal was evidence that the company knew about, abetted, and benefited from the abuse, and did nothing to stop it, and evidence that the abuse was directly connected to the pipeline project. Citing this evidence of complicity, a U.S. federal court of appeals ruled that the case should be allowed to proceed to trial. This was followed by an undisclosed out-of-court settlement in March 2005 between the plaintiffs and the company. Shortly thereafter, Chevron announced that it was seeking to acquire Unocal for U.S. $18 billion; the deal was finalized in August 2005.

The landmark lawsuit *Doe v. Unocal Corp.* was important for the future of corporate accountability in that it demonstrated that victims of human rights abuses could achieve some measure of justice even where it was otherwise absent in the victims' home country. However, its overall impact on the ground in Burma today is less evident, due in part to the unchanged brutal nature of the military regime and the pipeline battalions, and in part to the companies' continued failure to promote and protect human rights in their project area. Serious human rights abuses connected to the Yadana project continue, including forced labor.

Project in Burma" at 13-14 (June 1996) (available at http://www.earthrights.org/files/Reports/TotalDenial96.pdf) (battalions 273, 401, 406, 407, 408, 409, 410); EarthRights Int'l, "Supplemental Report: Forced Labor Along the Yadana and Yetagun Pipelines" at 3 (supplement to "More of the Same: Forced Labor Continues in Burma") (2001) (available at http://www.earthrights.org/files/Reports/supp.pdf); "Supplemental Report: Forced Labor Along the Yadana and Yetagun Pipelines," (battalions 273, 282); Confidential Interview #23 (2002), on file with ERI (defector confirming pipeline security duties of battalions 104, 273, 282, 401, 403, 405, 409).

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The connection between the Burmese military and the Yadana Project remains as strong as ever. Interviews from 2003-2008 have confirmed that these military battalions still operate in the pipeline region and that the army is still providing pipeline security.[29]

In 2007, I came to know a villager from Law Ther, a pipeline village, after he was assaulted by members of a pipeline security battalion. In fact, I helped him get care in a hospital for his injuries. According to his story, villagers from Law Ther attempted to stop soldiers from taking wood meant for a local school and were met with violence: "They did not listen to me but instead the officer . . . turned to me and he slapped my face twice, then he punched my stomach and when I tried to cover it he kicked my groin. I fell on the ground . . . I had to wait for a while to be able to walk."[30]

The security forces assigned to the Yadana Project exhibit all of the typical brutality of the Burmese military. This violence is not justified by any real threats to the pipeline or its personnel; the soldiers continue to kill civilians who pose no danger, and continue to commit rape, torture and other abuses that would be unjustifiable under any circumstances.

> My husband was arrested on Monday, August 15, 2005, at noon. LIB 273 ordered him to come . . . .After he arrived at the car road, the soldier tied him and they took him to [another villager's] house. On Tuesday they took him to [a factory] and the soldiers tied him and beat him and questioned him there. I went to visit him on Tuesday and I saw that they had tied his legs and feet and were using a log to torture him. I asked him, "What did they do to you?" But he did not tell me; I think he was worried that I would be afraid. But I could see his knees and legs were covered in injuries. When I asked him "Why did they arrest you?" he was about to answer but the soldier came back and ordered me to leave. On Wednesday they took him to Ya Pu village. Then on Thursday they took him to Kanbauk village. On Friday they took him back to Ya Pu and they killed him. Two soldiers from LIB 273 came to my house and they said they need to search my house. . . . They were looking for something in the house, and they looked everywhere, but they could not find anything. After an hour of searching they left without finding anything. I learned that they suspected my husband of having connections with an opposition group because the Burmese soldiers heard it from some other villager. So they came to our house and looked for something but then they could not find anything to support that.[31]

As has been recently documented in separate reports by Human Rights Watch (HRW)[32] and the

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[29] E.g., Interviews #037 (2003, Zinba), #043 (2005, Kanbauk), #010 (2007, Ya Pu), #050 (2005, Kanbauk), on file with ERI.

[30] Interview #016 (2007, Law Ther), on file with ERI.

[31] Interview #011 (2008, Law Ther), on file with ERI; see also Interview #020 (2007, Law Ther), on file with ERI.

[32] Human Rights Watch, "Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma" (Oct. 2007) (available at http://hrw.org/reports/2007/burma1007/burma1007web.pdf).

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Human Rights Education Institute of Burma (HREIB),[33] the military often takes recruits at a young age; this defector volunteered at age 13. He then went through a systematically brutalizing training process:

> During our stay there they are also treating us very badly, like for food they would give us morning glory that grew behind the toilet and they would feed it to us. They also badly hit and punished those who tried to escape from the camp. During my time there I also learnt that some people joined by their will and some were forced to join.[34]

In 2007, a boy from Shin Ta Pi village was killed by soldiers from battalion 408, one of the pipeline security battalions. Apparently the soldiers had clashed with elements of an armed opposition group, and found the boy on his farm as they searched for the rebels. They captured and killed him.[35] These soldiers apparently have not been prosecuted or punished in any way; this is not surprising, as impunity for murder of civilians by soldiers is common in Burma.[36]

As ERI has documented in the past, rape and other forms of sexual violence are rampant among the Burmese military.[37] At least one rape by pipeline security forces has been reported in the past few years, confirmed by two residents of Zinba village, one of the "pipeline villages". In the summer of 2005, soldiers from pipeline battalion 409 came across a young girl and her older sister bathing in a stream. They captured the girl as her sister ran away to find help; the girl, only six or seven years old, was raped so violently that she required medical attention for a torn vagina.[38]

A resident of the village of Michaunglaung described how his village, in close proximity to the Yadana pipeline, continued to be subjected to forced labor:

> Our village is one of the . . . villages under the Total Company's development zone, but we still have to work on forced labor. The foreigners saw what we have to do but they do not say anything to us. They pass by in their truck while we are building sentry posts and cleaning bushes along the road. But they do not stop to ask us anything. A few times I heard foreigners come to the village and ask whether or not we have to do forced labor. But no one dares say anything about it when they ask because people are afraid of the consequences.[39]

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[33] Human Rights Education Institute of Burma, "Despite Promises: Child Soldiers in Burma's SPDC Armed Forces" (Sep. 2006) (available at http://www.hreib.com/images/pb/csreport.pdf).

[34] Interview #006 (2008, defector from battalion 273), on file with ERI.

[35] Interview #007 (2008, Zinba), on file with ERI.

[36] "2007 Country Reports on Human Rights Practices: Burma," supra note 7, sec. 1(a).

[37] Betsy Apple, EarthRights Int'l, "School for Rape: The Burmese Military and Sexual Violence" (1998) (available at http://www.earthrights.org/files/Reports/schoolforrape.pdf).

[38] Interview #007 (2008, Zinba), on file with ERI; see also Interview #012 (2008, Zinba), on file with ERI.

[39] Interview #040 (2003, Michaunglaung), on file with ERI.

