



Multinational corporations in conflict-affected areas

Risks and challenges around human rights and conflict

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This paper highlights some of the risks and challenges associated with multinational corporations operating in fragile and conflict-affected areas, including human rights abuses; the lack of corporate accountability in such situations; and the risk of sparking or intensifying conflict.

Firstly, the risk that corporations become involved in gross human rights abuses is especially prevalent in conflict-affected areas, as the most serious forms of business-related human rights abuses tend to take place in such areas. Secondly, ensuring access to remedy for victims is most challenging when human rights abuses are taking place in such areas due to the 'accountability gap', both in home states as well as host states of multinational companies. Thirdly, in fragile and conflict-affected areas these same companies may also spark, drive or intensify conflict. Their business activities may benefit and support specific parties to the conflict, for example when sourcing from rebel held territory or supplying them with resources. Also, their presence on the ground may spark conflict when community grievances are not adequately addressed.

This paper aims to contribute to ongoing discussions about the harmful impacts of multinational corporations in fragile environments, and on how the private sector

can contribute to peaceful economic development instead of conflict. To this end, a number of recommendations to improve corporate accountability and decrease the risk of business-related human rights violations in fragile and conflict-affected areas are presented.

Introduction

Economic development and peace building

In recent years, private sector engagement in conflict-affected areas has been promoted by governments and international institutions alike. The World Bank, among others, has highlighted the role of the private sector in fragile and conflict-affected states, stating that a thriving and legal private sector provides livelihoods and growth, while delivering revenue streams in the form of taxes so governments can provide services to their citizens.¹ Multinational corporations are now perceived as a partner in development, based on the assumption that economic development is key in achieving human wellbeing, and emphasizing that businesses can bring about employment, infrastructure, technology, education, knowledge transfer, and ultimately stability and peace. ◂

Businesses are also increasingly seen as important actors in conflict prevention and resolution, with proponents pointing out that they could play an important role given their experience in: managing complex problems involving different actors; leadership; negotiations; and knowledge of local contexts.² Examples of companies making an effort to contribute to peace can be found in a paper of the UN Global Compact's Business for Peace programme.³ The private sector's growing role in the peace and security domain is reflected by the emergence of the concept of Corporate Security Responsibility that emphasises the political and security responsibility of businesses and regards them as "a promising and much-needed complement to the activities of states and civil society actors".⁴ According to Deitelhoff and Wolf⁵, two German scholars who developed the concept, an extra security dimension is added for companies operating in conflict zones. MNCs are confronted with the opportunity to realize profits, the risks of incurring substantial war damages and rising security costs and of being publicly associated with bloodshed and human rights violations. The choice between not investing in the first place, withdrawing from a conflict zone or contributing to a more predictable and secure business environment is a pressing one for MNCs.

Exacerbating or fueling conflict

However, there is much controversy around the potential impacts of multinational corporations in conflict-affected areas.⁶ While businesses contribute to economic development, which could be the basis for human rights improvements, their activities may also exacerbate or fuel conflict and are often linked to human rights violations. In the words of former UN Special Representative on human rights and transnational corporations: "The most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence. Human rights abuses may spark or intensify conflict, and conflict may in turn lead to further human rights abuses."⁷

In conflict-affected areas, businesses have been involved in human rights abuses in various forms, as the main perpetrator and as accomplices by aiding and abetting government forces or non-state actors such as rebel groups. Notable examples include the alleged involvement of Shell in gross human rights abuses in Nigeria during the military dictatorship;⁸ extractive companies sourcing blood diamonds from war-torn Sierra Leone⁹ and conflict minerals from Democratic Republic of Congo;¹⁰ private military companies involved in extrajudicial killings and torture in Afghanistan and Iraq; alleged complicity of construction companies in war crimes in Palestine;¹¹ and alleged complicity of oil companies in human rights abuses committed by the Sudanese government.¹² Also, it is increasingly debated to what extent and under what conditions the private sector can actually 'contribute to peace'. According to CDA Collaborative Learning Projects, not every well-intended

initiative contributes to peace, and assumptions about the relationship between economic development efforts and peacebuilding are often untested or false.¹³ A thorough understanding of the local context is paramount in order to design effective approaches for private sector engagement in peace building. A recent Chatham House report concludes that "promotion of extractive-led development as a means to peace in conflict-affected situations carries inherent risk. Even with significant financial and technical assistance and concerted multi-stakeholder efforts, there is no guarantee that resource development will contribute to peace. (...) Even a 'do no harm' approach in line with conflict-sensitive guidelines may inadvertently fuel conflict."¹⁴

The political economy of conflict

In addition to the direct link between the onset and intensity of conflict through conflict financing and creating grievances on the ground, there is also a broader concern about the political economy of conflict. The very conditions that characterize conflict may be highly profitable for certain types of businesses, with corporate actors drawn to conflict-affected areas because weak rule of law and dependence on foreign investors for the national budget creates profitable business opportunities for them. In this sense, war can be used to further economic interests, perpetuating armed violence with corporations benefitting from the conditions that conflicts generate.¹⁵ Conflict, then, "is not simply the breakdown of a particular system but a way of creating an alternative system of profit, power and protection".¹⁶ For example, companies can profit from weak government institutions to attain attractive investment incentives. In various post-conflict countries, multinational companies have been able to negotiate highly attractive agreements with national governments in need of foreign direct investments that do not necessarily take the interests of local communities into account. This can lead to the leasing out of vast areas of land, the provision of tax incentives and other benefits that increase the profitability of the multinational enterprises but that might also create new grounds for conflict at local and regional levels.

