

# Multinationals and Conflict

International principles and guidelines for corporate responsibility in conflict-affected areas



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SOMO

Mark van Dorp

Amsterdam, December 2014

## Colophon

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The Centre for Research on Multinational Corporations (SOMO) is an independent, not-for-profit research and network organisation working on social, ecological and economic issues related to sustainable development. Since 1973, the organisation investigates multinational corporations and the consequences of their activities for people and the environment around the world.



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## Acknowledgements

*There is no single magic formula, no one simple step, no words, whether written into the (United Nation's) Charter or into a treaty between states, which can automatically guarantee to us what we seek. Peace is a day-to day problem, the product of a multitude of events and judgments. Peace is not an "is", it is a "becoming."*

Haile Selassie's Address to the United Nations, 1963<sup>1</sup>

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<sup>1</sup> See: [http://en.wikisource.org/wiki/Selassie's\\_Address\\_to\\_the\\_United\\_Nations](http://en.wikisource.org/wiki/Selassie's_Address_to_the_United_Nations)

## Acronyms

B4P	Business for Peace initiative (UN Global Compact)
CAO	Compliance Advisor Ombudsman
CCCCMC	Chinese Chamber of Commerce for Minerals, Metals and Chemicals Importers and Exporters
CFS	Conflict-Free Smelter Program
CFSI	Conflict Free Sourcing Initiative
CFTI	Conflict Free Tin Initiative
CSBP	Conflict Sensitive Business Practice
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
CSecR	Corporate Security Responsibility
DCED	Donor Committee for Enterprise Development
DRC	Democratic Republic of Congo
ECOS	European Coalition on Oil in Sudan
EITI	Extractive Industries Transparency Initiative
FCS	Fragile and Conflict-affected Situations
FPIC	Free, Prior and Informed Consent
IA	International Alert
ICGLR - MTCS	International Conference of the Great Lake Region Mineral Tracking and Certification Scheme
ICoC	International Code of Conduct for Private Security Service Providers
ICRC	International Committee of the Red Cross
IFC	International Finance Corporation, World Bank Group
IHL	International Humanitarian Law
ILO	International Labour Organisation
iTSCI	ITRI Tin Supply Chain Initiative
KPCS	Kimberley Process Certification Scheme
MIGA	Multilateral Investment Guarantee Agency
NCP	National Contact Point
NGOs	Non-Governmental Organisations
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
RSPO	Roundtable on Sustainable Palm Oil
SMEs	Small and Medium-sized Enterprises
SOMO	Centre for Research on Multinational Corporations
UN	United Nations
UNDP	United Nations Development Program
UNGPs	United Nations Guiding Principles on Business and Human Rights
VPs	Voluntary Principles on Security and Human Rights

## Executive Summary

This new SOMO publication brings together existing knowledge about 24 international principles and guidelines for companies operating in conflict-affected areas. The main purpose of the paper is to give a relevant overview of the existing principles and guidelines and their scope, so that affected communities and workers can use them in their dealings with companies in case of business-related human right violations. Ultimately, this paper hopes to contribute to the private sector's potential of making a positive contribution to sustainable development, peace and security.

Over the past 15 years, a plethora of internationally accepted principles and guidelines have been developed for business and human rights, culminating in the adoption of the United Nations Guiding Principles for Business and Human Rights in 2011. Many of these principles have special relevance for conflict-affected areas, as the risk of gross human rights abuse is most prevalent in areas where there is conflict over the control of territory, resources or a government itself.

There is a long history of prosecuting business representatives for corporate complicity in war crimes, starting after the Second World War with the Neuremberg trials, and continuing with a number of high-profile cases in countries like Angola, Liberia, Democratic Republic of Congo and Sudan. However, holding corporations accountable remains highly challenging, and many judicial barriers exist in both home and host states. Given the many obstacles for legal recourse and the lack of international law specifically dealing with business and human rights in a conflict context, it is important to make use of voluntary principles and guidelines as an alternative way to hold companies to account.

The relevance of the two main generic guidelines, the UN Guiding Principles for Business and Human Rights and the OECD Guidelines for Multinational Enterprises, for conflict-affected areas is significant. The UNGPs make special reference to conflict contexts in several of its principles. In two complementary documents to the OECD Guidelines, on Risk Awareness and Due Diligence, more specific guidance is provided for companies operating in conflict-affected areas or weak governance zones. Also, the IFC Performance standards are particularly relevant for conflict-affected areas because this financial institution has a growing portfolio in fragile and conflict affected areas.

In addition, a number of guidance tools have been published by the UN Global Compact as well as by NGOs such as International Alert, Global Witness, DCAF and ICRC, providing companies with more detailed and practical guidance in dealing with conflict related issues and how to operate in a conflict-sensitive way. For specific sectors, especially the extractives industry, guidelines are available that are mostly industry-led sectoral initiatives. There are also country-specific guidelines for conflict-affected areas including for the DRC and Colombia.

However, this multitude of guidelines with relevance for conflict-affected areas has not visibly improved multinational companies' track record in human rights violations. Some of the major problems with the existing principles and guidelines include:

- ❑ 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.
- ❑ Existing guidelines and principles do not always offer the possibility to address wrongdoing or harm caused; very few have a non-judicial grievance mechanism attached, with the exception of the OECD Guidelines and the IFC Performance Standards.
- ❑ Another major problem is the lack of government capacity or political will in conflict-affected states to implement and monitor existing guidelines and to enforce existing laws in the field of business and human rights.
- ❑ In addition, in conflict-affected areas, there is very limited capacity to monitor human rights abuses and to provide follow up actions in holding companies accountable for corporate misconduct. Hence the need for capacity building, both at Government and CSO level.

Therefore the following recommendations are given:

- ❑ There is need for more clarity on how to implement the different guidelines for use in conflict-affected areas. It is recommended to hold a discussion on the best way forward, including 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 auspices of the UN Working Group on Business and Human Rights, and build upon the work of others, including NGOs.
- ❑ Such a specific Guidance would benefit greatly from an impact evaluation that looks into the extent to which the existing guidelines are implemented in conflict-affected areas.
- ❑ There is need for more country specific guidances to be included in the National Action Plans of conflict-affected countries, as they enable guidelines for corporate responsibility to be translated to the specific conflict context. These country specific guidances should consist of a 'smart mix' of mandatory and voluntary measures.
- ❑ Especially for companies from non-OECD countries, such as China, India, the Middle East or Russia, new ways need to be found to strengthen corporate responsibility standards for these companies. In this light, the recently developed Chinese guidelines for mining companies are a positive sign.
- ❑ Governments need to be pressured to provide the necessary legal framework for conflict due diligence, following the initiatives by the US and EU in this field.



# 1 Introduction

*Businesses operate in conflict zones and conflict-prone countries around the world. If they make the wrong decisions on investment, employment, community relations, environmental protection and security arrangements, they can exacerbate the tensions that produce conflict. But if they make the right decisions, they can help a country turn its back on conflict, and move towards lasting peace.*

Kofi Annan, 2005<sup>2</sup>

## 1.1 Purpose of the paper

This paper is written in the frame of SOMO's programme on Multinational Corporations in Conflict-Affected Areas. This 4-year programme, funded by the Dutch Ministry of Foreign Affairs, aims to empower local NGO's and communities to critically analyse the impact of the private sector in conflict-affected areas, and to ensure that companies are held to account for corporate misconduct. The programme aims to pave the way for multinational enterprises and their suppliers to make a positive contribution to post-conflict reconstruction. The programme focusses on five conflict-affected states: Democratic Republic of Congo, Liberia, Sierra Leone, South Sudan and Colombia.

In the context of fragility and conflict, this paper offers an overview of the various international principles and guidelines that outline how businesses should operate in conflict affected areas, and also their usefulness to civil society organisations. The ultimate aim is to provide civil society organisations, community based organisations and trade unions with an overview of international principles and guidelines for corporate responsibility in conflict-affected areas.<sup>3</sup> Given the many obstacles for legal recourse, and the lack of international law dealing specifically with the topic of business, human rights and conflict, the principles and guidelines listed in this report are of importance. They outline how businesses are expected to behave, they provide tools to CSOs, and some of them also have non-judicial grievance mechanisms that could be used by affected communities and workers to hold companies that are violating human rights accountable.

In conflict-affected environments, the main challenge is to foster peace, justice and stability after often long and highly disruptive periods of violent conflict. Lack of economic opportunities and high unemployment are key sources of fragility.<sup>4</sup> Private sector development is increasingly considered as a powerful and adaptable vehicle for reconstruction and regeneration of the economy, especially in post-conflict situations.<sup>5</sup> According to a World Bank paper on the role of the private sector in fragile and conflict-affected states, a thriving, legal, private sector provides livelihoods and growth, while

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2 International Alert, 2005, foreword by K. Annan (26 Sep 2014)

3 It should be noted that Swisspeace has published a very useful "Review of instruments and guidelines on conflict-sensitive business", see: Graf & Iff, 2012. The main difference is that the focus of the Swisspeace report is on businesses, while the current paper's target group is civil society organisations.

4 World Bank, 2011

5 Mac Sweeney, 2008

delivering revenue streams in the form of taxes so governments can provide services to their citizens.<sup>6</sup> In the aftermath of conflict, the private sector's role can extend beyond its narrow impact in providing jobs and generating income. The private sector can lift some burden from government and help lend legitimacy to the state. The private sector can deliver tangible dividends to the wider population through investments that not only create jobs but also provide basic and new services, introduce innovative approaches to development, and generate tax revenues for reconstruction efforts.<sup>7</sup> According to a recent World Bank study on job creation in fragile and conflict-affected situations, providing employment opportunities is often seen as a way to disincentivise ex-combatants and potential insurgents. Jobs also have the potential to (re-)build social cohesion in fractured communities through enabling inclusivity and providing common economic objectives to individuals with different ethnic, political and social identities. Furthermore jobs are a catalyst for broader development goals, such as income growth, poverty reduction and improvements in living standards, which are often set back during periods of fragility and conflict.<sup>8</sup>

In the last few years, the development of small and medium-sized enterprises (SMEs) has become increasingly important in the strategies of the international development community, particularly in relation to fragile and conflict-affected states. A surge of studies explores the linkages between private sector development and sustainable growth and the promotion of peace, which also helps to build the case for the potential of inclusive SME development in these kinds of settings. Despite this increasing interest, evidence to date on the impact of SMEs is sparse, particularly in settings affected by conflict and fragility. The impact evaluations that do exist suggest that the track record of private sector development interventions has very mixed results at best.<sup>9</sup> It is also increasingly recognised that private sector development can have significant negative impacts on local communities, the environment and human rights, especially in post-conflict settings.

For instance, in the UNDP's strategy for working with the private sector, it is recognized that the private sector sometimes also contributes to a negative impact on development, including on the environment, social conditions, labour rights, corruption and conflict. It is stated that the UNDP should work with and influence private actors to improve their performance and reverse such negative impact.<sup>10</sup> Another important consideration is what kind of growth will contribute to peace and security, and how economic growth will be distributed and who will benefit from it.

In general, there are many problems related to the issue of business and human rights. Victims of business-related human rights abuses continue to face many barriers when seeking judicial remedies. These barriers include denial of access to judicial remedy due to ethnic, racial or gender discrimination; difficulty of "piercing the corporate veil" to hold parent companies accountable for subsidiaries' actions; inadequate resources for prosecutors and investigators; and the lack in many countries of an option to pursue claims as a large group (collective or class actions). The issue of extraterritorial jurisdiction also limits remedies that victims of abuse may seek against companies in their home

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6 Peschka, 2010; World Bank Group, 2013

7 Peschka, 2010

8 Ralston, 2014

9 Lange, 2014

10 UNDP, 2012

countries. Advocates working to hold companies accountable for human rights abuses, and victims seeking effective remedies, continue to face tremendous challenges. Human rights defenders often face threats aimed at silencing their work, such as counter-lawsuits by companies aimed at derailing human rights defenders' work; threats of death, arrest or physical harm; and technological threats to privacy and confidentiality. While some progress has been made in some countries, much remains to be done.<sup>11</sup> Especially in the case of fragile states, corporate responsibility standards tend to be sidelined because economic growth is prioritized over social and ecological issues. It is therefore crucial that standards for corporate responsibility should be part and parcel of any private sector development strategy.

Even though much attention has been paid to the role of multinational corporations in conflict-affected areas, there is a lot of controversy around their potential impacts. While it is claimed by some that multinational corporations contribute to economic growth and generally have a positive impact on the peace building process, others claim that their presence often exacerbates existing conflict or contributes to new conflicts. This publication aims to bring together existing knowledge about international guidelines and principles for companies operating in conflict-affected areas. Also, SOMO would like to feed the discussion about the role of companies in peace building activities, and identify both the risks and opportunities when mediation is carried out by private sector actors. Ultimately, this paper hopes to contribute to the private sector's potential of making a positive contribution to sustainable development, peace and security.

## 1.2 Outline and methodology

In Chapter 2, after defining conflict-affected areas and conflict-sensitive business, a short history is provided of the role of multinational companies in conflict. This is followed by the different perspectives on the responsibility and behavior of multinational corporations during and after conflict.

Chapter 3 focuses on corporate responsibility principles and guidelines in conflict-affected areas. The chapter includes an overview of the main international principles and guidelines for corporate responsibility and their relevance in conflict-affected areas. This includes generic guidelines such as the UN Guiding Principles for Business and Human Rights and the OECD Guidelines for Multinational Enterprises, as well as more specific guidelines available for companies operating in conflict-affected environments.