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Forced portering, a signature abuse of the Burmese military in which civilians are ordered to carry heavy loads of arms, ammunition and supplies for soldiers during security operations, has continued in recent years. Villagers are most often conscripted in a semi-regular process, in which the battalions order the village headman to provide them with a specified number of porters. This procedure causes substantial hardship to the villagers:

> We have to go porter for them whenever they arrive in the village. We do not have many villagers in the village, so we have to go with them very often. We have no time to work on our job. We have to go with them by rotation and the village head arranges it.[40]

Recently, ERI spoke to a former soldier who had defected from the SPDC about forced labor, including forced portering. He stated:

> We ask these people to carry shell ammunition, food and supplies . . . . During the portering the soldiers treat porters not so good. I do not want to mention about these bad things so much since I myself I have done it to these people as well at that time.[41]

In some cases, villagers who are working in their fields and farms may be seized as porters by any military units they encounter, as one man related:

> When we were working in our garden or plantation, and rice farms, we have to be careful of the Burmese soldiers. The best way is to hide ourselves so that we do not have to answer their questions and risk being arrested [for portering].[42]

Portering trips often take several days or even much longer, in which the porters must often travel over difficult terrain with their heavy loads. Villagers in Michaunglaung were regularly conscripted for two-day portering trips with pipeline security battalions:

> We had to do portering for the LIB 409, LIB 407 to the areas. . . where the military is based. Villagers had to go by rotation and had to carry food and ammunition for them. The distance was two days and one night. The load was [approximately 40] pounds.[43]

Unocal's and Chevron's Legal Liability

The conduct of Unocal and its partners in the Yadana consortium led to legal liability in two ways. First, the oil companies were aiding and abetting the Burmese military in committing murder, rape, forced labor, and other abuses; they provided financial, logistical and other support to the soldiers

[40] Interview #045 (2005, Kaleinaung), on file with ERI.
[41] Interview #006 (2008, defector from battalion 273), on file with ERI.
[42] Interview #054 (2005, Ahlersekan), on file with ERI.
[43] Interview #024 (2007, Michaunglaung), on file with ERI.

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who were routinely violating human rights.[44] Second, the Yadana consortium used the Burmese military as its agent; hiring the military to provide security for the Project.[45]

Chevron unquestionably still relies on Burmese soldiers to provide security for the pipeline project and remains liable for abuses committed by the military providing pipeline security.
Since Chevron purchased Unocal in 2005, their role in the project has remained virtually unchanged and, while the military's forced labor practices have shifted over the years, abuses continue. The Yadana Project, in which Chevron is a partner, remains a highly destructive endeavor. It is the largest source of income for the Burmese military regime, which brutally oppresses its people. The companies continue to rely on Burmese forces for pipeline security, and those forces continue to conscript forced labor and commit serious human rights abuses in the course of their operations. Chevron remains complicit in and liable for human rights abuses that persist today.[46]

EXTRACTIVE COMPANIES AND HUMAN RIGHTS OBLIGATIONS

Binding and Enforceable Mechanisms: The Alien Tort Claims Act
International law accords to the state primary responsibility in the protection of human rights. However, it is also clear that human rights obligations apply to non-state actors. Multinational corporations bear rights and duties under international law, and have a legal obligation to respect, protect, and promote human rights. Multinational corporations are also bound by domestic legislation in the United States, including the Alien Tort Claims Act (ATCA), 28 USC §1350 (2000). ATCA is a critical tool for holding corporations accountable for gross human rights abuses committed abroad. ATCA allows non-citizens to sue in U.S. federal courts for gross human rights abuses, and has served to hold both individual and corporate perpetrators accountable in a credible court of law.

The elements of an ATCA claim at first glance appear simple: the plaintiff must be an alien alleging a tort, and the alleged tort must be a violation of the law of nations or a treaty of the United States.[47] A tort is in violation of the "law of nations" when it violates a norm of customary international law.[48] Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."[49] While determining when a practice has become general and consistent is not simple, it is clear that only the most egregious abuses, such as war crimes,[50]

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[44] *Doe v. Unocal Corp.*, 395 F.3d 932, 952-53 (9th Cir. 2002).
[45] *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1194, 1306 (C.D. Cal. 2000).
[46] See EarthRights International's most recent report on Chevron's activities in Burma, *The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma (Myanmar)*, is available at http://www.earthrights.org/campaignfeature/yadana_pipeline.html. This report details the on-going abuses committed against the people of Burma by the Burmese military on behalf of the consortium of multinational energy companies involved in the Yadana project, including U.S.-based Chevron, Corporation.
[47] See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).
[48] See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Filartiga*, 630 F.2d at 884; *Forti*, 694 F. Supp. at 709.
[49] Restatement (Third) of Foreign Relations Law § 102(2), cmt. c (1987).
[50] See *Kadic*, 70 F.3d at 242–43.

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crimes against humanity,[51] genocide,[52] summary execution,[53] torture,[54] forced labor,[55] and cruel, inhuman and degrading treatment,[56] meet the standard.

The Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain* confirms that only the most heinous violations are actionable.[57] In *Sosa,* the Court clearly enunciated that victims of the most serious human rights abuses, those that rise to the level of violations of customary international law (the law of nations), may continue to seek redress in United States' courts under ATCA.

Sosa v. Alvarez-Machain ensures that there will neither be an explosion of ATCA cases, nor will ATCA become a general corporate accountability measure. Rather, it will serve as a tool for corporate liability–and justice for victims–in a limited set of circumstances. As such, ATCA will continue to deter corporate complicity in severe human rights crimes anywhere in the world.

However, ERI remains concerned that corporations outside the jurisdiction of U.S. courts continue to commit human rights abuses with impunity, on their own and through security services. Therefore, we encourage Congress to work with their parliamentary counterparts abroad to encourage adoption and enforcement of legislation that promotes accountability for human rights abuses committed by corporations in the course of their extractive operations abroad.

Soft Laws – The Voluntary Principles on Security and Human Rights
In 2000, a number of extractive companies, NGOs, and governments came together to develop what came to be known as the Voluntary Principles on Security and Human Rights, to "guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."

EarthRights International recognizes that it was high time transnational corporations publicly acknowledge the importance of respecting human rights when carrying out drilling, pipeline, mining, and other extractive resource projects. However, these voluntary standards fall far short of what we should expect from corporations claiming to engage in responsible business practices. We need mandatory requirements-laws, not voluntary codes-that force ALL transnational corporations to protect the human rights of citizens in their host countries. This "soft law" can play a role in promoting respect for human rights, but it must be strengthened with additional resources and oversight, and should exist in conjunction with binding, enforceable mechanisms for accountability and transparency.

