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LIMITED CIRCULATION

ENLARGED WORKING GROUP ON SUDAN: RESOURCE EXPLOITATION IN CONFLICT SITUATIONS

March 31, 2000
Ottawa

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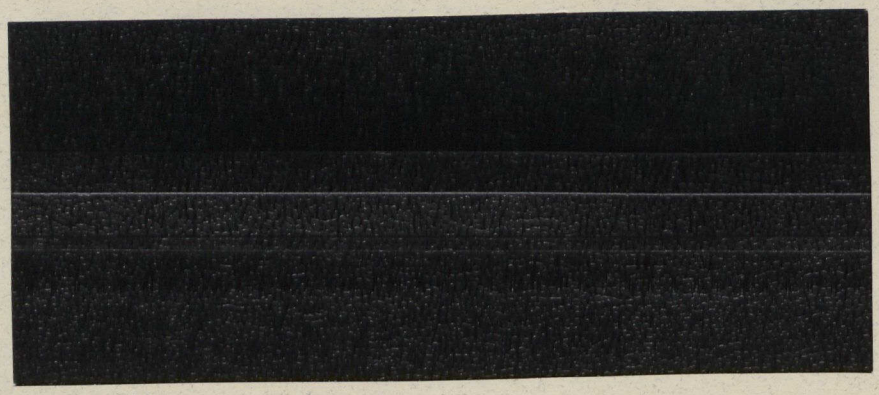

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On March 31, 2000, an enlarged Working Group on Sudan was convened to address resource exploitation in areas of conflict. The roundtable was a part of a larger consultation about Sudan. Hosted by the Canadian Centre for Foreign Policy Development, it was chaired by Senator Lois Wilson and included, among others, Gerry Barr, John Harker, Ian Smilie, Joe Stern, Shaun Poulter, and Penelope Simons.

1. Outlining the Problem

Consensus developed that operations of some foreign companies in conflict situations may aggravate/fuel conflict and have negative impacts on local human rights. Drawing on his own experience, John Harker pointed out that while some corporate executives profess values in common with human rights activists and NGOs, they often overlook and fail to acknowledge apparent human rights violations related to the operations of their companies. Therefore, companies have to be held responsible for their actions and accountable to some code of conduct. Ian Smilie talked about the need to distinguish between those companies which deliberately profit from conflict and those which make genuine investments. Since the former are mostly footloose (their location and identity easily changeable) monitoring and enforcement mechanisms should be directed at individuals and cash flows rather than the companies themselves.

Penelope Simons drew attention to the culture of the business sector. The main logic of a private company is to make profit. Historically, the behaviour of mostly Western private companies, unhindered by state or other multilaterally-based regulation, generated massive problems in countries (colonies) they operated in. Corporate responsibility should not only stem from a legal obligation but have a real moral/cultural base, she argued. Business culture should change so that more than just the profit logic guides the decisions and actions of private companies.

Most participants agreed that operations of private companies, especially in conflict zones, have to be made more transparent and operate withing some normative framework/set of universal standards. Currently, no effective legal mechanism exists to address human rights and

other infractions committed by private companies abroad. Sanctions are directed against states, not private individuals. Meanwhile, criminal law is not extraterritorial. Obligations of private companies are to be addressed by individual states in which they operate: "we can not tell Canadian companies how to act abroad just as we do not want foreign states to meddle in the operations of their companies in Canada," said Douglas Forsythe, Deputy Director, Economic Law Section, DFAIT.

States are bound by international laws, including provisions directed against slave labour, for instance. However, here the problem of an enforcement mechanism comes into play. As Joe Stern pointed out, while states may sign an abiding international convention, they are ultimately left with the choice to apply/enforce it. (We have seen the enforcement of international law in grave cases, such as war crimes or crimes against humanity through the International Criminal Court. However, precedent has not been set in regard to the unethical behaviour of private companies.)

