

Unanswered questions

Companies, conflict and the Democratic Republic of Congo

March 2004

The work of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo

and

The OECD Guidelines for Multinational Enterprises

RAID

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Rights and Accountability in Development (RAID) was founded in 1997 and carried out a 3-year research project investigating the human rights impacts of the privatisation of Zambia's copper mines under the auspices of the Refugee Studies Centre, Queen Elizabeth House, University of Oxford. In September 2003, RAID was incorporated as a private, not-for-profit, limited company. RAID aims through its research to promote social and economic rights and improve corporate accountability. RAID participated in the review of the *OECD Guidelines for Multinational Enterprises* and, through OECD WATCH, an international network of NGOs, works for their effective implementation.

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Unanswered questions: Companies, conflict and the Democratic Republic of Congo

Abstract

The Democratic Republic of Congo (DRC) is emerging from a devastating five-year war that is estimated to have cost the lives of more than three million people. Multinational corporations have been accused of helping to perpetuate the war and of profiteering from it. In a series of reports documenting the links between business, resource exploitation and conflict in the DRC, a UN Panel of Experts listed companies considered to be in violation of international business norms such as the *OECD Guidelines for Multinational Enterprises*. The UN reports raised the expectation that governments would hold to account those companies that were responsible for misconduct in the DRC. To date, there have been few signs of a response.

The furore created by the Panel's reports has heightened the need to distinguish between culpable multinational enterprises and those who acted responsibly in the DRC. Yet the Panel's final report failed to establish this distinction with rigour and clarity. Many unanswered questions remain about the allegations against companies. This raises concerns about how corporations should conduct business in zones of conflict and whether their behaviour ought to be regulated.

This report by Rights and Accountability in Development (RAID) examines the role of companies in the DRC conflict, their reactions to being listed by the UN Panel and the publicly unanswered questions that remain about their conduct. It frames the questions in relation to the *OECD Guidelines*. Governments adhering to the *Guidelines* have a responsibility to ensure that they are applied. It is in nobody's interest — neither that of responsible companies, nor that of the people of the DRC — to leave these questions unresolved. This report should act as a catalyst for action by governments.

An electronic version of RAID's full report is to be submitted to the UN Security Council, OECD Governments, the OECD's Committee on International Investment and Multinational Enterprises (CIME) and the International Criminal Court. Companies are urged to use the good offices of the NCPs to both provide and obtain further information.

Key Recommendations

- ❖ *Prompt government investigations:* Governments must give much greater priority to the examination of the role of companies in the DRC. The mechanism that exists under the *OECD Guidelines for Multinational Enterprises* for the investigation of company conduct should be used now with a view to issuing public recommendations on compliance. This will require revisiting many cases declared by the Panel as resolved.
- ❖ *International Criminal Court:* The United Nations and governments should co-operate fully with investigations which are being launched by the ICC into, *inter alia*, the complicity of business in war crimes in the DRC.
- ❖ *Domestic prosecutions:* National governments must investigate and prosecute companies where their conduct is shown to contravene domestic legislation. This includes the urgent investigation of alleged money laundering and arms trafficking by companies based in their jurisdictions in relation to the DRC.
- ❖ *Action by the OECD:* The OECD's Committee on International Investment and Multinational Enterprises should issue a clarification to companies about acceptable and unacceptable corporate conduct in conflict and post-conflict situations. The UN Human Rights Norms for Business should be incorporated into the text of the *OECD Guidelines*.
- ❖ *Call for permanent monitoring:* A permanent UN body, with clear and transparent procedures, should be established to monitor the role of business in conflict.
- ❖ *Binding regulation of business:* The *OECD Guidelines* – which can neither impose sanctions nor offer compensation – are a positive, but preliminary step, towards holding companies to account for their actions. In the absence of sufficient progress to redress corporate misconduct under the *Guidelines*, governments should consider a renewed call for the binding regulation of multinationals.

Unanswered questions: Companies, conflict and the Democratic Republic of Congo

Executive Summary

Introduction

This report is an examination of the role of companies in the five-year conflict that ravaged the Democratic Republic of Congo (DRC), their reactions to being listed by the UN Panel, and the publicly unanswered questions that remain about their conduct.¹ For the first time, both the Panel's allegations and the companies' responses are framed in relation to specific provisions of the Organisation for Economic Cooperation and Development's (OECD) *Guidelines for Multinational Enterprises*, the standard the Panel adopted as its yardstick.

Unanswered Questions argues that given the UN Security Council's failure to resolve satisfactorily and publicly the outstanding alleged breaches of the *OECD Guidelines*, governments now have an obligation to use the mechanisms they set up to monitor compliance under the *Guidelines* to investigate the Panel's allegations and put an end to speculation. Many of the companies share this viewpoint and may be frustrated by the lack of opportunity to have their views heard. But others may be simply satisfied with their 'resolved' status and may oppose any further inquiry.

The DRC is at a critical phase in its transition to the rule of law and desperately needs investment by responsible businesses to help repair the country's shattered infrastructure and regenerate its economy. Until impartial and fair public investigations have been carried out, the unanswered questions will continue to cast their shadow over the DRC's future and company activities in the country. Above and beyond the particular problems of the DRC, there are broader questions: What standards of corporate conduct are governments prepared to tolerate in conflict- and post-conflict situations? Are the existing instruments and voluntary codes adequate? And are the available implementation procedures of the *OECD Guidelines* sufficient for monitoring and enforcing them?

RAID makes no allegations of its own nor does it claim that any of the UN's allegations amount to a final determination of misconduct.² It simply argues

¹ UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo.

² The allegations that are restated do not purport to be based on material other than the Panel's reports or company responses unless specific reference is made to other sources.

that the Panel's reports raise legitimate, ethical questions which, in the interest of all parties concerned, must be resolved publicly and unambiguously.