Chevron, ExxonMobil, Shell, British Petroleum, Conoco, Freeport McMoRan, Rio Tinto and others agreed, in a pledge signed with the British and U.S. governments, to try to ensure that security forces, either their own or those contracted with local governments, respect the human rights of

[51] See *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986).
[52] See *Kadic*, 70 F.3d at 241-42.
[53] See *Marcos*, 25 F.3d at 1475.
[54] See *Filartiga*, 630 F.2d at 884.
[55] See *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).
[56] *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992).
[57] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

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local citizens. Specifically, the corporations promise to encourage private and police security forces comply with the rule of law. This includes insisting that security forces use minimum necessary force, not hire known human rights violators, and respect local people's right to demonstrate and collectively bargain.

It sounds good. Unfortunately, it sounds better than it is.

First, the standards are purely voluntary. There is no mechanism for their enforcement, and no remedy for their infraction. No government will monitor these corporations' compliance, and a failure to comply will subject them to the court of public opinion, and no other court. And that is assuming the public learns of any infractions.

Second, these standards are "soft," at best. Companies will "attempt to ensure" that security guards do not have records as abusers; they "should" report human rights abuses to the local government and "urge" investigations. Trying to ensure that peoples' human rights are protected in the course of these projects is insufficient; making sure they are protected is what we should demand.

And third, these voluntary standards do not cover all corporations-only those that choose to sign on. Granted, one can imagine corporations from extractive industries rushing to sign this code of conduct, but not necessarily because they are committed to human rights protection. By signing the voluntary code, corporations may be seeking to fend off a tougher challenge: legislation that requires them to behave responsibly. International Right to Know legislation, for example, requiring corporations to disclose information about their human rights, environmental, and labor practices abroad, exposes corporations to real scrutiny.

Transnational corporations that extract resources for a living claim that they do not have the luxury of only doing business with "good" governments. They have to go where the resources are, they say, and it so happens that resources co-exist alongside repressive regimes and brutal military forces in some cases.

Unfortunately, indigenous groups and NGOs, working in partnership, have learned a hard lesson: voluntary assurances are not enough. Responsible corporate behavior requires public scrutiny, which in turn requires transparency. We must develop laws, not voluntary standards, that require corporations in extractive industries to make their human rights, environmental, and labor practices visible to citizens. Once the public and stakeholders can see what is happening, they can demand accountability.

LEGISLATIVE INITIATIVES

The United States and other countries should enact and strengthen legal and regulatory mechanisms that promote transparency, normative frameworks and harmonization across systems. The goals of such mechanisms must be to promote stability for corporations operating internationally, allow for corporate liability and accountability for complicity in abuses abroad, and enable access to justice for survivors of abuses abroad. Civil society organizations and citizens of these countries should advocate for legislation to create such mechanisms.

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Pending Legislation

Extractive Industry Transparency Disclosure Act (EITDA) (S. 3889/HR6066):

Senator Charles Schumer (D-NY) and Congressman Barney Frank (D-MA) introduced Extractive Industry Transparency Disclosure Act (EITDA). Mr. Chairman, I want to thank you for cosponsoring this important legislation, which would increase the transparency of payments by extractive companies to host governments. EarthRights International fully supports passage of the EITDA. Disclosure of payments to host governments will assist citizens, investors and other stakeholders in holding governments accountable for resource revenue expenditures. By requiring companies registered with the Securities and Exchange Commission to publish payments made to foreign governments for oil, gas and minerals, EITDA can protect investors seeking to understand risk and help foster stability in the resource-rich countries that are the core of the energy industry, while at the same time, leveling the playing field for companies worried that "going it alone" on transparency could place them at a competitive disadvantage. We believe transparency in resource payments can lead to increased government accountability and contribute to a reduction in poverty, civil conflict and human rights abuses. While EITDA does not address specific human rights abuses by corporations, transparency and accountability go hand-in-hand in addressing the root causes of these abuses, and therefore, solutions must address both issues.

The cost to extractive companies of reporting payments should be minimal as companies already conduct internal audits and have revenue information available. The requirement would simply mean that companies need to incorporate reporting requirements into their integrated auditing.

Likewise, the cost for the U.S. government would be minimal, thus providing high impact at a low cost. Associated costs would include creating a Treasury website and any necessary oversight or enforcement.

Legislative Recommendations

Protect and Defend the Alien Tort Claims Act (ATCA)

It is crucial that Congress send a clear message that human rights matter, and U.S. courts have an important role to play in their promotion and protection. EarthRights International believes that as a result of the Alien Tort Claims Act, U.S. corporations and those under the jurisdiction of U.S. courts understand their legal obligations and liabilities under the law, and as such, are more likely to respect fundamental human rights in their operations.

Consider International Right to Know (IRTK) Legislation

We urge Congress to consider enacting legislation creating an International Right to Know. "Right to Know" laws take two forms: Community Right to Know and Workplace Right to Know. Each grants certain rights to those groups, and primarily cover toxic chemicals and also aspect of workplace safety. Other aspects of operations, such as the employment of children or the conduct of security firms, may not require disclosure but are regulated in the US.

International Right to Know legislation would promote corporate accountability by providing information about companies' environmental, labor, and human rights practices at home and abroad. IRTK could require companies based in the U.S. or traded on U.S. stock exchanges and their

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foreign subsidiaries and major contractors to disclose information on overseas operations along the lines of domestic disclosure standards. IRTK would allow governments, civil society, and the public to evaluate corporations' behavior and empower them to take steps to end current and prevent future abuses. In addition, the transparency compelled by IRTK could prompt companies to avoid perpetrating the kinds of abuses detailed on the Yadana pipeline project above.

Consider Banking Sanctions

EarthRights International supports economic sanctions that are effective in restricting meaningful revenues to the SPDC and cover the major resource companies investing in Burma. While the current U.S. sanctions regime[58] prohibits new investment in Burma, we have seen a flood of investment by extractive industry state-owned and non-state owned companies into Burma from China, India, Thailand, Korea and others that threaten to render the U.S. sanctions regime purely symbolic. At the time of the 1997 sanctions legislation, major revenue flows to the SPDC from the Yadana and Yetagun pipelines had not come on-line, and there was a severe deterioration in the foreign currency reserves of the SPDC. The sanctions were having the desired effect. Then the Yadana Project came online, and everything changed. By 2001, Thailand was importing about 570 million cubic feet of Yadana gas per day,[59] which amounted to over $550 million for the year. With the Burmese regime taking the lion's share of these receipts, Burma's foreign currency shortage ended—and, along with it, the best hopes that the junta might be isolated economically.

While Yadana revenues remain the largest single source of revenue for the Burmese military regime,[60] a new natural gas project, the Shwe project, scheduled to come on-line in 2012, will surpass Yadana in its income-generating potential for the junta. Currently South Korean company Daewoo is the operator of the project, with partners from India, China and Burma. At 5.7-10 tcf of gas, the deposits will earn the junta an estimated U.S. $12-17 billion, according to Shwe Gas Movement (SGM),[61] and they will earn Daewoo approximately U.S. $90 million per year for the estimated twenty-year life of the project.[62]

EarthRights International encourages Congress to consider additional measures that limit resource revenues from accruing to the SPDC until such time as a full transition to a system of government that allows for all of Burma's people to fully participate in development decisions and freely determine their own future. Access to U.S. capital markets is a powerful tool to ensure compliance,

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[58] Title 31 Part 537 of the U.S. Code of Federal Regulations.