Participants agreed to varying degrees that non-legal enforcement of codes of conduct is as important as existing legal enforcement mechanisms (i.e., sanctions, international law). The media, share values, image, greatly influence corporate behaviour, said Errol Mendes. Ian Smilie drew attention to the significance of public pressure. However, he added that non-legal enforcement tactics (i.e., public outcry) must go hand in hand with a legitimising legal framework.

Others, like David Melvill, Eastern and Southern Africa Division, DFAIT, emphasised the role share-holders play in driving corporate values. Share value depends on customer satisfaction. If a company is managed well and invests responsibly, share values increase. (The Talisman case made this apparent as share value declined following the release of information linking Talisman`s operation to human rights abuses in Sudan). The key is to facilitate more investor thinking around social responsibility. If share holders care about human rights, then corporations must care as well, he concluded. Gerry Barr, suggested that share holders are not always effective in holding companies accountable. In the Talisman case, for instance, share holders were denied voice because they held shares through Mutual Funds. Another problem is that consumer pressure is lower in extractive industries since the link between the final consumer and the producer is indirect and often rather abstract. Moreover, share holders express their disapproval through the sale of shares. To mitigate losses, it is in their interest to keep problems secret, posing obvious challenges to their ability to act as effective watch dogs.

Other tools that may be used to set a normative framework for companies include risk assessment and due diligence. A public relations audit is a possible tool since the image of a company bears greatly on risk assessment. Investor analysts and the media could be involved in these processes. However, some participants pointed to the Talisman example and reiterated that without some tangible framework and a monitoring and enforcement mechanism, companies will not be likely to co-operate closely with the media, NGOs, and other interest groups. Voluntary codes of conduct may end up diluted and largely ineffective. Moreover, as in the case of

Talisman, companies may choose to ignore the outcome of a risk assessment.

The problem of monitoring/regulating the trading of Canadian companies based entirely abroad arose. How to enforce rules in such situations? Stopping trading could be one of the possible punitive actions. However, the availability of reliable information is a problem in this case. The media would only provide newsworthy information, posing a serious challenge to the consistency and coherence of such a punitive framework.

Another point raised during the discussion by Ian Smilie was that the problem is political. It is not so much Talisman and other resource extractive companies that constitute the root of the problem, rather it is the repressive governments of countries these companies operate in. Criticism and mechanisms should be directed towards them as well.

2. Possible Solutions

Gerry Barr suggested that while there are areas where self-regulation models work, there are also extremes where regulatory measures are needed. "*A small law could be designed for the uniquely precarious circumstances that apply in complex emergencies to allow for national enforcement of internationally accepted and articulated human rights.*" The purpose would not be to restrain companies in their operations but, instead, to set a standard of performance which would ensure that profits and revenues would not be dependant on abusive practices or derived at the expense of regional stability.

Drawing on a Norwegian example, *the Canadian government, led by Minister Axworthy, could initiate a Canadian consultative body to review self regulation modes and canvass and explore a possible regulatory suite.* The existence of a MOU with Norway provides some buttressing and context. The Minister could identify the Talisman experience as one of the engines for this decision. A number of initiatives now underway in Canada could be brought into this process as well, including work now being done on the apparel and retail industries and transparency. Focussing on the extreme cases, this initiative could create the basis for regulation. The consultative body could provide context for articulation of actions that are presently impossible. Broad public support could be build in support of such an initiative, and a balanced public opinion created.

The Norwegian consultative body for human rights and Norwegian economic involvement abroad is call KOMpakt. KOMpakt is steered by the government. It is a multisectoral body that involves business, NGOs, business associations, and churches. It exposes Norwegian business to the social, economic and political consequences of their investments abroad, threats to workers rights, escalating poverty and social disintegration. It serves as a discussion forum and spreads awareness about the importance of corporate social responsibility: a national and corporate clean image is important to consumers, employees and critical for downstream commercial opportunities abroad. KOMpact has 5-6 plenary meetings annually and

three working groups.

