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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Issue of human rights and transnational corporations and other business enterprises

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, in accordance with Human Rights Council resolutions [17/4](#) and [44/15](#).

* [A/75/150](#).



**Report of the Working Group on the issue of human rights
and transnational corporations and other business enterprises**

**Business, human rights and conflict-affected regions:
towards heightened action**

Summary

In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises clarifies the practical steps and outlines practical measures that States and business enterprises should take to prevent and address business-related human rights abuse in conflict and post-conflict contexts, focusing on heightened human rights due diligence and access to remedy.

I. Introduction

1. Since the endorsement by the Human Rights Council of the Guiding Principles on Business and Human Rights¹ in 2011, the number of civil wars has almost tripled, with a six-fold increase in battle-related deaths² – peaking in 2016 with 53 countries experiencing conflict.³ According to the Secretary-General, over 71 million people have been forcibly displaced by war, violence and persecution, resulting in the world’s largest humanitarian crisis since the end of the Second World War. Many of these situations are “protracted crises with multiple adversaries, stalled peace processes, organized crime and attacks from violent extremists or terrorists.”⁴

2. This bleak picture means that, more than ever, the most egregious human rights abuses take place in conflict-affected areas and other situations of widespread violence and, conversely, that human rights abuses spark or intensify conflict.

3. Coronavirus disease (COVID-19) exacerbates the risks of violent conflict further.⁵ This pandemic causes more serious harm in conflict-affected countries by taxing the resources of already weak State institutions, complicating peace and development efforts, fuelling inequalities and further impacting the health and safety of vulnerable groups.

4. For businesses, this means that many face complex challenges in respecting human rights as they operate in such environments, either because their activities require them to be in or to re-enter conflict-affected areas, or because they become caught up in the outbreak of a conflict.

5. The Guiding Principles were drafted at a time when the connection between violent conflicts implicating business was brought to the world’s attention, as for example in Colombia, the Democratic Republic of the Congo, Liberia, Myanmar and Sierra Leone. These exceptional situations are recognized in the Principles as an issue of particular importance and it is emphasized that States should support business respect for human rights in conflict-affected areas.

6. The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, whose mandate preceded that of the Working Group, outlined a range of State policy options to prevent and deter corporate-related human rights abuses in conflict contexts.⁶ The Guiding Principles and the additional work of the Special Representative in 2011 provided initial guidance on the role of business along the conflict cycle.

7. In the present report, the Working Group further identifies and clarifies a range of policies and tools that States, alone or when acting as members of multilateral organizations, and businesses, could employ in conflict-prone regions to help ensure that business does not stimulate or exacerbate conflict or negatively impact peacebuilding.

8. The report is informed by a series of bilateral and multi-stakeholder consultations with States, civil society organizations, business representatives and experts in several regions of the world, comprehensive research and submissions by stakeholders.⁷

¹ A/HRC/17/31, annex.

² Escola de Cultura de Pau, Alert 2020! *Report on Conflicts, Human Rights and Peacebuilding* (Barcelona, Icaria, 2020). See also Sebastian Von Einsiedel, and others, *Civil War Trends and the Changing Nature of Armed Conflict* (United Nations University, Occasional Paper No. 10 (March 2017).

³ Ida Rudolfsen, “Non-State conflicts: trends from 1989 to 2018”, *Conflict Trends*, No. 2 (Peace Research Institute Oslo, 2019).

⁴ 2019 report of the Secretary-General on the Work of the Organization (A/74/1).

⁵ International Crisis Group, “COVID-19 and conflict: seven trends to watch”, *Special Briefing No. 4* (24 March 2020).

⁶ A/HRC/17/32.

⁷ See www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx.

II. Normative environment: human rights and humanitarian law

9. The Guiding Principles provide that business should respect the standards of international humanitarian law in situations of armed conflict.⁸ International human rights law and international humanitarian law are similar but distinct bodies of law. The Guiding Principles specifically reference international humanitarian law, the specialized set of standards which applies during armed conflict, both international and internal, as well as situations of military occupation, “when a State exercises an unconsented-to effective control over a territory on which it has no sovereign title.”⁹ International human rights law applies in times of peace and conflict but some rights may be temporarily suspended during states of emergency and armed conflict.

10. Another characteristic of international humanitarian law is that it binds State and non-State actors, including businesses, as well as individual managers and staff of businesses whose activities are closely linked to an armed conflict. As mentioned by the International Committee of the Red Cross (ICRC), determining which corporate activities are “closely linked to an armed conflict” can be a complex task because businesses carry out a wide range of activities that could be perceived as directly or indirectly connected to armed conflict. Business activities may be considered closely linked to an armed conflict if they provide direct support – be it military, logistical or financial assistance – even if they do not take place during actual fighting or on the physical battlefield and even if the business did not actually intend to support a party to the hostilities.¹⁰

11. Abuse in situations of conflict “quickly translates into international criminal responsibility for the individuals concerned. Individual economic actors may be accused of the direct commission of international crimes, in addition to situations of complicity. Many of those concerned are nationals of States parties to the Rome Statute of the International Criminal Court. Furthermore, several countries with internal armed conflicts have ratified the Rome Statute”.¹¹ Many States have incorporated relevant provisions of international criminal law into their domestic penal laws, allowing for the prosecution of legal and natural persons in national jurisdictions.¹²

12. International humanitarian law and a review of court cases in many jurisdictions highlight activities where businesses should ensure that they allocate resources and attention. These include forcibly displacing people from their communities, forcing people to work, acquiring questionable assets through pillage, using abusive security forces or allowing the use of business assets for gross abuses.¹³

III. Heightened action: States and businesses

13. The Guiding Principles do not specifically mention a different type of due diligence for conflict-affected regions. They are built around a concept of proportionality: the higher the risk, the more complex the processes. Hence, “because

⁸ See commentary to guiding principle 12.

⁹ See www.icrc.org/en/doc/war-and-law/contemporary-challenges-for-ihl/occupation/overviewoccupation.htm; and Hague Convention respecting the Laws and Customs of War on Land of 1907, art. 42.

¹⁰ See Australian Red Cross and RMIT University, “Doing responsible business in armed conflict risks, rights and responsibilities” (2020).

¹¹ Andrew Clapham, “Human rights obligations of non-State actors in conflict situations”, *International Review of the Red Cross*, vol. 88, No. 863 (September 2006).

¹² Ramasastry, Thompson and Taylor, “Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law”, Fafo report No. 536 (Fafo, 2006).

¹³ See Red Flags: Liability Risks for Businesses Operating in High-Risk Zones (<https://redflags.info/>).

the risk of gross human rights abuses is heightened in conflict-affected areas”,¹⁴ action by States and due diligence by business should be heightened accordingly.

A. Triggers and indicators

14. One of the most common questions to the Working Group from business and States alike is as to when heightened due diligence is warranted and when States should require more from business than just “respect for human rights” as in an ordinary setting.

15. The European Union has developed guidelines to help businesses to better understand the definition of conflict-affected and high-risk areas in the context of conflict minerals.¹⁵ In much more detail, the United Nations has developed a framework of analysis for the prevention of atrocity crimes.¹⁶ While the framework was designed for the prevention of international crimes such as genocide, crimes against humanity and war crimes, the set of risk factors and indicators identified is relevant in order to recognize when businesses (and States) should raise their level of due diligence.