[59] Paul Hueper, "Gas exports up and running," Petroleum Economist (Aug. 1, 2001).

[60] ERI's calculations, based on statements from the companies and documents released in the partial trial of Doe v. Unocal, suggest that at the end of 2007 the Yadana Project was taking in over U.S. $ 3.5 million daily, or nearly U.S. $ 1.3 billion annually. Nearly 75% of this income goes to the military regime—$969 million annually, based on fuel prices at the end of 2007, and conceivably much more if these prices continue to rise. See EarthRights International, The Human Cost of Energy 21 (2008) available at http://www.earthrights.org/files/Burma%20Project/Yadana/HCoE_pages.pdf.

[61] The Shwe Gas Movement (SGM) is a movement of civil society organizations that currently includes the Arakan Oil Watch (AOW), the Shwe Gas Campaign Committee-India, SGM Bangladesh, the All Arakan Student and Youth Congress (AASYC), and EarthRights International (ERI).

[62] See Shwe Gas Movement (SGM), Supply and Command 2, 51 (2006), available at http://www.shwe.org.

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and we look forward to working with members of Congress to identify specific legislation that will prevent receipt of these resource funds to the SPDC.

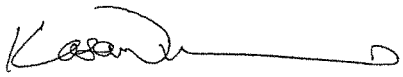
CONCLUSION

Human rights abuses, including systemic use of forced labor, is endemic throughout Burma. The U.S. State Department's latest report on human rights in Burma notes that the junta's human rights record is worsening, that forced labor is a "widespread and serious problem particularly targeting members of ethnic minority groups," and that "forced labor by children continue[s] to be a serious problem." Transnational extractive companies doing business in Burma continue to provide critical funding that supports the military junta, which in turn denies the most basic human rights to the people of Burma. These projects also lead directly to widespread abuses by security forces, including forced labor, forced relocations, murder, torture, rape, and other violations.

EarthRights International supports the development and expansion of mechanisms which promote revenue transparency, restrict the flow of resource revenues to the SPDC, and provide tools to hold corporations that are responsible for human rights abuses accountable. We look forward to continuing to work with Congress to address these important goals.

Thank you for the opportunity to testify today before the Judiciary Subcommittee on Human Rights and the Law on this important issue.

Sincerely,



Ka Hsaw Wa
Co-Founder and Executive Director
EarthRights International

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Extracting Natural Resources: Corporate Responsibility and the Rule of Law
Senate Judiciary Committee
Subcommittee on Human Rights and the Law
Wednesday, September 24, 2008

Lessons Learned:
Case Study regarding the Amungme, Kamoro and Freeport

Testimony by Abigail Abrash Walton
Faculty, Antioch University New England

"Development is development aggression when the people become the victims, not the beneficiaries; when the people are set aside in development planning, not partners in development; and when people are considered mere resources for profit-oriented development, not the center of development . . . . Development aggression violates the human rights of our people in all their dimensions—economic, social, cultural, civil and political."

The Philippine Alliance of Human Rights Advocates, as quoted in Ramon C. Casiple, "Human Rights vs. Development Aggression: Can Development Violate Human Rights?"

Imagine if a foreign corporation arrived one day with your national government's blessing, seized your home, destroyed your grocery store, local farms and gardens, your church, your favorite park, polluted your drinking and bathing water, created hazardous waste dumps throughout your town, blocked your efforts to seek justice through the courts, and bankrolled the police who threatened, tortured, raped and killed you or your family members for trying to resist this destruction of your way of life.

Meet the Amungme and Kamoro of West Papua. They don't have to imagine this scenario. They have lived it for the past four decades of mining operations on their lands by the Indonesian subsidiary of U.S.-based Freeport McMoRan Copper & Gold, Inc.

As multinational extraction corporations come in conflict with communities around the globe – from Appalachia to Alaska, from Burma to Nigeria – the experience of the Kamoro, Amungme and Freeport offers an excellent case study for understanding the dynamics of these conflicts and the power imbalances and lack of effective mechanisms for resolution that feed them. It is also one of the best-documented examples of the ways in which large-scale extractive industries undermine basic human rights. It is a classic story of environmental racism and injustice, of abuses across the full spectrum of economic, political, civil, social and cultural rights, and of the ways in which local people have sought to defend their lands, livelihoods and cultures without the benefit of effective legal recourse. Their story demonstrates the harm to human life and the environment that result when the economic interests of extractive industry corporations are allowed to trump protection of human rights and the environment.

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An essential take-home lesson of the Freeport experience is that the corporation remains above the law by wielding its financial, public relations and political influence to exploit weak governmental regulatory structures and to block or suppress independent attempts – through the courts, the market, the media – to consider violations of human rights and environmental protection measures. A more fundamental lesson, though, is that Freeport's contract of work with the national government to which it pays taxes and royalties – a document originally written by the company itself[1] – overrides core human rights standards, including those relating to development and indigenous people.[2]

Today, Freeport's West Papua gold and copper mining operations are amongst the largest in the world.[3] Freeport's mining operations has decapitated a mountain (the Grasberg), held sacred by the Amungme, filled with mining waste alpine lakes linked with Amungme earth spirits, and paved over other sacred sites lower in the valleys.[4] Operating at elevations of more than 12,000 feet above sea level, the company moves an average of 700,000 metric tons of material (vegetation, soil, rock, ore) every day – roughly the equivalent to moving Egypt's Great Pyramid of Cheops every week. Indeed, when the Grasberg open-pit is exhausted, it will become the world's largest underground mine. The legacy will be a 1,350-foot crater surrounded by mining tunnels, mountains of acid-leaching rock waste and a dumping ground of dead lowland rainforest – or "sacrifice zone" as Freeport calls it – stretching to the coast some 80 miles away.[5]

Freeport's seizure, control, and despoliation of Kamoro and Amungme lands and natural resources have circumscribed or destroyed local communities' economies and livelihoods. The Amungme and Kamoro have been further displaced and marginalized – economically, politically, socially, and culturally – by the outsiders who have swarmed to the economic "boom" town created by the mine. The area's population has exploded to some 120,000 people, having made it the fastest-growing "economic zone" in the entire Indonesian archipelago.