Louis Guay, Western Anglophone Africa, DFAIT, pointed out that lessons may also be learned from the Mining Policy Research Initiative. The MPRI was a multi-stakehoder body set up during the investment surge in Latin America to promote good practices among Canadian companies in the region.

Such a solution would be beneficial to Minister Axworthy and the Canadian government because it would allow the government to manage the discussion on resource exploitation in conflict zones and social corporate responsibility. It could also be seen as a constructive reaction to the conundrums posed by Talisman. If anything there will be more such challenges in the future.

Senator Wilson added that in order for such body to work, business would have to be intimately involved. She recalled a similar forum created by the International Centre for Human Rights and Development in Montreal. The representatives of business were targeted by NGOs and others to the point they felt compelled to walk out. She cautioned against repeating this mistake and encouraged a balanced inclusive approach. A national consultative body should include as many actors as possible: securities commissions, stock exchanges, lobby groups/associations, businesses, members of the financial sector (banks, insurance companies), government officials, International Financial Institutions, multilateral agencies, trade unions, churches, NGOs, and the academic community. The countries of impact should also be involved through a set of their own institutions and contact groups. Information/company reports should be accessible not only to shareholders by others as well.

Some suggested that Minister Axworthy could capitalise on the moral, as opposed to executive, authority of his office and adopt a language punitive to unethical corporate behaviour. There is little tangible leverage the government has *vis a vis* the private sector today. Others, however, cautioned against any strong expression of moral outrage on the part of the Minister since, without concrete remedial steps, moral outrage could undermine his credibility. Nonetheless, the government should encourage corporate responsibility. The Minister could set a benchmark by publicly stating how he expects Talisman to react (before May 3, 2000). Concretely, he could address dilemmas related to private security arrangements, the necessity of a neutral monitoring mechanism, a compensatory mechanism for those affected, as well as revenue management.

In the longer term, the government should develop a broad public discourse which would reflect the complexity of the issues and adopt a pro-active rather than defensive approach. (This could be achieved by convening a national consultative body on the lines of the Norwegian KOMpakt.) It should promote the discussion of the issues in various multilateral bodies and get the endorsement of the UN Secretary General. The government should also focus on doable goals and use those legal mechanisms that exist. Moral suasion and leadership should be matched by legal pressure. Activities aimed at developing a normative and legal framework for resource

extraction in conflict zones and instilling corporate social responsibility should be seen as a long term strategy. *A good record of Canadian companies should be conceptualised in economic terms as a comparative advantage.* The government should develop a communication strategy to relay these normative concepts and tangible initiatives to a wide public audience. A balanced public opinion is in everybody's interest.

Senator Lois Wilson pointed out that in order to tackle these difficult issues, Canada will have to address the tension between its human rights objectives and investment promotion. Another point raised during the discussion was that it could be beneficial to conceptualise oil/resources as drivers of peace rather than war. The impact of resources on conflict also has to be considered in a particular country context. Efforts should continue to develop codes of conduct and ensure the existing codes are not weakened. There has been some progress in the private sector: most reputable companies engage in research and do risk assessment before initiating operations.

In conclusion, Senator Wilson thanks everybody for their participation in the roundtable. Joe Stern echoed her comments and reiterated the importance of outside views to the shaping of Canadian foreign policy toward Sudan.

List of Participants

Senator Lois Wilson, Chair
Joseph Stern
Harald von Riekhoff
Penelope Simons
Georgette Gagnon
Shaun Poulter
John Harker
Ian Smilie
Gerry Barr
Errol Mendes
Shawn Houlihan
Andrew McAllister
Michelle Lobo
Louis Guay, Deputy Director, Western Anglophone Africa, DFAIT
Douglas Forsythe, Deputy Director, Economic Law Section, DFAIT
David Melvill, Sudan, Somalia, Uganda, Eastern and Southern Africa Division, DFAIT
Marketa Geisler, Rapporteur/Writer, Canadian Centre for Foreign Policy Development