Current popular discourse on promoting the role of business in development, conflict prevention and resolution should be treated with great care and caution. Businesses operating in such contexts have a responsibility to exercise heightened due diligence to ensure they are not causing, contributing or being linked to human rights violations and the onset and escalation of conflict. The purpose of this paper is to highlight some of the main challenges with business activity in fragile and conflict-affected areas.

Aims of the paper

□ Informing civil society organisations (CSOs), policy-makers, investors and companies about the risks and challenges of private sector investments in conflict-affected areas

This paper informs civil society organisations, policy-makers from governments, international institutions such as the World Bank, OECD and the United Nations, investors and multinational corporations about the risks and challenges associated with private sector investments in conflict-affected areas. Ultimately, the aim is to encourage governments and companies to better consider these risks and challenges in specific conflict contexts, to ensure that due diligence processes go further than in more stable countries, through so-called 'enhanced due diligence'.¹⁷

□ Encouraging governments to close the accountability gap

The paper also aims to encourage governments to increase their efforts in closing the accountability gap that exists in conflict-affected areas, and to constructively work towards an internationally binding instrument on business and human rights as currently negotiated in the intergovernmental working group established by the UN Human Rights Council.¹⁸

□ Increasing awareness on how companies may spark, drive or intensify conflict

The activities of businesses may not only lead to human rights abuses, but also to sparking new conflict or intensifying existing ones. The paper highlights the different ways in which businesses cause or contribute to conflict, for example by engaging with parties to the conflict in such a way that they become complicit in human rights atrocities, but also by sparking company-community conflicts and inter- and intra-community conflict.

Context of the paper

The paper focuses mainly on multinational corporations, meaning corporations that operate in more than one country.¹⁹ It is part of a series of working papers and reports written as part of SOMO's programme on Multinational Corporations in Conflict-Affected Areas.²⁰ This four-year programme, funded by the Dutch Ministry of Foreign Affairs, aims to empower local NGOs and communities to critically analyse the impact of the private sector in conflict-affected areas, and to ensure that companies are held accountable for corporate misconduct.²¹

On conflict-affected areas

Definitions of conflict

In the business and human rights field, when discussing the activities of multinationals in conflict areas, the terms 'conflict', 'conflict-affected', 'high-risk areas' and 'fragile states' are often used interchangeably. They can however have different meanings and implications across various fields, with the term 'conflict' in international law for example only referring to a specific set of conflicts (see Box 1). In this paper, 'conflict-affected areas' refers to areas affected by violence, political instability, institutional weakness and collapse of civil infrastructure. Although precise definitions differ (see Annex 1 for an overview), the term 'conflict-affected' is widely used by international organisations, states, academics and civil society organisations.²² The term 'fragile state' is often also mentioned in relation to conflict-affected areas, and generally refers to countries with weak institutions, a lack of capacity, and issues with accountability and/or legitimacy on the part of the state.

As indicated in Box 1, the limited scope of conflict as defined by international law means there are serious limitations to the application of international law in relation to non-international armed conflict. Conflicts that do not meet the definition of international or non-international armed conflict are not governed by international humanitarian law. This means that for businesses operating in these environments, international humanitarian law does not apply. Therefore, for the purpose of this paper, it is useful to take a broader definition of conflict and also include other forms of conflict, such as internal disturbances, tensions and riots.

The risk of renewed conflict

Although fragile states do not necessarily always experience conflict, there is a strong correlation between the two. As the 2011 World Development Report notes, out of 17 fragile states, 16 experienced some type of conflict in the last decades.²³ Additionally, conflict-affected areas are prone to experience renewed conflict over time. Most conflicts occur in countries that experienced previous conflict, with 90% of the last decade's civil wars occurring in countries that had already had a civil war in the last 30 years.²⁴

Context matters

Fragile and conflict-affected areas include countries currently experiencing violent conflict, those emerging from conflict through a transition and those that are post-conflict.

Box 1: Conflict according to international humanitarian law (IHL)

In international humanitarian law (IHL), the term 'conflict' refers to two types of conflicts: international armed conflict and non-international armed conflict. From a legal point of view, no other types of conflict exist. The difference between international and non-international armed conflict is important because of the applicability of specific international humanitarian law provisions, by which multinational corporations are also bound (ICRC 2006), and which applies fully to international armed conflicts but only partially to non-international armed conflicts. International armed conflicts are inter-state conflicts, meaning conflict between two or more states. At the time international humanitarian law was developed this was the most prominent type of armed conflict. Non-international armed conflicts are conflicts between the state and one or more non-state armed groups, or between such groups only. Although as a matter of law internal disturbances, such as riots, isolated and sporadic acts of violence and acts of criminality, do not amount to non-international armed conflict, such events may escalate into non-international armed conflict or often occur in states experiencing armed conflict. To distinguish these forms of conflict from the scope of 'non-international armed conflict', a certain threshold of confrontation should be met. The armed confrontation must for example reach a minimum level of intensity and the parties involved in it must show a minimum of organisation (ICRC 2008). Since the end of the Cold War, non-international armed conflicts, such as civil wars, have been on the rise and are now the most predominant form of conflict (Wenger and Mason 2008).