The human and economic costs of the war

The war in the DRC, which began in August 1998, is estimated to have cost some 3 million lives, making it the most devastating conflict in terms of civilian deaths since World War II.³ Human rights organisations have documented grave abuses that have been carried out by all parties during the war. Unarmed civilians have been massacred; forcible abductions, arbitrary arrest and torture have been widespread; and thousands of women and girls have been subjected to rape by combatants.⁴ The human and economic costs of the war have been immense. According to the World Bank 'Physical damage is extensive, institutions are in a shambles and the economy has literally collapsed'.⁵ Accurate and reliable data on levels of poverty and deprivation are not readily available, but information from a range of UN and other sources, including the Interim Poverty Reduction Strategy, makes grim reading.

- ❖ More than 2.4 million people are internally displaced, living in extreme poverty.
- ❖ 37 per cent of the Congo's 55 million people have no access to any kind of health care — most health districts are in a state of complete abandonment.⁶
- ❖ 33 per cent of the population — 16 million people — suffer from serious malnutrition
- ❖ Per capita income has declined steadily from \$ 250 in 1990 to \$ 85 in 2000.
- ❖ DRC is now one of the world's poorest countries and social indicators are among the worst in Africa.

The war has left the country in a state of economic collapse. According to the World Bank, 'the

³ International Rescue Committee, 'Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey,' April 2003.

⁴ See for example, Human Rights Watch, *Democratic Republic of the Congo: Confronting Impunity*, January 2004.

⁵ World Bank, *Emergency Economic and Social Reunification Support Project*, 11 September 2003.

⁶ World Bank, *Democratic Republic of the Congo, Interim Poverty Reduction Strategy and Joint IDA-IMF Staff Assessment*, 24 May 2002.

widespread looting of public and individual assets, and the absence of any effective economic management systems have discouraged economic production, while laying the ground for a mushrooming of semi-criminal networks'.⁷

In April 2003, the warring parties finally agreed to share power and signed the All Inclusive Agreement on the Transitional Government. Elections are due to be held in 2005. The Government of National Unity was installed in June 2003 but the peace remains fragile. A Truth and Reconciliation Commission is supposed to be established to consider political, economic and social crimes committed from 1960 to 2003. The transitional government is also obliged under the terms of the peace agreement to set up a mechanism to review all commercial agreements and contracts signed during the conflict.

The Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo

In October 2003, the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo published its final report to the UN Security Council. The Security Council had appointed the Panel in 2000, as a response to widespread concern at the link between exploitation of gold, diamonds, and other minerals in the east of the DRC, and the war ongoing in that region since 1996. In the course of its work, the Panel has provided the most detailed account of how the exploitation of resources has funded many of the different armed groups fighting in eastern DRC, and has also enriched individual officers of the Rwandan, Ugandan and Zimbabwean armies that have intervened in the conflict. In addition, the Panel identified business enterprises from outside the region that it believed to be implicated in the conflict.

The UN Panel names companies considered to be in violation of the OECD Guidelines for Multinational Enterprises

In an unprecedented step, the Panel in its October 2002 report listed 29 companies and 54 individuals against whom it recommended the imposition of financial restrictions and travel bans. It included in an annex (Annex III) 85 other companies, which it declared to be in violation of the *OECD Guidelines for Multinational Enterprises*.

The *OECD Guidelines*, adopted by governments in all thirty OECD member countries and by eight non-

⁷ World Bank, *Emergency Economic and Social Reunification Support Project*, September 2003.

War in the Democratic Republic of Congo

1996: The first Congolese war begins.

May 1997: The government of President Mobutu is overthrown, bringing to power the Alliance des Forces Democratiques pour la Liberation du Congo-Zaire (AFDL) led by Laurent-Désiré Kabila.

August 1998: A falling out between Kabila and his former Ugandan and Rwandan allies, sparks a second Congolese war. The war draws in Angola, Namibia and Zimbabwe on the side of the DRC government and Uganda, Rwandan and Burundi on the side of several rebel groups.

1999: Lusaka Peace Accords are signed, but the peace collapses. DRC is divided among four regimes supported by foreign forces. A 'resource war' is fought, mainly in the eastern DRC: resources fuel the war, which is perpetuated to control resources.

16 January 2001: Laurent Kabila is assassinated and succeeded by his son, Joseph Kabila.

April 2002: Two of the principal rebel movements agree the Sun City Peace Accord with the DRC government.

30 July 2002: Rwanda and DRC sign bilateral accords, leading to Rwandan troop withdrawals in October 2002.

6 September 2002: Uganda and DRC sign bilateral accords leading to Ugandan troop withdrawals in May 2003.

April 2003: The third major rebel force, together with the other parties, sign the All Inclusive Agreement on the Transitional Government.

June 2003 onwards: The naming of a transitional government and the swearing in of two former rebel leaders as vice-presidents. However, serious microconflicts and human rights violations continue throughout 2003, especially in the provinces of Ituri and northern Katanga.

members, are recommendations addressed directly to companies setting down 'shared expectations for business conduct'.⁸

Most significantly, the *OECD Guidelines* are the first international instrument on corporate social responsibility to provide a government-supported (though voluntary) mechanism for monitoring and influencing corporate behaviour. Governments adhering to the *Guidelines* have been obliged to set up 'National Contact Points' (NCPs) to promote the *Guidelines* and 'contribute to the solution of problems which may arise.' Each NCP must report annually to the OECD Committee on International Investment and Multinational Enterprises (CIME). The *OECD Guidelines* outline a procedure, known as the 'specific instance' mechanism, for bringing issues of compliance to the attention of the relevant NCP.

⁸ Member countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK, and the USA; adhering non-members are: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia.

