



Attn. UN Working Group on Business and Human Rights
Ref. Human rights in conflict and post-conflict contexts
Sent by e-mail to unwgbhrconflictproject@gmail.com

Utrecht, 10 April 2020.

Dear Members of the UN Working Group on Business and Human Rights,

We wish to thank you for the opportunity to contribute to the project on conflict and post-conflict contexts. PAX is a Dutch peace organisation, we advocate for humanitarian disarmament and human rights compatible regulation of the arms trade and we have 20 years of experience engaging with businesses in conflict situations. The many adverse impacts of business operations in Sudan, South Sudan, Democratic Republic of Congo, Colombia, and other theatres of war show the inadequacy of prevailing rules and practices. Still there exist good practices that may make a difference if widely adopted, and that we would like to share with you.

The first part of this letter takes a look at the growing realisation by business enterprises with experience operating in conflict and post-conflict situations that effective human rights due diligence requires understanding and addressing conflict drivers in collaboration with other actors. It also identifies two good practices from Colombia with regard to the role of business in transitional justice.

In the second part, we identify specific recommendations and good practices, notably:

1. As controversial weapons by their nature contribute to human rights violations, companies should stop producing them, and investors should engage towards that end.
2. Arms producers should assess the human rights track record of companies to prevent and mitigate the risk that the end-users of their products commit violations or abuses.
3. Knowingly benefitting from abuses by others in conflict situations should be prohibited.
4. When negotiating agreements about public security provision, companies should include the *Model Clauses for Agreements between Government Security Forces and Companies with Respect to Security and Human Rights*.
5. Enhanced due diligence for investing in companies with operations in conflict situations should include assurances that these companies understand and address conflict drivers in collaboration with other actors, combined with a predictable and transparent disengagement policy.

We would welcome the opportunity to engage further on these issues, and remain at your disposal if there are questions or you seek additional information beyond what follows.

Kind regards,

Egbert Wesselink
Senior Advisor

PAX

wesselink@paxforpeace.nl

+31 62 062 6756

Part 1 Responding to human rights challenges in conflict affected contexts

1. There is a broad consensus that business operations in conflict and post-conflict contexts are never neutral and always impact the conflict itself, for better or for worse. The worst forms of business-related human rights abuse tend to happen in conflict-affected contexts and the conflicts themselves are driving their occurrence. Consequently, to know their human rights impacts and account for them in conflict situations, companies will need to understand how their operations impact and are impacted by the conflict. To inform prevention and mitigation measures, companies need to analyse the conflict itself.
2. Meaningful conflict analysis identifies conflict drivers. In intrastate conflict these are typically inequality, exclusion, and a sense of injustice. Underlying issues like repression, rule of law, poverty, security, gender and civic space can be expected to play a role in most conflict and post-conflict contexts, deserving careful analysis.¹
3. It is established practice that companies make efforts to understand conflict to understand how they can best prevent and mitigate their human rights risks. Already since 2000, companies that implement the Voluntary Principles on Security and Human Rights are committing themselves to conduct conflict analyses for “Identification of and understanding the root causes and nature of local conflicts, as well as the level of adherence to human rights and international humanitarian law standards by key actors”.² The UNGP expects home States to provide guidance in conflict-affected areas and to “identify, prevent and mitigate the human rights-related risks of [business] activities and business relationships”. It seems paramount that home States ensure that business enterprises have an adequate understanding of their environment.
4. The UNGP states that one’s leverage to prevent or mitigate adverse impacts is not static and may be increased by collaborating with other actors. The strongly enhanced risks of direct links and contributing to or causing adverse impacts that are inherent to conflict contexts, requires commensurate efforts to maximise one’s leverage. Coordination and collaboration between “... governments; representatives from development, humanitarian, security, and diplomatic organizations; civil society; and private sector, academia, and regional organizations”³ will often be needed, for instance for effective engagement with host States.
5. What can and should business enterprises do to manage their impacts on conflict? The new [2019-2022 strategy](#) of the Voluntary Principles on Security and Human Rights Initiative offers important guidance, setting the security and human rights priorities of many of the world largest

¹ United Nations – World Bank Group, [Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict](#), 2018.

² [Voluntary Principles on Security and Human Rights](#), p. 4.

³ [Pathways for Peace](#), p. 286-7.

energy and mining companies, many with operations in conflict and post-conflict contexts. The section that deals with violent contexts deserves careful attention. It reads:

Violent conflict is a major driver of security-related human rights violations. Members are aware that underlying conflict drivers such as political, social and economic exclusion and lack of opportunity, the absence of the rule of law, insufficient civic space and ability to dialogue, repression, persecution of human right defenders, and poor human security, all create conditions where the risk of violent conflict increases. By helping to address such underlying issues, members are creating an enabling environment for the realisation of human rights. Members are committed to having a positive impact on local governance, peace and stability and playing a proactive role in preventing conflict, rather than reacting to it is essential for effective implementation.⁴