The definition of conflict in the sense of international humanitarian law is rather narrow. Conflicts within the meaning of international law have certain distinct characteristics, such as the presence of warring factions and the applicability of humanitarian law. The majority of conflicts in the past decade have been low-intensity conflicts, and many conflict situations that are relevant in the context of business, human rights and conflict that do not necessarily meet the legal threshold criteria would be excluded if looking at conflict as defined purely by international law (Heidelberg Institute for International Conflict Research 2015).

Sources

- ICRC (2006). *Business and International Humanitarian Law: an introduction in the rights and obligations of business enterprises under international humanitarian law*; <https://www.icrc.org/eng/resources/documents/publication/p0882.htm>.
- ICRC (2008). *How is the term 'armed conflict' defined in international humanitarian law?*; <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.
- A. Wenger and S. Mason (2008). *The civilization of armed conflict: trends and implications*. *International Review of the Red Cross*, volume 90, p. 837-846.
- Heidelberg Institute for International Conflict Research (2015), *Conflict Barometer 2014*; http://hiik.de/de/konfliktbarometer/pdf/ConflictBarometer_2014.pdf.

The exact context may vary widely, and can include post-conflict countries such as Liberia and Sierra Leone which maintain a fragile peace; countries such as Colombia or Myanmar with pockets of high-intensity violence; and countries experiencing fully fledged conflicts such as Syria, Libya and South Sudan. While recognizing these differences, these areas have common characteristics, including instability, weak state control and rule of law, institutional weakness, and failing regulatory and enforcement systems.²⁵ It is important to highlight that all countries in these different phases face a risk of re-emergence of conflict.

Multinationals in fragile and conflict-affected areas: human rights at risk

Multinational corporations operating in fragile and conflict-affected areas are of particular concern from a human rights perspective. Firstly, the risk that corporations become involved in gross human rights abuses is especially prevalent in conflict-affected areas. The most serious forms of business-related human rights abuses tend to take place in such areas, where corporations can become complicit in gross human rights abuses committed by state and non-state actors.²⁶ Secondly, ensuring access to remedy for victims is most challenging when human rights abuses are taking place in such areas. Host states, where

multinationals operate, as well as home states, where they are headquartered, are often unable or unwilling to hold multinational corporations accountable. An 'accountability gap' exists. Thirdly, in addition to human rights violations caused by multinational corporations, in fragile and conflict-affected areas these same companies may also spark, drive or intensify conflict. Their business activities may benefit and support specific parties to the conflict, for example when sourcing from rebel held territory or supplying them with resources. Also, their presence on the ground may spark conflict when community grievances are not adequately addressed.

Conflict-affected areas and the heightened risk of human rights violations

*"Gross human rights abuses can take place anywhere. But the risks are particularly great in areas of poor governance, and especially in conflict-affected areas."*²⁷

Human rights abuses and conflict

The link between the worst forms of business-related human rights abuses and conflict-affected areas is not surprising. The most serious forms of abuses occur in these very areas. A report for the Office of the UN High Commissioner for Human Rights (OHCHR) highlights a number of cases where corporations were complicit in gross human rights abuses, the majority of which were committed in conflict-affected areas.²⁸ Examples are the alleged complicity of Dutch company Lima Holding in war crimes in Palestine; the alleged complicity of French company Qosmos in serious human rights violations by the Assad regime in Syria; and the alleged complicity in human rights abuses by Swiss-German company Danzer committed by military forces in the Democratic Republic of Congo (see Box 2).²⁹

Other research shows the links between the worst forms of corporate human rights abuses and conflict-affected areas; the majority of the cases profiled by the Business and Human Rights Resource Centre relate to abuses committed in 'weak governance zones',³⁰ while a report of 2014 by Belgian non-governmental organisation (NGO) IPIS notes that of the largest European companies listed on stock exchanges that were implicated in human rights abuses, "the most severe often allegedly occur in countries in which rule of law and institutions are weak".³¹

Involvement of companies

When operating in conflict-affected environments, businesses may find it difficult to avoid becoming involved in the conflict in one way or another. In such areas, "businesses [...] are exposed to the surrounding conflict dynamics. Not only their operations, but also their personnel, products or services may become part of the ongoing conflict".³² Parties to a conflict will inevitably

attempt to use and influence the operations and assets of businesses to further their objectives, and profit from business activities. In addition, while there are companies whose activities are connected to conflict – such as private security providers and arms traders – 'normal' business activities may also be implicated in human rights abuses purely because they happen in the context of fragility and conflict. The reason for this is that their business activities require them to be in the area affected by conflict, for example extractive companies, or because they get caught up in the outbreak of a conflict and decide to continue to operate.³³

See Annex 2 for high-risk business activities in conflict-affected areas.

The accountability gap

*"When a company takes your land without compensation, pollutes your water, or brings in private militia to guard an oil well who start to rape and abuse the women of a local community, you should have the right to ensure it stops, and to get your livelihood restored. It should not matter whether you are rich or poor or in what country you live."*³⁴

Conditions in fragile and conflict-affected areas

Accountability issues need to be taken into account when business-related human rights abuses take place. According to the European Center for Constitutional and Human Rights (ECCHR), multinational corporations must bear responsibility for injustices caused by their international business activities, even when operating in conflict regions with weak public infrastructures or authoritarian regimes that offer few opportunities to conduct business within the rule of law.³⁵ Internationally recognized standards lay out clear standards on how corporations should deal with the risk that their subsidiaries might violate human rights in conflict regions and weak or authoritarian states. According to ECCHR, while these rules are not binding, they are considered part of international soft law. They represent a consensus of the international community of states and denote trade standards that conscientious business people and corporations must adhere to.³⁶ Nevertheless, conditions in fragile and conflict-affected areas make it difficult for victims of corporate misconduct to seek justice and hold businesses accountable. As stated above, factors such as weak rule of law, failing justice systems and lack of control over territory often render conflict-affected states incapable of holding multinational corporations to account. In certain contexts, authorities may also be unwilling to do so because of their involvement in human rights violations, or because they profit from business activities and seek to create a conducive environment that attracts businesses.