1. Armed conflict and other forms of instability

16. If armed conflict is the most obvious trigger for heightened due diligence, other situations can put a State under such a level of stress that it becomes more prone to serious human rights violations. Genocide and crimes against humanity can occur during peacetime. Instability includes serious levels of political volatility, caused by abrupt or irregular regime change, transfer or disputes over power or growing nationalist, armed or radical opposition movements; threats to the security of the country due to armed conflict in neighbouring countries, threats of external interventions or humanitarian crises; even volatility in economic or social affairs caused by acute poverty, mass unemployment or deep horizontal inequalities is relevant.

2. Weakness or absence of State structures

17. Human rights are protected by States through the establishment of frameworks and institutions. States are still fully bound by their obligations even when such structures are inadequate or simply do not exist. However, reality dictates an acknowledgement that their ability to fulfil those obligations is significantly diminished and that the human rights regime cannot be expected to function as intended. This aspect of State weakness is significant, as many businesses operate, with wilful blindness, on the basis that such States will act in the same way as States that are well governed. However, this leaves populations vulnerable to those who exploit “law-free zones” and the dysfunction of State machinery, including the State itself, or to those that may opt for violence to respond to real or perceived threats. The weakness of State structures can be assessed through the severity of factors such as the lack of an independent and impartial judiciary, the lack of effective civilian control of security forces and high levels of corruption.

3. Record of serious violations of international human rights and humanitarian law

18. Societies that have a history of armed violence and serious violations of international human rights and international humanitarian law may be more prone to further abuses. This includes situations where the legacies of past atrocity crimes have

¹⁴ Guiding principle 7.

¹⁵ Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council.

¹⁶ United Nations, “Framework of analysis for atrocity crimes: a tool for prevention” (2014).

not been adequately addressed through individual criminal accountability, reparation, truth-seeking and reconciliation processes or comprehensive reform measures in the security and judicial sectors.

4. Warning signals

19. Most complex situations requiring heightened due diligence cannot be explained as isolated or spontaneous events that occur without some level of preparation. Significant resources are needed to commit massive or widespread acts of violence. Such resources are not always readily available and can take time to assemble. In the course of the development of these situations, it should therefore be possible to identify actions that point to the likelihood that steps are being taken towards mass violence, including the amassing of weapons and arms.

20. The events or measures, whether gradual or sudden, which produce an environment conducive to serious human rights abuses or which suggest a trajectory towards their perpetration include: the imposition of emergency laws or extraordinary security measures; the suspension of, or interference with, vital State institutions, particularly if this results in the exclusion of vulnerable or minority groups; increased politicization of identity; and increased inflammatory rhetoric or hate speech targeting specific groups or individuals.

21. Similarly, due diligence should be heightened when: there are sustained signs of militia or paramilitary groups; States strengthen their security apparatus or mobilize against specific groups; strict control or banning of communication channels; or non-governmental organizations, international organizations, media or other relevant actors are expelled or banned.

B. Heightened State action

22. Business should exercise heightened due diligence in conflict-affected contexts because of the increased risk of being involved in serious human rights abuses. The same applies to States. The Guiding Principles and the 2011 companion report on States challenges and options with regard to business in conflict-affected regions provide a range of actions for them to act, including on how the home States of businesses operating in conflict areas can do more to ensure that their companies are respecting international human rights law and international humanitarian law.¹⁷

23. Some States have started to address the issue more actively. Chile trains some of its armed and security forces on the content of the Guiding Principles and Switzerland provides good offices services to mediate disputes between Swiss companies and communities in conflict-affected countries.¹⁸ Much State activity has been focused on the private security sector because of the high number of reported human rights abuses.¹⁹

24. Following earlier efforts on conflict diamonds,²⁰ the most significant developments are probably those focused on curbing the trade in so-called “conflict minerals”.

25. In the United States of America, the Dodd-Frank Wall Street Reform and Consumer Protection Act,²¹ which entered into force in 2014, requires businesses

¹⁷ See [A/HRC/17/32](#).

¹⁸ See www.globalnaps.org/country/Switzerland%20and%20www.globalnaps.org/country/Chile.

¹⁹ See www.securityhumanrightshub.org/content/private-security-providers.

²⁰ General Assembly resolution 74/268.

²¹ United States, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (July 21, 2010), Section 1502 (“Conflict Minerals Statutory Provision”). Despite relaxed enforcement in 2017, the regulation remains in force, and businesses are expected to continue to file disclosures about the source of minerals in their products.

listed in the United States to report annually on the measures taken to exercise due diligence when they manufacture, or use in their supply chain, products containing four minerals most commonly linked to conflict (tin, tantalum, tungsten and gold) when any of these minerals originated in the Democratic Republic of the Congo or an adjacent country. Echoing this Act and building on the Organization for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,²² the European Union conflict minerals regulation will become effective on 1 January 2021.²³

26. Beyond the OECD Guidance, the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters issued guidelines on responsible mineral supply chains, based on the Guiding Principles and the OECD Guidance, and designed to align Chinese business due diligence with international standards.²⁴

27. This emerging regulatory coherence increases the ability of States to address business activities in, or connected to, conflict-affected regions. Nonetheless, much more needs to be done as some of the worst violations continue to occur in the Democratic Republic of the Congo, often directly linked to the extraction of minerals. Although “regulated”, trade in the industry continues to be rife with smugglers and middlemen, with much of the regulation ultimately being illusory.²⁵

28. Unfortunately, a review of the existing national action plans on business and human rights²⁶ and the response to the survey initiated by the Working Group for the present report demonstrate that there is still much room for States both to develop policies, regulations and enforcement measures that effectively address the risk of gross human rights abuses for businesses operating in conflict situations and to break down their internal silos when dealing with this issue. The private security sector is one of the few sectors where States have focused their attention.²⁷ The lifting of international sanctions may be an opportunity to ensure that business re-engages in a country in a rights-respecting manner that does not exacerbate conflict. One rare example of this is the United States Burma Responsible Investment Reporting Requirements,²⁸ brought into force after sanctions were lifted, and under which businesses are required to report on steps taken to ensure responsible business conduct in Myanmar.

29. Few States link the granting of trade and investment incentives, including export credit, to a business’s engagement in heightened due diligence in conflict settings or provide guidance through embassies to business about potential “red flags” in conflict settings. While States further strengthen their supporting and advisory capacity, it is just as essential that they address businesses domiciled or operating in their territory and/or jurisdiction that commit or are involved in gross human rights abuses. The Working Group has noted that there have been few investigations and prosecutions of

²² OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (2016).

²³ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

²⁴ “China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*, 2015.

²⁵ Claude Iguma Wakenge, Dennis Dijkzeul and Koen Vlassenroot, “Regulating the old game of smuggling? Coltan mining, trade and reforms in the Democratic Republic of the Congo”, *Journal of Modern African Studies*, vol. 56, No. 3, pp. 497–522 (2018).

²⁶ See globalnaps.org/issue/conflict-affected-areas/.

²⁷ See the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, available at www.globalpolicy.org/images/pdfs/0917montreuxdocument.pdf.