This is consistent with prevailing international conflict prevention strategies. In their joint strategy *Pathways for Peace*, the World Bank Group and the United Nations show that today's violent conflicts are primarily driven by inequality, exclusion and feelings of injustice and that all successful conflict prevention strategies are aimed at reducing these conflict drivers.⁵

6. In addition, the Voluntary Principles Initiative (VPI) made it a priority to maximise “impact through joint and cross-pillar action” to address specific challenges such as engaging with host governments to obtain their cooperation, and the creation of an enabling environment for the realization of human rights.
7. There is a tendency to assume that the main role of business in conflict and post-conflict contexts is to develop the economy. Unfortunately, international conflict prevention policies remain conspicuously superficial about the role of business. *Pathways for Peace* states

“The private sector contributes to prevention when it aligns its activities with the Sustainable Development Goals (SDGs), for example, by adhering to the UN Guiding Principles for Business and Human Rights or joining the UN Global Compact”

The suggestion that adhering to the UNGP or joining the Global Compact contributes to conflict prevention is not backed by research. There is no evidence that economic engagement by itself removes conflict drivers or that Foreign Direct Investment mixed with conflict-sensitive approaches will substantially prevent or mitigate human rights risks for business enterprises.

8. Few if any transitional justice processes have addressed the role of business actors in conflict. The Colombian peace process is progressing slowly and is yet to deliver final results, but the

⁴ [Providing Global Leadership in Security and Human Rights: Voluntary Principles on Security and Human Rights Initiative Strategy 2019-2022](#), Voluntary Principles on Security and Human Rights Initiative, November 2019.

⁵ United Nations–World Bank Group, [Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict](#), 2018.

country already offers examples of good practices that may serve future transitional justice processes, including two described below.

- a. In August 2019, the Colombian Truth Commission, after ample discussions among participants, adopted a Protocol for the *Technical Roundtable in Support of its Interaction with Business Actors*, that offers both assurances and incentives for companies to participate in the truth finding process. By determining that testimonies before the Truth Commission cannot be used as evidence before a court, the Protocol offers legal clarity and assurances removes impediments for businesses to cooperate fully with the Commission. By allowing a level of discretion in public exposure of testimonies, it also provides reputational comfort, while remaining uncompromising re the core mission of the Commission, truth finding.
- b. In the industrial mining region of Cesar, organized victims' groups that have suffered from the violence during the armed conflict in Colombia are taking initiatives to engage in dialogue with mining companies. They are inviting them to participate in a joint exploration of the recent history of the conflict in the region, and to explore ways in which companies could make an contribution to rebuilding of the economies of conflict-affected communities. In addition, they also invite companies to urge the State to take its responsibility in providing victim leaders with safety guarantees. The foundations for such a local, non-judicial, bilateral process have been laid in terms of methodology and expectations, and is designed as an example of a meaningful complement to State based processes.⁶

Part 2

Specific measures

1. Controversial weapons

Weapons that are prohibited under IHL or that are widely considered to be inhumane and indiscriminate are often referred to as 'controversial weapons'. This term typically refers to at least chemical and biological weapons, nuclear weapons, anti-personnel landmines, cluster munitions and white phosphorus weapons.

Companies that produce weapons are by definition at risk of becoming directly linked to human rights abuses and violations of International Humanitarian and Human Rights Law. International law allows for the use of force only under strictly defined circumstances. The principle of Humanity, that is a key foundation of International Humanitarian Law, limits parties to a conflict in their choice of means and methods of warfare and protects persons that are *hors de combat*.

⁶ For further information, see: [Prodeco advances on peace and reconciliation](#), PAX, 2018.

The general principles of IHL have been further operationalized in conventions and treaties, including a number of treaties that prohibit weapons systems that, by their nature, cannot be used in compliance with IHL. These treaties imply obligations under the UN Guiding Principles which apply to companies: where international treaties prohibit weapons because they cannot be used in compliance with human rights in conflict situations (as enshrined in IHL), the UNGP imply companies should act to avoid violation of these human rights.

Recommendations:

- ✓ States adopt national legislation to prohibit financial institutions and private investors under their jurisdiction from financing or investing in companies that are involved in the production of controversial weapons.
- ✓ Companies do not produce any controversial weapons, wholly or in part, under any circumstances.
- ✓ Public financial institutions and private investors do not finance or invest in companies that are involved in the production of controversial weapons in any way. If an active business relationship exists with a company involved in such production, they should engage with the company to end those activities. Engagement should be time-bound and aimed at concrete progress. If unsuccessful, engagement it should be followed by full divestment from the company.

2. Arms Trade

All arms producers, not just those involved in the production of controversial weapons, are at risk of being directly linked to human rights abuses. The weapons system itself does not determine whether human rights in war situations will be respected, its end-users are usually the determining factor. States whose armed forces use military goods indiscriminately or disproportionately and target non-combatants, are violating IHL. This risk must be assessed before weapons are sold. Home States have a key role to play as they usually regulate the exports of military goods through a licencing system. Our experience shows that a customer's poor track record on human rights signals an enhanced risk of misuse of the delivered arms, raising the risk for the selling company that it becomes directly linked or contributes to adverse human rights impacts, including of the most hideous kind. Business enterprises that are involved in such sales should prevent, mitigate and remediate such impacts.