Box 2: Example of business-related human rights abuses in conflict-affected areas: Danzer in DRC

Note: The information in this box does not contain new research but has been quoted from various public NGO sources. It has not been further verified with the company involved.

The Danzer Group is one of the world's biggest producers of hardwood veneers, as well as one of the biggest international traders in tropical roundwood (or logs), sliced wood and veneers (Greenpeace 2011). The Swiss-German Group operates a number of large timber concessions in the Democratic Republic of Congo (DRC) and neighbouring Republic of Congo (RC).

On 2 May 2011, a village in northern DRC was attacked by Congolese police and military (Business & Human Rights Resource Centre 2015). During the attack several human rights abuses took place, such as rape, grievous bodily harm, arson, and arbitrary arrests of villagers. The Congolese security forces reportedly used vehicles belonging to SIFORCO, which was a Danzer subsidiary at that time. Furthermore, following the attack, SIFORCO reportedly made a payment to the soldiers and police officers (European Center for Constitutional and Human Rights 2014).

In March 2012, a group of villagers represented by *Avocats sans Frontières* (ASF, or Lawyers without Borders) filed a complaint in DRC against 60 Congolese military and police officers allegedly involved in the attack. The plaintiffs also claim there is evidence that some SIFORCO employees participated in its planning and preparation. In July 2012, ASF filed a complaint in a DRC court against SIFORCO for civil responsibility and against two SIFORCO employees for criminal responsibility for alleged complicity in the incident. In 2013 a team from the DRC Military Prosecutor's office conducted investigations in collaboration with the UN. The trial started on 5 June 2015 and has not yet been concluded (Business & Human Rights Resource Centre 2015).

In April 2013, two NGOs – European Center for Constitutional and Human Rights (ECCHR) and Global Witness – filed a criminal complaint in Germany against Olof von Gagern, a senior manager of Danzer Group (European Center for Constitutional and Human Rights 2014). The complaint alleges Von Gagern was complicit in the abuse and rape of the villagers through omission. According to the plaintiffs, given the context of conflict, the reputation of police and military forces in the DRC - and the concerned province in particular -, von Gagern should have given specific directions to its local employees on how to engage with the security forces. Danzer and SIFORCO deny the accusations and insist they did not facilitate violence against local communities in DRC and that the events of 2 May were beyond their control and responsibility. Under German law, corporations cannot be prosecuted for crimes. Senior managers may, however, have criminal responsibility arising from a duty of care towards those affected by the actions of their employees. In March 2015, the public prosecutor's office in Tübingen, Germany discontinued the investigations. ECCHR is now seeking to appeal this decision and is calling for investigations to be reopened. According to ECCHR, the state prosecution failed to take into account key pieces of evidence, including files from two investigative proceedings in Congo (Business & Human Rights Resource Centre 2015).

In response to the accusations, Danzer asked Swiss NGO Swisspeace to support the company in improving its due diligence processes in Congo-Brazzaville. In 2013, a manual was established in collaboration with Danzer on Conflict Sensitivity Due Diligence for Timber Companies (Swisspeace 2013).

Sources:

- *Business & Human Rights Resource Centre (2015). Danzer Group & SIFORCO lawsuits (re Democratic Republic of Congo); <http://business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo#c86298>.*
- *Greenpeace (2011). Stolen future – conflicts and logging in Congo's rainforests – the case of Danzer; <http://www.greenpeace.org/international/Global/international/publications/forests/2011>.*
- *European Center for Constitutional and Human Rights (2014). The Danzer Case: German manager's liability for subsidiary in Congo; http://www.ecchr.eu/en/our_work/business-and-human-rights/danzer.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/Case%20Report%20Danzer%202014-08-15.pdf.*
- *Swisspeace (2013). Conflict Sensitivity Due Diligence for Timber Companies in the Congo Basin (a manual); http://www.swisspeace.ch/fileadmin/user_upload/Media/Topics/Business___Peace/Manual_Danzer_EN.pdf.*

