

UN Working Group on Business and Human Rights' project on business, conflict and human rights

Consultation held at the annual conference of the Network on Business, Conflict and Human Rights (BCHR)

Geneva – 28 November, 2019

As part of its mandate to promote the UN Guiding Principles on Business and Human Rights, the UN Working Group on Business and Human Rights is running a [project to clarify the practical steps that companies, investors and States should take to implement the Guiding Principles in conflict and post-conflict contexts](#). The Working Group's recommendations to States and the private sector will be presented in a report to the UN General Assembly in October 2020.

The Working Group held a specific session during the [BCHR annual conference](#) in order to consult with the experts of the network to help inform the project further.

Highlights of the discussion

1. Findings from its expert and multi-stakeholder consultations held in 2019 (including regional consultations in Beirut and Davao):

- There is a need to break silos between actors in several areas.
- Notably, integration of conflict analysis tools in the work of organizations focused on business and human rights would contribute to a better understanding of how to effectively prevent and address business-related human rights abuse in conflict-affected settings.
- Existing tools for conflict prevention and conflict analysis can be useful for “enhanced” corporate human rights due diligence in conflict-affected contexts, but are currently not widely used by companies or other actors focused on companies’ human rights impacts in conflict contexts.
- The need for engaging with actors in the peacebuilding world is also apparent, as currently there are few tools for engaging the private sector focused on the business and human rights lens and how to manage human rights impacts.
- Such silos exist within the UN and in government and also within companies. There is a need for more clarity on things that might seem obvious, but clearly not seem to be among the actors operating in conflict-affected contexts.
- For example, the Working Group convened a consultation with humanitarian actors to learn from their experience of dealing with armed groups. Surprisingly, while there is a lot of experience, there is very little guidance on how to engage responsibly with armed groups.
- The Working Group also highlighted one particular dilemma that has emerged, including at the regional consultation in the Middle East: what specific guidance should be developed for companies that face the risk of becoming entangled in conflict dynamics and human rights abuses, but do not have the choice of leaving as opposed to transnational corporations that have the possibility of exit. With regard to companies that may be able to leave, criteria for “responsible exit” still need further clarification.

2. Takeaways from the Forum on Business and Human Rights that took place on 25-27 November:

- A panel on the role of home states in promoting responsible investment in post-conflict contexts demonstrated that there is demand for guidance, not so much in the form of normative and legal standards, but rather for practical and operational guidance.
- There is a need to elaborate on what responsible engagement looks like when business and investment involve relationships with actors that may have committed war crimes or gross human rights abuses. This includes the question of what to do when the “bad guys” are government actors with ties to the sector in question. While the easy recommendation to make is to advise against engagement in such contexts, the reality is different, which begs the question of how to address that reality and minimize and prevent adverse impacts. One clear message is the need for looking at business relationships.
- Some useful guidance is emerging, including from governments, such as the recent guidance from the Netherlands on conflict-sensitive private sector development. However, there is a need to identify what else is needed.
- While Forum discussions emphasized the importance of legislation and mandatory human rights due diligence generally, there is a need to also look at other tools for driving responsible business practice. Another example referenced was how the Canadian government may withdraw trade support to companies that fail to respect human rights, which can be an effective measure. It was stressed that there is a clear need for creativity and to identify the full canvas of tools.

3. Key points from the expert discussion where further clarity and guidance would be considered useful:

The applicability of international humanitarian law

- The UN Guiding Principles on Business and Human Rights require that “in situations of armed conflict enterprises should respect the standards of international humanitarian law.” However, practical guidance needs to be unpacked.
- While companies have an interest in ensuring they are not complicit in war crimes, one challenge is that since there is no clear and uniform definition of “conflict”, it may not be obvious to companies when international humanitarian law should be applied, in addition to the question of how it should be operationalized. In this context it was noted that business cannot rely on the parties to the conflict to determine whether there is an ongoing armed conflict or not. This was underlined by the example from one country where the question of recognizing whether there was an armed conflict was considered too sensitive by the government. An NGO working on guidelines for the private sector concerning due diligence for responsible business – covering issues such as land rights, security and organized crime – had included reference to international humanitarian law, but this had created tensions with the government. Another example was the question of whether a country is in a “reconstruction” stage or not, which can be a highly politicized issue.
- At the same time it was cautioned against overcomplicating guidance for companies, and that in most contexts as long as companies respect international human rights law standards, they will be able to operate responsibly. It was noted that international humanitarian law in fact is more permissive than international human rights law, and except for in special cases, human rights standards provide the best benchmark.
- It was suggested that the Working Group project should not get bogged down in an attempt to define armed conflict, but that it would be useful to reiterate the fact that international

humanitarian law indicates to states and companies when enhanced due diligence needs to be applied. It should suffice to mention that heightened tensions require taking into account international humanitarian and criminal law and to point business in the right direction.