²⁸ <https://2009-2017.state.gov/r/pa/prs/ps/2013/05/209869.htm>.

businesses or individual economic actors, despite numerous allegations implicating both in international crimes.²⁹ Such cases are difficult to investigate. However, no reasonable justification exists for neglecting to address such allegations. Such investigations typically are no more expensive or complicated than cases involving terrorism or organized crime. There are many cases of successful cross-border cooperation to prosecute economic actors in other areas closely linked to human rights, such as trafficking in persons, environmental crimes, transnational bribery and corruption. Such cases demonstrate that when States have the political will to act against cross-border harms they can do so effectively.

C. Heightened United Nations action

30. While maintaining worldwide peace and security is one of its most essential purposes, the role and impact of business in conflict contexts have received little attention from the United Nations peace and security architecture.³⁰

31. The Security Council mentions the OECD Guidance in its resolutions on the Democratic Republic of the Congo and Côte d'Ivoire and encourages all States to raise awareness on human rights due diligence, and stakeholders in supply chains to exercise it.³¹ The United Nations Global Compact has a “Business for Peace” platform; however, this platform is largely unknown in the peace and security architecture.

32. The private sector is barely mentioned in the joint United Nations and World Bank study, *Pathways for Peace*.³² The recognition that business can serve as both a friend and a foe to peace and stability has yet to translate into meaningful policies from United Nations peace and security actors, or meaningful action on the ground from peacekeepers, peacebuilders and mediators on the ground.

33. This is a clear disconnect: businesses are expected to incorporate peace and security issues into their strategies and operations, but those who make up the international peace and security architecture – including States, United Nations organs and regional organizations – do not seem to incorporate business into their strategies and programmes.³³

34. Research on business and peacekeeping, peacebuilding or peace mediation – which could inform policymakers working within the international peace and security architecture – is extremely limited, particularly as compared with similar bodies of work on linkages between peace and security and women and armed or terrorist groups. Beyond a 2004 Security Council discussion on the “economic dimensions of armed conflict”, which did not lead to a resolution,³⁴ there are largely: no research or policy documents linking business to the viability of peace agreements; no Security Council resolutions on business, peace and security; and no Oslo forums on mediation dedicated to the topic.³⁵

35. The key assumption which underpins much of the peace architecture is that business is good for peace and is a positive driver for economic development, with

²⁹ See A/HRC/35/33.

³⁰ See Jolyon Ford, *Regulating Business for Peace: The United Nations, the Private Sector and Post-Conflict Recovery* (Cambridge, United Kingdom, Cambridge University Press, 2015).

³¹ See Security Council resolutions 2389 (2017) and 2219 (2015).

³² United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2018).

³³ See Josie L. Kaye, “The business of peace and the politics of inclusion: what role for local ‘licit’ and ‘illicit’ business actors in peace mediation?”, DPhil thesis, University of Oxford, 2019. Available at <https://ora.ox.ac.uk/objects/uuid:3003288e-8dee-47e3-b860-8d7a21b5d077>.

³⁴ See S/2011/271.

³⁵ See Kaye, “The business of peace and the politics of inclusion”.

little analysis of the negative human rights impacts that may result from business actions. Since understanding of these dynamics is low, there is comparatively little pressure on the United Nations or States to consider business-related issues seriously and develop relevant policies to address them.

36. As conflicts increase in intensity, complexity and scope, and as the Secretary-General, in his call to action for human rights, requires United Nations system-wide human rights risk analysis, including in United Nations mission and non-mission settings,³⁶ the international peace and security architecture must move beyond a static assumption that business is good for peace through its presence, and instead assess and act upon the impacts – both positive and negative – that business has in conflict and peace.

37. Sustainable Development Goal 16 on peaceful and inclusive societies and Goal 17 on global partnerships provide a useful framework for this engagement. However, partnerships with business are perceived as essentially transactional, as demonstrated, for instance, by the indicator for effective public-private partnerships, which includes the “amount of United States dollars committed to public-private partnerships”.³⁷

38. Beyond calls for business investment and economic development, and as it embarks on a decade for action, the United Nations Secretariat needs to strengthen its peace and security pillar institutional structures, capacity-building, awareness-raising and inter-agency cooperation capabilities to ensure and promote corporate respect for human rights in conflict-affected settings.

39. An essential part of any conflict prevention and peacebuilding framework should be the development of a strategy on “business, peace and security”, drawing on the Guiding Principles.

40. The onus is on the United Nations system, but States have a key role to play. They should mandate, encourage and support the Organization to institute policies and practices that promote corporate respect for human rights in conflict-affected settings and encourage a United Nations system able to acknowledge and engage, where appropriate, meaningfully with business actors in conflict to peace settings. In guiding principle 10, States are called on to encourage multilateral institutions dealing with business-related issues to promote business respect for human rights, and States should do the same with institutions dealing with peace and security. This would contribute greatly to international policy coherence. It would fulfil an important self-serving function for States because capacity-building and awareness-raising through the United Nations play a vital role in helping all States to fulfil their duty to protect.³⁸

D. Heightened corporate due diligence

41. The complexity of any human rights due diligence process depends upon the operating context, the size and nature of the business activities under scrutiny, the relationships associated with those activities and the severity of the potential adverse human rights impacts. In conflict-affected situations, the complexity will be increased by the operating context, where State structures are weak or non-existent; business relationships, as some actors may be active participants to the conflict, former combatants or abusers; and the severity of potential human rights abuses.

³⁶ See www.un.org/sg/sites/www.un.org.sg/files/atoms/files/The_Highest_Aspiration_A_Call_To_Action_For_Human_Right_English.pdf.

³⁷ Sustainable Development Goal target 17.17 and indicator 17.17.1.

³⁸ See guiding principle 10 and commentary.

42. Activities linking businesses to conflict are often not perceived as salient human rights issues and therefore might be ignored or under prioritized in standard human rights impact assessments.³⁹ At worst, acting in an apparently human rights-compatible way might in fact fuel conflict dynamics. For example, a business is likely to engage public or private security owing to the presence of conflict. Even if such security forces behave exemplarily, their presence affects the local context and may lead to an escalation of violence. Hiring practices fully compliant in terms of human rights might fuel a perception of advantage of a specific group over another, and lead to an escalation of grievances and violence. A simple land acquisition may fuel conflict when it is predicated on the prior dispossession or forced eviction of communities.

43. This highlights one of the biggest misconceptions of business when operating in a conflict-affected environment. Businesses are not neutral actors; their presence is not without impact. Even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics.⁴⁰

44. In conflict contexts, therefore, while human rights due diligence requiring business to assess, avoid or mitigate adverse human rights impacts remains valid and necessary, it needs to be complemented by a conflict-sensitive approach. This involves gaining a sound understanding of the two-way interaction between activities and context, and acting to minimize negative impacts.⁴¹

45. A number of resources have emerged over recent years that can help business apply a conflict-sensitive lens and implement this heightened due diligence, including conflict diagnostic tools from the United Nations Development Programme (UNDP), which can be deployed by business alongside more typical human rights due diligence.⁴²

46. Business should focus on three main steps: first, identify the root causes of tensions and potential triggers, which include the contextual factors such as the characteristics of a country or region that can affect conflict, and the real and perceived grievances that can drive conflict. This conflict analysis will help identify the human rights abuses or impacts that may arise due to the conflict and not just business operations. There will be a difference between workplace risks based on normal safety concerns versus those related to employees belonging to different groups that were parties to a conflict.

47. Second, map the main actors in the conflict and their motives, capacities and opportunities to inflict violence, which include affected stakeholders, parties to the conflict and “mobilizers”, those people or institutions using grievances and resources to mobilize others, either for violence or for peaceful conflict resolution. Business should pay particular attention to human rights defenders, those “individuals or groups that, in their personal or professional capacity and in a peaceful manner, strive

³⁹ See www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf.

⁴⁰ See for instance Mary B. Anderson and Luc Zandvliet, *Getting it Right: Making Corporate-Community Relations Work* (Sheffield: Greenleaf Publishing, 2009).

⁴¹ See Conflict Sensitivity Community Hub at <https://conflictsensitivity.org/conflict-sensitivity/what-is-conflict-sensitivity/>.

⁴² See International Alert, *Human Rights Due Diligence in Conflict-Affected Settings: Guidance for Extractives Industries* (London, 2018); Geneva Centre for Security Sector Governance (DCAF) and ICRC, *Addressing Security and Human Rights Challenges in Complex Environments Toolkit* (2017), available at www.securityhumanrightshub.org/content/call-project-partners-toolkit-and-knowledge-hub-addressing-security-and-human-rights; Swisspeace, “Enhanced Human Rights Due Diligence in Conflict Affected and High-Risk Areas”, 2016; United Nations Development Group, *Conducting a Conflict and Development Analysis* (2016); Shift, “Human Rights Due Diligence in High Risk Circumstances” (New York, 2015); Corporate Engagement Program-CDA Collaborative Learning Projects, Prospectors and Developers Association of Canada and World Vision Canada, “Preventing Conflict In Exploration” (2012).

to protect and promote human rights.”⁴³ In conflict-affected contexts, human rights defenders may share the same claims as a party to the conflict but advocate for rights holders in a peaceful manner. Business should therefore be careful to differentiate between the two, and not expose human rights defenders to undue risks, for example by initiating frivolous legal proceedings or reporting them to authorities.

48. Third, identify and anticipate the ways in which the businesses’ own operations, products or services impact upon existing social tensions and relationships between the various groups, and/or create new tensions or conflicts.

49. Additionally, business should not underestimate the impact of operating in conflict-affected areas on their own staff. They should ensure that the people assigned to complex operations are equipped with a proper understanding of conflict dynamics in the region and have the capacity and support required to manage the stress of such environments.

1. Prioritization

50. Conflict-sensitivity will be important if business needs to prioritize which impacts to address first. According to the Guiding Principles, the order in which impacts are addressed is based on their severity.⁴⁴ In conflict situations, prioritization requires businesses to think about the likelihood and consequences of conflict as a crucial element: how likely is the issue to create or exacerbate conflict? How severe are the human rights implications of the conflict risks identified?

51. In some cases, an impact may be categorized as less severe by the scale-scope-irremediability criteria, but still likely to drive conflict. For example, an employee’s religious beliefs may not be the most salient human rights issue in a non-conflict setting, but, if conflict was fuelled by religious divisions, it may well be a salient conflict issue and hence one that should be addressed. Businesses need to consider salient risks in terms of both human rights and conflict. Then, because the impact of conflict is usually more severe for more people, businesses should prioritize salient conflict issues which are not identified as salient in terms of human rights; and, finally, salient human rights issues which are considered unlikely to cause or exacerbate conflict.

2. Stakeholder engagement

52. Human rights due diligence should be ongoing, given that risks may change over time as the business operations and context evolve.⁴⁵ This is all the more so in conflict-affected contexts. Businesses should ensure that they have adequate processes in place to respond to changing circumstances and the corresponding impacts of their actions, underlining the need for robust stakeholder engagement and grievance mechanisms. This sometimes seems counter-intuitive for business which, in a volatile environment, might be tempted to limit interactions with “the outside” in order to be shielded from the conflict or not to be seen as conferring legitimacy on a specific group. However, this narrow approach creates many problems and may well expose the business to more risks.⁴⁶

53. Stakeholder engagement needs to be broad in conflict-affected contexts, in order to mitigate the lack of information, the polarization and the high level of mistrust which usually exist among groups and communities, and to get a sense not only of the facts

⁴³ See A/72/170, para. 12.

⁴⁴ See guiding principle 14 and commentary.

⁴⁵ See guiding principle 17 and commentary.

⁴⁶ See Ben Miller and others, *A Seat at the Table: Capacities and Limitations of Private Sector Peacebuilding* (CDA Collaborative Learning Projects, Africa Centre for Dispute Settlement and Peace Research Institute Oslo, 2018).

but of the perception of the situation by different stakeholders. The challenge and the need for good stakeholder engagement is well summed up as follows: “Managers are often trained to get to the truth of the matter. An environmental engineer must establish where unsafe levels of arsenic in drinking water are coming from. Yet in complex environments, there may be great value in simply listening to people’s different stories. They can teach us how people see themselves and others; what divides them and what connects them; how different pieces of a system may fit together; and even how some people may be manipulating stories to achieve certain goals.”⁴⁷

54. Robust stakeholder engagement benefits business directly by increasing its social capital with local communities. It will be particularly important where there are strong connections between such communities and armed groups. For example, in Colombia during the civil war, an engineering and construction business and, separately, an energy business each managed to complete a major project in territory controlled by insurgent groups. Both businesses spent two years engaging in participatory community development projects prior to initiating technical operations which motivated communities to help the businesses to resolve challenges, including problems arising from the activities of the local armed groups.⁴⁸

E. Additional considerations for business

1. Armed non-State actors

55. The role of security forces regarding the responsibility to respect human rights has been well explored, including in particular by the Voluntary Principles Initiative. There has not been an equivalent focus on those who could be seen as the “other side” of the security issue, armed non-State actors. ICRC rightly notes that their proliferation is a central feature of the changing geopolitical landscape of the last decade and “in some of the most complex recent conflicts, analysts observed hundreds, if not thousands, of groups engaging in armed violence. Their size, structure and capabilities vary widely. While large groups with centralized and well-defined command-and-control structures continue to arise or to exist, other groups are decentralized in their structure and operate in fluid alliances.”⁴⁹

56. These groups represent unique challenges for businesses. Beyond the violence, businesses find themselves confronted with potential criminal liability if found to have benefited or assisted an armed group designated a terrorist organization, as demonstrated by the recent case of a business indicted for war crimes for allegedly paying ISIS to access its factory in the Syrian Arab Republic.⁵⁰ At the same time, it is often impossible to continue operating in a region without having some interaction

⁴⁷ See Brian Ganson, ed., *Management in Complex Environments: Questions for Leaders* (Stockholm, International Council of Swedish Industry, 2013).

⁴⁸ See, Simón Patiño Montoya and Ben Miller “ISAGEN and the Construction of the Amoyá River Hydroelectric Center – La Esperanza”, Cambridge, United States, CDA Collaborative Learning Projects and Fundación Ideas para la Paz, 2016); Simón Patiño Montoya, Ben Miller and Dost Bardouille, “Oleoducto Central S.A. y el Plan de Mantenimiento Civil” (Cambridge, United States, CDA Collaborative Learning Projects and Fundación Ideas para la Paz, 2017); and Simón Patiño Montoya and Ben Miller, “Tipiel y el Proyecto de Desarrollo Integral Ciudadela Educativa” (Cambridge, United States, CDA Collaborative Learning Projects and Fundación Ideas para la Paz, 2016).

⁴⁹ See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the Seventieth Anniversary of the Geneva Conventions* (2019), chap. 4. See also [A/HRC/38/44](#).

⁵⁰ A French appeal court rejected a preliminary charge of “complicity in crimes against humanity”. The case is being appealed to the Supreme Court. The company still faces charges of “financing terrorism”, endangerment of people’s lives and violation of sanctions.

with armed groups or dealing with a business operated by an armed group as part of the group's own profit-making operations.

57. Armed groups are indubitably subject to, and must respect, international humanitarian law. Nonetheless, their existence, and how to deal with them, has been largely neglected as an issue in the context of business activities.⁵¹ This is not surprising, considering how legally and politically challenging – and sensitive – the topic is. Nonetheless, more clarity is needed in order to help business navigate this very specific challenge. The Working Group convened a consultation with business and humanitarian organizations to identify potential good practices that could be transferred from their practice to the business and human rights field. Interestingly, the main finding is that the issue has rarely been openly discussed or acknowledged in either the humanitarian⁵² or development⁵³ communities. While more research is needed to guide business, and other actors, operating in conflict-affected contexts, some useful insights have emerged from consistent personal experiences and anecdotal evidence.

58. First, armed groups should be understood. The lack of engagement between business and armed groups gives rise to a poor understanding of their motivations and objectives. For example, armed groups may be respectful of communities or willing to permit business to operate in the hope that doing so will earn them greater international legitimacy. Other groups may see business as a source of revenue or logistical support, or may attack a business because it represents foreign interests. Having a clear understanding of their structure, their control of territory and population, their objectives, their political agenda and the support from the local population are essential to identifying how likely it is that the armed group will interact with the business.

59. Second, business should have a clear engagement strategy. Experience seems to indicate that interacting with armed groups is mostly left to an ad hoc approach at the operational level. This results in inconsistent approaches and a transfer of responsibilities to field staff, or even local communities when they are used as a proxy. Businesses need to be aware of the formal classification of an armed group, particularly when they are designated as terrorist organizations. However, when reality dictates that they must engage with them, they should consider tools developed by relevant initiatives dealing with security and human rights issues, such as the Voluntary Principles, to avoid abuses. Developing a strategy should be an opportunity to communicate with the host and sometimes home government, about engagement with the armed group, as it may have criminalized any contact with such groups. Experience demonstrates that businesses have an interest in keeping home and host Governments informed of their interactions, even when such contact is officially forbidden. Business, like humanitarian groups, may have to engage in dialogue with armed groups and should be prepared to explain their own commitments to human rights and to respect for the well-being of people impacted by their operations.

60. Third, businesses should strive to maintain impartiality. As mentioned in paragraph 43, businesses cannot be neutral actors in a conflict context. This does not mean that businesses should not try to be impartial, including by consistently demonstrating independence from government-led or armed group-led efforts and

⁵¹ See Ben Miller and Dost Bardouille, with Sarah Cechvala, “Business and Armed Non-State Actors: Dilemmas, Challenges and a Way Forward” (Cambridge, United States, CDA Collaborative Learning Projects, 2014); International Conflict and Security Consulting Ltd. (INCAS), *Stabilising Areas Affected by Criminalised Violent Conflict: A Guide for Analysis and Stabilisation Strategy*, (INCAS, 2014).

⁵² See, for example, Ashley Jackson, “Humanitarian negotiations with armed non-State actors: key lessons from Afghanistan, Sudan and Somalia” (Humanitarian Policy Group, policy brief No. 55, Overseas Development Institute, 2014).

⁵³ See Colin Walch, “Why Should Development Actors Engage with Non-State Armed Groups?” (IPI Global Observatory, 2019).

avoiding any activity or public statement that may be construed as supporting either side of the conflict or as excusing their abuses.

61. Lastly, business should look to collaborate with other business, non-governmental organizations and the United Nations. Most businesses consider that coordination or information-sharing is neither feasible nor desirable given legal liability concerns, but cooperation would be more cost-efficient because the resources required to analyse armed groups and conflict dynamics are vast, and the task is continuous.

2. The gender lens

62. There is ample evidence of the differentiated impact of violence on women and girls and that conflict exacerbates gender-based discrimination.⁵⁴ Accordingly, it is important for business to realize the specific experience of women and girls in conflict and post-conflict situations and, given the risks to women and girls of sexual violence, discrimination and pervasive inequality, the private sector should address gender and conflict as part of any heightened human rights due diligence.⁵⁵ The Working Group has developed specific guidance on the gender dimensions of the Guiding Principles.⁵⁶

63. In particular, women and girls are disproportionately affected as conflict heightens their lack of access to and management of land and other natural resources critical to their livelihoods. The security sector is a key sector for which a gender lens needs to be applied in order to prevent abuses and gender-based discrimination by security forces. The International Code of Conduct Association for Private Security Providers includes explicit references to gender discrimination and sexual and gender-based violence in several sections.

3. Responsible exit

64. There may come a point at which a business faces a decision to suspend or terminate its activities in or linked to a conflict-affected context. The Guiding Principles refer to disengagement as an option for addressing adverse human rights impacts by a business relationship but do not deal directly with this situation.⁵⁷ The road map that businesses should follow is nonetheless clear as the Guiding Principles are built on the idea that “at all times, enterprises need to be aware of any risks that a particular course of action may pose to affected stakeholders and take these into account in their decisions.”⁵⁸

65. Exit must be more than a company leaving a region and evacuating its expatriate employees. The concrete steps that businesses need to take will be extremely context dependent. However, the need to exit will not usually materialize overnight but will be the result of a deteriorating situation over a period. The first step is therefore to anticipate and plan a clear exit strategy in advance. This will allow the business to identify and assess the impacts of disengagement with affected people, including business partners and communities, and to develop mitigation strategies. These may include: providing reasonable notice to communities, suppliers, workers and other partners of the pending disengagement; ensuring that staff continue to receive income for the duration of the crisis, in the event of temporary suspension or training, and capacity-building to mitigate the loss of employment; and ensuring the security of

⁵⁴ United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), “Women2000: Sexual Violence and Armed Conflict: United Nations Response”, 1998.

⁵⁵ See www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx%20and%20www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2012-interactif-V3.pdf.

⁵⁶ A/HRC/41/43.

⁵⁷ See commentaries to guiding principles 19 and 23.

⁵⁸ *The Corporate Responsibility to Respect Human Rights: an Interpretative Guide* (United Nations publication, Sales No.HR/PUB/12/02), p. 79.

remaining staff who cannot be evacuated. If a business is offering ancillary services or philanthropic programmes, it must mitigate the effects of its exit, for instance by providing for hand over to an adequate entity, such as a civil society actor.

4. “Captive” businesses

66. In the context of human rights abuses and peacebuilding, much focus is traditionally placed upon the efforts of large, mobile multinational firms. The problem of businesses that are “captive” to conflict contexts is underexamined.

67. There are two main reasons why a business might be dependent upon a conflict zone with little chance of relocating.

68. The first is by far the most prevalent: a business is State-owned or is headquartered, founded and run within the conflict zone. Such businesses range in size from micro-enterprises of fewer than five employees to large businesses with staffs of hundreds. Not only the employees but the owners, managers and their families all live within the conflict zones. This makes departing a personal as much as a corporate matter, as “withdrawing” often means that they will become refugees with their families in another country and will leave employees without jobs. In the Syrian Arab Republic, for example, businesses that attempted to keep operating during the conflict were subject to economic and physical pressure from the conflict parties and from economic pressure (mainly in the form of sanctions) from the international community.⁵⁹

69. The second reason why businesses may be “captive” is because of a resource which cannot be found (or would be difficult to find) elsewhere. For example, despite decades of war, businesses rely on coltan from the Democratic Republic of the Congo as a key component in electronics.⁶⁰ The country has 70 per cent of the world’s known coltan reserves, making it nearly impossible to fully withdraw.

70. Respect for human rights by “captive” businesses represents a unique challenge. With limited ability to leave, captive businesses are subject to substantially more pressure from conflict actors, especially as subjects of violence themselves, particularly if they have witnessed human rights violations. It is therefore important that, during a post-conflict transition, local businesses be considered as a specific category. They may be subject to coercion from State and non-State actors because of their need to remain. Further clarification as to when the defence of necessity may apply is critical. Further examination of case studies of such businesses, in terms of how to identify and mitigate human rights impacts, is also essential.

71. Captive enterprises may be critical because of the important reconciliation role that they can play post-conflict.⁶¹ Peacebuilding through such businesses may not involve some of the issues associated with multinational enterprises. This is because peacebuilding occurs within the homes and communities of those living in conflict-affected zones. This is a unique benefit as it ensures that, although “captive”, micro-enterprises and small enterprises are able to continue operating.

⁵⁹ John Elias Katsos, “Business and terrorism: the ISIS case”, in *Business, Peacebuilding and Sustainable Development*, John Elias Katsos, Jason Miklian and Rina M. Alluri, eds. (London, Routledge, 2019).

⁶⁰ Miho Taka, “Coltan mining and conflict in the eastern Democratic Republic of the Congo (DRC)”, in *New Perspectives on Human Security*, Malcolm McIntosh and Alan Hunter, eds., (London, Routledge, 2017) pp. 159–173.

⁶¹ Jay Joseph, John E. Katsos and Mariam Daher, “Local business, local peace? Intergroup and economic dynamics” in *Journal of Business Ethics* (Springer, 2020), pp. 1–20.

IV. Post-conflict

72. The reconstruction and peacebuilding phases that a country undergoes after a conflict are clearly part of the conflict, and business and States should apply the same principles, in particular, heightened due diligence, as during the active phase of a conflict.

73. There are a number of specific challenges, such as the pressure to attract investment and regrow economic activities at any cost. Combined with very fragile public institutions, this in turn creates a high risk of State capture by economic interests with little or no regard for human rights concerns or conflict sensitivity. As the pace of foreign investment often outpaces a host State's legal framework, and the ability to ensure a meaningful set of human rights protections and rule of law, some experts suggested during the Working Group's consultations that it might be useful to have a brief pause on investments to allow for a host State to properly ensure that the investment would be rights respecting and not one that would exacerbate conflict.

74. International financial institutions are particularly active in post-conflict settings. Their focus on attracting investors without building in adequate human rights safeguards and, in some contexts, facilitating investments that involved abuses and provided fuel to reignite old conflicts was an issue flagged during the Working Group's consultations.⁶² There seems to be increasing recognition of these challenges,⁶³ as demonstrated by a common trend to align human rights due diligence, as defined in the Guiding Principles, either in operational policies, such as that of the International Finance Corporation,⁶⁴ or in broader policy statements, for example, of the World Bank or the African Development Bank.⁶⁵

75. In its World Bank Group *Strategy for Fragility, Conflict, and Violence 2020–2025*, the World Bank Group acknowledges that it is critical for investment activity that conflict analysis be taken into account but offers no analysis of why and how business can ensure respect for human rights.⁶⁶

76. As a minimum, international financial institutions should further align with the Guiding Principles. They should carry out their own heightened human rights due diligence, require this from businesses which have funding and advisory services and prioritize investments involving businesses that are committed to responsible business conduct.

77. As most reconstruction efforts will be based on contractual arrangements between the host State and the international community, other States or business, or through national reconstruction plans, heightened human rights due diligence should be ingrained at all levels, when treaties and contracts are negotiated and administered and during national policymaking. The principles for responsible contracts,⁶⁷ issued at the same time as the Guiding Principles, provide key elements to be considered when mainstreaming human rights diligence into a wider range of policies and laws affecting

⁶² See www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx.

⁶³ See OHCHR, *Benchmarking Study of Development Finance Institutions' Safeguards and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights* (draft, 2019).

⁶⁴ International Finance Corporation, "Environmental and Social Sustainability Policy" (2012).

⁶⁵ World Bank, *The World Bank Environmental and Social Framework* (Washington, D.C., 2017), "A Vision for Sustainable Development"; African Development Bank, *African Development Bank Group's Integrated Safeguards System: Policy Statement and Integrated Safeguards*, Safeguards and Sustainability Series, vol. 1, No. 1 (Tunis, December 2013).

⁶⁶ World Bank Group, *Strategy for Fragility, Conflict, and Violence 2020–2025* (Washington, D.C., World Bank Group, 2020).

⁶⁷ [A/HRC/17/31/Add.3](http://www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx).

reconstruction processes. The principles are focused on the steps that business and States should take to properly address the human rights implications of any major investment.

78. An interesting example of such forward planning might be in the commitment of the United Nations for its assistance in the Syrian Arab Republic,⁶⁸ which it stated that “rigorous standards of due diligence should apply [to its assistance], drawing from the principles of the human rights due diligence policy” and that “the United Nations shall apply” the Guiding Principles “in all areas of its work in Syria”. While the situation on the ground has not permitted a test of this commitment, this should be a standard procedure for any future reconstruction work.

79. While home States have a critical role, local investment promotion authorities also have a vital role to play in ensuring that business respects human rights. The Working Group’s consultation highlighted the critical role that economic institutions, such as local investment boards, play in providing incentives to businesses to act responsibly. In one situation, businesses saw the risks of doing business in an area as being too high because of the conflict. The regional board of investment noted that managing human rights risks would help prevent a relapse into conflict and developed a business sustainability framework which reflected international standards but was based on community engagement in order to include sensitivity to local cultures and values.

80. After the conflict, businesses will often have to partner with companies and individuals that have been parties to the conflict, or people who have committed human rights abuses. Screening of relationships is therefore particularly important. The statement of eminent jurists on legal obligations when supporting reconstruction in Syria provides guidance for business in terms of what constitutes responsible engagement.⁶⁹ Business activity should not further institutionalize the impacts of war crimes, for example, by solidifying the status of resettlements where forced displacements along sectarian lines have taken place. For business, it is not just a question of whom they are dealing with, but where they are going, which requires understanding of the specific local context. It is essential for businesses to consult with local communities and to develop appropriate tools for screening business partners as part of human rights due diligence, as well as to recognize that, in many cases, it will hardly be possible to invest in a way that is compliant with international standards.

V. Access to remedy and transitional justice

81. In addition to civil remedy, criminal prosecution of economic actors who have engaged in or aided and abetted gross human rights abuses is considered an important facet of access to remedy. Through criminal prosecution, victims can seek justice by holding perpetrators to account and seek restitution. As the Working Group has emphasized previously, it is vital for States to pursue accountability of businesses and individual economic actors for gross abuses committed during armed conflict. This point is also underscored in the first Office of the High Commissioner for Human Rights (OHCHR) accountability and remedy report.⁷⁰ Argentina, for example, has prosecuted corporate managers and executives who were involved in killings and forced disappearances during Argentina’s “dirty war”.

82. One of the key features of post-conflict situations is the presence of transitional justice processes. Transitional justice refers to “how societies respond to serious and

⁶⁸ See www.kommersant.ru/docs/2018/UN-Assistance-in-Syria-2017.pdf.

⁶⁹ www.businesshumanrights.org/sites/default/files/documents/Eminents%20Jurists%20Statement_Syria%20reconstruction.pdf.

⁷⁰ S/2011/271.

massive violations of human rights and humanitarian law. It comprises “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice is commonly aimed at providing redress for victims, accountability for perpetrators of past abuses, and identifying and addressing the root causes and structural drivers of violence and repression, such as gender inequality and social exclusion. While transitional justice includes criminal accountability, it is underpinned by a broader understanding of justice that takes into account a range of victims’ needs and societal priorities.”⁷¹

83. Just as business and human rights appears to be overlooked by the peace and security world, transitional justice is a separate field and community of practice from business and human rights. Until recently, little attempt has been made to examine how these frameworks overlap, and if and how transitional justice frameworks should address the role of business during and after armed conflict.⁷²

84. The challenge is complex because transitional justice processes are highly contextual. There is not one single set of “best practices” for business in all conflict/post-conflict settings. Business and human rights responses to these scenarios need to be flexible enough to be context sensitive.

85. Those who design transitional justice mechanisms, as well as business, should acknowledge that businesses have a responsibility to remedy their past behaviour. Businesses should engage with relevant transitional justice processes and contribute to truth, reparation and guarantees of non-recurrence where appropriate. One way to conceptualize synergies between the business and human rights field and transitional justice frameworks is that the four pillars of transitional justice – each of which represents a form of substantive remediation – should be recognized as an inherent part of the remedy pillar of the Guiding Principles, and become a guidepost for how States design transitional justice processes that account for the role of business.⁷³

86. Often, businesses, like others present in the area, may be victims, perpetrators, or both at different times. States should be cognizant of this complexity when designing transitional justice processes. Where a business has the dual role of victim and perpetrator, its responsibility to respect and remedy impacts cannot be excused by the fact that it has been a victim at other points of the conflict. This requires States to distinguish between the types of businesses involved in the conflict. Where they were part of the conflict and committed conflict-related human rights abuses, the State has an obligation to investigate their role and to hold them to account. From a transitional justice perspective, this can be done through a combination of various mechanisms based on the four pillars of transitional justice: truth, justice, reparation and guarantees of non-recurrence.

87. Numerous truth commissions have examined the role of business in conflict, including in Colombia, Liberia, Sierra Leone and South Africa. The challenge is to create appropriate incentives that will encourage businesses to appear before such commissions. Such incentives should be linked to the nature of the accountability mechanisms in place to hold those most responsible to account through criminal prosecution.

⁷¹ See Working Group on Transitional Justice and SDG16+, “On Solid Ground - Building Sustainable Peace and Development After Massive Human Rights Violations” (2019).

⁷² Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (London, Routledge, 2013).

⁷³ *Ibid.*; and Irene Pietrapaoli, *Business, Human Rights and Transitional Justice* (London, Routledge, 2020); and Leigh A. Payne, Gabriel Pereira and Laura Bernal-Bermúdez, *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes’ Lever* (Cambridge, United Kingdom, Cambridge University Press, 2020).

88. One example is the Colombian experience. Accepting that some economic actors had committed conflict-related crimes, they were initially included in the mandatory jurisdiction of the Special Jurisdiction for Peace, but the Colombian Constitutional Court declared that the mandatory jurisdiction of the Special Jurisdiction over economic actors was unconstitutional. This could create a mistaken view that businesses were not really part of the conflict⁷⁴ and diminish the few incentives for businesses to engage with such proceedings.

89. To avoid such problems, transitional justice tribunals should be given jurisdiction over all actors in the conflict. Where businesses incur criminal liability, the obligation to provide remedies goes well beyond symbolic reparations and includes all forms of reparation, in particular restitution (e.g., in the context of land displacement) and compensation. To the extent that symbolic reparations are provided, it must be clear that these do not replace other forms of reparation and that they need to be constructed from the perspective of the victims, not determined by the businesses without consultation.

90. Even businesses that have not incurred legal responsibility but, for example, benefited from the conflict, should be very strongly encouraged to engage with the truth component of the transitional justice process and provide the full truth about their role in the conflict, even if they acted within the realm of the lawful. The Truth and Reconciliation Commission of South Africa, for example, recommended that businesses that had benefited from doing business under apartheid contribute to a reparations “tax” on the wealth acquired through systematic discrimination.

91. This is important for businesses that might have actively and willingly contributed to serious human rights violations but are not criminally liable simply because criminal corporate responsibility does not exist. In such cases, they should be encouraged to contribute reparations. Engaging with a truth commission can contribute to guarantees of non-recurrence. One form of guarantees of non-recurrence would be for States to introduce corporate criminal responsibility, given that corporate actors can incite human rights abuses and criminal responsibility. Holding only individuals to account can be insufficient and inappropriate in the circumstances.

92. Experts and stakeholders both recommended that where remedies, or business involvement in post-conflict reconstruction, take the form of development measures, it is crucial that there be consultation with the relevant communities where these measures are taking place, to provide development according to their needs and avoid revictimization.

93. Operational-level grievance mechanisms are a major tool in conflict settings. They should follow the established effectiveness criteria, but their design and operation requires heightened attention. Just like stakeholder engagement, robust grievance mechanisms are more important in conflict-affected contexts. However, it is important for businesses to understand that a grievance mechanism may not be fit for purpose for all circumstances, for example if the allegations involve gross human rights abuses or other serious criminal matters. The International Code of Conduct Association for Private Security Providers, for example, has developed a guidance manual and policy on grievance mechanisms, which provides examples of how security providers should address the issue of reporting crimes to national authorities.⁷⁵

⁷⁴ See Sabine Michalowski and others, *Terceros Civiles, Ante la Jurisdiccion Especial Para La Paz (Dejusticia)*, (2020).

⁷⁵ www.icoca.ch/sites/default/files/uploads/Manual.pdf.

94. Businesses should acknowledge that armed conflict will increase the level of risk, and of fear, and make more individuals afraid to report their grievances. Confidentiality of the process, and the security of the people accessing the mechanisms, should therefore be fully secured.