Chapter 4 provides the main conclusions and recommendations of the paper.

The paper has been written based on literature review, including academic and NGO papers written on the subject, a search of relevant databases such as the Business and Human Rights Resource Centre, and interviews and discussions with various stakeholders. This paper has been reviewed by a number of experts in the field of private sector and conflict.

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11 Business & Human Rights Resource Centre, 2013

## 2 Multinationals and conflict

*Rebel leader Laurent Kabila, marching across Zaire with his troops to seize the state, told a journalist that in Zaire, rebellion was easy: all you needed was \$10,000 and a satellite phone. (...) In Zaire, everyone was so poor that with \$10,000 you could hire yourself a small army. (...) And the satellite phone? Kabila needed it to strike deals with resource extraction companies. By the time he reached Kinshasa he reportedly had arranged \$500 million worth of deals.*

Paul Collier, 2008<sup>12</sup>

To be able to understand the role of multinationals in conflict, it is important to first describe what is meant by conflict and conflict-affected areas, as well as what conflict-sensitive business means (section 2.1). This is followed in section 2.2 by an introduction to the relation between business-related human rights violations and conflict. In 2.3, a short historical overview is given of the role of businesses in conflict-affected areas, focusing on their involvement in human rights abuses in these areas, as well as complicity in war crimes.

### 2.1 Operating in a conflict context: definitions

A generally agreed definition of a conflict-affected environment is as follows:<sup>13</sup>

*A conflict-affected environment refers to countries or regions where there is a high risk of violent conflict breaking out; that are in the midst of violent conflict; or have recently emerged from it, including countries classified as 'post-conflict'.*

This includes a wide range of places and contexts, displaying very different challenges, some experiencing open armed violence, some not – currently ranging from Israel/Palestine, Afghanistan, Iraq, Colombia, South Sudan to the Democratic Republic of Congo. Many of these countries are often referred to as 'fragile states', which are generally understood to be poor developing countries, which either have experienced violence and warfare or are in danger of collapsing into violence. However, the 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.<sup>14</sup> Therefore, a more common denominator has become fragile and conflict-affected situations (FCS).<sup>15</sup>

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12 Collier, 2008

13 DCED, 2010

14 Putzel and Di John, 2012

15 World Bank, undated

Although it is hard to categorize the different phases of conflict, generally one can distinguish three phases:<sup>16</sup>

1. Latent conflict: where there is currently no open armed violence, but where significant political, social and economic instability prevails
2. Open and sustained violence: countries currently experiencing organised armed violence in parts, or all, of their territory.
3. Conflict settlement or resolution: countries that are currently transitioning out of armed conflict or have experienced armed conflict in the recent past.

**Figure 1: Phases and cycles of conflict** (DCED 2010, p.8)



As can be seen in the figure above, the post-conflict phase should ideally lead to a phase of sustainable peace. To achieve this, it is crucial to tackle the underlying causes of conflict. It is acknowledged that conflict resolution is not sufficient to move to sustainable peace. What is actually needed is a process of conflict transformation, a term coined by John Paul Lederach, which can be defined as follows:<sup>17</sup>

<sup>16</sup> DCED, 2010

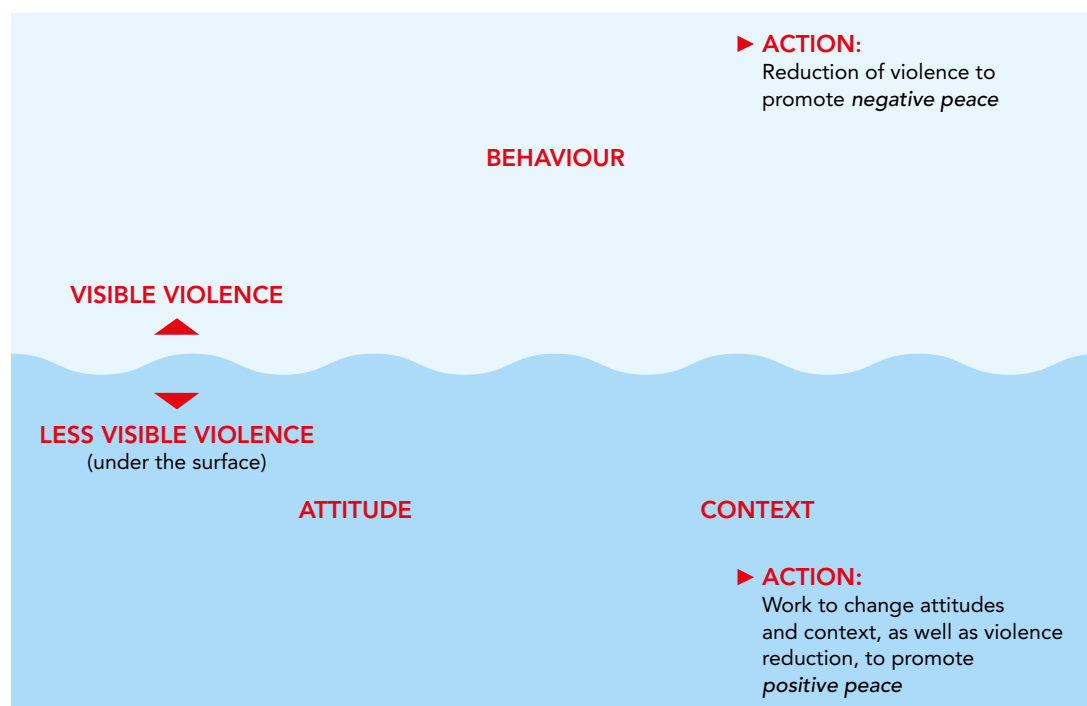
<sup>17</sup> Lederach, 2003

*Conflict transformation focuses on creating adaptive responses to human conflict through change processes which increase justice and reduce violence.*

In other words, conflict transformation not only aims to end violence and change relationships between the conflicting parties, as conflict resolution tends to do, but it also aims to change the political, social and economic structures that cause negative relationships. It sees conflict as an opportunity to transform the existing situation into something better. This can be illustrated with the use of Johan Galtung's famous violence triangle (see figure below). The figure clearly illustrates the importance of the concept of conflict transformation for this paper: by changing attitudes of multinational corporations, governments and citizens, and by changing the context in which companies operate, it is possible to end the negative impacts of multinational companies and to work towards positive peace in which local communities and workers benefit sustainably from private sector development.

**Figure 2: Adaptation of Galtung's triangle**

Fisher et al., 2000; In: I. Specht, 2008, Conflict Analysis.



## Box 1: Conflict-sensitive business

In the peace building literature, conflict-sensitivity is a widely used term for an overall approach to all conflict-affected environments, and essentially involves:<sup>1</sup>


*Being aware of the history of the political and social environment, identifying potential points of tension and hostility, and conducting intervention activities in a way which is sensitive to these.*

When applied to the role of companies in conflict-affected environments, conflict-sensitivity is translated by International Alert as follows:<sup>2</sup>

*Conflict sensitive business practice (CSBP) benefits host communities, as well as the wider regional and international contexts, by ensuring that company investments avoid exacerbating violent conflict. Violent conflict clearly represents a threat to life, security, growth and prosperity for affected communities. It undermines decades of development and destroys the social fabric of a locality, country or region. Conflict sensitive business practice can help companies avoid causing, triggering or accelerating these destructive dynamics to the mutual benefit of themselves and communities. It can also help them develop legitimate steps towards contributing to peace and stability in unstable states.*

International Alert also states that:

*... from the perspective of the affected communities, it is important to note that early, consistent, meaningful and empowering stakeholder engagement processes lie at the core of conflict sensitive business practice. Improved relationships between companies and communities help different stakeholder groups to understand what the impacts of investment are likely to be. This includes the timely application of Free, Prior and Informed Consent (FPIC). Transparency about company plans, schedules and prospects, and the creation of effective channels through which stakeholders can raise and address problems, invites trusting relationships, reduces uncertainty over the future and creates a sense of shared ownership over a company's operations.<sup>3</sup>*

In this line of thinking, companies can adopt a range of strategies for managing corporate/conflict impacts. At a minimum, companies should comply with national regulations (even if host governments are not implementing or monitoring them effectively) and internationally agreed laws, conventions and standards. This is shown as 'compliance', at the base of the pyramid shown in the figure below. It should be noted that compliance with national regulations is difficult, if not impossible, in countries without a functioning legal framework, such as Somalia. This makes it even more important to rely on international regulations and normative frameworks. Beyond compliance, companies should be aware of their ability to create or exacerbate conflict and develop mitigation measures to avoid or minimise negative impacts. 

1 Mac Sweeney, 2008, p.22

2 International Alert, 2005

3 Ibid.

### Continuing box 1: Conflict-sensitive business

This requires improved conflict risk and impact assessment tools, and is shown as 'do no harm' at the centre of the pyramid.<sup>4</sup> Beyond fulfilling the 'compliance' and 'do no harm' parts of the pyramid, companies can pro-actively contribute to the alleviation of the structural or trigger causes of conflict in the interests of a more stable operating environment and safer world. This can also take the shape of improving the position of communities and workers, leading to improved stability. This is shown as 'peacebuilding' at the top of the pyramid.

**Figure 3: Strategies for managing corporate-conflict risk** (Banfield et al. 2003)



4 Do No Harm was developed for humanitarian actors by Mary Anderson, see: [www.cdainc.com/cdawww/project\\_profile.php?pid=DNH&pname=Do%20No%20Harm](http://www.cdainc.com/cdawww/project_profile.php?pid=DNH&pname=Do%20No%20Harm); the concept has been expanded through the work of the CDA Collaborative Learning Projects and can also be applied to all actors, including business.



## 2.2 Business-related human rights violations and conflict

This section provides an introduction to the involvement of multinational companies in human rights abuses in conflict-affected areas. Because of the specific challenges that companies are facing when operating in conflict-affected areas and the heightened risks of human rights violations, a number of specific standards and guidelines for companies working in conflict-affected areas were developed since the beginning of the 21st century, which will be dealt with in depth in Chapter 3.

This culminated in the development of the Guiding Principles on Business and Human Rights by the United Nations. In 2008, UN Special Representative John Ruggie proposed a framework on business & human rights, resting on three pillars:

- ❑ the state duty to protect against human rights abuses by third parties, including business;
- ❑ the corporate responsibility to respect human rights; and
- ❑ greater access by victims to effective remedy, both judicial and non-judicial.

In June 2011, the UN Guiding Principles for Business and Human Rights were endorsed by the UN Human Rights Council.<sup>18</sup> These Guidelines are designed for worldwide application, but have special relevance for conflict-affected areas.

According to the UN Guiding Principles, the risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection. Perhaps the greatest risks arise in conflict-affected areas.<sup>19</sup> The involvement of multinational companies in gross human rights abuse often results in creating or exacerbating conflict. One of the major problems with human rights violations in conflict-affected areas is that the UN Guiding Principles are based on the state duty to protect human rights, while in conflict settings the state is often absent or involved in human rights violations itself.

A number of examples of human right violations that increase the conflict potential are:<sup>20</sup>

- ❑ Violence against and killings of union activists (e.g. agribusiness and beverage companies in Colombia).
- ❑ Operations affecting the neighbouring water table, impacting communities that live on, and make their living off, adjacent land (e.g. oil companies in Colombia).
- ❑ Forced labour and child labour (e.g. cocoa industry in Cote d'Ivoire).
- ❑ Lack of freedom of association (e.g. oil companies in Nigeria).
- ❑ Displacement of indigenous communities (e.g. mining sector in Guatemala).
- ❑ Not respecting communities' right to free, prior & informed consent (FPIC).
- ❑ Discriminating certain ethnic groups in recruiting workers.

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<sup>18</sup> United Nations, 2011a

<sup>19</sup> United Nations, 2012

<sup>20</sup> All examples are taken from: Castan Centre for Human Rights Law, International Business Leaders Forum, and Office of the United Nations High Commissioner for Human Rights (OHCHR), 2008, Human Rights Translated – A Business Reference Guide, [http://hrbdf.org/doc/human\\_rights\\_translated.pdf](http://hrbdf.org/doc/human_rights_translated.pdf)

International guidelines and principles for corporate social responsibility are very important and can potentially play a role in holding companies accountable to corporate misconduct. However, one of the major weaknesses of international guidelines and principles is the voluntary nature and lack of accountability mechanisms. In conflict-affected areas this is even worse due to the absence of the government, providing a power vacuum in which companies can often operate freely and without being held accountable.

As a result of the lack of accountability mechanisms for companies violating human rights, a number of initiatives are currently ongoing to tackle this problem. This includes the OHCHR domestic law remedies process, the Council of Europe recommendations to member states to implement the UNGPs and the proposal for an international legally binding instrument for multinational enterprises with respect to human rights. This proposal was tabled by Ecuador and South-Africa, and subsequently adopted at the UN Human Rights Council in Geneva in June 2014.<sup>21</sup> As a result, an intergovernmental working group will be established with the mandate to elaborate an international instrument on business and human rights. Although the resolution was supported by many countries in the Global South, and while international law on business and human rights is something many civil society organizations desire, the proposal is also quite controversial and not supported by most western countries. The European Union member states as well as the United States have voted against the resolution, describing it as polarizing and counterproductive.

During the same Human Rights Council session, another resolution was adopted which extends the mandate of the UN Working Group on Business and Human Rights to promote and build on the UN Guiding Principles. The resolution also requests the High Commissioner for Human Rights to facilitate a consultative process with stakeholders exploring *“the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses.”* This resolution was adopted by consensus, requiring no vote and thus providing a much stronger basis.