How to engage responsibly in a post-conflict and reconstruction context

- To some extent, ongoing conflicts present business with clearer lines for whether engagement is acceptable or not, not least where sanctions regimes exist. In situations of post-conflict and reconstruction contexts, the situation may be less black and white, and expectations toward companies and investors less straightforward, including with regard to what business relationships may be acceptable from the standpoint of responsible business conduct.
- A key issue for a company is the question of who to do business with and how to avoid becoming linked to actors – including government actors – who have been involved in or benefited from war crimes and gross human rights abuses. In some contexts, business may not have an option of who to deal with, and a basic practical question is where to draw the line for no-go engagements.
- It was suggested that a key factor to look at is the connection potential business partners have to the government and specifically government actors that played a role in war crimes and human rights violations. Business partners may also include government agencies. It was noted that a link to the government may not necessarily be a human rights concern in every case, but it is necessary to look closely at the connection and potential implications of a business relationship.
- It was recognized that it is challenging for responsible companies to find objective reliable information about potential business relationships and their connection with human rights violations. In such contexts, it would be critical to consult widely. It was suggested that the first place for business to look is civil society, but also consult with businesspeople who left the country due to the conflict and businesses in neighbouring countries. One challenge companies have faced, is that civil society organizations may be reluctant to advise companies, as they fear their information may be misused. One suggestion to overcome this challenge was that academics could play a bridging role. Embassies might provide another key source of information for transnational corporations. The assessment of international financial institutions' role was more critical, as experiences suggest they have a weak record in implementing human rights safeguards locally (in spite of strengthened policy frameworks) and tend to focus on factors to attract investment (e.g. labour costs and business opportunities) – and that companies rely too much on their advice as opposed to seeking contrasting information from civil society organizations. Another source for companies in their due diligence process before entering fragile contexts is political risk consultancies, which also may not necessarily apply human rights standards in their advice.
- One suggestion for companies is that they should always ask who are the owners of the companies they become linked to. This means asking explicitly about who actually own the shares and going beyond the shareholding/shell companies. It may be uncomfortable for companies to do so, but it should be done as part of the due diligence process. Another suggestion was to recommend full transparency on all business relationships as often it may be difficult for a company to identify individuals linked to human rights violations, whereas civil society organizations may have access to such information and might be able to leverage transparency about business relationships. At the same time, it was stressed that there is no easy way out for companies and that enhanced due diligence should be carried out.

- It was noted that it might be most effective for uptake in actual business practice if guidance for companies provided a list of key concrete issues – such as land grabs and forced displacements – that they need to consider. In that context, reference was made to a 2018 “Statement of eminent jurists on legal obligations when supporting reconstruction in Syria”¹, which provides some suggestions on where to draw the line for responsible engagement. Notably, business activity should not contribute to institutionalizing impacts of war crimes. For example, where forced displacements along sectarian lines have taken place, it will hardly be possible to invest in a way that respects international standards. For business, it is not just a question of who you are dealing with but also where you are going, which requires understanding of the specific local context.
- The role of business in transitional justice and access to remedy is also important in such contexts. If a company has benefited from conflict or forced displacement, it was stressed that it should provide reparations – while being sensitive to ongoing transitional justice and peacebuilding processes. It was noted that a fundamental issue is to be open about how it may have benefited and offer apology.
- Another issue that companies operating in conflict-affected settings need to consider is the risk of becoming linked to modern slavery, and that this also requires a solid understanding of the local context and presence of refugees and internally displaced persons.