Recommendations:

- ✓ States adhere to and abide by the provisions in the Arms Trade Treaty. EU Member States, in addition, adhere to and abide by the criteria set forth in the European Council common position defining common rules governing control of exports of military technology and equipment.⁷

⁷ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Current version: 17 September 2019, found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0944>

- ✓ Companies conduct due diligence that focusses on their prospective customer's human rights track records and assesses the risk that arms are used in violation of international humanitarian law or international human rights law before each decision to sell arms or other military goods

3. Benefitting from abuses by others

UNWG consultations addressed the issue of benefitting from conflict or forced displacement. It was argued that this may by itself justify an obligation to contribute to remedy and reparations, and to be sensitive to transitional justice and peacebuilding processes. Despite the fact that profit seeking is the principal motivation behind business decision making, UN Guiding Principles do not include the notion that benefitting from abuses by others can be problematic in itself. We believe that companies that knowingly benefit from human rights abuses by others should contribute to remedying their consequences.

Ethically, it is problematic to justify permission to knowingly benefit from a forbidden act. The worse the abuses, the less permissible this would seem to be. We suggest including a prohibition of knowingly benefitting from abuses by others into enhanced due diligence requirements for conflict and post-conflict contexts. Such a prohibition would broaden businesses' obligations and shift the agenda from due diligence processes to actual abuses. This is a direct and arguably effective route to reach the goal of the UNGP in extreme contexts. Benefitting is not a new category of involvement in human rights impacts. The real life cases the UNGPs were meant to respond to were more emblematic of benefitting from abuses than causing or contributing to abuses. Causation or likelihood do not play a definitive role in what constitutes contribution, as illustrated by existing guidance, including, *inter alia*: the OECD use of omission; the OHCHR's use of facilitating environment; the OECD's introduction of a "continuum between 'contributing to' and having a 'direct link' to an adverse human rights impact"⁸, and; John Ruggie's response to the Thun group⁹, arguing that motivating human rights harm is a factor that determines whether a company moves from the linkage to the contributing category. It is hard to see how, in a business context, prospects of benefitting can be separated from this factor. Knowingly benefitting cannot be separated from the intention to benefit. Because of its urgency in conflict and post-conflict contexts, it is paramount that businesses assess the risk of benefitting from abuses by others, and that they take effective measures to prevent this from occurring.

Recommendation

- ✓ Enhanced due diligence requirements for conflict and post-conflict contexts include a duty to assess the risk of benefitting from abuses by others, and a prohibition of knowingly benefitting from abuses by others.

⁸ United Nations High Commissioner for Human Rights, [OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector](#), 2017, p. 5.

⁹ John G. Ruggie, [Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context](#), 21 February 2017, p. 5.

- ✓ Companies that knowingly benefit from an abuse by others contribute to the realisation of the right to remedy and reparation of people harmed by the abuse.

4. Public Security Provision

2016, the Voluntary Principles Initiative adopted *Model Clauses for Agreements between Government Security Forces and Companies with Respect to Security and Human Rights*.¹⁰ A response to a proliferation of security agreements between governments and individual businesses, they are particularly relevant in conflict situations. They are expected to strengthen the consistency of human rights language in such agreements, fortify the negotiating position of businesses, and facilitate joint engagement with host States by businesses, home States and other actors.

Recommendations

- ✓ Businesses operating in conflict and post-conflict contexts publicly endorse the Model Clauses and make every effort - including through joint engagement with other businesses and home States - to include them in security agreements with States and State agencies.
- ✓ Financiers, shareholders and financial institutions require businesses operating in high-risk environments to publicly express their support for the Model Clauses and account for their efforts to make use of them.

5. Engagement - Disengagement

When investing in companies with operations in conflict and post-conflict contexts, investors enhanced due diligence should include assurances that companies understand and address conflict drivers in collaboration with other actors. The Guiding Principles state that a business relationship may have to be terminated if efforts to exercise leverage aimed at addressing an adverse human rights impact prove unsuccessful.¹¹ Building and exercising leverage in business relationships is an essential tool to end and mitigate this risk. In case of a relationship with businesses that operate in environments of enhanced risk, a predictable and dependable disengagement strategy is a critical aspect of good practice.

Recommendations

- ✓ Investors' enhanced due diligence for investing in companies with operations in conflict situations, include assurances that these companies understand and address conflict drivers in collaboration with other actors, and account for it, combined with a predictable and transparent disengagement policy.

¹⁰ Voluntary Principles Initiative, [Model Clauses for Agreements between Government Security Forces and Companies with Respect to Security and Human Rights](#), 2016.

¹¹ SOMO, [Should I stay or should I go? Exploring the role of disengagement in human rights due diligence](#), 2016.