In their numerous public statements, the Amungme consistently speak about the loss of human dignity and mistreatment -- physical, psychological, spiritual and economic – they have experienced since Freeport, its agents and by-products (subcontractors, military protectors, economic migrants and others) arrived. As one Amungme community leader expressed it, "We feel that [Freeport] and the Government of Indonesia have blatantly disregarded our existence as the owners of the land which was confiscated. They have humiliated our existence, our dignity, our self-esteem, and pride and we, as human beings, have been belittled and trodden over. We are wondering ourselves if, in fact, we are human beings or merely creatures which are in the process of evolution to become human beings."[6]

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[1] George A. Mealey, "Grasberg: Mining the Richest and Most Remote Deposit of Copper and Gold in the World, in the Mountains of Irian Jaya, Indonesia," Freeport-McMoRan Copper & Gold, Inc., New Orleans, 1996, p. 83.
[2] See discussion of Freeport's Contract of Work in Abigail Abrash, "Development Aggression: Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas With Recommendations," Robert F. Kennedy Memorial Center for Human Rights, Washington, July 2002, pp. 10-11.
[3] See, for example, Jan Fetter-Degges, "Freeport-McMoRan, Human Rights: Overview," Social Issues Service, 2006 Company Report – C, Insitutional Shareholder Services, April 13, 2006.
[4] See, for example, Chris Ballard, "The Signature of Terror: Violence, Memory and Landscape at Freeport," in Inscribed Landscapes: Marking and Making Place. Edited by Bruno David and Meredith Wilson. Honolulu: University of Hawaii Press, 2001.
[5] See, among others, R.W. Phelps, "Moving a Mountain a Day: Grasberg Grows Six Fold," Engineering & Mining Journal, McGraw Hill Publishing Company, New York, June 2000.
[6] 'The Amungme and Komoro Demand Justice for the Destruction caused by Freeport Indonesia in Irian Jaya,' translated letter by Tom Beanal, in his capacity as Director of the Lorentz Foundation, a nongovernmental organization founded by the Kamoro and Amungme people; circa 1993 (on file with author).

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Another Amungme community leader has asked, "What do they think the Amungme are? Human? Half-human? Or not human at all? If we were seen as human . . . they would not take the most valued property of the Amungme, just as we have never wanted to take the property of others . . . I sometimes wonder, whose actions are more primitive?"[7]

The Amungme and Kamoro have stated in a variety of publicly available documents (i.e., resolutions, statements, speeches) that their conflict with Freeport began with the company's confiscation of indigenous communities' territory without consultation with or consent by local landowners. Freeport's 1967 Contract of Work, drafted by the company[8], gave Freeport broad powers over the local population and resources, including the right to take, on a tax-free basis, land, timber, water, and other natural resources, and to resettle indigenous inhabitants while providing "reasonable compensation" only for dwellings and permanent improvements.[9] Freeport was not required to compensate local communities for the loss of their food gardens, hunting and fishing grounds, drinking water, forest products, sacred sites, and other elements of the natural environment upon which their cultures and livelihoods depend.[10] A sign of the times, no human rights or environmental impact assessment was done. Indeed, in the subsequent 1991 Contract of Work, the contract also explicitly provides for flexibility on the part of the Indonesian government in enforcing relevant environmental protection laws and regulations.[11]

Indonesia's national laws have not been in compliance with international human rights standards; they have offered no adequate respect for community land rights, no rights of refusal or of informed consent, and no effective protection for traditional livelihoods and cultures. The legal regime governing land, minerals, water, and other natural resources has granted near-total control to the government.[12]

At the same time, Indonesian authorities have treated opposition to economic "development" as a crime of subversion, often acting with aggression against indigenous communities seeking to retain their customary lands or to participate in decision-making regarding use or management of natural resources.[13] As Freeport constructed its mining base camp, port site, milling operations, roads and

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[7] 'Arti Tanah Bagi Suku Amungme', *Kompas*, 25 September, 1995 English translation ; and cite in M. Easton, *Land Tenure Issues Surrounding the PT Freeport Indonesia Concession in Irian Jaya*, unpublished manuscript (on file with author).

[8] Mealey, "Grasberg," p. 83.

[9] Contract of Work Dated 7 April 1967 Between Indonesia and Freeport Indonesia, Incorporated: Decision of the Cabinet Presidium, No. 82/E/KEP/4/1967 (Jakarta: Direktorat Pembinaan Pengusahaan Pertambangan, 1967), Article 2, paragraphs (d) and (e).

[10] Ibid.

[11] "In recognition of the added burdens and expenses to be borne by the Company [Freeport] and the additional service to be performed by the Company as a result of the location of its activities in a difficult environment, the Government recognizes that appropriate arrangements may be required to minimize the adverse economic and operational costs resulting from the administration of the laws and regulations of the Government from time to time in effect, and in construing the Company's obligations to comply with such laws and regulations." Source: Contract of Work between the Government of the Republik of Indonesia and PT. Freeport Indonesia Company (1991), Article 18, para.8.

[12] See, for example, Denise Leith, "The Politics of Power: Freeport in Suharto's Indonesia," University of Hawai'i Press, Honolulu, 2003, pp. 108-109.

[13] See, among others, Sudargo Gautama and Robert N. Hornick, An Introduction to Indonesian Law: Unity in Diversity (Bandung, 1972). The authors illustrate the weakness of local autonomy over land use: "The national government is always free, on behalf of the national interest, to intervene and to dispose of the village's community land in some way other than that determined by the village. Thus, for example, the government is free to clear forest areas on community land as part, say, of a national program to encourage transmigration ... The village's *adat* right of disposal may not be raised as an obstacle to national policy" (94).

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other infrastructure, Kamoro and Amungme villages were forced to relocate and were barred access to land now under the company's control. Meanwhile, Indonesian soldiers and police – provisioned by Freeport and operating with a mandate to protect the company – have cracked down ruthlessly on those who have protested the invasion. The dynamics are complicated by the fact that the Indonesian military has relied on raising two thirds of its operating budget from legal and illegal methods, including "protection money" from Freeport and other companies, illegal logging, prostitution, and trafficking in stolen goods and endangered species.[14]

The experience of the Kamoro and Amungme is one of 'ersatz development' or 'development aggression,' in which dominant powers – Freeport, the Indonesian central government and military – have used coercion, intimidation, force, divide-and-conquer strategies and other undemocratic, non-transparent and non-participatory means to impose the cash-wage nexus, in which land and other natural resorces become exchangeable commodities. This system has siphoned the vast majority of short-term resource profits to foreign stockholders and the national elite, leaving local people dispossessed, displaced and marginalized. In fact, some 80 percent of the profits from the Freeport mine go directly to Freeport McMoRan in the United States, and from there to shareholders throughout the United States and the world who own Freeport stock. Some of the major institutional investors are TIAA-CREF, the New York City Employees Retirement System and a host of companies that package Freeport shares with others to create the mutual funds that are the bedrock of Americans' pensions and other investments.

The human rights conditions associated with Freeport's mining operations[15] include:

- Torture, rape, indiscriminate and extra judicial killings[16], disappearances, arbitrary detention, racial and employment discrimination, interference with access to legal representation, and severe restrictions on freedom of movement;

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[14] Abrash, "Development Aggression," p. 17.