The Panel’s reports depict a self-reinforcing cycle of conflict and resource exploitation in the DRC: natural resources fuelled the war, which was perpetuated to control resources. All parties to the conflict have been accused of serious human rights violations. By mapping the interconnections between Congolese parties to the conflict, foreign governments and companies, the Panel maintained that business activities, directly or indirectly, deliberately or through negligence, contributed to the prolongation of the conflict and other human rights abuses.

In some cases, the Panel detailed specific allegations against companies in the main body of its reports. In others, it merely listed companies as being in violation of the *Guidelines* without further elaboration. Nowhere did the Panel relate its concerns to specific provisions within the *Guidelines*.

Unanswered Questions attempts to use the *OECD Guidelines* to identify the varying types and degrees of misconduct by companies doing business in the DRC and to do so on the basis of information publicly provided by the UN Panel and by the companies themselves in their responses.

Types of alleged misconduct	Questions of compliance
❖ Companies who benefited from the direct assistance of the combatants, such as those trading in minerals, which were, mined using forced labour or those whose assets were protected by soldiers or militia.	⇒ Such conduct raises serious questions in relation to the provision in the <i>Guidelines</i> which specifies that that enterprises should ‘[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.’
❖ Companies supplying arms to either rebel or government forces or even participating in military action.	⇒ Irrespective of whether or not sanctions have been breached, activity of this kind should be scrutinized to determine whether or not it is consistent with the human rights provision under the <i>Guidelines</i> .
❖ Companies engaged in the smuggling of diamonds to supply international markets, money laundering, and illegal currency transactions.	⇒ The <i>Guidelines</i> seek the adoption of accounting and auditing practices that prevent ‘off the books transactions’ or the creation of documents which do not properly and fairly record transactions. Clearly smuggling would represent a total disregard for such requirements.
❖ Companies buying minerals from former foreign or rebel-controlled areas without conducting due diligence tests as to where the minerals came from or who was profiting from the trade.	⇒ Under the <i>Guidelines</i> , it is specified that enterprises should encourage business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the <i>Guidelines</i> .
❖ Companies indirectly involved in the trade in resources from former foreign army and rebel-controlled areas of DRC.	⇒ The supply-chain provision places an onus on all companies to comply with the <i>Guidelines</i> and to consider whether their own role in exploiting resources in a conflict zone is compatible with the provisions on human rights and sustainable development.
❖ Companies offering inducements or exercising anti-competitive influence at a time of great instability to secure lucrative concessions or contracts.	⇒ Under the <i>Guidelines</i> , enterprises should not offer promise, give or demand bribes or other undue advantage to obtain or retain business. They should also refrain from entering into anti-competitive agreements and from seeking or accepting exemptions from statutory regulation.
❖ Companies profiting from lucrative joint ventures, mainly in government controlled areas, set up to exploit DRC’s natural resources with little or no benefit going to the Congolese people.	⇒ Under the <i>Guidelines</i> , enterprises should ‘[c]ontribute to economic, social and environmental progress with a view to achieving sustainable development.’ The compatibility of exploitative joint ventures with such a provision is highly questionable.
❖ Banks failing to exercise due diligence when providing facilities for companies engaged in misconduct.	⇒ The <i>Guidelines</i> require all enterprises, including banks, to ‘[s]upport and uphold good governance principles and to develop and apply good corporate governance practices.’ A responsibility is therefore placed on banks and financiers to exercise due diligence and to encourage business partners to apply principles of corporate conduct compatible with the <i>Guidelines</i> .

The UN Expert Panel is forced to backtrack

The Panel's naming of companies prompted many of them to lobby their own governments and the Security Council to seek their removal from the annexes. The Security Council, stung by criticism that companies had been denied an opportunity to respond to the Panel's allegations, invited them to send their reactions and gave an undertaking to publish them. The Security Council recommended a six-month renewal of the Panel's mandate. The main purpose of this was to review existing and new information 'in order to verify, reinforce and, where necessary, update the Panel's findings, and/or clear parties named in the Panel's previous reports, with a view to adjusting accordingly the lists attached to these reports'.⁹

In the final report of October 2003, the vast majority of company cases were listed as resolved. But serious questions about corporate conduct remain which require a public response.

Potential miscategorisations and unanswered questions

The categories used in the Panel's October 2003 report are confusing and contradictory. The 'resolved' category includes many cases where it is not at all apparent that there has been any resolution, and the reasons for determining that a case has been 'resolved' are not transparent. Many named companies have publicised their appearance in category I (resolved) as though it were synonymous with 'exoneration,' but that is not what the categorisation entails because the Panel's message is ambiguous. The Panel states that '[c]onsequently, the parties listed in Category I may be viewed as having been removed from the Annexes.'¹⁰ However, it also asserts: 'for any particular party the Panel has acquired information indicating that, *prima facie*, a party has been engaged in conduct related to business dealings linked to the DRC...that do not meet generally accepted international standards of corporate behaviour or governance'¹¹ and that '[i]t should be stressed that resolution should not be seen as invalidating the Panel's earlier findings with regard to the activities of these actors.'¹² In other words, 'resolved' does not necessarily mean absolved, only that there are 'no current outstanding issues'.

In its final report, there is no way of way of differentiating between those companies who were in violation of the *Guidelines* and those that were not because the Panel leaves unexplained the

⁹ UN Security Council, Resolution 1457 of 23 January 2003, paragraph 9.

¹⁰ UN Panel Report, 23 October 2003, S/2003/1027, paragraph 23.

¹¹ *Ibid.*, paragraph 15.

¹² *Idem.*

Category I companies are those whose cases are described as 'resolved', where the Panel has concluded that 'there are no current outstanding issues, the original issues that led to their being listed in the Annexes having been worked out to the satisfaction of both the Panel and the companies and individuals concerned.' In all, 42 of the companies formerly listed in annex III are now placed in the 'resolved' category.

Category II comprises two cases concerning companies which have reached a 'provisional resolution' on matters of substance, but one that is dependent on them fulfilling commitments that will only occur after the end of the Panel's mandate. Details have therefore been referred to the relevant NCPs for monitoring of these commitments.