Although the above initiatives vary in their mandate, scope and nature, the developments clearly show that it is increasingly seen as unacceptable that multinational corporations are not held accountable for human rights violations.

## 2.3 Corporate complicity in war crimes

In this section, the focus will be more specific on how companies and individuals working for those companies have contributed to war crimes. Throughout history, while some individuals behind companies have been held legally liable for human rights abuses and complicity in war crimes in conflict affected areas, this is not the case for corporations themselves. Holding corporations accountable remains highly challenging, and many judicial barriers exist in both home and host states.<sup>22</sup> This observation is important, and should be taken into consideration when looking at the

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<sup>21</sup> Business and Human Rights Resource Centre website; <http://business-humanrights.org/en/binding-treaty>

<sup>22</sup> Skinner et al, 2013

international framework for corporate responsibility. In the current debate, the question is whether it is possible to prosecute companies involved in war crimes as well.<sup>23</sup>

Businesses have always operated in zones of conflict. Throughout history, some businesses have played a direct role by providing the means with which wars are fought. Others have provided infrastructure support – intentionally or not – that facilitated the continuation of conflict. Some have supported national governments while others have aided armed groups, among others by paying taxes or royalties to warring parties. In the past, many businesses have maintained that in zones of conflict they have no choice but to comply with requests and orders, even if they are illegal.<sup>24</sup> However, the Nuremberg Trials following World War II showed that such a defense is not tenable. During these trials, prosecutors attempted to implicate German industrialists in indictments for “*crimes against peace*”.<sup>25</sup>

After Nuremberg, there followed a series of landmark “*industrialist trials*”. These did not involve allegations of crimes associated with the crime of aggression, as in Nuremberg, but resulted nevertheless in convictions of other war crimes for direct and indirect involvement of the accused.<sup>26</sup> This included the G. Farben case, the German chemical company, where in a United States court 12 officials were convicted of plunder for taking possession of industrial facilities in occupied territory and of slavery for exploiting concentration camp inmates in their factories, among others in Auschwitz. Another famous case is the Zyklon B case, in which three key officials of the company that supplied Zyklon B gas to concentration camps, were charged in a British military court for arranging shipments of “*poison gas used for the extermination of allied nationals in concentration camps, well knowing that the said gas was so to be used.*”<sup>27</sup>

These and other individual prosecutions were then set in the wider context of the evolving framework of international law relating to conflict, including the Geneva Conventions, their Additional Protocols and the jurisprudence of crimes against humanity. Mistreatment of civilians, abuse of prisoners, indiscriminate attack, the use of unnecessarily devastating weapons, sexual enslavement and abuse, destruction of property and forced displacement and confinement were being progressively more clearly established as international crimes, but they were still limited to individuals.

Between the trials in the wake of WWII and the 1990s, very few cases are described of corporate complicity. This changed in the 1990s, when international criminal justice experienced a revival with the International Criminal Tribunals for Former Yugoslavia and Rwanda as well as the International Criminal Court, among other initiatives. Of particular relevance to corporate criminal responsibility was the case in the International Criminal Tribunals for Rwanda (ICTR) which resulted in the conviction

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23 See for instance: Van der Wilt, 2013

24 Tripathi, 2010

25 Chatham House, 2006

26 This is an important distinction in view of the current discussion around the different types of involvement in adverse human right impacts as defined by the UN Guiding Principles. According to the UNGPs, companies can be causing, contributing to or directly linked to a human rights abuse, which determines what action can be expected from a company; See: SOMO et al., 2012, p.41

27 Chatham House, 2006

## Box 2: Business and international humanitarian law

According to the International Committee of the Red Cross, international humanitarian law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.<sup>1</sup> It protects persons not, or no longer, taking part in hostilities and restricts the means and methods of warfare. IHL is also known as the law of war or the law of armed conflict. Some of the rules of IHL are similar to those of human rights law, but these two bodies of law have developed separately and are contained in different treaties. Human rights law – unlike IHL – applies in peacetime, and many of its provisions may be suspended during armed conflict. IHL applies only during armed conflict and cannot be suspended. International humanitarian law distinguishes between international and non-international armed conflicts. International armed conflicts oppose two or more States. Non-international armed conflicts – colloquially known as civil wars – on the other hand oppose a State and an organized armed group or two or more such groups. Since the initial Geneva Convention of 1864, humanitarian law has evolved to meet the ever-growing need for protection resulting from developments in weaponry and new types of conflict, especially the growth of civil and intra-state conflicts. Today, the four Geneva Conventions of 1949 and their Additional Protocols of 1977 constitute the main instruments of international humanitarian law.

Business enterprises have become increasingly familiar with human rights law. Many have adopted corporate policies aimed at ensuring that their operations respect, and at times even promote respect for human rights. Companies have also adopted policies aimed at reducing the likelihood of contributing, directly or indirectly, to human rights abuses. However, business enterprises are generally less familiar with international humanitarian law, even though this body of law, specifically developed to regulate situations of armed conflict, has important implications for them when they operate in countries experiencing armed conflict as defined in international law. On the one hand international humanitarian law grants protection to the personnel – provided they do not take part directly in armed hostilities – and the assets and capital investments of business enterprises. On the other hand it imposes obligations on managers and staff and exposes them – and the business enterprises themselves – to the risk of criminal or civil liability.

The relation between IHL and human rights law is important, because in contexts of armed conflict human rights will often be interpreted based on standards of international humanitarian law. Business enterprises operating in zones of armed conflict should use extreme caution and be aware that their actions may be considered to be closely linked to the conflict even though they do not take place during fighting or on the battlefield. A significant risk of criminal liability thus exists for those who commit grave breaches of international humanitarian law, including where business enterprises or their representatives commit or knowingly assist violations carried out by others, such as contractors, subsidiaries or clients. Business enterprises therefore run legal risks, whether based on criminal responsibility for the commission of or complicity in war crimes or on civil liability for damages, as many cases from conflict areas have shown. Well-documented cases include Talisman and Lundin in Sudan, Gus van Kouwenhoven in Liberia and Anvil in DRC (see box 3).

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1 International Committee of the Red Cross, 2006

of two directors of the local radio station “RTLM” for incitement to genocide in Rwanda. It should be noted that the developments in international criminal justice did not keep pace with the discussions around corporate criminal complicity.<sup>28</sup>

The debate on corporate criminal complicity gained momentum at the turn of the millennium because of many high-profile cases of multinational corporations operating in conflict areas in Africa, such as Angola, Liberia, Sierra Leone, Democratic Republic of Congo (DRC) and Sudan. In 2001, a UN panel investigated the link between business and illegal exploitation of resources in the DRC. It was concluded that *“the role of the private sector in the exploitation of natural resources and the continuation of the war has been vital. A number of companies have been involved and have fuelled the war directly, trading arms for natural resources. Others have facilitated access to financial resources, which are used to purchase weapons. Companies trading minerals, which the Panel considered to be “the engine of the conflict in the Democratic Republic of the Congo” have prepared the field for illegal mining activities in the country.”*<sup>29</sup> This was a landmark event, as it was for the first time in history that a UN investigation accused multinational corporations of helping to perpetuate a war and of profiteering from it, and of being in violation of international business norms such as the OECD Guidelines for Multinational Enterprises. The list of companies includes more than a hundred companies, including well-known multinational corporations such as Anglo American, Barclays, Fortis Bank, Lundin Group.<sup>30</sup> The UN reports raised the expectation that governments would hold to account those companies that were responsible for misconduct in the DRC. To date, there have been few signs of a response. Many unanswered questions remain about the allegations against companies.<sup>31</sup>

In 2005, there was the case of Dutch businessman Frans van Anraat, known as “Chemical Frans”, who stood trial on charges of complicity in genocide and war crimes before Dutch criminal courts. Although he was not convicted of genocide, he was convicted for complicity in war crimes for supplying chemical components to Saddam Hussein.<sup>32</sup> The Court of Appeal of The Hague sentenced Van Anraat to 17 years of imprisonment. Whereas Van Anraat stood trial and was convicted as a natural person, it has been argued by Global Witness that the courts would probably have found no difficulty in establishing criminal responsibility of the corporation which Van Anraat had created and directed, if that corporation had been prosecuted as well.<sup>33</sup>

Over the last two decades, many other cases of corporate complicity in conflicts have been extensively documented by NGO’s such as Global Witness, IPIS, RAID and Human Rights Watch (see box 3).

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28 Chatham House, 2006 & S. Tripathi, 2010. The “Radio Télévision Libre des Mille Collines” station broadcasted from July 8, 1993 to July 31, 1994, and its role in the Rwandan Genocide is widely cited as an example of what inciting and vindictive speech can do when it is unregulated and unrestricted, operating in an environment which has no effective alternatives.

29 UN Security Council, 2001

30 For the full list of companies, see: RAID 2004

31 RAID, 2004

32 Chatham House, 2006. The industrialist was quoted as objecting: “The images of the gas attack on the Kurdish city of Halabja were a shock. But I did not give the order to do that.”

33 Van der Wilt, 2013

**Box 3: Cases of corporate complicity in conflict-affected areas<sup>1</sup>**

- ❑ In Sudan, the Canadian company Talisman has been accused of fueling the civil war by supplying equipment used by the Khartoum Government in human rights abuses against civilians and funding its repressive activities through their royalty payments. A report commissioned by the Canadian government confirmed that Talisman indeed exacerbated the conflict, although placing the direct responsibility on the Khartoum regime for grave human rights abuses, including the systematic enslavement of children and women.
- ❑ Another case of complicity in Sudan is that of Lundin Petroleum, a Swedish oil company, which is under investigation for having violated International Humanitarian Law and having made a material contribution to war crimes in Sudan. A report from ECOS (European Coalition on Oil in Sudan) found out that over 10,000 people were killed and over 200,000 forced to leave their homes and established that Lundin was complicit of these violations because they took place in the block allocated to Lundin to exploit oil and because Lundin provided material support to the government.
- ❑ Dutch timber merchant Gus van Kouwenhoven, who was the president-director of Oriental Timber Company (OTC) in Liberia and close friend of former Liberian President Charles Taylor, was acquitted by a Dutch appeals court of smuggling arms to Charles Taylor in exchange for logging rights. Van Kouwenhoven was convicted in 2006 of selling weapons to Charles Taylor's government between 2001-03 in violation of a UN embargo, but acquitted of war crimes charges. The weapons he had allegedly smuggled were used by militias to commit atrocities against civilians in West Africa. The appeals court overturned the weapons conviction, saying the prosecution witnesses who linked Mr van Kouwenhoven to arms dealing were unreliable.
- ❑ There is also the case of Anvil, a Canadian mining company, active in DRC. Anvil was accused of being complicit in human rights abuses committed by official Congolese army forces through the provision of assets that were confiscated by the army. Despite class actions filed by families of the victims, the Supreme Court of Canada refused to hear the case on technical and jurisdiction grounds. While Anvil admitted to having provided the Congolese army with trucks, food, lodging and other logistical support, it claims the assets were requisitioned by the authorities and denies any wrongdoing. Anvil argues that it was caught by surprise.

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<sup>1</sup> See Global Witness: 1999; Global Witness, 2001; Global Witness: 2006; Human Rights Watch; IPIS, 2009

These examples clearly illustrate the negative role that multinational companies can play in war economies and how they are involved in war crimes and other serious human rights violations.

## 2.4 Perspectives on multinational corporations during and after conflict

There are different perspectives on the role of multinational corporations during and after conflict. One perspective focuses on the positive force that businesses can be in the peace building process by generating employment and tax revenues, and by playing a mediating role in brokering peace between the warring parties. Another perspective emphasizes the risks associated with the presence of multinational companies in conflict-affected areas. This perspective focuses on the potential negative impacts of companies in terms of environmental or human right violations or their role in exacerbating existing conflicts or sparking new ones.

One of the first publications dealing with the role of the private sector in peace building, in 2000, states that *“the private sector, ranging from large multinationals to informal micro-enterprises, has a role in contributing – both directly and indirectly – to the prevention and resolution of violent conflict. There is growing evidence that as market economies become more widespread and as business becomes a more central actor in societies around the world, the importance of this role is increasing.”*<sup>34</sup> The report outlines the business case for engagement in conflict prevention and resolution, among others by looking at potential reputation costs and the threats of international litigation and lawsuits for companies that are accused of complicity with either state or non-state actors that are perpetrating the violence. It is also claimed that there is a strong moral case for greater corporate leadership in today’s world where the private sector is an increasingly prominent actor.<sup>35</sup> In 2004, at a UN Security Council meeting devoted to the issue of the role of business in conflict prevention and peace building, Secretary General Kofi Annan stated that *“business itself has an enormous stake in the search for solutions, and companies require a stable environment in order to conduct their operations and minimize their risks.”*<sup>36</sup>

Over the last decade, numerous publications have appeared with the key message that the private sector can and should contribute to peacebuilding, not only because it will improve the business case (more stability is often in the company’s interest) but also because it is part of the private sector’s social responsibility.<sup>37</sup> This has evolved into the concept of Corporate Security Responsibility, which goes beyond traditional Corporate Social Responsibility. It puts emphasis on the political and security responsibility of business and advocates for the involvement of business to extend beyond purely social matters, and including security as an issue of major importance. In a globalized world where governments often fail to solve conflict and maintain security, and are unable to tackle root causes of social tension, the international community is increasingly promoting the engagement

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34 Nelson, 2000

35 Ibid.

36 UN Security Council, 2004

37 See among others: Wenger & Möckli, 2003; Fort & Schipani, 2004; Spreitzer, 2007, p.28, 1077–1095, 2007

of all actors, including the private sector, to contribute to peace and security.<sup>38</sup> As an example of a company that has brought this idea in practice, box 4 describes the case of a multinational beverage company and the challenges it is facing in conflict-affected areas (see box 4).