[15] See, for example, Abrash, "Development Aggression"; "Mission to Indonesia and East Timor on the Issue of Violence Against Women, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences," UN Economic and Social Council, E/CN.4/1999/68/Add.3 (January 21, 1999); "Report of the Visit of the Working Group to Indonesia (January 31 to February 12, 1999)," UN Working Group on Arbitrary Detention, UN Economic and Social Council, E/CN.4/2000/4/Add.2 (July 5, 1999); "Results of Monitoring and Investigating of Five Incidents at Timika and One Incident at Hoea, Irian Jaya During October 1994-June 1995," National Human Rights Commission of Indonesia, Jakarta, September 1995; "Violations of Human Rights in the Timika Area of Irian Jaya, Indonesia," Catholic Church of Jayapura, 1995; "Human Rights Violations and Disaster in Bela, Alama, Jila and Mapnduma," Indonesian Evangelical Church (Mimika, Irian Jaya), the Catholic Church Three Kings Parish (Timika, Irian Jaya), and the Christian Evangelical Church of Mimika, 1998; "Incidents of Military Violence Against Indigenous Women in Irian Jaya (West Papua), Indonesia," RFK Center for Human Rights and the Institute for Human Rights Studies and Advocacy, Washington/Jayapura, 1999; LEMASA, "The Amungme Tribal Council's Resolution on the 50th Anniversary of the Universal Declaration of Human Rights and its Implementation on Papuan Soil," Timika, December 10, 1998; Survival International, "Rio Tinto Critic Gagged," Survival International, London, 1998; Robert Bryce, "Plaintiffs in Freeport Suit Are Harassed," *Austin Chronicle*, September 27, 1996; and LEMASA, " The Indonesian Armed Forces in Timika Forcefully Took Away the People's Document," Timika, August 14, 1996; and "Timika: Where's Mama?" *Tempo*, Regions 27/I, March 13-19, 2001.

[16] The first documented Indonesian military killings of indigenous people in the Freeport area occurred in 1972, when Amungme protested against Freeport's operations on Amungme lands. Researchers have recorded more than 150 cases of individual killings of Amungme and other indigenous people in and around the mine since the 1970s, as well as hundreds of additional deaths amongst these populations from illness and injury due to forced relocation and military attacks.

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- Violation of subsistence rights resulting from seizure and destruction of thousands of acres of rainforest, including community hunting grounds and forest gardens, and contamination of water supplies and fishing grounds;
- Violation of cultural rights, including destruction of a mountain and other sites held sacred by the Amungme; and
- Forced resettlement of communities and massive destruction of housing, churches and other shelters.

Former Freeport pilot Terry Doyle states that in the late 1970s and early 1980s, Freeport company management ordered Freeport helicopter pilots to transport Indonesian military troops on patrol missions,[17] and there is well-documented evidence that during this same period, Indonesian troops carried out severe and violent attacks on civilian populations within and outside of Freeport's COW areas.

Indeed, Freeport has provided considerable financial and logistical support—as well as equipment—to the Indonesian military and police. Since the early 1970s, the Indonesian military has used Freeport-built infrastructure (e.g., airport, roads, port site) as a staging ground for deadly assaults against the original Papuan landowners in the mine's vicinity—actions purported to be undertaken for protection of the mine and the elimination of popular resistance to Indonesian sovereignty.[18] The military presence increased exponentially following the discovery of the Grasberg deposit, rising to at least 1,850 soldiers by 1996.[19]

The Indonesian government has acknowledged the active measures taken by the Indonesian military to expand its authority in the Freeport Contract of Work areas. Referring to a March 1996 riot that caused a temporary shutdown of mining operations, Indonesian Minister of Defense Juwono Sudarsono confirmed that "elements within the military had incited the unrest experienced by Freeport in order to highlight the benefits of their presence."[20] Senior and former Freeport employees also asserted that the military had convinced Freeport management that its presence was necessary to protect the mining operation from disturbances by "disgruntled employees, locals who accuse the company of environmental damage, exploitation (even pillaging) of resources, and cultural insensitivity."[21] In response, Freeport agreed to pay the military an initial sum of $35 million, to be supplemented by an annual "donation" of $11 million[22]. For example, leaked internal company documents provide information about Freeport's expenditures for military headquarters, recreational facilities, "guard houses and guard posts, barracks, parade grounds and ammunition storage facilities," as well as offices for two Army advisors, totaling $5,160,770 for the Army and an additional $4,060,000 for police.[23] Later reporting, by *The New York Times*, references payments by the company to individual Indonesian military personnel.

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[17] See interview with Terry Doyle in "The Role of the Indonesian Military in Irian Jaya," 12-13.
[18] See, among others, "The Role of the Indonesian Military in Irian Jaya, The Transmigration of Millions of Javanese Settlers to Irian Jaya, and Why the Issue is so Problematic for Australian Foreign Policy," Background Briefing Transcript (Parliament of the Commonwealth of Australia, Department of the Parliamentary Library, September 18, 1983), p. 7.
[19] Final Report: Amungme Baseline Study, Appendix V, UNCEN-ANU Baseline Studies Project, Universitas Cenderawasih and the Australian National University, 1998.
[20] Lesley McCulloch, "Trifungsi: The Role of the Indonesian Military in Business," presented to The International Conference on Soldiers in Business: Military as an Economic Actor (Jakarta: Bonn International Center for Conversion, 2000), p. 29.
[21] Lesley McCulloch, "Security Dilemma for Investors," *Jakarta Post*, 17 July 2000.
[22] McCulloch, "Trifungsi," p. 29.
[23] Julian Evans, "Indonesia's Next East Timor," *New Statesman*, 10 July 2000.

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> "According to Company records obtained by *The Times* show that from 1998 through 2004, Freeport gave military and police generals, colonels, majors and captains, and military units, nearly $20 million. Individual commanders received tens of thousands of dollars, in one case up to $150,000, according to the documents. They were provided by an individual close to Freeport and confirmed as authentic by current and former employees."[24]

Concerned about the potential investor risks and liabilities resulting from Freeport payments to the military, the New York City Comptroller's Office, on behalf of the NYC Employees Retirement System (managing the pensions of the city's firefighters, teachers, police and other civil servants), filed a shareholder resolution in 2005 calling on Freeport management to report to shareholders on these risks.[25]

However, investor concerns about the company's practices remain. Most recently, Norway's Minister of Finance announced on September 9, 2008, that the country's Government Pension Fund – Global, with $375 billion in holdings, has divested itself of all stock holdings in Rio Tinto, the giant Anglo-Australian mining firm that owns a major share in Freeport's West Papua mine, because of the extreme environmental damage caused by the Freeport mining operation.[26] The same Norwegian government pension fund divested itself of all its Freeport (FCX) stock in December 2006.[27] This decision was based on a judgment by Norway's Council on Ethics for the Government Pension Fund – Global that Freeport's dumping of toxic mine waste into local river systems has caused environmental damage that is "extensive, long-term and irreversible," with "considerable negative consequences for the indigenous peoples residing in the area."[28]

The Norwegian decision brings to mind a similar finding by the U.S. Overseas Private Investment Corporation (OPIC). Citing the damage caused by Freeport's river disposal of waste known as "tailings" and concluding that the company's environmental impact was in violation of U.S. regulations, OPIC revoked Freeport's $100 million political risk insurance in October 1995. OPIC stated that the mine had "created and continues to pose unreasonable or major environmental, health or safety hazards with respect to the rivers that are being impacted by the tailings, the surrounding terrestrial ecosystem, and the local inhabitants."[29]

Indeed, Kamoro communities wrote to Freeport management in 1997, calling attention to the serious environmental and health impacts of the company's mining operations. Their letter states: "The 87 families and 300 people of our villages [who] have suffered from the disposal of mining wastes and environmental damage caused by [Freeport] for over thirty years in this area protest to you strongly about the continuous pollution and devastation of our tribal lands . . . The floods and the toxic

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[24] Jane Perlez and Raymond Bonner, "Below a Mountain of Wealth, a River of Waste," *The New York Times*, December 27, 2005, p. A1.