Attempts to hold companies accountable

In conflict-affected areas, justice and accountability are often difficult to obtain because of weak governance structures, and a lack of capacity and knowledge. As a result, victims of human rights abuses have attempted to hold companies accountable in industrialised and Western countries where the majority of multinationals are headquartered – the so called ‘home states’.³⁷ The Business and Human Rights Resource Centre notes that the majority of the legal cases it profiled relate to extra-territorial abuses, occurring outside the country where the case is brought.³⁸ Examples are the lawsuit against private security company Kellogg Brown & Root (KBR) in the US by families of Nepali men who were trafficked to work at military bases in Iraq; the lawsuit against Canadian company Anvil Mining in Canada alleging complicity in an army attack that led to rape, torture and killing of villagers in the DRC; the lawsuit against Drummond, alleging complicity in killing a Colombian labour leader; and the case against Danish timber company Dalhoff, Larsen and Horneman (DLH) in France for complicity in human rights abuses in Liberia during the civil war. Another interesting case is the legal complaint filed in 2013 by a Swiss NGO against Argor-Heraeus, a Swiss precious metals company. This company was accused of illegally processing over three tons of pillaged gold from the Democratic Republic of Congo. However, in March 2015, the Swiss Attorney General closed the Argor case and concluded that there was no reason to believe that the company had been aware of the criminal origin of the three tons of gold pillaged from the DRC that it had refined. In response to this decision, the NGO stated that “this decision gives free rein to companies who violate their duty of diligence and prefer to remain ignorant of the criminal origin of raw materials. It means that they can simply turn a blind eye to indications suggesting the criminal origin of raw materials in order to avoid prosecution.”³⁹ In all these instances the courts dismissed the case because of the extra-territorial nature of the abuses.⁴⁰ As a result, to date there has been no accountability for these actions, neither in the home nor in the host states of multinational corporations.⁴¹

Sporadic victories

However, sporadic victories for victims of business-related human rights abuses have occurred (see Annex 3), but are “few and far between”.⁴² Victims face major obstacles to accessing justice, such as the reluctance of home states to exercise extra-territorial jurisdiction over violations committed by multinationals in their countries of operations, as well as high costs involved, complex corporate structures, difficulty in obtaining evidence, and the ‘separate legal personality’ and ‘limited liability’ doctrine.⁴³

Governance gap

This effectively means that the human rights regime, which places the primary duty for the protection of human rights on states, does not function properly, especially in the context of conflict-affected areas⁴⁴, which leaves a ‘governance gap’ when it comes to holding multinationals accountable. International law dealing specifically with this topic is absent and there are no international institutions with the authority to hold corporations accountable. Existing institutions such as UN human rights treaty bodies are only mandated to make decisions on a state’s conduct in the protection of human rights. International arbitration tribunals allow corporations to bring cases when states have violated rights granted to them in investment treaties but are not accessible for victims of human rights violations.

International tribunals

The International Criminal Court (ICC), established to end impunity for international crimes (which often are committed in conflict-affected areas) has jurisdiction over individuals but not over corporate actors (e.g. companies). The Court can prosecute business people for their role in international crimes, but up to now has not done so. Designated international tribunals such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia also exclude jurisdiction over legal entities. There is an ongoing debate among law experts about the possibility of holding corporate officers and managers criminally responsible before the International Criminal Court (ICC) for grave human rights violations committed by their agents, employees, or business partners. According to Graff (2004), to the extent that corporate officers and managers play a role at all in the atrocities, they are more likely to remain behind the scenes, issuing secret orders, turning a blind eye to “efficient” business practices, or supplying the means to commit the crime.⁴⁵ The Rome Statute did not, in the end, include jurisdiction over non-natural persons. However, under the Rome Statute, direct participation in the crime is not necessary to establish the criminal liability of corporate officers and managers. The Office of the Prosecutor may invoke theories of “intermediary participation,” such as command responsibility and accomplice liability, to hold them accountable for acts committed by others.⁴⁶ The importance of punishing corporations is stressed by both lawyers and criminologists, mainly because of the dynamics within corporations which makes punishing individual members not very effective. Business related human rights abuses are often the result of certain business policy and corporate culture rather than the conduct of individuals.⁴⁷ It has been argued that the International Criminal Court should therefore have jurisdiction over legal entities.⁴⁸ However, it is not likely that this will become reality soon. In Annex 4, a number of cases are presented of business-related human rights violations in relation to international criminal law.

Box 3: Examples of non-judicial grievance mechanisms dealing with business-related human rights abuses in conflict-affected areas

- ❑ In 2012 farmers in Honduras filed a complaint at the Compliance Advisor Ombudsman of the International Finance Corporation against palm oil company Dinant. The company is accused of forced evictions of farmers in the Aguan Valley, and violence and assassinations of farmers by private and public security forces under control of Dinant (Compliance Advisor Ombudsman 2014).
Status: Open (The finalization of CAO's assessment phase has been postponed)
- ❑ Local communities in Liberia filed a complaint at the Roundtable for Sustainable Palm Oil in 2013 against palm oil company Equatorial Palm for using customary land of the communities and failing to obtain free, prior and informed consent (RSPO 2015).
Status: Letter has been sent on the final decision of the Complaints Panel.
- ❑ In 2013, Lawyers for Palestinian Human Rights filed a complaint against security company G4S at the UK National Contact Point established under the OECD Guidelines for Multinational Enterprises, alleging serious human rights abuses as a result of the detention and imprisonment of children in Israeli prison facilities (OECD Watch 2015a).
Status: Concluded
- ❑ British NGO Reprise filed a complaint against company British Telecom at the UK National Contact Point in 2014, alleging that the company had contributed to gross human rights violations by providing mass surveillance infrastructure to the US National Security Agency (NSA) and therefore facilitating US drone strikes in Yemen (OECD Watch 2015b).
Status: Rejected

For a more detailed description, please refer to the source documents below.