Peace building NGO's such as International Alert, Swisspeace and Search for Common Ground have adopted a pragmatic approach and are of the opinion that all non-state actors (including business) have a role to play, directly or indirectly, in peace matters.<sup>39</sup> According to these NGOs, peace is too important to be left alone to governments or UN institutions only. It is argued that businesses can co-create conditions for peace by providing what is commonly referred to as "peace dividends" (offering economic incentives to warring parties to stop hostilities). It is also argued that companies can use their leverage to incite warring parties to sit at the negotiation table. These practices are not very common and highly sensitive given the risks these companies face of being accused of becoming "politically" active, or of being accused of benefiting from potential future deals. Apart from the reputational risks that companies are facing, there is also the risk that companies' involvement in peace mediation leads to outcomes that are not beneficial to the communities affected by a company's operations, because of misjudgment on the side of the company. This is not unlikely, given the intricate nature of conflict contexts and since conflict-sensitivity has not yet been fully integrated in most companies' policies.

A positive development is that in 2013, the Business for Peace (B4P) initiative of the UN Global Compact was launched. So far, over a hundred companies have become participants.<sup>40</sup> Companies that join B4P commit to annually report on efforts to integrate the ten Global Compact principles into its operations in complex environments along with other contributions made to advance peace. Global Compact participants can do so through their Communications on Progress, while non-Global Compact participants in B4P can do so by submitting their annual sustainability report to the B4P team. All participants are strongly encouraged to set specific benchmarks and targets to track progress. Companies are also invited to participate in Global Compact consultations as well as any other dialogue and learning opportunities on operating in high-risk and conflict-affected areas.<sup>41</sup>

In an overview of company cases involved in peace building initiatives, it is optimistically stated that *"in the past few years, more companies are taking up the challenge of advancing human rights, environmental protection, anti-corruption and higher labour standards – displaying an ever stronger commitment to corporate sustainability in high-risk areas. Responsible businesses are taking measures to understand conflict dynamics and design policies that better integrate conflict-sensitivity in such operating environments. Businesses are increasingly looking for venues where they can contribute towards peace building and make a positive impact on the economic and social life of local communities, while establishing and growing markets."*<sup>42</sup> It is important for civil society to follow

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38 Deitelhoff and Wolf, eds, 2010

39 See these organisations websites: <http://www.international-alert.org/economy>; <http://www.swisspeace.ch/topics/business-peace.html>; [https://www.sfcg.org/programmes/sbp/programmes\\_sbp.html](https://www.sfcg.org/programmes/sbp/programmes_sbp.html)

40 See the UN Global Compact website: [https://www.unglobalcompact.org/docs/issues\\_doc/Peace\\_and\\_Business/Business\\_for\\_Peace\\_Participants.pdf](https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Business_for_Peace_Participants.pdf)

41 See the UN Global Compact website: [https://www.unglobalcompact.org/Issues/conflict\\_prevention/frequently\\_asked\\_questions.html#q7](https://www.unglobalcompact.org/Issues/conflict_prevention/frequently_asked_questions.html#q7)

42 UN Global Compact & PRI, 2013



#### **Box 4: The role of a multinational company in Burundi and DRC: business diplomacy vs. support to rebel groups**

In Burundi, a multinational beverage company played the role of “business diplomats” by bringing the government and a rebel group together in search of common grounds to help solve the conflict.<sup>1</sup> The company did not actually mediate between the parties involved, but provided contacts, logistical and financial support for such a dialogue to happen. The company was initially asked to participate in the dialogue, but it refused to do so as the company saw its role limited to facilitating the dialogue and ensuring that the lines of communication between opposing parties remained open. This reportedly took place in the late 1990s, and allowed the Burundi government to talk to a rebel group, sowing the seeds of peaceful behavior.<sup>2</sup>

The same company has been operating for several years in rebel held territory in Eastern Congo. According to media reports, the company is faced with illegal checkpoints, held by rebel groups, which are the primary revenue source for armed groups in the area.<sup>3</sup> M23 is one of the major players in the region but there are also other road and river rebel sentries. Thousands of trucks owned by the company must pass through checkpoints each year to deliver their products to bars and shops. Based on low-end estimates, the company’s distributors could be paying more than \$1 million a year to rebel groups through these illegal checkpoints. In a response, the company’s management said that due to the complexity of the situation in the DRC and the use of local distributors, the amount and the payments were difficult for them to verify. The company did not consider withdrawing from the region because, as one of their directors explained, “*there’s a belief that you can help the most by being present, being a contributor to the local economy*”. One of the key problems is the absence of a legitimate, well-functioning government that provides security, which makes it very difficult for multinational and local companies to operate in such a fragile environment. The question remains whether companies can be held responsible for human rights violations or war crimes committed by rebel groups that they have been supporting through paying taxes.

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1 Pers. comm. F. Lenfant, January 2014; Bais & Huijser, 2005; Homé, 2006

2 A peace agreement was finally signed in Burundi in 2000 (The Arusha Peace and Reconciliation Agreement for Burundi).

3 Foreign Policy, 2013

the B4P initiative critically, given the risk that companies might be using the initiative for window dressing purposes. As has been argued before, multinational companies – despite all the good intentions – often become part of the conflict once they start operating in a conflict environment and it is important that this initiative is closely monitored. The fact that the Steering Committee of the B4P includes peace building NGO International Alert as well as some universities provides good hopes that this initiative will indeed provide a positive contribution to the debate on the role of multinationals in peace building.<sup>43</sup>

Finally, there is ongoing discussion on the role that businesses can potentially play in the “Responsibility to Protect” framework, as defined by UN Secretary General Ban Ki-Moon. It is argued by some that there is a specific role for businesses to participate in all three “pillars” of the RtoP.<sup>44</sup> Also here, it is important to be aware of the potential pitfalls of the private sector’s involvement.

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43 See the UN Global Compact website: [https://www.unglobalcompact.org/Issues/conflict\\_prevention/steering\\_committee\\_members.html](https://www.unglobalcompact.org/Issues/conflict_prevention/steering_committee_members.html)

44 1. “The protection responsibilities of the state,” or the idea that states are required to prevent mass atrocities within their areas of control; 2. “International assistance and capacity-building,” or the idea that the international community – specifically defined as UN member states in the UN documents – is obligated to support states in their execution of the first pillar; and 3. “Timely and decisive response,” or the idea that when violations of RtoP occur, the international community is obligated to step in to stop the violations. See: Seyle, 2013, *Business Participation in the Responsibility to Protect*; [http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Business-in-RtoP-for-ISA-2013\\_Seyle.pdf](http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Business-in-RtoP-for-ISA-2013_Seyle.pdf)

## 3 Overview of international principles and guidelines

*I am strongly in favor of business contributing to the solution of societal challenges of all sorts (referring to the positive role companies can play in conflict). But the first step is to not infringe on the rights of others; not to contribute to harm or make a situation worse; not to exploit the absence of or weakness in the rule of law in a particular country or situation. Moreover, there is no equivalent to carbon offsets in human rights: 'doing good' by building a clinic does not absolve a company from otherwise harming individuals or damaging communities.*

John Ruggie, 2012<sup>45</sup>

This section deals with the main international instruments and guidelines for corporate responsibility and their relevance in conflict-affected areas, such as the UN Guiding Principles for Business and Human Rights and the OECD Guidelines for Multinational Enterprises. The principles and guidelines are presented according to their institutional affiliation, United Nations, OECD and IFC, followed by a number of specific guidelines that are related to security, conflict minerals and specific countries or sectors. Finally, it presents a number of tools for doing business in conflict-affected areas designed by NGOs.

### 3.1 Principles and guidelines of multilateral institutions

#### 3.1.1 UN Guiding Principles on Business and Human Rights

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<b>Name:</b>	UN Guiding Principles on Business and Human Rights
<b>Year of implementation:</b>	2011
<b>Secretariat:</b>	United Nations/Office of the High Commissioner for Human Rights (OHCHR), Geneva
<b>Website:</b>	<a href="http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx">http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx</a>

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#### Description

In 2005, the United Nations appointed a Special Representative, John Ruggie, to identify and clarify business obligations with regards to human rights. During several years, the Special Representative "mapped patterns of alleged human rights abuses by business enterprises, researched evolving standards of international human rights law and international criminal law and emerging practice by States and companies"<sup>46</sup> mainly through stakeholder consultations. These consultations resulted

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45 International Committee of the Red Cross, 2012

46 United Nations, 2011a, p.3.

in the Protect, Respect and Remedy Framework, which was approved by the UN in 2008, and the UN Guiding Principles on Business and Human Rights, adopted by the Human Rights Council in 2011, providing principles to implement the Protect, Respect and Remedy Framework. The Framework is based on three pillars. The first is the State duty to protect against human rights abuses by third parties, the second is the corporate responsibility to respect human rights, while the third is the necessity for victims of human rights abuses to be able to access remedy, both judicial and non-judicial. With regards to business responsibilities, the UNGPs clearly stipulate that “business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”<sup>47</sup>

The Guiding Principles provide guidance on how to implement the framework, but do not create new legal obligations. They build upon existing standards and practices, and aim at “integrating them within a single logically coherent template, and at identifying where current legislation falls short and how it should be improved”.<sup>48</sup> This was followed in 2012 by the publication of an Interpretive Guide on the corporate responsibility to respect human rights. This guide is meant to provide some further explanation of those Principles that relate specifically to the corporate part of the UN Guiding Principles.<sup>49</sup> It is noted that further work will be needed to develop operational guidance, depending on the sector, operating context and other factors. The UN Working Group on Business and Human Rights will play a central role in this regard. In 2012, the European Commission developed guidance documents on the implementation of the Guiding Principles that are specifically related to three different business sectors: Oil & Gas, ICT/Telecommunications and Employment & Recruitment agencies.<sup>50</sup>

The UN Guiding Principles have strengths and weaknesses. A major strength is that it is the most authoritative and internationally recognized framework for business and human rights, as it is backed by UN member state governments and was based on extensive consultations with many stakeholders over a period of six years. The Guiding Principles explain the corporate conduct that is expected from companies by UN member states, and have been supported by many business and industry associations.<sup>51</sup> In other words, it is a reference point that can be used for many purposes: for states as a reminder of their obligations to uphold human rights and incorporate in their legislation provisions to promote human rights, for business as a framework to guide the integration of human rights in their operations and help them conduct due diligence, i.e. minimize negative impact, and for civil society to hold both governments and business to account when human rights are not upheld.

While the framework and the UNGPs are supported by governments, business and CSO’s alike, they are not exempt from criticism. A major weakness, which is valid for most guidelines, is their voluntary nature. It is also argued that such voluntary measures to implement human rights due diligence – which could prevent abuses – are not far reaching and are implemented by companies acting

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47 United Nations, 2011a, p.4

48 United Nations, 2011a, p.6

49 United Nations, 2012

50 EU, 2012, p.4; Institute for Human Rights and Business, 2012

51 SOMO et al., 2012

responsibly, but not by those with a dubious track record.<sup>52</sup> In addition, there are complaints about the slow implementation of the UNGPs.

To implement the UNGPs, countries are encouraged to develop National Action Plans. However, so far only six countries have developed National Action Plans, and in general these plans often do not reach out far enough.<sup>53</sup> The UN Working Group on business and human rights has stressed the need to put particular emphasis on the third pillar of the Guiding Principles in national action plans. States should clarify, develop and strengthen the often weak and inconsistent accountability measures and mechanisms available in each country. While a fully integrated and comprehensive regime for the effective redress of adverse corporate-related human rights impacts will take time to emerge, States should make policy adjustments to address impunity as a matter of priority.<sup>54</sup> To improve the process of adopting national action plans, UN OHCHR has developed a guidance on national action plans for the implementation of the UNGPs.<sup>55</sup>

### Relevance for conflict affected areas

The relevance of the UNGPs for conflict affected areas is high. A number of principles have specific provisions on business and human rights in conflict areas. Those are principles 7, 12, 14, 17, 18, 21, and 23.<sup>56</sup>

#### Pillar 1: Protect

*Principle 7* stipulates that states (both home and host states) must ensure that business operating in conflict-affected areas do not commit or contribute to human rights abuses and measures they can take to this end. It is specified that states should:

- ❑ engage business to identify, prevent and mitigate human rights related risks of their activities;
- ❑ provide adequate assistance to business to assess and address risks of abuses;
- ❑ deny access to public support for business involved in abuse;
- ❑ ensure that their legislation addresses effectively business implication in human rights abuses.

In principle 7, it is also stated that some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources, or a Government itself – where the human rights regime cannot be expected to function as intended. Therefore, responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. A major constraint of the UNGPs is the responsibility conferred to states to regulate business and help business ensure it does not commit or contribute to human rights violations, which limits its application in conflict areas. While the UNGPs make a distinction between home and host states, they do not acknowledge the fact that most (host) states in fragile and conflict prone areas

52 Cidse Briefing Note, 2014

53 The UN Working Group strongly encourages all States to develop, enact and update a national action plan as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights. At the time of writing, only six countries have produced a national action plan (UK, Netherlands, Italy, Denmark, Spain, Finland), while a dozen countries are preparing one. See: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> and <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>

54 United Nations, 2014

55 UN Working Group on Business and Human Rights, 2014

56 United Nations, 2011a

lack the capacity to regulate corporate activity, and/or the willingness to do so because they are involved in human rights violations themselves.