[25] Jan Fetter-Degges, "Freeport-McMoRan, Human Rights: Overview," Social Issues Service, 2006 Company Report – C, Insitutional Shareholder Services, April 13, 2006.

[26] Bjorn H. Amland, "Norway wealth fund blacklists miner Rio Tinto over environmental concerns in Indonesia," Associated Press, September 9, 2008; John Acher, "Norway oil fund ejects Rio Tinto on ethical grounds," September 9, 2008, Reuters; David Robertson, "Norwegian wealth fund sells stake in Rio Tinto; The opencast Grasberg mine in West Papua, Indonesia, has been called one of the worst eyesores in the world," *The Times* (of London), September 10, 2008.

[27] Ministry of Finance, Norway. 2006. "Two companies – Wal-Mart and Freeport – are being excluded from the Norwegian Government Pension Fund – Global investment universe." Press release No.: 44/2006. June 6. Retrieved January 3, 2008, from Ministry of Finance Website: http://www.regjeringen.no/eng/dep/fin.html.

[28] Ibid.

[29] U.S. Overseas Private Investment Corporation, Letter to Freeport-McMoRan Copper & Gold Inc. (Washington: 10 October 1995); Robert Bryce, "Rough times for OPIC," *Austin Chronicle*, 21 February 1997.

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chemicals caused by the mining waste dumped in the River Muamiuwa and River Ajkwa have [made some places dry up and poisoned others]. The sago palms and the trees which provide wood for our homes and canoes are dead; the animals we hunt have fled; the traditional medicine plants have gone. Our culture is starting to die out and we are suffering from increasing serious health problems."[30]

Indonesian law explicitly provides that (1) every person has the right to a good and healthy living environment; and (2) those managing the land have an obligation to prevent and abate environmental damage and pollution.[31] However, legal researchers cite Indonesia as a "classic example of a state with extensive environmental legislation going virtually unenforced due to political constraints."[32] Senior government officials, their family members and associates, and members of the armed forces maintain vast holdings in mining, logging, and other natural resource operations throughout the country.[33] Lack of an independent judiciary proves a primary obstacle to environmental and human rights protection.[34]

It is important to note, too, that Freeport-McMoRan's relationships with U.S. and Indonesian government decision-makers reportedly have shielded the company from independent scrutiny of its involvement in human rights and environmental violations.

For example, according to U.S. foreign service officers who have served in the U.S. Embassy during the past three decades, Freeport management has enjoyed a close relationship with U.S. ambassadors serving in Jakarta and with some U.S. Embassy staff who are responsible for oversight of environmental issues in Indonesia. One foreign service officer who served in Jakarta in the 1980s as the Embassy's human rights officer described how West Papua was "off limits" to human rights monitoring by Embassy staff. Stating that he and his colleagues were never invited to do monitoring in West Papua, the foreign service officer described how this was part of the "understanding" that Freeport CEO Moffett had with U.S. ambassadors.[35] Another former foreign service officer described being summoned to Ambassador Bob Barry's office immediately following the departure from Indonesia of the 1994 U.S. Overseas Private Investment Corporation (OPIC) team that was examining Freeport's environmental practices. The former foreign service officer reported being grilled by Barry, then-PT Freeport Indonesia President Louis Clinton and another Freeport representative about the

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[30] Kamoro community members from Negeripi and Nawaripi, "Protest Against Environmental Destruction and Rejection of Plans to Move People from their Tribal Lands" (Timika: 25 January 1997).

[31] See 1982 Basic Provisions for the Management of the Living Environment, Act 4, article 5.

[32] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the Harvard Law School Human Rights Program, "Research Report to the Assistant Secretary-General in Response to the Special Rapporteur on Human Rights and Environment" (1996), 14.

[33] The military has not hesitated to acquire and protect assets by force. A lieutenant commander of Indonesia's elite, US-trained Kopassus special forces told a human rights investigator in West Papua in 1998 that the military was carrying out operations in West Papua's Central Highlands "to make sure that investors can come in." See RFK Center and the Institute for Human Rights Studies and Advocacy, "Incidents of Military Violence." See, among others, Leith, "The Politics of Power," and Peter Waldman, "Hand in Glove: How Suharto's Circle and a Mining Firm Did So Well Together," The Wall Street Journal, September 29, 1998, p. A1.

[34] For further information concerning the subordination of the Indonesian judiciary to the executive and the military, see, for example, U.S. Department of State, "Country Reports on Human Rights Practices: Indonesia" (Washington: U.S. Government Printing Office, January 1997-2007), preface and sections on Denial of Fair Public Trial; For example, from the 2007 report: "The law provides for judicial independence. In practice the judiciary remained susceptible to influence from outside parties, including business interests, politicians, and the military. Low salaries continued to encourage acceptance of bribes, and judges were subject to pressure from government authorities, which appeared to influence the outcome of cases."

[35] Interview by the author, Washington, D.C., 1997.

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OPIC team's itinerary and the content of their meetings with Indonesian officials of the Ministries of Environment and of Mines & Energy.[36] According to a high-ranking U.S. Embassy official present in Jakarta in the late 1990s, more-senior U.S. Embassy personnel colluded with Freeport and members of the Indonesian government to block the American lawyer Martin J. Regan from meeting with his Amungme clients.[37] (In September 1996, Indonesian police deported and black-listed Mr. Regan when he attempted to meet with his clients in Timika.)