In **category III** are those companies where issues have been 'referred to NCPs for updating or further investigation', often because they have rejected the Panel's contentions. Also in this category are companies currently involved in legal proceedings, for example, those making defamation claims against newspapers on the same subject matter. The outcome of such proceedings may provide additional documents and information for NCPs and hence their placement in category III. Overall, dossiers on 11 cases have been referred to NCPs in Belgium, Germany and the UK for further investigation.

Category IV identifies 29 cases of companies and individuals that either have been 'referred to Governments for further investigation' or have been the subject of requests from Governments for further information so that they can conduct their own enquiries. Of these, 12 are Annex III companies.

Category V contains those companies and parties, 38 cases in all, that 'did not react to the Panel's report'. Ten companies in this final category are Annex III companies.

passage to category I status.¹³ This is unacceptable both from the point of view of accountability and the public interest and also from the point of view of the parties concerned. Not only is it impossible to identify those companies who have agreed to take remedial action from those who have not, but no details whatsoever are given on what this action might entail. It is therefore impossible for the public and affected parties to judge their adequacy or whether, indeed, anything at all is being done.

Moreover, there are significant gaps in the public record. Some companies that seemingly have not responded to the Panel nevertheless appear in the resolved category. Others that are listed as not having responded, including several operating out of

¹³ The Panel lists a company in category I because: it has either acknowledged inappropriate behaviour and has taken or proposes time-bound remedial action; or because it has ceased trading with Congolese partners who cannot meet international standards of business ethics; or because it has shown that conduct perceived as suspect due to lack of transparency, was, in fact, acceptable; or because it has been doing business for many years in DRC prior to the outbreak of conflict in 1998 and, although finding itself operating in areas recently held by rebels or opposition groups, did so in a responsible manner; or else because it has only tangential or indirect links to DRC, being one step removed from direct trade. The Panel does not state into which of these 'sub-categories' a company falls.

adhering countries, have profited from their silence and escape scrutiny altogether.

Problems with the Panel's final classification include:

- ❖ The failure to distinguish between acceptable and unacceptable behaviour.
- ❖ An undifferentiated approach to 'resolution'.
- ❖ Gaps in the public record.
- ❖ Corporate silence and the avoidance of scrutiny.
- ❖ Potential miscategorisation and unresolved allegations.

The potentially most serious aspect of the Panel's final categorisation is that there is no publicly available record of how each case was decided. It cannot therefore be satisfactorily determined why certain companies are placed in a particular category. In other terms, why are certain companies listed in the resolved category I when the Panel's original allegations against them have not been publicly answered or re-examined? Or why have certain companies been listed for further investigation when others have not, even though their compliance with the *Guidelines* is equally, if not more, questionable?

In the light of the unanswered questions over conduct that remain, the limited list of companies for further investigation by National Contact Points (NCPs) drawn up by the Panel should be extended.

Next Steps

The mandate of the UN Panel of Experts has now ended; there will be no further extensions from the Security Council. The responsibility to act on its findings relating to businesses operating in the DRC thus rests with the OECD mechanisms for monitoring compliance with the *Guidelines*, and in particular with the National Contact Points. The Panel has drawn up a limited list of companies for further investigation in the OECD forum. It is of paramount importance that governments adhering to the *OECD Guidelines* not only launch full investigations into these companies, but also seek to address the anomalies arising from the Panel's final categorisation. This will require revisiting many cases declared by the Panel as 'resolved' because of the Panel's assertion that 'resolution should not be seen as invalidating the Panel's earlier findings'.

Indeed, under the *Guidelines*, the conduct of any company – resolved, unresolved or otherwise – may give rise to the examination of a specific instance

whereby information on misconduct is presented to the NCP by interested parties (including NGOs and trade unions). New and existing cases alike can be the subject of an NGO complaint.

Responsible companies, who share the view that the best way of resolving specific instances under the *Guidelines* is to do so through the NCPs, should welcome a dialogue that gives them the opportunity to show how their conduct in the DRC was ethical. The Panel's initiative to provide information to NCPs is a positive step yet, at the same time, this process raises a number of concerns and issues that require clarification.

- ❖ **Transparency.** Dossiers on 11 companies in category III have been forwarded by the Panel to NCPs in Belgium, Germany and the UK for further investigation. Two further companies are listed in category II for subsequent monitoring by the UK and Belgian NCPs. It is necessary, in the interests of accountability and impartiality, to establish on what basis the companies concerned were selected and why others were not selected.
- ❖ **NCPs' Investigative powers.** Of course, the agreement to receive cases is meaningless if no action is then to be taken on the cases. It seems that the receipt of dossiers from the Panel has not automatically triggered implementation of the *Guidelines* under the specific instance mechanism. NCPs do have an investigative function and their role is not limited to that of mediation. The OECD's own commentary on procedures makes clear that when issues arise in a non-adhering country, NCPs 'may...be in a position to pursue enquiries and engage in other fact finding activities'.¹⁴ Moreover, the disbanding of the UN Panel and the absence of a formal complainant need not be an insuperable obstacle to NCP action. The commentary further specifies that NCPs 'may also take other steps to further the effective implementation of the *Guidelines*'.¹⁵ There are precedents where NCPs have initiated the examination of a specific instance in the absence of a formal complainant.¹⁶
- ❖ **Alleged lack of evidence.** Adhering governments and NCPs have complained about the difficulty in obtaining further evidence on misconduct from the UN Panel. Now the UN

¹⁴ *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, I. Procedural Guidance for NCPs, paragraph 20.

¹⁵ *Ibid.*, paragraph 13

¹⁶ The Finnish NCP, for example, at the request of a company listed by the Panel, examined the issues raised by the Panel and made a report of its findings.