Role of home states

- It was noted that Working Group recommendations to home states and their role in promoting responsible business in conflict-affected contexts need to touch on all home states, covering both developed and emerging markets. At the same time, one observation was that the issue of business and conflict may be less sensitive than the human rights agenda for some states, as the connection between treating people well and stability may have wider resonance.
- States that set higher standards and requirements for companies’ human rights due diligence in conflict-affected settings also need to consider the potential implication that such markets are left to companies from countries that are directly involved in the conflict and with little scrutiny on responsible business conduct. A balanced approach is undoubtedly complicated but needs to include a human rights-based perspective and assessments of how different actors are part of a conflict. Home states should not only use regulatory measures, but also apply other tools for example in their roles as funders of business.
- A common assessment is that most embassies continue to give priority to promoting trade and investment opportunities without giving adequate attention to addressing the risk that companies from their jurisdiction become linked to human rights abuse, both generally and in relation to conflict-affected contexts specifically. One good practice example was mentioned, where an embassy had reached out to human rights defenders and established contact with civil society organizations in order to help facilitate dialogue.
- With regard to the recommendation that human rights due diligence should involve asking for information about the real owners of potential business partners, practical implementation may be rendered difficult in view of wider policy reform issues related to home government beneficial ownership practices that enable companies to evade legal obligations and transparency.

¹ https://www.business-humanrights.org/sites/default/files/documents/Eminents%20Jurists%20Statement_Syria%20reconstruction.pdf

- One recommendation for home states was to help offset costs incurred on companies by undertaking more comprehensive human rights due diligence through tax incentives for companies that can demonstrate good practice.
- The role of OECD national contact points (NCP) was highlighted in relation to the role of home states in promoting access to remedy for victims. It was noted that most NCPs lack conflict sensitivity in their mandates and policies, and that this was a specific aspect that the Working Group's recommendations should address, while further clarity on how to guide NCPs still needs to be worked out.
- The Working Group was encouraged to craft a strategy for effective uptake of its recommendations, where partners at the regional level could play an important role.

Arms industry

- Arms trade provide an example of how lack of policy coherence plays out in practice within governments, between government departments that facilitate such trade and those that are charged with overseeing implementation of legal requirements and international standards. It was noted that even though arms trade licences are governed by law in most jurisdictions, capacity constraints for effective screening of the number of contracts are a real challenge.
- It was suggested that the capacity challenge – at least in a European context – could be addressed by international cooperation at the European level to co-manage assessment and advice on human rights risks for the industry. A lot of information on context-specific risks already exists as a result of tracking by civil society organizations as well as chambers of commerce and embassies. It was also noted that such inter-governmental cooperation would need to be backed by sufficient resources to be effective. A challenge for such coordination to develop in practice is that the arms industry is often connected to “national interests”.
- It was noted that such alignment has been developing in relation to trade in goods used for capital punishment and torture.
- While the Guiding Principles on Business and Human Rights should be applied to the arms industry, it was cautioned against the risk of “securitizing” the wider business, conflict and human rights agenda, as considerations for the arms industry may not necessarily be applicable for other industries.

Gender dimension

- Participants emphasized the critical importance of integrating the gender dimension in guidance to states and business. With regard to post-conflict situations, it was stressed that business activities that reinforce patriarchy can undermine the foundations for sustainable peace.
- It was noted that gender and conflict is a very broad issue, and that there is a need for further work to clarify guidance in relation to business, gender and conflict.

Framing guidance for business

- It was suggested that it is easier to get business to buy into the “business for peace” and “do good” lens than the Guiding Principles' requirement of focusing first on managing risks and avoiding harm. However, it was noted that if companies first and foremost meet their responsibility and avoid harm, this will have the greatest positive impact.
- While the Guiding Principles' approach is to focus on preventing and addressing adverse impacts, one suggestion was that it would also be helpful if the Working Group's guidance is framed around the concept of building sustainable peace. One way of making the connection

is to demonstrate that corporate respect for human rights is a critical component for sustaining peace.

- Another aspect is that companies ask for concrete practical guidance and how to translate human rights standards requirements into management language. It would be important for the Working Group's guidance to address this. One suggestion was that guidance would be more concrete if framed around specific impacts and using sector-based initiatives as a bridge to translate general expectations into concrete action in specific sector context.
- It was also noted that there is a need to be explicit about when enhanced due diligence is expected and that this will imply additional costs for the company. Companies need to spend more on stakeholder and expert engagement as well as accountability measures, and it is critical to be open about the fact that this will cost more.

4. Next steps

The Working Group is seeking to hold two regional consultations in 2020, in Côte d'Ivoire and Latin America. It is expected that the envisaged consultation in Latin America in particular will focus on the issue of access to remedy and the role and responsibilities of business in a transitional justice context.

The Working Group has now issued a call for all interested parties to submit relevant information and material to help inform the project. Deadline: 10 April.

The final report with recommendations to states, companies and investors will be presented to the UN General Assembly in October 2020.

For information about the call for input and more background:

<https://www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx>