

Call for inputs to the Project on business in conflict and post-conflict contexts by the UN Working Group on Business and Human Rights

Submission by Mark van Dorp, April 2020

Upon invitation from the UN Working Group on Business and Human Rights, Mark van Dorp is submitting the following information and insights gained during his research of the last 10 years, including as a researcher for SOMO (from 2011-2017) and as an independent consultant on responsible business in fragile and conflict-affected areas as Bureau Van Dorp (from 2017 until present). In this submission, reference is made to published reports, which are provided in footnotes. The submission is structured according to a number of themes.

1. Strengths and weaknesses of the UNGP in Fragile and Conflict-affected Settings (FCS)

A comprehensive analysis of international principles and guidelines for corporate responsibility in conflict-affected areas was published by SOMO in 2014.¹ It was noted that the UN Guiding Principles are one of the few international standards with special reference to conflict contexts, with specific guidance provided in a report on the implementation of the UNGP in conflict-affected areas by former Special Representative John Ruggie. It was concluded by SOMO (2014) that the UN Guiding Principles have both strengths and weaknesses. A major strength is that it is the most authoritative and internationally recognized framework for business and human rights. With regards to business responsibilities, the UNGP clearly stipulate that companies need to take the conflict context into account.

A major weakness is the voluntary nature of the UNGP, placing no obligation on companies and governments to implement them. In this respect, the process towards a UN binding treaty for business and human rights is an interesting opportunity for the improvement of responsible business practice in general, and in conflict settings in particular, and would form a strong incentive to implement the UNGP. It is also argued that voluntary measures to implement human rights due diligence – which could prevent abuses – are not far reaching and are only implemented by companies acting responsibly, but not by those with a dubious track record. In addition, there are complaints about the slow implementation of the UNGP. The Guiding Principles are not accompanied by binding international legal obligations for companies and are not accompanied by a grievance or complaints mechanism that victims of business-related human rights abuses can access for remedy, which weakens the possibilities for civil society to hold companies to account.

2. Lack of implementation and monitoring of UNGP in FCS

One of the conclusions of SOMO's report² was that it is not clear to what extent the existing guidelines are implemented effectively in conflict-affected areas, and what their impact has been in terms of preventing corporate misconduct and business-related human rights violations. It is recommended to initiate an impact evaluation as an important step towards more effective use of guidelines.

It was also concluded that there is need to provide more clarity on how to implement the different existing international principles and guidelines in fragile and conflict-affected areas. It was recommended to consider the possibility of developing a specific Guidance for fragile and conflict-affected areas, in which all conflict-specific elements of the OECD Guidelines and the UN Guiding Principles are brought together. Such a Conflict Guidance could be developed under the leadership of the UN Working Group on Business and Human Rights. This guidance should build upon the work of

¹ SOMO, "Multinationals and Conflict – International principles and guidelines for corporate responsibility in conflict-affected areas", 2014, <https://www.somo.nl/multinationals-and-conflict-2/>

² SOMO, 2014

others, including the toolkit developed by DCAF and ICRC and the toolkits by International Alert and swisspeace on “heightened due diligence”. This guidance would benefit greatly from an impact evaluation that looks into the extent to which the existing guidelines are implemented in conflict-affected areas.

3. Evidence based research into the implementation of the UNGP in FCS

Between 2013 and 2016, a number of in-depth case studies on the extractives and agro-industrial sectors were carried out by SOMO and its partners in five countries (Colombia, Liberia, Sierra Leone, South Sudan and Democratic Republic of the Congo), funded by the Dutch Ministry of Foreign Affairs. As reported by SOMO (2016)³, one of the biggest challenges is the lack of capacity and willingness on the part of multinational companies to implement the standards. There is also a lack of government capacity or political will in fragile and conflict-affected states to implement and monitor existing guidelines and enforce existing laws. Finally, in such states, there is very limited civil society capacity to monitor human rights abuses and the implementation of international standards.

Based on company case studies in Liberia, DRC and Colombia, it was concluded that often companies operate in areas that belong to communities displaced by civil war. If companies do not carry out proper due diligence, including a thorough conflict analysis and a stakeholder mapping, this may lead to exacerbation of existing conflict or even to new conflicts. In DRC, in the value chain of copper and cobalt, it appeared that electronics manufacturers sourcing from DRC are currently failing to conduct adequate human rights due diligence. In Colombia, research showed that due diligence procedures were not followed properly by palm oil and petroleum companies, leading to an increased risk of contributing to conflict.⁴

In fragile and conflict-affected states, disengagement and divestment happen more often than in more stable settings. For some companies this has to do with human rights violations with which they do not want to be associated, but more often it is simply a financial-economic decision based on the lack of a viable business case. The decision on whether or not to disengage from a problematic business relationship is a key consideration within the human rights due diligence process, with the OECD Guidelines for Multinational Enterprises refer to disengagement as a measure of “last resort”. Research by SOMO on a mining company in Sierra Leone shows that the lack of a proper exit strategy when a company disengages can lead to severe local impacts. It was concluded that companies seeking to disengage have additional obligations in fragile and conflict-affected areas, including ensuring environmental safeguards and respecting community rights, because the impacts of departure can be greater than in more stable situations.⁵

Another conclusion was that there is an almost complete lack of access to remedy for victims when human rights abuses are taking place in conflict-affected areas for two reasons. Fragile state governments are generally not able or willing to fulfil their duty to protect against human rights abuses by corporations, nor their obligation to provide remedy to victims. Secondly, international grievance mechanisms do not function as intended in fragile states because victims do not dare raise their voice for fear of losing their jobs, their land or their lives, and because of a lack of awareness of the existence of these mechanisms.⁶

³ SOMO, “Fragile! Handle with Care: Multinationals and Conflict - Lessons from SOMO’s Multinational Corporations in Conflict-Affected Areas programme”, 2016, <https://www.somo.nl/fragile-handle-care-multinationalsconflict/>

⁴ SOMO, 2016

⁵ SOMO, 2016

⁶ SOMO, 2016

4. The application of a “conflict lens” in Private sector development policies and instruments

In a report written for SOMO and Oxfam Novib in 2018⁷, entitled “Private Sector Development policies and instruments through a conflict lens”, it was recommended that a so-called “conflict lens” be added to all Dutch PSD policies, instruments and support channels (financial and non-financial). To have this “conflict lens” applied in a more consistent way, conflict sensitivity needs to be formalised and harmonized in the PSD support criteria. Moreover, a greater capacity to assess conflict sensitivity needs to be developed. To achieve this, it was recommended that a guidance document on conflict sensitivity for implementing agencies of Dutch PSD interventions would be developed. In fact, encouraged by this recommendation, in November 2019, the Dutch Ministry of Foreign Affairs has published a set of Guidelines on Conflict Sensitive Private Sector Development (PSD).⁸ This will be an important tool to comply with the international obligations of the Dutch government to ensure that companies conduct human rights due diligence in FCS as part of the state’s “duty to protect” against business-related human rights violations. It is therefore recommended to look into the adoption of such an approach for other countries, and potentially by the EU or the UN as well.

General conclusions and recommendations:

- Need for impact evaluation of implementation of the UNGP: It is not clear to what extent the existing guidelines are implemented effectively in Fragile and Conflict-affected Settings (FCS), and what their impact has been in terms of preventing corporate misconduct and business-related human rights violations. It is recommended to initiate an impact evaluation as an important step towards more effective use of guidelines.
- Need for inclusion of enhanced due diligence processes in responsible business guidelines: There is a need for the inclusion of enhanced due diligence processes in responsible business guidelines, with specific attention to the challenges in fragile and conflict-affected areas. Ultimately, it is recommended to make enhanced due diligence mandatory through a UN binding treaty for business and human rights.
- Need for specific conflict guidance under the UNGP and other international standards for corporate responsibility: It is recommended to develop a specific conflict guidance as an addition to international standards for responsible business, such as the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises. Such conflict guidance would help prevent some of the worst impacts of multinational companies in conflict environments because it enables companies to operate responsibly, and it allows CSOs and researchers to monitor companies’ policies and practices.
- Develop and adopt Guidelines on Conflict Sensitive Private Sector Development as part of the state’s “duty to protect”: Such Guidelines, as adopted by the Dutch Government in 2019, will be an important tool to comply with the international obligations to ensure that companies conduct human rights due diligence in FCS as part of the state’s “duty to protect” against business-related human rights violations. It is therefore recommended to look into the adoption of such an approach for other countries, and potentially by the EU or the UN as well.

⁷ SOMO and Oxfam Novib, “Private Sector Development policies and instruments through a conflict lens - Addressing the knowledge gap on the role of conflict sensitivity in Dutch PSD policies and instruments”, 2018, <https://www.somo.nl/somo-and-oxfam-novib-publication-private-sector-development-policies-and-instruments-through-a-conflict-lens/>

⁸ Ministry of Foreign Affairs, “Guidelines Conflict Sensitive Private Sector Development”, 2019 <https://www.government.nl/documents/reports/2019/11/04/guidelines-conflict-sensitive-private-sector-development>