Freeport reportedly also has sought to increase its influence with U.S. officials through its political contributions. For example, according to a February 1997 article in the *Austin Chronicle*[38], there is an apparent link between OPIC's 1996 temporary reinstatement of Freeport's political risk insurance (through December 1996) and Freeport contributions to the Democratic National Committee (DNC). According to the article, sources close to OPIC reported that, after the agency reinstated Freeport's political risk insurance, then-OPIC President Ruth Harkin stated that she had persuaded Freeport's Chief Executive Officer James Robert ("Jim Bob") Moffett to contribute $100,000 to the DNC.[39]

The Kamoro and Amungme continue to seek the return of lands that Freeport and the Indonesian government have confiscated without the community's permission, accountability for military personnel who have perpetrated human rights abuses, explanations by Freeport of the company's mining plans, a role in decision-making regarding use and management of natural resources and environmental conservation, and independent environmental and human rights assessments to determine the extent of damages. They have appealed to the Indonesian government and military, the United Nations, United States courts and policymakers, and directly to Freeport and Rio Tinto (a major investor in Freeport's West Papua operation) management and shareholders in an effort to be heard and to have their concerns effectively addressed. These appeals have come in the form of public community resolutions, interventions and other testimony to U.N. human rights bodies and Indonesia's National Commission on Human Rights, U.S. Congressional briefings, numerous direct meetings with Freeport management, and two court cases, filed on behalf of Amungme plaintiffs in U.S. federal and Louisiana state court, respectively.[40]

If the political will and legal mechanisms existed to respect and enforce the right to development[41] and other basic rights guaranteed under international law, the Amungme and Kamoro might find redress for the myriad environmental, cultural, political and economic injustices they have experienced. (Indeed, governments, including Indonesia and the United States, have reaffirmed the right to

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[36] Interview by the author, Washington, D.C., 2000.
[37] Correspondence with the author, September 2008.
[38] Bryce, "Rough Times," 1997.
[39] According to U.S. Federal Election Commission documents, as reported by the *Austin Chronicle*, Freeport-McMoRan gave the DNC $40,000 on August 26, 1996. On September 6, 1996, the wives of Freeport's top executives, Chief Financial Officer Richard Adkerson, vice chairman Rene Latiolais, and Chief Investment Officer Charles Goodyear, wrote checks to the DNC totaling $35,000. Four days later, Mr. Moffett's wife Louise wrote a check to the DNC for $2,500, bringing the total amount of contributions by Freeport spouses to $77,500 within a two-week period.
[40] *Beanal v. Freeport-McMoRan Copper & Gold, Inc.* (a $6 billion lawsuit filed in U.S. Federal District Court on April 29, 1996) and *Alomang v. Freeport-McMoRan Copper & Gold, Inc.* (filed in the Louisiana state court system on June 19, 1996). The federal suit was not successful. The Louisiana State Supreme Court upheld the right of Ms. Alomang to sue Freeport in Louisiana state court. However, Michael Bangeris, the New Orleans district court judge, dismissed the suit on March 21, 2000, on the grounds that the plaintiff had not proven that PT Freeport Indonesia is the "legal alter ego" of Freeport-McMoRan Copper & Gold, Inc.
[41] See Declaration on the Right to Development; United Nations General Assembly; Resolution 41/128; adopted December 4, 1986; and "Integrating Human Rights with Sustainable Human Development," United Nations Development Programme, New York, January 2000

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development, which incorporates an emphasis on sustainable development and environmental protection, as a "universal and inalienable right and an integral part of fundamental human rights."[42])

Rather than take meaningful action to respect well-established international human rights standards as it was urged to do by respected international human rights organizations, Freeport chose to take cover through becoming a signatory to the Voluntary Principles on Security and Human Rights, crafted by the U.S. State Department in response to mounting evidence and international criticism of extractive industries' contribution to human rights violations in the areas in which they operate. The Voluntary Principles, however, are fundamentally flawed in that they are:

1) Voluntary, without any requirement that all corporations be held to the same performance standards
2) Not Transparent, without any requirement that corporations cooperate with independent monitoring of facts on the ground in operations areas
3) Lax, by sanctioning the continued *de facto* collusion and patronage between corporations and national or local security forces that operate, with recourse to lethal force, and with impunity to safeguard corporate operations over the well-founded and often peaceful resistance of local affected communities
4) Inadequate, in that they ignore the central question of whether or not members of affected communities' basic rights have been respected and upheld in the decision by national government elites to contract with corporations to operate in the first place

The story of the Amungme, Kamoro and Freeport continues, now in its fourth decade. By taking a determined stand in defense of their rights, the Kamoro and the Amungme and other similarly situated communities are changing the rules of the game,[43] making it increasingly unacceptable that corporations and governments devastate communities and the natural environment in the name of corporate profit-taking and trickle-down "development."[44] It also underscores the urgent need for more successful mechanisms for safeguarding the rights of those affected adversely by extractive industries.

Indeed, in an open letter to Indonesia's National Commission on Human Rights, the Amungme state, "For us, the Amungme people, the root cause of the human rights violations is Freeport . . .Considering that the government decided to designate Freeport as a 'vital project', why was the matter not first

[42] Vienna Declaration and Programme of Action, World Conference on Human Rights, United Nations, A/CONF.157/23, June 25, 1993, section 10.

[43] International human rights instruments and other "best practice standards" now include Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization, adopted June 27, 1989; U.N. Declaration on the Rights of Indigenous Peoples, September 2007; Proposed American Declaration on the Rights of Indigenous Peoples, Proposed American Commission on Human Rights, OEA/Ser/L/V/11.95, Doc. 6, February 26, 1997; and Principles for the Conduct of Company Operations Within the Minerals Industry, Australian Non-Government Organizations, October 1997.

[44] The Amungme and Kamoro's resistance to Freeport – and the extensive documentation of the human rights and environmental problems associated with the company's West Papua mining operation – served as a factor in a June 5, 2000, decision by Sri Lanka's Supreme Court to uphold the Constitutional rights of local farmers and a Buddhist monk in defending their lands and livelihoods from the danger posed by a proposed phosphate mining operation that the government of Sri Lanka attempted to contract with Freeport to conduct via a mineral investment agreement. The three judges quoted the Rio Declaration in their decision, stating that, "Human beings are at the centre of concerns for sustainable development. To achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Source: Tharuka Dissanaike, "The Eppawala example: The Eppawalans' environment is safe, all credit to local activism," *Himal Southasian*, The Southasia Trust, Lalitpur, Nepal, October 2000.

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discussed with the people who are the owners of the natural resources before the company began its operations? Or is it that because the company was designated as a vital project, it was deemed necessary to sacrifice the interests of the people? If the company is indeed a vital project, making it necessary for the Government to sacrifice its own people, we regard this as economic colonisation by capitalists in contravention of our national economic system. . . . The fact that Freeport has been allowed to operate here in Irian Jaya and dig up and exploit our mineral resources, to destroy the very means of our existence, to drive us out of our ancestral lands, to impoverish us and kill us on our own territory, is all the result of a policy which has been determined at the centre in Jakarta. It is the Central Government that must take responsibility for reaching a solution to this problem."[45]

I commend and thank this Subcommittee for exploring this crucial subject area through today's hearing, and urge the honorable members of this body to exercise your effective and principled leadership in strengthening the rule of law and protection of human rights with respect to the operations of extractive industries.

Thank you.

[45] "Amungme People's Response to National Commission on Human Rights Findings Announced on 22 September 1995."

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