## **Pillar 2: Respect**

*Principle 12* states that the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, as a minimum, as those expressed in the International Bill of Human Rights, and the principles concerning fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work. Depending on circumstances, business enterprises may need to consider additional standards. According to Principle 12, in armed conflict, the standards of international humanitarian law apply to business enterprises as well as to others. On the one hand, international humanitarian law grants protection to business personnel – provided they do not take part directly in armed hostilities – as well as to the assets and capital investments of enterprises. On the other hand, it imposes obligations on managers and staff not to breach international humanitarian law and exposes them – and the enterprises themselves – to the risk of criminal or civil liability in the event that they do so. The International Committee of the Red Cross has developed guidance on the rights and obligations of business enterprises under international humanitarian law.<sup>57</sup> In principle 12, special reference is also made to additional standards based on the context, including the need to respect the human rights of individuals belonging to specific groups such as indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. These groups are also especially vulnerable in a conflict context which means that they deserve special attention.

*Principle 14* states that the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Specifically related to conflict, the following is specified: If the area is affected by, or prone to, conflict, there may be particular risks with regard to security, the right to life and ethnic discrimination. Therefore, these risks will likely need to be the subject of the most systematized and regular attention.

*Principle 17 and 18* describe human rights due diligence, and what companies should do to identify and assess any actual or potential adverse human rights impacts, through their own activities or as a result of their business relationships. It states that companies should focus on those entities which may harm human rights when acting in connection with the enterprise’s own operations, products or services. For instance, if an enterprise’s facilities will be protected by State security forces, the enterprise is not being asked to assess the general human rights record of the security forces or the State, but the risks that human rights abuses may occur as a result of the security forces’ presence at its facilities. While their past human rights record will be one consideration, other factors will include

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57 United Nations, 2012, p.11-12; When a violent conflict is defined as such by the International Committee of the Red Cross (ICRC), international humanitarian law applies. When companies are active in situations characterized by the International Committee of the Red Cross as armed conflict, the International Humanitarian Law applies for all actors, including business. This means that if companies are involved in activities such as pillage, manufacturing of illegal weapons, use of forced labor, unlawful violence by company-hired militias or collusion with state or non-state forces, they will face liability charges in courts of law. See: International Committee of the Red Cross, 2006, Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law; [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0882.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf)

### Box 5: The relevance of due diligence in conflict-affected areas

As a central element of the Protect, Respect and Remedy framework and the UN Guiding Principles, it is useful to look at the various definitions of due diligence by some of the major stakeholders. According to the OECD, “due diligence is an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict. Due diligence can also help companies ensure they observe international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions”.<sup>1</sup> Due Diligence can be considered a risk minimizing mechanism and thus refers to “the steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions.”<sup>2</sup>

The UN Guiding Principles on Business and Human Rights state that “in order to identify, prevent, mitigate, and account for how they address their adverse human rights impacts, business should carry out human rights Due Diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”<sup>3</sup>

Global Witness describes Due Diligence, with reference to companies operating in the DRC in the extractive sector as the “need to show the public that they have procedures in place to prevent direct or indirect involvement with serious human rights abuses and other crimes.” Global Witness adds that Due Diligence “is a process that all reputable companies understand and employ on a regular basis to address risks ranging from corruption to environmental damage”.<sup>4</sup>

It is recommended to take stock of the lessons learned from other due diligence frameworks and to integrate these lessons in newly set-up frameworks, such as the EU Conflict Due Diligence framework.

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1 OECD, 2013, p.13

2 OECD, 2013, p.8

3 United Nations, 2011a

4 Global Witness, 2010

the general stability and rule of law in the area in question; local circumstances, such as any current or likely tensions among communities, between communities and local authorities or between communities and the enterprise; local attitudes to the Government or the armed forces; and, of course, the training and skills of the armed forces in handling such assignments in line with human rights. As a special area of interest in a conflict context, companies should prioritize human rights due diligence for “security services provided by contractors or forces in areas of conflict or weak governance and rule of law.”

*Principle 21* stipulates that “business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them.” Despite the absence of clear reference to conflict contexts, one can make the link with difficult operating contexts found in (post) conflict areas. This principle places responsibility on business to report on how to address risks of severe human rights impacts.

*Principle 23* states that companies should treat the risk of being complicit in human rights abuses committed by other actors as a legal compliance issue, and that companies should ensure that they do not exacerbate conflict situations. It is important to note that this risk is clearly higher in conflict zones than in regular operating environments, and the capacity of the State to enforce laws and regulations effectively is weak. In the rare situations where local law or other requirements put an enterprise at risk of being involved in gross abuses of human rights such as international crimes, it should carefully consider whether and how it can continue to operate with integrity in such circumstances, while also being aware of the human rights impact that could result from terminating its activities. In addition, it is noted that the risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection or where there are entrenched patterns of severe discrimination. Perhaps the greatest risks arise in conflict-affected areas, though they are not limited to such regions. Such contexts should automatically raise red flags within the enterprise and trigger human rights due diligence processes that are finely tuned and sensitive to this higher level of risk.

In the Interpretive Guide, it is stated that in conflict-affected areas, many enterprises will find it difficult to assess the risks adequately. If that is the case, they should seek advice from credible external sources, including civil society organizations working in or reporting from the area. Where appropriate, they can also seek advice from Governments, including that of their home State. National human rights institutions can be another valuable source of advice. Working with business partners, industry bodies or multistakeholder initiatives can also help enterprises in devising approaches that are more finely tuned to the human rights risks posed by complex circumstances.

### **Pillar 3: Access to Remedy**

In *Principle 25*, it is described that states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. This includes the use of judicial or non-judicial grievance mechanisms. However, in the context of conflict, citizens in many fragile countries experience difficulties in accessing justice and remedy mechanisms, which underscores the “*need for effective extraterritorial actions by States where multinational companies are based*”.<sup>58</sup>

### **What does it mean for businesses?**

The UN Guiding Principles provide the leading normative framework for businesses and present the first global standard for preventing and addressing the risk of adverse human rights impact linked to

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58 Cidse Briefing Note, 2014 p.1



business activities. Many businesses around the world are already looking how they can implement the GPs in their operations, and have started to develop human rights policies based on the GPs.<sup>59</sup>

### What does it mean for civil society organizations?

The UN Guiding Principles are a very relevant and valuable tool that can support CSOs in their efforts to understand and address business responsibility to respect human rights in conflict affected areas. It will help communities and workers to point out companies' responsibility to respect internationally recognized rights. CSOs can play an indispensable role as a countervailing power in confronting companies with this responsibility, and ensuring they are held to account to meet the responsibility and improve their behavior.

However, 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. Nevertheless, the GPs can be used by CSOs in their research, campaigns, engagement and advocacy towards companies and governments. A guide for CSOs on how to use the UN Guiding Principles in company research and advocacy has been developed by SOMO, Cividep and CEDHA in 2012.<sup>60</sup>

### 3.1.2 UN Global Compact Guidance

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<b>Name:</b>	UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas
<b>Year of implementation:</b>	2010
<b>Secretariat:</b>	United Nations Global Compact Office, New York
<b>Website:</b>	<a href="https://www.unglobalcompact.org/resources/281">https://www.unglobalcompact.org/resources/281</a>

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#### Description

The UN Global Compact is the largest voluntary corporate responsibility initiative in the world, backed up by 12,000 corporate participants and other stakeholders from over 145 countries.<sup>61</sup> The United Nations-supported Principles for Responsible Investment (PRI) Initiative is an international network of investors working together to put the six Principles for Responsible Investment into practice.<sup>62</sup> In 2010, the UN Global Compact, together with the PRI initiative, developed a Guidance on Responsible Business in Conflict-Affected and High-Risk Areas. It was observed that various tools had been developed to help companies implement responsible business practices in these sensitive areas, yet they still faced many challenges. Two major difficulties had been the lack of agreement on

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<sup>59</sup> United Nations, 2012, p.2

<sup>60</sup> SOMO et al., 2012

<sup>61</sup> See UN Global Compact website: <https://www.unglobalcompact.org/index.html>

<sup>62</sup> See PRI website: <http://www.unpri.org/>

## Box 6: Developments around the implementation of the UNGPs in conflict-affected areas

Since the adoption of the UN Guiding Principles, several developments have taken place to support the implementation of the UNGPs in conflict-affected areas. This includes the following:

### □ Ruggie's report on business and human rights in conflict-affected regions

As an addition to the Guiding Principles, in 2011 John Ruggie published a report on business and human rights in conflict-affected regions.<sup>1</sup> In the report, he states that in conflict zones, the international human rights regime cannot possibly function as intended.<sup>2</sup> There remains a lack of clarity among states with regard to what innovative, proactive and, above all, practical policies and tools have the greatest potential for preventing or mitigating business related abuses in situations of conflict. In the report, Ruggie outlines a range of policy options that home, host and neighboring States have to, or could develop, to prevent and deter corporate-related human rights abuses in conflict contexts. Different policy options are also provided for so-called cooperative and uncooperative enterprises, and they include interesting suggestions that deserve to be further developed.<sup>3</sup> Ruggie has also talked of a 'negative symbiotic relationship' between company involvement in human rights abuses and conflict zones – for example mining companies in parts of the DRC.

### □ Guidance on National Action Plans focusing on conflict-affected areas

UN OHCHR has developed a guidance on national action plans for the implementation of the UNGPs.<sup>4</sup> A main element of every National Action Plan is that they need to respond to specific challenges faced in the national context, because "one size will not fit all". One of the main issues to consider for inclusion in NAPs is conflict-affected areas (under Guiding Principle 7), which asks States to take enhanced and context-specific measures to address the heightened risks of adverse human rights impacts. Potential measures that could be included in NAPs include the provision of guidance and advice, for instance through embassies and/or NHRIs (National Human Rights Institutions), on conducting effective human rights due diligence processes in conflict-affected areas; Supporting, and where necessary requiring, companies to conduct conflict sensitivity assessments as part of their human rights due diligence; Developing guidance on how to deal with the risk of sexual and gender-based violence and advising business enterprises about this; Promoting the implementation of the OECD Due Diligence Guidance for Responsible Supply Chains in Conflict-Affected and High-Risk Areas. Also, the heightened risks of corporate involvement in gross human rights violations in conflict affected areas should lead governments to take into consideration the implementation of specific legislations. ◻

1 United Nations, 2011b,

2 Ibid

3 United Nations, 2011b

4 UN Working Group on Business and Human Rights, 2014

### Continuing box 6: Developments around the implementation of the UNGPs in conflict-affected areas

In this regard, Governments should consider assessing the legal framework with regard to the extent to which it addresses heightened risks of adverse human rights impacts in conflict affected areas, and identifying, and acting to deal with any protection gaps.<sup>5</sup>

As an example of actions that countries could take in conflict states, in its National Action Plan, the UK states that it has taken account of business activity in conflict and fragile states within its Building Stability Overseas Strategy.<sup>6</sup>

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5 UN Working Group on Business and Human Rights, 2014

6 UK Government, 2013

what constitutes “responsible” business in conflict-affected and high-risk areas, and the practical challenges unique to such contexts.

The Guidance seeks to provide a common reference point for constructive dialogue between companies and investors and to complement applicable national and international laws by promoting international good practice.<sup>63</sup> The Guidance categorizes responsible business practices into four areas: Core Business, Government Relations, Local Stakeholder Engagement and Strategic Social Investment. For each of these sections, a number of guidance points are provided. This is followed by explanatory notes and practical examples. As explained in section 2.4, Global Compact launched the Business for Peace initiative in 2013.

In general, the Global Compact has been widely criticized by civil society because of a number of weaknesses. This includes the absence of screening of new participants and the lack of independent monitoring or enforcement. The only obligation for participating companies is that they have to issue an annual Communication on Progress). As a result, there is a risk that companies might use their Global Compact membership as a means to improve their corporate images and not to achieve real improvements in social and environmental issues.<sup>64</sup> These issues also apply to the companies adhering to the Guidance and the participants of the Business for Peace initiative, especially regarding the lack of independent monitoring and enforcement, as this is even more problematic in conflict-affected areas.

#### Relevance for conflict affected areas

In the introduction to the Guidance, it is stated that “for companies of all sizes, operating a business unit in a high-risk area poses a number of dilemmas with no easy answers. There are challenges, yet

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63 UN Global Compact & PRI, 2010

64 SOMO, 2013

a number of difficulties can be defused with early proactive measures. It is our hope that this guidance is a useful resource to help reduce corporate risks and enhance the capacity of companies to make a positive long-lasting contribution to peace and development. We believe there is effectively no contradiction between maximized long-term financial performance and positive contributions to peace and development". A strong point of the Guidance is that it is quite comprehensive and covers domains not tackled by other guidelines and principles. For instance, guidance point #1 states that "Companies are encouraged to take adequate steps to identify the interaction between their core business operations and conflict dynamics and ensure that they do no harm. They are encouraged to adapt existing due diligence measures to the specific needs of conflict-affected and high risk contexts." Other examples include the emphasis on tax revenue generation, provision of jobs, value creation, and strategic social investments.

The Guidance is based on the premise that the private sector can make a meaningful contribution to stability and security in conflict-affected areas. As noted by the UN Global Compact, "the guidance does not offer technical instructions and is not intended to serve as a blueprint for responsible behavior in all conflict-affected and high-risk areas. It does not presume to replace the private sector's legal rights and duties to their home and host country governments." This means that the Guidance does not provide an answer to the question what should be done in case companies are willingly contributing to conflict, or when they are not willing to take a critical look at their own potential human rights impacts. In other words, the voluntary nature makes it at best a helpful tool for companies that are already operating in a conflict-sensitive manner.

#### **What does it mean for businesses?**

The Guidance seeks to provide a common reference point for constructive dialogue between companies and investors. It is a very practical tool that includes guidance points for companies operating in conflict-affected areas, followed by explanatory notes and practical examples.

#### **What does it mean for civil society organizations?**

Although the Guidance does not provide any concrete tools that can be used by CSOs to address grievances, it can still be used as a standard set of principles for engaging with companies operating in conflict-affected areas who have committed to the UN Global Compact Guidance. In addition, CSOs should look at this Guidance in relation to other more generic standards, such as the UN Guiding Principles and the OECD Guidelines.

### **3.1.3 OECD Guidelines for Multinational Enterprises**

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<i>Name:</i>	OECD Guidelines for Multinational Enterprises
<i>Year of implementation:</i>	1976 (last updated version: 2011)
<i>Secretariat:</i>	Organisation for Economic Co-operation and Development (OECD), Paris
<i>Website:</i>	<a href="http://mneguidelines.oecd.org/">http://mneguidelines.oecd.org/</a>

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### Description

The OECD Guidelines for Multinational Enterprises (hereafter the OECD Guidelines) set out principles and standards for responsible business conduct. They are a unique, government backed international corporate accountability mechanism aimed at encouraging responsible business behavior. They define standards for socially and environmentally responsible corporate behavior and proscribe procedures for resolving disputes between corporations and the communities or individuals negatively affected by corporate activities.<sup>65</sup>

The Guidelines were first adopted in 1976 and have been reviewed 5 times since then. The 2011 update took place with the active participation of business, labor, NGOs, non-adhering countries and international organizations. One of the main improvements in the 2011 version was the addition of a human rights chapter, which is consistent with the UNGPs. The Guidelines cover the following areas: disclosure of information, anti-corruption, environmental protection, respect for core labor standards, protection of human rights, science and technology, competition, consumer interests and taxation. The guidelines provide recommendations outlining how OECD countries expect businesses operating in or from their countries to operate.

Although enterprises are ultimately responsible for observing the Guidelines in their day-to-day operations, governments also have a vested interest in enhancing the Guidelines profile and effectiveness. The Guidelines are the only government-backed international instrument on responsible business conduct with a built-in grievance mechanism. All OECD member countries and adhering countries are obliged to set up a functioning NCP. One of their principal functions is to contribute to the resolution of issues that arise from alleged breaches of the Guidelines in specific instances. The 'specific instance' complaint procedure is focused on finding a resolution between the parties through mediated dialogue. If mediation fails, NCPs can make statements determining whether the Guidelines have been breached and make recommendations to promote better observance of the Guidelines.<sup>66</sup>

### Relevance for conflict affected areas

The OECD Guidelines do not refer specifically to conflict affected areas. However, their relevance in these areas is significant, as most of the issues that the Guidelines address are often found in conflict zones, such as corruption and human rights violations. The human rights chapter of the OECD Guidelines state that "Enterprises should carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts." This means that in a conflict context additional measures should be taken to ensure proper due diligence, which is in line with the UN Guiding Principles (principles 17 and 18).

It is also stated that "a State's failure either to enforce relevant domestic laws or to implement international human rights obligations (...) does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognized human rights, enterprises should seek ways to honor them to the fullest extent which does not place them in violation of domestic law." Another relevant part of the Guidelines on human rights is the

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<sup>65</sup> OECD Watch, 2013

<sup>66</sup> OECD, 2014

### **Box 7: The OECD Guidelines complaint mechanism in a conflict area: the case of Afrimex in the DRC<sup>1</sup>**

In 2007, Global Witness filed a complaint with the UK National Contact Point against Afrimex, alleging that the company's trade in minerals contributed directly to the brutal conflict and large-scale human rights abuses in the DRC. The complaint described how Afrimex traded coltan and cassiterite (tin ore) and made tax payments to the RCD-Goma, an armed rebel group with a well-documented record of carrying out grave human rights abuses, including massacres of civilians, torture and sexual violence. The UK-NCP issued a strong final statement, in which it agreed with the allegations of Global Witness and found Afrimex in violation of OECD Guidelines. It concluded that Afrimex's taxation payment down the supply chain funded the conflict in which numerous human rights abuses have occurred.

The UK-NCP made a number of recommendations to Afrimex concerning how it could improve its corporate responsibility for human rights, the adoption of a corporate code of conduct that includes corporate policies on human rights. It also recommended that Afrimex should include in its corporate policies the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. Finally, the UK-NCP urged Afrimex to use its influence over contracting parties and business partners, when trading in natural resources from this region, to ensure that due diligence is applied to the supply chain.

The UK-NCP's decision in *Global Witness v. Afrimex* is an important development in the field of corporate responsibility for human rights and the handling of disputes by NCPs under the OECD Guidelines. The decision also reveals some problems with the NCP system, particularly the inability of NCPs to make binding decisions on corporations under the OECD Guidelines and to impose sanctions or forms of compensation for victims of human rights abuses. Although the UK-NCP found Afrimex in violation of the OECD Guidelines over the course of many years in the DRC, neither the UK-NCP nor any other organ of the UK government has the authority to impose sanctions on Afrimex for such violations.

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<sup>1</sup> OECD Watch, 2013, p.30; Cernic, 2009

following: "In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments."<sup>67</sup> As an additional tool to the OECD Guidelines, the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones was developed in 2006 (see section 3.1.4 below).

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<sup>67</sup> OECD, 2011, p.31/32

Also particularly relevant for conflict contexts is the fact that the OECD Guidelines are coupled with a specific dispute resolution mechanism. In fragile states, governments are often too weak to take up the state duty to protect human rights. In case of human rights violations by companies from OECD member countries or adhering countries, affected communities and workers can file a complaint at the National Contact Point of the host state (where the company operates) or at the home state (where the company is located). For conflict-affected countries that have their own NCP, there are some additional challenges in applying the OECD Guidelines' grievance mechanism, especially the requirement to operate impartially. This applies when there is a lack of control over parts of the territory or when the state is authoritarian and does not allow communities or workers to speak out freely. In those cases, the host state might not be in a position to provide a proper, impartial solution in case of breaches of the OECD Guidelines. However, most conflict-affected countries do not have a National Contact Point (with the exception of Colombia, which has an NCP since 2011), and therefore the most commonly used entry point to raise complaints for human rights violations in these countries are the home states of the businesses involved (see box 7 for an example).

#### **What does it mean for businesses?**

The OECD Guidelines apply worldwide to enterprises' operations in or from OECD and adhering countries. In the guidelines a long list of general policies that companies should adhere to is included, as well as specific chapters on various issues (see above).

#### **What does it mean for civil society organizations?**

In case of a breach of one of the chapters of the Guidelines, communities, workers, or individuals impacted by the enterprise's activities, a trade union or an NGO can file a complaint against a company for alleged breaches of the Guidelines. OECD Watch is an international network of civil society organisations promoting corporate accountability. The network supports organisations or individuals that file complaints against companies for alleged breaches of the OECD Guidelines. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises.<sup>68</sup>

### **3.1.4 OECD Risk Awareness Tool**

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<i>Name:</i>	OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones
<i>Year of implementation:</i>	2006
<i>Secretariat:</i>	Organisation for Economic Co-operation and Development (OECD), Paris
<i>Website:</i>	<a href="http://www.oecd.org/corporate/mne/weakgovernancezones-riskawarenessstoolformultinationalenterprises-oecd.htm">http://www.oecd.org/corporate/mne/weakgovernancezones-riskawarenessstoolformultinationalenterprises-oecd.htm</a>

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<sup>68</sup> See: <http://oecdwatch.org/>

The OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, (hereafter the Risk Awareness Tool) aims to help companies that invest in countries where governments are unwilling or unable to assume their responsibilities.<sup>69</sup> It addresses risks and ethical dilemmas that companies are likely to face in such weak governance zones<sup>70</sup>, including obeying the law and observing international instruments, heightened care in managing investments, knowing business partners and clients and dealing with public sector officials, and speaking out about wrongdoing. The Risk Awareness Tool was created in 2006 as a complement to the OECD Guidelines for Multinational Enterprises, after the need for such a tool was raised during the 2005 G8 Gleneagles Summit. As a follow-up to the tool, the OECD has launched a pilot project on due diligence in the mining and minerals sector (see section 3.2.4 below).

### Relevance for conflict affected areas

The UN Security Council stressed the importance of the tool for promoting responsible business conduct and avoiding the illegal exploitation of natural resources in countries in conflict.<sup>71</sup> The Tool proposes a list of questions that companies might ask themselves when considering actual or prospective investments in weak governance zones. The questions cover the following topics:

- I Obeying the law and observing international instruments
- II Heightened managerial care
- III Political activities
- IV Knowing clients and business partners
- V Speaking out about wrongdoing
- VI Business roles in weak governance societies – a broadened view of self interest

Special attention is given to issues of human rights and management of security forces, combating corruption and money laundering (both in topic I), reporting and disclosure of information (in topic II), involvement in local politics (in topic III), and weak fiscal systems (in topic VI).<sup>72</sup>

### What does it mean for businesses?

The Risk Awareness Tool does not create new obligations on companies, but is provided by the OECD to be used by companies in the context of their own assessment procedures when investing in weak governance zones. In addition, the questions do not alter the text and the commentary of the OECD Guidelines for Multinational Enterprises.<sup>73</sup>

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69 OECD, 2006, p.3

70 A weak governance zone is defined as an investment environment in which governments are unable or unwilling to assume their responsibilities. These “government failures” lead to broader failures in political, economic and civic institutions that, in turn, create the conditions for endemic violence, crime and corruption and that block economic and social development; OECD, 2006

71 Business & Human Rights Resource Centre website; <http://business-humanrights.org/en/conflict-peace/special-initiatives/oecd-tool-for-companies-in-weak-governance-zones>

72 Regarding this last issue, companies that make large tax payments into governments with weak fiscal systems may want to assess possible risks (e.g. of damage to reputation) associated with making payments into fiscal systems that cannot control revenues or channel expenditures in a financially and politically accountable way. OECD, 2006, p.32

73 OECD, 2006, p.13



### What does it mean for civil society organizations?

While the Risk Awareness Tool cannot be used as a basis for bringing specific instances (or complaints), NCPs and interested parties might use it as a complementary source of information and ideas when confronted with the issue of responsible investment in weak governance zones.<sup>74</sup> In that sense, the Tool provides an interesting and useful addition to the OECD Guidelines for victims of business-related human rights violations. It is recommended to raise more awareness about the Tool during training on the OECD Guidelines, and in efforts to strengthen the National Contact Points in conflict-affected areas.

### 3.1.5 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals

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<i>Name:</i>	OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
<i>Year of implementation:</i>	2011 (revised edition in 2013)
<i>Secretariat:</i>	Organisation for Economic Co-operation and Development (OECD), Paris
<i>Website:</i>	<a href="http://www.oecd.org/daf/inv/mne/mining.htm">http://www.oecd.org/daf/inv/mne/mining.htm</a>

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#### Description

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereafter the Due Diligence Guidance) is the first example of a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas. The Due Diligence guidance provides a framework for detailed due diligence as a basis for responsible global supply chain management of tin, tantalum, tungsten, their ores and mineral derivatives, and gold (the so-called 3TG group of minerals). Its objective is to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices. It is also intended to cultivate transparent mineral supply chains and sustainable corporate engagement in the mineral sector with a view to enabling countries to benefit from their natural mineral resources and preventing the extraction and trade of minerals from becoming a source of conflict, human rights abuses, and insecurity.<sup>75</sup>

The Due Diligence guidance is built around a Five-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain, which companies should integrate into their management systems. The five steps include:

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<sup>74</sup> Ibid

<sup>75</sup> OECD, 2013

1. Establish strong company management systems
2. Identify and assess risk in the supply chain
3. Design and implement a strategy to respond to identified risks
4. Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain
5. Report on supply chain due diligence

In addition, it includes a Model Supply Chain Policy for a Responsible Global Supply Chain. The Guidance was developed through a multi-stakeholder process with in-depth engagement from the OECD and eleven countries of the International Conference on the Great Lakes Region<sup>76</sup>, industry, civil society, as well as the United Nations. An OECD Recommendation on the Due Diligence Guidance was adopted on 25 May 2011 and subsequently amended on 17 July 2012 to include a reference to the Supplement on Gold. The second revised version was published in 2013.

### **Relevance for conflict affected areas**

The Due Diligence Guidance was designed specifically for Conflict-Affected and High-Risk Areas. The United Nations Security Council resolution 1952 (2010) supported taking forward the due diligence recommendations contained in the final report of the United Nations Group of Experts on the Democratic Republic of the Congo. This led to the formulation of the OECD Due Diligence Guidance. An encouraging development is that in February 2012, the DRC Government passed a law making it a requirement for all mining and mineral trading companies operating in the DRC to meet the OECD due diligence standards.<sup>77</sup>

### **What does it mean for businesses?**

This Guidance is intended to serve as a common reference for all suppliers and other stakeholders in the mineral supply chain and any industry-driven schemes which may be developed, in order to clarify expectations concerning the nature of responsible supply chain management of minerals from conflict-affected and high-risk areas. While not legally binding, the Due Diligence Guidance reflects the common position and political commitment of OECD members and non-member adherents. The Due Diligence Guidance builds on and is consistent with the principles and standards contained in the OECD Guidelines for Multinational Enterprises and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

### **What does it mean for civil society organizations?**

Throughout the document, civil society is frequently mentioned and companies are encouraged to cooperate and consult with CSOs on almost every topic of the Due Diligence process. One of the requirements of the five-step framework (see above) provides that companies should establish a company-level, or industry-wide, grievance mechanism as an early-warning risk-awareness system.<sup>78</sup> While engaging with companies, CSOs can use this requirement to put pressure on companies to

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76 Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia; OECD, 2013. See section 3.3.3 for a description of the Great Lakes Mineral Tracking and Certification Scheme that resulted from this involvement.

77 Global Witness, 2014

78 OECD, 2013, p.17

implement such a grievance mechanism, and to question companies about their Due Diligence processes.

### 3.1.6 IFC Performance Standards on Environmental and Social Sustainability

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Name:	IFC Performance Standards on Environmental and Social Sustainability
Year of implementation:	2006 (updated in 2012)
Secretariat:	International Finance Corporation, World Bank Group, Washington D.C.
Website:	<a href="http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes">http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes</a>

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#### Description

IFC's Environmental and Social Performance Standards define IFC clients' responsibilities for managing their environmental and social risks.<sup>79</sup> Together, the eight Performance Standards establish standards that the client (i.e. companies making an investment in a developing country) is to meet throughout the life of an investment by IFC. The standards are related to:

- ❑ Assessment and Management of Environmental and Social Risks and Impacts
- ❑ Labor and Working Conditions
- ❑ Resource Efficiency and Pollution Prevention
- ❑ Community Health, Safety, and Security
- ❑ Land Acquisition and Involuntary Resettlement
- ❑ Biodiversity Conservation and Sustainable Management of Living Natural Resources
- ❑ Indigenous Peoples
- ❑ Cultural Heritage

A set of eight Guidance Notes, corresponding to each Performance Standard, and an additional Interpretation Note on Financial Intermediaries offer guidance on the requirements contained in the Performance Standards, including reference materials, and on good sustainability practices to help clients improve project performance. IFC also has a guide to human rights impact assessment and management, but they do not require clients to use it.<sup>80</sup> It is important to note that all the Guidance Notes and other materials referenced in this paragraph are not binding on the client.

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79 International Finance Corporation, 2012 [www.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES)

80 See: [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management)

### Relevance for conflict affected areas

Although the IFC Performance Standards are only directly applicable when there is IFC financing, they are relevant for conflict-affected areas because IFC has a huge portfolio in fragile and conflict affected areas.<sup>81</sup> Fragile and Conflict-Affected Situations (FCS) are a priority for IFC and form part of its five Strategic Pillars.<sup>82</sup> IFC has committed to increasing private sector investment in FCS, including through a 50% increase of its own-account investment volume between FY12 and FY16. Furthermore, IFC is working with the g7+ members<sup>83</sup> to find ways to increase private investment to their countries. In addition, the IFC Performance Standards are relevant in conflict-affected areas as many instruments and organizations refer to it. Because of the specific problems at stake in conflict-affected situations, performance standards 1 (Assessment and Management of Environmental and Social Risks and Impacts), 4 (Community Health, Safety, and Security), 5 (Land Acquisition and Involuntary Resettlement) and 7 (Indigenous Peoples) have particular relevance there.

In performance standard 4, it is specifically mentioned that *“in conflict and post-conflict areas, the level of risks and impacts described in this Performance Standard 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.”* It also has a specific section on how to deal with Security Personnel. And in performance standard 7, reference is made to conflict as well: *“This Performance Standard applies to communities or groups of Indigenous Peoples who maintain a collective attachment, i.e., whose identity as a group or community is linked, to distinct habitats or ancestral territories and the natural resources therein. It may also apply to communities or groups that have lost collective attachment to distinct habitats or ancestral territories in the project area, (...) because of forced severance, conflict, government resettlement programs, dispossession of their lands, natural disasters, or incorporation of such territories into an urban area.”*<sup>84</sup>

### What does it mean for businesses?

The Performance Standards are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities. According to the IFC, the benefits to companies include the following:<sup>85</sup>

- ❑ They provide a guard against unforeseen risks and impacts.
- ❑ They improve financial and operational performance.
- ❑ They provide a social license to operate.
- ❑ They gain an international stamp of approval.

81 International Finance Corporation, 2014

82 Described as follows under pillar 1: Strengthening the focus on frontier markets (IDA countries, Fragile Situations, and frontier regions in non-IDA countries); International Finance Corporation, 2012b, IFC ROAD MAP FY13-15; <http://www.ifc.org/wps/wcm/connect/87c9800046b649beaa04abb254bfb7d4/Road+Map+FY13-15.pdf?MOD=AJPERES>

83 The g7+ is a voluntary association of 20 countries that are or have been affected by conflict and are now in transition to the next stage of development. See: <http://www.g7plus.org/>

84 International Finance Corporation, 2012a

85 International Finance Corporation, undated

The Performance Standards may also be applied by other financial institutions.<sup>86</sup> This includes the “Equator Principle Financial Institutions”, more than 70 of the world’s leading investment banks in developed and developing countries which have adopted environmental and social standards based on IFC’s Performance Standards.

### **What does it mean for civil society organizations?**

The World Bank Group has created two accountability mechanisms to receive complaints from those who have been adversely affected by activities it finances. The mechanism with jurisdiction over the IFC and MIGA, the private-sector arm of the WBG, is the Compliance Advisor Ombudsman (CAO). Complaints to the CAO often relate to projects in sectors such as agribusiness, mining, transportation, hydropower and other infrastructure sub-sectors. The CAO’s Dispute Resolution function provides a forum for communities and companies to address grievances, if both parties agree.<sup>87</sup> The CAO can also conduct an investigation to determine if IFC has complied with its commitments in the design and supervision of the project. The CAO, however, does not have the authority to order suspension or cancellation of the project.

While some of the provisions are strong on paper, civil society has profound concerns about their implementation. Civil society would also argue that there is need for a reform of the current system towards explicitly addressing human rights violations as a result of World Bank financed activities. The current standards are not rights-based, and do not require clients to undertake human rights due diligence, as required by the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises.

## **3.2 Sectoral and country-specific initiatives**

This section provides a brief overview of sectoral and country-specific initiatives with relevance for conflict-affected areas. Most of these initiatives are industry-led, although they have often been set up as multi-stakeholder initiatives, including participation of governments and NGOs.

### **3.2.1 Security related sectoral initiatives**

#### **Voluntary Principles on Security and Human Rights**

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<i>Name:</i>	Voluntary Principles on Security and Human Rights
<i>Year of implementation:</i>	2000
<i>Secretariat:</i>	Foley Hoag LLP, Washington, DC
<i>Website:</i>	<a href="http://www.voluntaryprinciples.org/">http://www.voluntaryprinciples.org/</a>

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86 International Finance Corporation, 2012a

87 SOMO and Accountability Counsel, 2013

The Voluntary Principles on Security and Human Rights (hereafter the VPs) were established in 2000 in an initiative launched by the US and UK Governments. It is a multi-stakeholder initiative that guides extractive sector companies in maintaining the safety and security of their operations in a manner that ensures respect for human rights and fundamental freedoms. Participants in the Voluntary Principles encompass 17 oil and mining companies, including the six super majors<sup>88</sup>, Anglo American, Freeport, Rio Tinto and Statoil; 7 governments, including the United States, the United Kingdom, the Netherlands and Canada; and 9 NGOs, including Human Rights Watch, International Alert and PAX.<sup>89</sup> According to its own website, the VPs are the only human rights guidelines designed specifically for extractive sector companies. They are nonbinding and offer an operational approach to help companies function effectively. The VPs fall into three categories:<sup>90</sup>

1. Risk assessment: This issue focuses on effective risk assessments, which according to the VPs should include the following factors: Identification of security risks; Potential for violence; Human rights records; Rule of law; Conflict analysis and Equipment transfers.
2. Relations with public security: This issue is about reducing the risk of abuses by public security forces, and promoting respect for human rights. Principles have been formulated around security arrangements, deployment and conduct, consultation and advice and responses to human right abuses.
3. Relations with private security: It is acknowledged that where host governments are unable or unwilling to provide adequate security to protect a Company's personnel or assets, it may be necessary to engage private security providers as a complement to public security. Given the risks associated with such activities, specific principles have been formulated regarding private security conduct. One of these principles states that private security should act in a lawful manner, and take into account international guidelines regarding the local use of force, including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials.

The VPs were developed in response to reports of human rights abuses allegedly committed by security providers contracted by the extractive industry. As such, they have played an important role in the early stages of the debate on the role of multinational companies in fueling conflict. According to the International Committee of the Red Cross, the VPs are the only set of guidelines emanating from a multi-stakeholder process that expressly refers to international humanitarian law.<sup>91</sup> However, its major weakness is that it is a voluntary initiative without grievance or complaint mechanism in case of breaching of the principles. Questions have been raised about lack of transparency, mainly because of the confidential nature of the dialogue on which the VPs are based. There have also been concerns about the actual implementation of the principles and the participation criteria.<sup>92</sup> In 2009, the plenary adopted changes to the VPs, including minimum requirements for participation, a dispute resolution process to raise concerns about the performance of a participant, clear account-

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88 Consisting of BP, Chevron, ExxonMobil, Royal Dutch Shell and Total

89 Foley Hoag LLP, 2010

90 See VPs website: <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>

91 ICRC, 2006

92 Business & Human Rights Resource Centre website; <http://business-humanrights.org/en/conflict-peace/special-initiatives/voluntary-principles-on-security-and-human-rights>

ability mechanisms, and some public reporting on implementation, or support of implementation, of the VPs. In 2010, a National-Level Implementation Guidance Note was developed by The Fund for Peace and International Alert.<sup>93</sup> At the moment, only the Colombia case study is publicly available.<sup>94</sup>

According to the VPs website, “through implementation of the Voluntary Principles, companies are better able to align their corporate policies and procedures with internationally recognized human rights principles in the provision of security for their operations. In so doing, companies communicate to employees, contractors, shareholders, and consumers their commitment to the Principles: (1) through sharing of best practices and lessons learned with one another, and (2) by collaborating on difficult issues.” However, due to the voluntary nature of the VPs, it is not possible to hold companies to account in case they not comply with the VPs.

In general, CSOs can make use of the VPs by questioning extractive sector companies that have subscribed to the VPs about the way in which the companies are complying with them, especially with regards to respect for human rights and fundamental freedoms. As a multi-stakeholder initiative, it is also open to participating NGOs. According to the VPs website, “participation in the VPs Initiative provides non-governmental organizations with the opportunity to promote respect for human rights within the context of security provision in the extractive sector. Member organizations engage with companies and governments to promote adherence to and implementation of the Voluntary Principles through the development of strong corporate policies, practices and procedures.” There are currently 9 NGOs participating in the initiative. The fact that so few NGOs are committed to the Initiative is probably because NGOs see it as an industry driven initiative. Tellingly, in 2013 Oxfam America announced its departure. Their decision stems from their “frustration at the lack of meaningful progress in independent assurance, despite more than ten years of deliberation and discussion”.<sup>95</sup>

### International Code of Conduct for Private Security Service Providers (ICoC)

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<i>Name:</i>	International Code of Conduct for Private Security Service Providers
<i>Year of implementation:</i>	2010
<i>Secretariat:</i>	Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva
<i>Website:</i>	<a href="http://www.icoc-psp.org/">http://www.icoc-psp.org/</a>

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The International Code of Conduct for Private Security Service Providers (hereafter the ICoC), is a set of standards for security companies to respect human rights and humanitarian law. It is a multi-stakeholder initiative developed as a complement to the Montreux Document, an intergovernmental set of principles and obligations on the use of private military and security companies during armed

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93 Fund for Peace & International Alert, 2010

94 Voluntary Principles on Security and Human Rights , undated

95 Business & Human Rights Resource Centre website; <http://business-humanrights.org/en/oxfam-leaves-voluntary-principles-for-security-and-human-rights-multi-stakeholder-initiative>

conflicts.<sup>96</sup> The Code includes provisions specific to the conduct of personnel, management and governance of private security companies. These include rules on the use of force, detention, prohibition of torture and inhuman and degrading treatment, prohibition of sexual exploitation, abuse and gender-based violence, human trafficking, forced labour, child labour, discrimination, selection and vetting of personnel and subcontractors, incorporating the Code's provisions in company policies, training of personnel, health and safety, and grievance mechanisms, among other topics. 708 companies have signed the ICoC, 6 states and 13 NGO's are members of the ICoC. There is also an ICOC Association, a Swiss multistakeholder initiative composed of states, private security companies and civil society organizations.<sup>97</sup>

### 3.2.2 Sectoral initiatives related to conflict minerals

#### Kimberley Process Certification Scheme

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<b>Name:</b>	Kimberley Process Certification Scheme
<b>Year of implementation:</b>	2003
<b>Secretariat:</b>	KPCS has a rotating chair, currently China (2014)
<b>Website:</b>	<a href="http://www.kimberleyprocess.com/en">http://www.kimberleyprocess.com/en</a>

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The Kimberley Process Certification Scheme (hereafter KPCS), is a "joint government, industry and civil society initiative to stem the flow of conflict diamonds – rough diamonds used by rebel movements to finance wars against legitimate governments". It aims at eradicating conflict diamonds through a certification mechanism covering the whole supply chain, and is equipped with a sanction regime to diminish opportunities for funding war. It is an international certification protocol whereby production and transport of rough diamonds are controlled from the mine to its export point. Diamonds are sealed in containers and accompanied by a certificate of origin.