Sources:

- *Compliance Advisor Ombudsman (2014). CAO Case Honduras / Dinant-02/Aguan Valley; http://www.cao-ombudsman.org/cases/case_detail.aspx?id=224.*
- *RSPO (2015). Case Tracker – Equatorial Palm Oil PLC; <http://www.rspo.org/members/complaints/status-of-complaints/view/44>.*
- *OECD Watch (2015a). Case overview – Lawyers for Palestinian Human Rights vs. G4S; http://www.oecdwatch.org/cases/Case_327.*
- *OECD Watch (2015b). Case overview – Reprise vs. British Telecommunications plc; http://www.oecdwatch.org/cases/Case_350.*

International standards and accountability mechanisms

To close the accountability gap, various soft-law instruments have been developed over the years, while in the vacuum created by the lack of avenues for judicial remedy different types of non-judicial grievance mechanisms have proliferated.⁴⁹ In 2014, SOMO identified the existing guidelines and principles that are relevant to conflict-affected areas.⁵⁰ For example, the UN Guiding Principles on Business and Human Rights have been instrumental in clarifying the duty of states to protect – and the responsibility of businesses to respect – human rights and provide access to justice. The OECD Guidelines for Multinational Enterprises provide recommendations for responsible business conduct for

multinationals operating in or from OECD countries, and the OECD has developed a specific set of guidelines for sourcing minerals from conflict-affected areas.⁵¹ The Guidelines also oblige OECD countries to set up National Contact Points which can handle complaints against companies that have failed to adhere to the Guidelines' standards, including human rights violations.⁵² International development finance institutions such as the World Bank have established their own accountability mechanisms, to which people affected by companies financed by such institutions can bring complaints.⁵³ For examples of non-judicial grievance mechanisms dealing with business-related human rights abuses in conflict-affected areas,

see Box 3. The ability of these mechanisms to provide remedy for the victims of human rights abuses remains very weak however, and impunity for business-related human rights abuses thus remains.⁵⁴ In a forthcoming report from SOMO, written by a group of NGOs, it is concluded that international accountability mechanisms do not function properly. This is illustrated by the fact that out of the 864 concluded complaints that were submitted over the last 20 years, just under 20% resulted in a successfully negotiated settlement (8%) or a publicly disclosed compliance report (11,5%).⁵⁵ The authors argue that a new accountability system must be established as a matter of urgency with mechanisms that are empowered to make binding decisions and Development Finance Institutions (DFIs) that no longer claim immunity in national courts. In this way, DFIs can be truly held accountable for the harms caused to people and communities around the world by the activities they finance, including in conflict-affected areas.

UN binding treaty on business and human rights

In 2014, a process has been initiated at the inter-state level to fill the governance gap by introducing a binding treaty on business and human rights. At the 26th session of the UN Human Rights Council, Ecuador and South Africa tabled a resolution which was eventually supported by 20 countries and directs “to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights.”⁵⁶ Over the next few years, the working group will prepare the building blocks of a legally binding instrument which should form the basis for substantive negotiations.

Risks of sparking or intensifying conflict

“Human rights abuses may spark or intensify conflict, and conflict may in turn lead to further human rights abuses.”⁵⁷

Businesses causing or contributing to conflict

The activities of businesses may not only lead to human rights abuses, but also to sparking new conflict or intensifying existing ones. Business-related human rights abuses are thus of great concern from a peace and security perspective. There are various ways in which businesses cause or contribute to conflict, for example by engaging with parties to the conflict in such a way that they become complicit in human rights atrocities, but also by sparking company-community conflicts and inter- and intra-community conflict. When sourcing resources from conflict-affected areas, companies are likely to deal – directly or through their supply chain – with parties to a conflict and through this may provide financial and other means that are used to finance conflict related activities. The engagement of companies with conflict actors has been documented quite extensively, for example in relation to conflict diamonds

from Sierra Leone and conflict minerals from the DRC. As a result, while pursuing profit in a context where they cannot possibly operate in isolation from the conflict dynamics, businesses can become complicit in abuses by aiding and abetting perpetrators such as governments, state authorities and rebel factions for their benefit and/or with their knowledge and assistance.⁵⁸ As concluded at an expert meeting in May 2015, empirical evidence points out that both businesses as well as other stakeholders often do not seem to operate in a conflict-sensitive way.⁵⁹ Companies often have very effective public relations strategies that allow them to avoid actually committing to conflict-sensitive practices or engaging with actors critical of their corporate conduct. In many parts of the world corporations prefer to talk directly to politicians. Meanwhile, governments are often either absent in conflict-affected settings or fail to effectively regulate the private sector.

Risks of engaging with conflict actors

An interesting example is the Dutch beer manufacturer Heineken, operating in various conflict-affected countries in Africa.⁶⁰ In DRC, the company is faced with illegal checkpoints, held by rebel groups. Fees collected at the checkpoints form the primary revenue source for armed groups in the area. A thorough case study by the Swedish CCDI project⁶¹ of the company’s operations in DRC has shed light on the intricacies that arise when transnational corporations operate in conflict zones such as Eastern Congo.⁶² The report concludes that operating in such areas increases the risk of engaging with conflict actors who are accused of human rights abuses. According to the report, during the occupation of Eastern Congo by RDC-Goma rebels⁶³, multiple sources indicated that Bralima, Heineken’s local subsidiary, was aware of paying taxes to rebel groups engaged in human rights violations.⁶⁴ According to the report, if Bralima indeed knowingly provided funding to RDC-Goma by paying taxes to them, this would amount to at least silent complicity with the human rights abuses committed by RCD-Goma’s troops.⁶⁵

Company-community conflict

Conflict between companies and communities can also arise, for example, because companies often operate in an environment where power over natural resources, pollution and land rights are highly sensitive issues, making business activities such as natural resource extraction problematic. In such contexts, concession agreements and the conditions under which business operate are often contested.⁶⁶ In Colombia, for example, land conflicts between local communities and coal companies Glencore and Drummond have allegedly fuelled local conflicts and resulted in the killing of union leaders and protesters.⁶⁷ In Liberia, extractive companies occupy spaces where communities derive their income from farming and hunting, and where ex-combatants engage in artisanal mining. Removing these miners without offering a suitable livelihood alternative and without

proper resettling, poses a high risk of sparking conflict between companies, national security forces and the local mining community, which in a volatile context such as post-conflict Liberia is a serious issue of concern.⁶⁸ For instance, iron ore company ArcelorMittal negotiated a contract with the national transitional government of Liberia immediately after the end of the conflict, a contract that was highly criticised and which was later renegotiated. The abuse of land and property rights, especially those relating to the allocation of resource concessions such as the one given to ArcelorMittal, is widely recognised to be a major catalyst to conflict. Despite this, the authorities gave the company rights to possess public land and compulsorily purchase private land without adequate compensation.⁶⁹

Land grabbing and employment

Finally, conflict can result from the conditions companies create on the ground. Community grievances over use of land and resources can easily turn violent in (post) conflict settings. In Liberia for example, community protests against iron ore company Arcelor Mittal for unpaid compensation for lost crops turned violent in July 2014.⁷⁰ Also employment, often regarded as the positive development impact of private sector engagement, can be a trigger for sparking conflict. While employment can inhibit violence when it offers an alternative means of income and identity, it can also spark conflict when it is exploitative and destructive of a sense of dignity.⁷¹ In Sierra Leone, protests by workers of mining company African Minerals turned violent in April 2012 when workers demanded better working conditions, better pay and the right to form their own union.⁷² Labour conditions in conflict-affected areas are often an area of concern, with the majority of the employment offered by corporations being low skilled and temporary, substituting subsistence farming without adequate income or assurances for future employment, and with many instances of labour rights violations with regards to occupational health and safety, living wage, collective bargaining, among others. Employment can also be a source of conflicts between and within communities, as does the question who benefits from private sector activities and who carries the burden of their impacts.

Conclusion

Weak institutions and justice systems, or in some cases the complete absence of rule of law, increase the likelihood of business involvement in human rights abuses in conflict-affected areas. Not only are the worst forms of human rights violations perpetrated in such environments, holding corporations accountable and ensuring remedy for victims in those areas is also nearly impossible because of the existing governance gap. Multinationals are not held accountable in host states (where the abuses take place)

due to the inability or unwillingness of the authorities to do so, nor in the home states (where the corporation is headquartered) due to the major obstacles for victims to access to justice. International law dealing specifically with this topic is absent and there are no international institutions with the authority to hold corporations accountable. In addition, because of the potential to spark and intensify conflict, business activity in conflict-affected areas is also a concern from a peace and security perspective. Contrasting the relatively new discourse of private sector actors as potential contributors to peace and development, the risks of negative impacts on human rights, peace and stability by the activities of multinationals in conflict-affected areas need to be better take into account and mitigated before considering the potential role of companies in bringing stability, let alone as peacebuilders.

In addition to the direct link between the onset and intensity of conflict through conflict financing and creating grievances on the ground, there is also a broader concern about the political economy of conflict. The very conditions that characterise conflict may be highly profitable for certain types of businesses, with corporate actors drawn to conflict-affected areas because weak rule of law and dependence on foreign investors for the national budget creates profitable business opportunities for them. In this sense, war can be used to further economic interests, perpetuating armed violence with corporations benefitting from the conditions that conflicts generate.

Recommendations

Based on the findings of this report, the following recommendations are made, in order to decrease business-related human rights violations in conflict-affected areas.

In relation to the heightened risk of human rights violations, it is recommended:

- ❑ To demand from governments to better respond to business-related risks in specific conflict contexts, by making 'enhanced due diligence' processes mandatory for any company, irrespective of the location of their operations but with special attention to companies operating in conflict-affected areas.
- ❑ To further define and operationalize the concept of 'enhanced due diligence' and develop country specific guidance, building on ongoing initiatives by the OECD, the UN and several NGOs.



In relation to the accountability gap, it is recommended:

- ❑ To increase the capacity of governments and CSOs in conflict-affected areas to implement and monitor existing guidelines and to enforce existing laws in the field of business and human rights, in order to close the accountability gap in conflict-affected areas.
- ❑ To encourage the International Criminal Court to hold corporate officers and managers criminally responsible before the ICC for grave human rights violations committed by their agents, employees, or business partners.

- ❑ To ensure that international accountability mechanisms are empowered to make binding decisions so they can be truly held accountable for the harms caused to people and communities around the world, including in conflict-affected areas.

In relation to the risks of sparking or intensifying conflict, it is recommended:

- ❑ To include conflict sensitivity as a key aspect of international standards for responsible business, as an additional way to prevent some of the worst impacts of multinational companies in conflict settings. This would provide an early warning system for increased risks of business-related human rights violations.