Panel has disbanded, governments and the UN must find a mechanism by which the additional information it gathered can be handed over. At the same time, and as the full RAID report demonstrates, detailed information is already in the public domain. Moreover, the argument that insufficient evidence exists to launch an investigation is defeated by the counter-argument that a key purpose of any investigation is to uncover such evidence in the first place.

- ❖ **Reluctance to determine that a breach has occurred.** Certain NCPs have stressed that their role is that of a mediator and not to decide whether a company has breached the *Guidelines* in a particular instance. This approach ignores an NCP's responsibility to make such a determination ('the procedure makes clear that an NCP will issue a statement').¹⁷ Given the gravity of the allegations concerning corporate activities in the DRC, NCPs who seek only to facilitate discussion between the parties or merely to extract a promise from a company about future behaviour risk appearing to turn a blind eye to past harm. Confidence in the future requires the acknowledgement of past wrongs.
- ❖ **Complaints by NGOs.** NGOs, as interested parties, may raise issues independently under the *Guidelines*. Even though the dossiers on certain companies have been listed as 'resolved' by the Panel, many NGOs, do not consider that all of the enterprises concerned were in compliance with the *Guidelines*. At the same time, re-listed or unexonerated companies should also be given the opportunity to explain their conduct or to provide clarification.

The contribution of this report

The RAID report examines the role of companies in the DRC conflict as described by the Panel, their reactions to being listed by the UN Panel and the unanswered questions that remain about their conduct in the wake of the Panel's final report.

The purpose of the RAID report is to bring to the attention of both CIME and appropriate NCPs those contradictions, inconsistencies and unanswered questions that remain, based on information already in the public domain. It is in the interests of all parties to seek clarification of these matters. The report is intended to offer a constructive approach. In order to organise the material a broad distinction is made in the full report — following the Panel's

¹⁷ *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, I. Procedural Guidance for NCPs, paragraph 18.

own practice — between those companies operating in government-controlled areas and those doing business in areas formerly controlled by foreign armies and rebel forces.

An electronic version of RAID's full report is to be submitted to the UN Security Council, OECD Governments, the OECD's Committee on International Investment and Multinational Enterprises (CIME) and the International Criminal Court. Companies are urged to use the good offices of the NCPs to both provide and obtain further information.

Sources

The full RAID report provides detailed information on the businesses involved in the DRC, based on the reports of the UN Panel, the companies' responses and, where available and appropriate, additional, expressly referenced information.¹⁸ This includes the final reports of a Belgian Senate 'Great Lakes' Commission of Inquiry and a Ugandan Judicial Commission of Inquiry, both established and conducted in response to the Panel's work and Security Council statements and resolutions.¹⁹ In addition, RAID interviewed members of the UN Panel of Experts, Congolese and OECD government officials, National Contact Points, World Bank staff, employees of Gécamines (the Congolese state-owned mining corporation), the staff of private sector companies operating in the DRC, Congolese trade unionists and other civil society representatives, and international and OECD-based NGOs.

For each company or group of companies, a chart is provided in the full RAID report indicating the questions about that company's activities that remain to be answered, and the provisions of the *Guidelines* that might apply.

Lessons and recommendations

When considered as a whole, the Panel's work has been invaluable in examining the self-reinforcing cycle of conflict and resource exploitation in the DRC. The Panel's decision to use a benchmark against which to assess corporate conduct has given the *OECD Guidelines* a new impetus. However, by

¹⁸ The RAID report relies exclusively on the UN Panel's reports and company responses unless the text or a footnote expressly states otherwise. It is not based on investigative research by RAID.

¹⁹ The President of Uganda 'took urgent steps to implement the decision to set up an inquiry' in response to the Security Council urging 'governments named in the [Panel's] reports to conduct their own inquiries into these allegations.' (See S/PRST/13, 3 May 2001). The Belgian Senate 'Great Lakes' Commission of Inquiry 'a été instituée à l'occasion du rapport des Nations unies relatif aux activités illégales d'entreprises belges et autres en République démocratique du Congo' and in its final conclusions it is stated that 'La commission prend acte de la résolution 1457 du 24 janvier 2003 du Conseil de sécurité de l'ONU.'

listing companies that it considered to be in violation of the *Guidelines* in its annexes, the Panel gave rise to the expectation that governments would act to curb corporate misconduct in the DRC.

The call for investigation came from the highest authority. In a resolution after the Panel's October 2002 report, the Security Council requested the Panel 'to establish a procedure to provide to Member States, upon request, information previously collected by the Panel to help them take the necessary investigative action' and urged all States 'to conduct their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel'.²⁰ The call for appropriate action by governments on the basis of information provided by the Panel was reiterated in a second resolution.²¹ In the Security Council's final public statement to date, following the Panel's October 2003 report, all States were again urged to proceed with their own investigations 'on the basis in particular of information and documentation accumulated by the Panel during its work and forwarded to governments'.²² The basis for investigation is not, therefore, *exclusively* tied to information from the Panel.

While it is not correct to say that NCPs have done nothing, many of their activities so far have been ineffectual. The main reason for this has been the low priority OECD governments have given to following up on the UN Panel's work. Without a clear signal from their governments, NCPs have been unwilling or unable to take a more vigorous approach. Few, if any, have taken steps to obtain background information on the activities of companies in the DRC from informed sources. Government departments have failed to coordinate with NCPs or to share relevant information. While recognising that they could be more proactive in their fact-finding, NCPs have been hampered by limited resources. This inaction is a cause for serious concern and public confidence in the effectiveness of the *OECD Guidelines* is being damaged. This situation reflects less on the NCPs themselves, but upon the sincerity and determination of OECD governments to address the issue of corporate accountability in conflict zones.

As the Panel has always recognised, the responsibility to implement the *Guidelines* rests with adhering governments. The onus has shifted to the OECD forum. Adhering governments have a responsibility to ensure that the *Guidelines* are

applied. It is in nobody's interest – neither that of responsible companies, nor that of the people of the DRC – to leave hanging those questions left unanswered by the Panel.

- ❖ **Prompt government investigations:** Governments must give much greater priority to the examination of the role of companies in the DRC. Adhering governments, acting through the CIME and individual NCPs, must establish a clear time-table for carrying out the investigation of specific instances with a view to issuing public recommendations on compliance. This will require revisiting many cases declared by the Panel as resolved. As the full RAID report demonstrates, there is sufficient information in the public domain for NCPs to act without waiting for a submission from an interested party. NCPs should be given additional resources to carry out this task.
- ❖ **The NCP process:** A high-ranking official or independent expert should be appointed in each adhering country to coordinate the work of the NCP and to prepare a progress report for consideration by national parliaments. The findings of NCPs should be subject to parliamentary scrutiny.
- ❖ **International Criminal Court:** Governments and the UN should co-operate fully with investigations which are being launched by the ICC into, *inter alia*, the complicity of business in war crimes in the DRC.
- ❖ **Domestic prosecutions:** National governments must investigate and prosecute companies where their conduct is shown to contravene domestic legislation. In particular, Governments should urgently investigate whether there have been any breaches of domestic anti-bribery laws and money laundering legislation by companies based in their jurisdictions in relation to the DRC.
- ❖ **Action by the OECD:** In its forthcoming generic study on business in weak governance zones, CIME should issue a clarification to companies about the use of the *Guidelines* in determining acceptable and unacceptable corporate conduct in conflict and post-conflict situations.

²⁰ Security Council Resolution 1457 (2003) of 24 January 2003, respectively paragraphs 12 and 15.

²¹ Security Council Resolution 1499 (2003) of 13 August 2003, paragraph 3.

²² Security Council, Presidential Statement S/PRST/2003/21 of 19 November 2003.

- ❖ ***Incorporation of the UN Human Rights Norms for Business into the OECD Guidelines:*** This would immediately strengthen companies' understanding of what is expected of them and reinforce the existing – if unelaborated – human rights provision.
- ❖ ***Review of existing commercial agreements:*** The transitional government has resolved to establish a mechanism for the review of all commercial agreements and contracts signed during the conflict. Such a review will underpin the future prosperity and stability of the DRC. OECD member states are called upon to assist the transitional government in its implementation of this review.
- ❖ ***Call for permanent monitoring:*** A permanent UN body, with clear and transparent procedures, should be established to monitor the role of business in conflict.
- ❖ ***Binding regulation of business:*** The *Guidelines* – which can neither impose sanctions nor offer compensation – are a positive, but preliminary step, towards holding companies to account for their actions. In the absence of sufficient progress to redress corporate misconduct under the *Guidelines*, governments should consider a renewed call for the binding regulation of multinationals.

Companies listed by the UN Panel in Annex I and Annex III or referred to in the main body of its October 2002 report and their final categorisation in October 2003

UN Panel's October 2002 Report

- A1** Annex I – Companies on which the Panel recommended the placing of financial restrictions
- A3** Annex III – Business enterprises considered by the Panel to be in violation of the *OECD Guidelines for Multinational Enterprises*
- MB** Referred to in the main body of the Panel's reports (but not in any annex)

UN Panel's October 2003 Report

- R** Resolved – Category I
- PG** Pending government investigation – Category IV
- PR** Provisional Resolution & Monitoring – Category II
- NR** No reaction – Category V
- UI** Unresolved & NCP investigation – Category III
- NC** Not categorised

	<i>OECD adhering country?</i>	<i>Business</i>	<i>Annex/Body</i>	<i>Category</i>	<i>Public Reaction to Panel?</i>
A & M Minerals and Metals Plc	Yes – UK	Trading minerals	A3	R	Yes - 22
A.H. Pong & Sons	No - South Africa	Import-Export	A3	PG	No
A. Knight International Ltd	Yes – UK	Assaying	A3	R	No
Abadiam	Yes - Belgium	Diamond trading	MB	NC	Yes - 28
African Trading Corporation SARL	No - South Africa	Trading resources	A3	PG	No
Afrimex	Yes – UK	Coltan trading	A3	R	Yes - 19
Ahmad Diamond Corporation	Yes - Belgium	Diamond trading	A3 A1	UI	Yes - 36
Alex Stewart (Assayers) Ltd	Yes – UK	Assaying	A3	R	Yes - 20
Amalgamated Metal Corporation Plc	Yes – UK	Coltan trading	A3	R	Yes - 10
American Mineral Fields	Yes - Canada	Mining	A3	R	Yes - 6
Anglo American Plc	Yes – UK	Mining	A3	R	Yes - 18
Anglovaal Mining Ltd	No - South Africa	Mining	A3	R	Yes - 16
Artic Investment	<i>See under Oryx Natural Resources</i>				
Asa Diam	Yes - Belgium	Diamond trading	A3 A1	UI	Yes - 37
Asa International	Yes - Belgium		A3	UI	
Ashanti Goldfields	No - Ghana	Mining	A3	R	Yes - 15
Aviation Consultancy Service Company (ACS)	No - Zimbabwe/ South Africa	Aviation consultancy	MB	NC	No
Avient Air	Yes – UK/Zimbabwe	Military company	A3	UI	Yes - 35
Banro Corporation	Yes - Canada	Mining	A3	R	Yes - 14
Barclays Bank	Yes – UK	Banking	A3	R	Yes - 8
Bayer A.G.	<i>See under H.C. Starck</i>				
BBL (Bank)	Yes - Belgium	Banking	A3	UI	No
Banque Belgoise	Yes - Belgium	Banking	A3	R	Yes - 23
Fortis	Yes - Belgium	Banking	A3	R	
Bukavu Aviation Transport Business Air Service	No - DRC No - DRC	Airline company Airline company	A1 A1	NR NR	No
C. Steinweg NV	Yes - Belgium	Freight forwarders	A3	NR	No

	OECD adhering country?	Business	Annex/Body	Category	Public Reaction to Panel?
Cabot Corporation	Yes - USA	Tantalum processing	A3	®	No
Carson Products	No - South Africa	Beauty Products	A3	®	Yes - 17
Chemie Pharmacie Holland	Yes - Netherlands	Finance & logistics	A3	NR	No
Cogecom	Yes - Belgium	Coltan trading	A3	UI	Yes - 31
COMIEX - Congo	No - DRC	Resource exploitation	A1	NR	No
Congo Holding Development Company Track Star Trading 151 (Pty) Ltd	No - DRC No - South Africa	Resource trading/exploitation Mineral trading/exploitation	A1 A3	PG PG	Yes - 32
Conmet	No – DRC/Uganda	Coltan trading	A1	PG	No
COSLEG	No – DRC/Zimbabwe	Resource exploitation	A1	NR	No
Dara Forest	No - Thailand	Timber exploitation	A3	NR	No
DAS Air	Yes – UK	Airline company	A3	UI	No
De Beers	Yes – UK	Diamond mining/trading	A3	UI	Yes - 29
Diagem BVBA	Yes - Belgium	Diamond trading	A3	®	Yes - 39
Eagle Wings Resources International Eagle Wings Resources International Trinitech International Inc	Yes - USA No – Rwanda [but link] Yes - USA	Coltan exploitation Coltan exploitation Coltan trading/exploitation	A3 A1 A3	® ® ®	No
Echogem	Yes - Belgium	Diamond trading	A3	NR	No
Egimex	Yes - Belgium	n/a	A3	NR	No
Enterprise General Malta Forrest Enterprise General Malta Forrest George Forrest International Afrique Groupe George Forrest	Yes - Belgium No – DRC [but link] No – DRC [but link] Yes - Belgium	Copper/cobalt exploitation Construction/mining/trading Management Copper/cobalt exploitation	A1 A3 A3 A1	PR PR PR PR	Yes - 24
Euromet	Yes – UK	Coltan trading	A3	PG	No
Exaco	No - DRC	Cobalt/copper exploitation	A1	NR	No
Finconcord SA	Yes - Switzerland	Coltan trading	A3	®	No
Finmining Raremet Chris Huber	No - St.Kitts [but link] No - St.Kitts [but link] Yes – Switzerland/ South Africa	Coltan trading Coltan trading n/a	A3 A3 n/a	NR NR NR	No
First Quantum Minerals	Yes - Canada	Mining	A3	®	Yes - 4
Flashes of Color	Yes - USA	Diamond trading	A3	®	No
Fortis	<i>See under Banque Belgoise</i>				
George Forrest International Afrique	<i>See under Enterprise General Malta Forrest</i>				
Great Lakes General Trade	No - Rwanda	Mineral trading	A1	NR	No
Great Lakes Metals	No - Rwanda	Mineral trading	A1	NR	No
Groupe George Forrest	<i>See under Enterprise General Malta Forrest</i>				
H.C. Starck GmbH & Co KG Bayer A.G.	Yes - Germany Yes - Germany	Coltan processing Chemical industry	A3 A3	® ®	Yes - 3
Hambros	Yes - UK	Banking	MB	NR	No
Harambee Mining Corporation	Yes - Canada	Mining	A3	®	No

	OECD adhering country?	Business	Annex/Body	Category	Public Reaction to Panel?
Ibryv and Associates LLC	Yes - Switzerland	Diamond trading	A3	®	No
International Panorama Resources	Yes - Canada	Mining	A3	PG	No
ISCOR/Kumba Resources	No - South Africa	Mining	A3	®	Yes - 11
ZINCOR/Kumba Resources	No - South Africa	Mining	A3	®	
Jewel Impex BVBA	Yes - Belgium	Diamond trading	A3	®	Yes - 41
K&N	Yes - Belgium	Project development	A3	NR	No
Kababankola Mining Company	<i>See under Tremalt</i>				
Kemet Electronics Corporation	Yes - USA	Capacitor manufacture	A3	®	Yes - 21
KHA International AG	Yes - Germany	Minerals trading/exploitation	A3	UI	Yes - 33
Masingiro GmbH	Yes - Germany	Minerals trading	A3	UI	
Kinross Gold Corporation	Yes - Canada	Mining	A3	®	Yes - 5
Komal Gems NV	Yes - Belgium	Diamond trading	A3	®	Yes - 40
Lundin Group	Yes - UK/Bermuda	Mining	A3	®	Yes - 2
Tenke Mining Corporation	Yes - Canada	Mining	A3	®	
Malaysian Smelting Corporation	No - Malaysia	Coltan processing	A3	®	No
Masingiro GmbH	<i>See under KHA International</i>				
Melkior Resources	Yes - Canada	Mining	A3	®	Yes - 13
Mercantile CC	No - South Africa	Trading natural resources	A3	PG	No
Mineraal Afrika Ltd	Yes - UK	Trading natural resources	A3	PG	No
Minerals Business Company	No - DRC	Mineral trading	A1	NR	No
NAC Kazatomprom	No - Kazakhstan	Tantalum processing	A3	PG	No
Nami Gems BVBA	Yes - Belgium	Diamond trading	A3	®	Yes - 27
Ningxia Non-ferrous Metals Smelter	No - China	Tantalum processing	A3	®	No
Okapi Air – Odessa Air	No - Uganda	Airline company	A1	NR	No
OM Group	Yes - Finland/USA	Mining	A3	®	Yes - 7
Operation Sovereign Legitimacy (OSLEG) Pvt Ltd	No - Zimbabwe	Commercial interest resource exploitation	A3 A1	NR	No
Orion Mining Inc	No - South Africa	Mining	A3	PG	No
Oryx Natural Resources	Yes - UK/Grand Cayman/Oman	Diamond exploitation	A1	UI	Yes - 26
Artic Investment	Yes - UK	Investment	A3	UI	
Pacific Ores Metals and Chemicals Ltd	No - Hong Kong	Coltan trading	A3	®	No
Raceview Enterprises	No - Zimbabwe	Logistical supply	MB	NC	No
Raremet	<i>See under Finmining</i>				
Ridgepointe Overseas Developments Ltd.	Yes - UK/Br.Vir.Is.	Mining	MB	NC	Yes - 30
Rwanda Allied Partners	No - Rwanda	Mineral trading	A1	®	No
Rwanda Metals	No - Rwanda	Mineral trading	A1	NR	No
Saracen	No - South Africa	Security company	A3	PG	Yes - 34
Saracen Uganda Ltd	No - Uganda	Security company	A1	PG	
SDV Transintra	Yes - France	Transport	A3	NR	No
Sierra Gem Diamonds	Yes - Belgium	Diamond trading	A3 A1	UI	Yes - 42
SLC Germany GmbH	Yes - Germany	Coltan transport	A3	PG	No

	OECD adhering country?	Business	Annex/Body	Category	Public Reaction to Panel?
Sogem	<i>See under Umicore</i>				
Specialty Metals Company SV	Yes - Belgium	Coltan trading	A3	UI	No
Standard Chartered Bank	Yes - UK	Banking	A3	®	Yes - 9
Swanepoel	No - South Africa	Construction	A3	PG	No
Tandan Group	No - South Africa	Holding company	A1	®	No
Thorntree Industries (Pvt) Ltd	No - Zimbabwe	Capital provision	A3 A1	®	
Tenke Mining Corporation	<i>See under Lundin Group</i>				
Thorntree Industries (Pvt) Ltd	<i>See under Tandan Group</i>				
Track Star Trading 151 (Pty) Ltd	<i>See under Congo Holding Development Company</i>				
Trademet SA	Yes - Belgium	Coltan trading	A3	®	No
Tremalt Ltd	Yes - UK/Br.Vir.Is	Cobalt/copper exploitation	A3 A1	PR	Yes - 25
Kababankola Mining Company	No - Zimbabwe [but link]	Mining	A3	PR	
Trinitech International Inc	<i>See under Eagle Wings Resources International</i>				
Trinity Investment Group	No - DRC/Uganda	Resource exploitation	A1	NR	No
Triple A Diamonds	Yes - Belgium	Diamond trading	A3 A1	®	Yes - 43
Tristar	No - Rwanda	Holding company	A1	NR	No
Umicore	Yes - Belgium	Metals and materials group	A3	®	Yes - 12
Sogem	Yes - Belgium	Coltan trading	A3	®	
Victoria Group	No - DRC/Uganda	Resource exploitation	A1	NR	No
Vishay Sprague	Yes - USA/Israel	Capacitor manufacture	A3	®	No
ZINCOR	<i>See under ISCOR</i>				

Notes

1. The Panel enters certain enterprises, which it had listed separately in Annex I or Annex III of its October 2002 report, together under one combined entry in the categories in its October 2003 report. This scheme has been adopted in the above table. The entries which the Panel has combined are:

Eagle Wings Resources International/Trinitech International Inc
Banque Belgoise/Fortis
Umicore/SOGEM
Bayer AG/H.C. Starck GmbH & Co
ISCOR/ZINCOR (Kumba)
Kababankola Mining Company/Tremalt Ltd
Enterprise General Malta Forrest/George Forrest International Afrique/Groupe George Forrest
ASA Diam/ASA International
KHA International AG/Masingiro GmbH
Finming/Raremet Ltd.
Oryx Natural Resources/Artic Investment
Bukavu Aviation Transport/Business Air Service
Saracen Uganda Ltd (South Africa)/Saracen Uganda Ltd. (Uganda)
Tandan Group/Thorntree Industries
Congo Holding Development Company/Track Star Trading 151

2. In addition, the Lundin Group/Tenke Mining Corporation have been grouped together in the above table. This is because both entities are dealt with together in the same reply to the Panel from Tenke Mining Corporation. In its reply, Tenke Mining Corporation notes: 'Regarding company semantics, the "Lundin Group" does not exist as a formal entity. Tenke Mining Corp is a Canadian public company, which holds its ownership in the Tenke Fungurume deposit through its wholly owned subsidiary - Lundin Holdings Limited...'

3. The description under 'Business' is essentially the same as that used by the Panel in the annexes to its reports. Occasionally, the description used either by the Panel in the main body of its reports or in a company's own reply to the Panel is used instead.

Chronology of the Panel's reports

- ❖ Interim report, dated 16 January 2001 (S/2001/49).
- ❖ Report, dated 12 April 2001 (S/2001/357).
- ❖ Addendum report, dated 13 November 2001 (S/2001/1072).
- ❖ Interim report, dated 22 May 2002 (S/2002/565).
- ❖ Report, dated 16 October 2002 (S/2002/1146).
- ❖ Addendum, dated 20 June 2003 (S/2002/1146/Add.1).
- ❖ Report, dated 23 October 2003 (S/2003/1027).

Key Security Council Resolutions and Presidential Statements on the Panel and its work

- ❖ Presidential Statement, Security Council, S/PRST/2000/20, 2 June 2000.
- ❖ Presidential Statement, Security Council, S/PRST/2001/13, 3 May 2001.
- ❖ Presidential Statement, Security Council, S/PRST/2001/39, 19 December 2001.
- ❖ Security Council Resolution 1457 (2003), 24 January 2003.
- ❖ Security Council Resolution 1499 (2003), 13 August 2003.
- ❖ Presidential Statement, Security Council, S/PRST/2003/21, 19 November 2003.