95. Similarly, the breakdown of the rule of law and the judiciary system or the polarization and/or repression of civil society organizations, which ordinarily provide an avenue for communities to raise grievances, may transform a business mechanism into a sole recourse for communities to be heard. Businesses should ensure that their design allows for such grievances to be transmitted to the appropriate actors. An interesting example of such a process is well described by Guías Colombia: when grievances and/or complaints may refer to abuses by the army or armed groups against people in the community, employees or contractors, the business “should make the facts known to competent authorities, to avoid any accusation of complicity by omission and can and should communicate to victims or their families the ICRC contact information for reporting their case.... ICRC and its delegates, in accordance with its own rules, should explain to the victims or their families the course of action to follow, as well as any humanitarian answers ICRC may provide, on a case-by-case basis.”⁷⁶

VI. Challenges of the cyber age

96. The emergence of technology impacts conflict-affected contexts, as well as the rest of human activity. As mentioned by ICRC, “cyber tools, increasingly autonomous weapon systems, and artificial intelligence are being used in contemporary armed conflicts....[International humanitarian law] is applicable to the development and use of new weaponry and new technological developments in warfare – whether they involve ... cybertechnology;... autonomous weapon systems; [or] artificial intelligence and machine learning.... States that develop or acquire such weapons or means of warfare are responsible for ensuring that they can be used in compliance with [international humanitarian law]”.⁷⁷ The same can be said with regard to human rights, and businesses which develop or trade such means of warfare should follow the Guiding Principles.

97. If there is no doubt in relation to the normative framework, much work remains to be done to flesh out the concrete consequences of implementing the Guiding Principles for this industry. A multi-stakeholder initiative bringing together representatives of industry, States and civil society, with the overarching objectives of operationalizing the human rights responsibilities of the sector, and setting out practical guidance and standards for the responsible provision of cyberservices, would seem to be particularly timely. This could follow, for instance, the model of the International Code of Conduct for Private Security Service Providers.

98. Beyond the means and methods of warfare, many recent human rights abuses in conflict-affected contexts have been fuelled by misinformation and hate campaigns online, as demonstrated by the findings of the 2018 report of the independent international fact-finding mission on Myanmar.⁷⁸

99. There are a number of relatively simple factors that the technology sector should consider in order to improve its capacity to respect human rights in conflict contexts. First, there is no exceptionalism for the sector. It is a natural tendency of each sector

⁷⁶ www.ideaspaz.org/media/website/FIP_GC_Grievance&Complaints_web_C-0519.pdf.

⁷⁷ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2019), chap. 2.

⁷⁸ A/HRC/39/64.

to consider itself different from the norm, with very specific challenges,⁷⁹ but the Guiding Principles apply equally to all businesses in all sectors. For example, there is no fundamental difference in outcome between a mining operation faced by the challenge of known local militias using their trucks to attack, rape and kill members of a specific community and a social platform allowing known extremists to post hate messages inciting the attack, rape and killing of members of a specific community. Second, the sector should adopt a genuine human rights approach, in which all rights are recognized as equal, rather than a misguided understanding of human rights whereby the right to free speech, or the right to physical security, would be so absolute or unyielding as to trump any other human rights.⁸⁰

VII. Conclusions

100. **The Guiding Principles provide clarity on what is expected from business and States in conflict-affected areas. What is now required is more decisive action to integrate business and human rights into peace and security frameworks.**

101. **Alongside conflict minerals is a trend towards general mandatory human rights due diligence regulations. Both underscore the importance of the advisory role of States in conflict-affected markets, as well as the need for robust policy coherence, including in development finance and reconstruction.**⁸¹

102. **This expansion of mandatory due diligence means that the issue of business in conflict-affected regions should gain traction faster, including an expectation of heightened due diligence. The lessons learned of implementing conflict minerals regulations across multiple jurisdictions offers insights transferable to a broader set of policy issues in conflict-affected regions. The process exemplifies a point made in the 2011 companion report on State policies. States are more inclined to adopt policies which do not put their own businesses at an unfair disadvantage. Multilateral standard setting is likely critical to ensuring that States move forward in the fulfilment of the State duty to protect human rights in conflict settings.**

103. **Therefore, States should consider, and business should support, the establishment of a multilateral and multi-stakeholder forum to share and build on existing practices in the context of conflict and peacebuilding. This could also be an opportunity to consider an international agreement clarifying risks, prohibited activities and modes of liabilities with respect to business in conflict or other high-risk situations, such as clarifying the types of gross human rights abuses that are prohibited.**

VIII. Recommendations

104. **To States:**

- **Home and host States should use their key policy tools and levers to ensure that business engages in conflict-sensitive heightened due diligence when operating in conflict-affected areas. This may include linking access to export credit, investment approvals and access to investment finance, to demonstrable heightened human rights due diligence.**

⁷⁹ See for example John E. Katsos and Jason Miklian, “Overcoming tech exceptionalism: how to improve societal impact by technology firms in fragile and conflict settings”, *Global Policy*, 9 January 2019. Available at www.globalpolicyjournal.com/blog/09/01/2019/overcoming-tech-exceptionalism-how-improve-societal-impact-technology-firms-fragile.

⁸⁰ See Ontario Human Rights Commission “Policy on competing human rights” (2012).

⁸¹ See commentary to guiding principle 8; 2019 report of the Working Group (A/74/198).

- **Embassies and investment-related and trade-related functions should provide conflict-sensitive advisory services and tools to the private sector, including to small- and medium-sized enterprises, to assist them in respecting human rights in conflict-affected settings.**
- **States should develop appropriate guidelines for business engagement in peacebuilding settings to ensure that businesses operate with respect for human rights and conflict-sensitivity.**
- **States should encourage multilateral institutions dealing with peace and security issues to promote business respect for human rights through the proactive engagement of business actors in peace and security processes that concern them.**
- **States should ensure that transitional justice mechanisms include all actors, including economic actors, and ensure that the role of business is fully considered within such mechanisms, consistent with core principles of transitional justice such as accountability, reparations and guarantees of non-repetition, as essential parts of effective remedy.**
- **States must actively pursue cross-border investigations and prosecutions of international crimes committed by corporate actors as part of a commitment to access to effective remedy.**
- **States, under the auspices of the United Nations or other international processes, should develop guidelines for human-rights based engagement with armed non-State actors.**

105. **United Nations**

- **The United Nations, in particular its peacekeeping, peacebuilding and mediation pillars, should develop a strategy on business, peace and security that embraces the Guiding Principles as a foundational component.**
- **The United Nations should ensure that an appropriate level of awareness is incorporated into its peace and security pillar on the issue of business, human rights and conflict, including by disseminating information about news, tools and research both within and outside the United Nations system, and by organizing regular awareness-raising sessions for staff and Member States.**
- **The United Nations should establish robust interagency cooperation to ensure that all its entities confronted with a business presence in their operations in conflict-affected contexts do not work in isolation and share existing knowledge with the United Nations system.**
- **The United Nations peace and security pillar should strengthen its own knowledge and capacity and develop, in cooperation with relevant entities within and outside the United Nations system, basic tools and specific guidance notes and thematic briefs, for peacekeepers, mediators and peacebuilders.**

106. **Businesses should:**

- **Seek advice from embassies and investment and trade-related functions to receive conflict-sensitive advisory services and tools to assist them in respecting human rights in conflict-affected settings.**
- **Engage in heightened human rights due diligence that incorporates tools from atrocity prevention and conflict prevention to augment their existing due diligence frameworks.**
- **Develop operational-level grievance mechanisms that have a conflict-sensitive approach.**

- **Commit to active engagement with local communities and groups in conflict and post-conflict settings.**
 - **Ensure that a gender-responsive approach is used to develop heightened human rights due diligence and in grievance, remedy and transitional justice mechanisms.**
 - **Actively participate in truth and reconciliation processes and provide reparations and guarantees of non-repetition as part of their commitment to building peace.**
-