Annex I

International institutions on the meaning of 'conflict-affected areas' and 'fragile states'

- The UN Guiding Principles mention “conflict over the control of territory, resources or a Government itself” (United Nations 2011). Principle 7 stipulates that states (both home and host states) must ensure that businesses operating in conflict-affected areas do not commit or contribute to human rights abuses, and it sets out measures states can take to this end.
- The OECD developed a specific guidance document on sourcing from ‘conflict-affected and high-risk areas’, which states that these are areas with “armed conflict, widespread violence or other risks of harm to people”, (with armed conflict referring to conflicts as defined in international humanitarian law, while also considering other forms of conflict by including the term “high-risk areas” which are “areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence”, and “are often characterised by widespread human rights abuses and violations of national or international law”) (OECD 2013).
- The IFC does not define “conflict-affected areas” at all, although “fragile and conflict-affected-situations” are considered a priority. It does refer to areas where “the level of risks and impacts described [...] may be greater. The risks that a project could exacerbate an already sensitive local situation and stress scarce local resources should not be overlooked as it may lead to further conflict” (International Finance Corporation 2014).
- The Heidelberg Institute refers to political conflict, meaning differences between at least two actors regarding values, which is carried out “using observable and interrelated conflict measures that lie outside established regulatory procedures and threaten core state functions, the international order, or hold the prospect of doing so”. It thereby distinguishes five levels of conflict: dispute, non-violent crises, violent crises, limited war, and war (Heidelberg Institute for International Conflict Research website).
- ‘Fragile state’ is defined by the World Bank as “periods when states or institutions lack the capacity, accountability, or legitimacy to mediate relations between citizen groups and between citizens and the state, making them vulnerable to violence” (World Bank 2011). The use and definition of fragile states is highly contested, especially by Southern governments. It is by now acknowledged that it is not only by fragility that one can define a

country, but also by looking at the resilience of certain states that have achieved and maintained peace over time, even when faced with economic stagnation (Putzel and Di John, 2012). According to the OECD, a more universal approach for assessing fragility will be needed in the post-2015 period, one that moves beyond a single categorisation of fragile states toward measures that capture diverse aspects of risk and vulnerability (OECD 2015).

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Annex II

High-risk business activities in conflict-affected areas

In its brochure on Business and International Humanitarian Law, the International Committee of the Red Cross (ICRC) highlights several business activities that in a conflict-affected context create high risks (ICRC 2006). For example:

- In order to operate in conflict-affected countries, businesses often have to set up security systems, either hiring security services from the government, contracting private security companies or even resorting to rebel forces or other armed groups to fulfill security

roles. "Problematically, in some instances the same forces contracted to maintain security of a business enterprise take part in surrounding conflicts and at times violate international humanitarian law in the process."

- Labour conditions are also of particular concern in conflict-affected areas. Some companies have used civilians or prisoners of war to carry out work that did not meet minimum labour standards. International humanitarian law prohibits uncompensated or abusive labour, and lays down minimum working conditions and places limitations on the types of work that such individuals can be asked to carry out.
- The ICRC also notes that "business operations sometimes involve obtaining access to resources and establishing transport routes in ways that may affect a civilian population's residential or agricultural land. Securing such access within conflict zones has at times involved the intervention of warring parties who evicted residents by force."
- Furthermore, corporations should be careful not to acquire resources and property without the given consent of the owner. "The taking of private property without due legal process and fair compensation may amount to pillage."

Source:

- ICRC (2006). *Business and International Humanitarian Law: an introduction in the rights and obligations of business enterprises under international humanitarian law*; <https://www.icrc.org/eng/resources/documents/publication/p0882.htm>.

Annex III

Sporadic victories for victims of business-related human rights abuses in conflict-affected areas

There are a number of cases of victories for victims of business-related human rights abuses in conflict-affected areas:

- In 2005 Dutch businessman Frans van Anraat was sentenced to prison in the Netherlands for complicity in war crimes by supplying chemicals to the Hussein regime in Iraq (The Hague Justice Portal, no date).
- In 2013 and 2014, courts in Colombia sent several businessmen to prison for widespread human rights abuses, the use of paramilitaries and illegally obtaining territory for palm oil plantations (Colombia Reports 2014).

- While in October 2014 four former security guards of private security company Blackwater (now Academia) were convicted by a US court for killing Iraqi civilians (Business & Human Rights Resource Centre, no date).

These convictions remain, however, the exception to the rule, and such victories are often limited to liability of individuals while the company continues to act with impunity. An interesting case that is currently ongoing is the case against ICT company Qosmos in France for complicity in torture by providing surveillance material to the Assad regime in Syria (FIDH 2014).

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Annex IV

Business-related human rights violations and international criminal law

Below, a number of cases are presented of business-related human rights violations in relation to international criminal law:

- The International Criminal Court and criminal tribunals on a few occasions have received information or have dealt with business-related human rights abuses amounting to (international) crimes. In 2012 the Court received information about crimes against humanity in Ecuador and the alleged involvement of palm oil company Dinant and its managers (Center for Constitutional Rights & FIDH 2012).
- In 2014 the Court received information about Chevron's alleged role in crimes against humanity in Ecuador, and about a massive land grab for sugar, rubber and logging activities amounting to crimes against humanity in Cambodia (Reuters 2014). It is uncertain if the Court will start investigations in these cases. In 2003 the

International Criminal Tribunal for Rwanda convicted two individuals for incitement to genocide, committed as part of the corporate activity of a radio station (Fauchald and Stigen 2009).

- Another business-related case is the trial against Alfred Musema, director of the Gisovu Tea Factory during the 1994 genocide in Rwanda. He was accused of transporting armed attackers, including employees of the factory, and ordering them to attack Tutsis seeking refuge there. He also personally took part in such attacks and killings, as well as acts of rape. Mr. Musema was found guilty of genocide and crimes against humanity and was sentenced to life imprisonment.

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Colophon

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