The Kimberley Process started when Southern African diamond-producing states met in Kimberley, South Africa, in May 2000, to discuss ways to stop the trade in 'conflict diamonds' and ensure that diamond purchases were not financing violence by rebel movements and their allies seeking to undermine legitimate governments. In December 2000, the United Nations General Assembly adopted a landmark resolution supporting the creation of an international certification scheme for rough diamonds. By November 2002, negotiations between governments, the international diamond industry and civil society organisations resulted in the creation of the Kimberley Process Certification

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96 The Montreux Document is the first document which defines how international law applies to private military and security companies. It is an intergovernmental document intended to promote compliance with international humanitarian law and human rights law whenever private military and security companies are present in armed conflicts. See: International Committee of the Red Cross, 2009, 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; <http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm>

97 See ICoCA website: <http://www.icoca.ch/en>



Scheme (KPCS). The KPCS entered into force in 2003, when participating countries started to implement its rules. The Kimberley Process (KP) is open to all countries that are willing and able to implement its requirements. The KP has 54 participants, representing 81 countries, with the European Union and its Member States counting as a single participant. KP members account for approximately 99.8% of the global production of rough diamonds. In addition, the World Diamond Council, representing the international diamond industry and one civil society organisation participate in the KP and have played a major role since its outset.<sup>98</sup>

### **IPIECA Guide to operating in areas of conflict for the oil and gas industry**

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<i>Name:</i>	Guide to operating in areas of conflict for the oil and gas industry
<i>Year of implementation:</i>	2008
<i>Secretariat:</i>	International Petroleum Industry Environmental Conservation Association, London, UK
<i>Website:</i>	<a href="http://www.ipieca.org/publication/guide-operating-areas-conflict-oil-and-gas-industry">http://www.ipieca.org/publication/guide-operating-areas-conflict-oil-and-gas-industry</a>

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The purpose of this Guide is to provide, in a simple and accessible format, basic guidance on risk assessment and risk management in conflict settings that oil and gas companies might face. These include conflicts between companies and local communities which are directly related to the presence and operations of the companies themselves, as well as wider social and political conflicts in which companies are not directly involved but which are very likely to impact on companies operating in such conflict environments. The IPIECA guide is a sector-driven guide and addresses risk management, adding a conflict analysis and conflict impact assessment to traditional approaches to risk analysis. The second part sets out guidance on managing conflicts while upholding a company's ethics and reputation and respecting laws and international standards.

### **Conflict Free Sourcing Initiative**

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<i>Name:</i>	Conflict Free Sourcing Initiative
<i>Year of implementation:</i>	2008
<i>Secretariat:</i>	Electronic Industry Citizenship Coalition, Washington, D.C.
<i>Website:</i>	<a href="http://www.conflictreesourcing.org/">http://www.conflictreesourcing.org/</a>

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The Conflict Free Sourcing Initiative (CFSI), founded in 2008 by members of the Electronic Industry Citizenship Coalition and the Global e-Sustainability Initiative, is a membership initiative meant to help companies address conflict minerals issues. Over 180 companies from seven different industries participate in the CFSI today, contributing to a range of tools and resources including the Conflict-Free Smelter Program, the Conflict Minerals Reporting Template, Reasonable Country of Origin

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<sup>98</sup> See Kimberley Process website: <http://www.kimberleyprocess.com/en/about>

Inquiry data and a range of guidance documents on conflict minerals sourcing. It also provides guidance documents on conflict mineral sourcing and organizes regular workshops on conflict mineral issues.

The flagship program of the CFSI, the Conflict-Free Smelter Program (CFSP) is designed to help companies make informed choices about conflict minerals in their supply chains. Focusing on a “pinch point” (a point with relatively few actors) in the global metals supply chain, the CFSP uses an independent third-party audit to identify smelters and refiners that have systems in place to assure sourcing of only conflict-free materials. Companies can then use this information to inform their sourcing choices. A number of smelters and refiners that meet the standards of the audit is published on the website of CFSP.<sup>99</sup>

### ITRI Tin Supply Chain Initiative

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<i>Name:</i>	ITRI Tin Supply Chain Initiative
<i>Year of implementation:</i>	2010
<i>Secretariat:</i>	ITRI, UK
<i>Website:</i>	<a href="https://www.itri.co.uk/">https://www.itri.co.uk/</a>

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The ITRI Tin Supply Chain Initiative (iTSCI) is a joint industry programme of traceability and due diligence designed to address concerns over ‘conflict minerals’ such as cassiterite from central Africa.<sup>100</sup> The iTSCi system aims to meet the needs of companies wishing to maintain trade with responsible supply chain actors in the Democratic Republic of Congo (DRC) and adjoining countries, as well as to meet due diligence expectations of the international community in terms of guidance from the UN, OECD and national laws such as the Dodd Frank Act in the US. The initiative assists upstream companies (from mine to smelter) to institute the actions, structures, and processes necessary to conform with the OECD Due Diligence Guidance (DDG) at a very practical level, including small and medium sized enterprises, co-operatives and artisanal mine sites. It is designed for use by industry, but with oversight and clear roles for government officials. It also takes into account the recommendations of the UN Security Council (UNSC) to expand due diligence to include criminal networks, as well as armed groups and to include violations of the asset freeze and travel ban on sanctioned individuals and entities.<sup>101</sup>

iTSCi has been in development since 2008 and was first piloted in south Kivu, eastern DRC, during the summer of 2010, but project activities had to be closed down due to the mining suspension initiated by the Government of DRC from September 2010 to March 2011. Projects in the Kivus will be re-started in the near future depending on international and industry approval of non-conflict-mines, further funding, and the confirmation that Dodd-Frank compliant buyers will re-enter the market. Since 2011, iTSCi has been in the implementation phase in Rwanda and the southern DRC

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<sup>99</sup> See CFSI website: <http://www.conflictreesourcing.org/conflict-free-smelter-refiner-lists/>

<sup>100</sup> In addition to tin, coltan is also certified under iTDCi in eastern Congo and Katanga; Pers. comm. C. Bwenda, Dec. 2014

<sup>101</sup> See ITRI website: [https://www.itri.co.uk/index.php?option=com\\_zoo&view=item&Itemid=189](https://www.itri.co.uk/index.php?option=com_zoo&view=item&Itemid=189)

province of Katanga. iTSCi may be extended to Burundi and Uganda, if funding is assured, and eventually the entire Great Lakes Region.<sup>102</sup>

### Conflict Free Tin Initiative

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<b>Name:</b>	Conflict Free Tin Initiative
<b>Year of implementation:</b>	2012
<b>Secretariat:</b>	unknown
<b>Website:</b>	<a href="http://solutions-network.org/site-cfti/">http://solutions-network.org/site-cfti/</a>

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The Conflict Free Tin Initiative (CFTI) is a pilot focused on South Kivu, Eastern DRC. The traceability system put in place will establish a conflict-free tin supply chain. There are at least six levels in this supply chain from mine to end-user. The Dutch Government acts as a broker, bringing the partners along the supply chain together, from mine to smelter to end-user. The Conflict Free Tin Initiative will have three phases, a) the identification of a conflict-free mine and tracking of the minerals from the mine to the smelter while managing any associated risks b) linking with the Conflict-Free Smelter Program, and c) building downstream demand (encouraging companies to buy this conflict free tin). It is supported by 12 companies, including Fairphone, the Dutch Ministry of Foreign Affairs and 2 NGOs. According to Dutch Minister Ploumen of Foreign Trade and Development Cooperation, *“the Conflict Free Tin Initiative is a good example of a project in which aid and trade come together. A diverse group of stakeholders have successfully created a supply chain to export conflict free minerals from the conflict prone areas of the Democratic Republic of Congo.”*<sup>103</sup>

### Conflict-Free Gold Standard

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<b>Name:</b>	Conflict-Free Gold Standard
<b>Year of implementation:</b>	2012
<b>Secretariat:</b>	World Gold Council, London, UK
<b>Website:</b>	<a href="http://www.gold.org/sites/default/files/documents/Conflict_Free_Gold_Standard_English.pdf">http://www.gold.org/sites/default/files/documents/Conflict_Free_Gold_Standard_English.pdf</a>

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The Conflict-Free Gold Standard provides a mechanism by which gold producers can assess and provide assurance that their gold has been extracted in a manner that does not cause, support or benefit unlawful armed conflict or contribute to serious human rights abuses or breaches of international humanitarian law. It was launched in 2012, mainly to support the industry's compliance with Dodd-Frank Act section 1502 which requires companies to state whether the gold sourced in the DRC and used in or for their products is conflict-free.

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<sup>102</sup> See ITRI website: [https://www.itri.co.uk/index.php?option=com\\_zoo&view=item&Itemid=189](https://www.itri.co.uk/index.php?option=com_zoo&view=item&Itemid=189)

<sup>103</sup> See CFTI website: <http://solutions-network.org/site-cfti/participants/>

### 3.2.3 Country specific initiatives

#### Democratic Republic of Congo: Great Lakes Mineral Tracking and Certification Scheme

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<i>Name:</i>	International Conference of the Great Lakes Region – Mineral Tracking and Certification Scheme
<i>Year of implementation:</i>	2012
<i>Secretariat:</i>	International Conference of the Great Lakes Region, Executive Secretariat, Bujumbura, Burundi
<i>Website:</i>	<a href="http://www.icglr.org/images/ICGLR%20Certification%20Manual%20Final%20Nov%202011En.pdf">http://www.icglr.org/images/ICGLR%20Certification%20Manual%20Final%20Nov%202011En.pdf</a>

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The International Conference of the Great Lakes Region Mineral Tracking and Certification Scheme (ICGLR – MTCS) is a government led initiative that requires that economic actors involved in the chain of custody in the DRC exercise due diligence to ensure that they do not contribute to human rights abuses or conflict in the Democratic Republic of Congo. It was initiated by the DRC Government, and supported by member states of the ICGLR (Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia). It started as a voluntary scheme yet some elements (such as the Regional Certification Manual) have been taken into the national legislation of the DRC<sup>104</sup>. The scheme aims to ascertain that the mineral chain does not benefit non-state armed groups or public or private security forces who: (a) illegally control mine sites or otherwise control transportation routes, points where minerals are traded and upstream actors in the supply chain; (b) illegally tax or extort money or minerals at points of access to mine sites, along transportation routes or at points where minerals are traded; and/or (c) illegally tax or extort intermediaries, export companies or international traders. The scheme provides for mine inspections, certification mechanisms, and for independent audits. Consequently, the DRC Mining Ministry published a list of green and red mining sites in North and South Kivu. Minerals from sites flagged red are not conflict free and cannot be traded.

#### Colombia Guidelines on Human Rights and International Humanitarian Law

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<i>Name:</i>	Colombia Guidelines on Human Rights and International Humanitarian Law
<i>Year of implementation:</i>	2010
<i>Secretariat:</i>	Fundación Ideas para la Paz (FIP), Bogota, Colombia
<i>Website:</i>	<a href="http://archive.ideaspaz.org/images/Propuestas%204%20Guias%20Colombia%20FINAL%20agosto%202013%20web.pdf">http://archive.ideaspaz.org/images/Propuestas%204%20Guias%20Colombia%20FINAL%20agosto%202013%20web.pdf</a>

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<sup>104</sup> Pole Institute, 2013, p. 14

The “*Guías Colombia en Derechos Humanos y Derecho Internacional Humanitario*” (hereafter the Colombia Guidelines) is a multi-stakeholder initiative composed of members of the business community and Civil Society Organizations (CSO) in Colombia and the Colombian government. The common purpose is to contribute to the improvement of Human Rights and International Humanitarian Law in relation to business operations in Colombia. With this objective, those who are part of the Colombia Guidelines have taken on the task of developing guidelines and tools that guide the business operations in a way that upholds Human Rights and international humanitarian law. It builds on best practices in the business and human rights field, as well as on the collective commitment to the respect for human rights and IHL. In July 2010, the Colombia Guidelines were publicly launched and signed by among others Coca-Cola, Nestle, International Alert, Fundación Ideas para la Paz, and the Colombian Government. After the public launch of the initiative, practical guidelines in each of the areas that comprise the initiative have been developed on security, land and grievance mechanisms. The UN framework on Business and Human Rights (the Protect, Respect, and Remedy Framework and the Guiding Principles) has been chosen as a common framework for all the guidelines.<sup>105</sup>

### Chinese Guidelines for Social Responsibility in Outbound Mining Investments

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<b>Name:</b>	Chinese Guidelines for Social Responsibility in Outbound Mining Investments
<b>Year of implementation:</b>	2014
<b>Secretariat:</b>	Chinese Chamber of Commerce for Minerals, Metals and Chemicals Importers and Exporters (CCCMC), Ministry of Commerce, Beijing, China
<b>Website:</b>	<a href="https://www.emm-network.org/wp-content/uploads/2014/10/Guidelines-for-Social-Responsibility-in-Outbound-Mining-Investments.pdf">https://www.emm-network.org/wp-content/uploads/2014/10/Guidelines-for-Social-Responsibility-in-Outbound-Mining-Investments.pdf</a>

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In October 2014, the Chinese Chamber of Commerce for Minerals, Metals and Chemicals Importers and Exporters (CCCMC), under the auspices of the Ministry of Commerce, took concrete action to tackle the links between companies registered in China and conflict minerals when it established Guidelines for Social Responsibility in Outbound Mining Investments.<sup>106</sup> The Guidelines’ purpose is to reduce operating risks for mining and minerals trading companies overseas and ensure companies prevent their operations from directly or indirectly causing harm. The Guidelines were developed in association with the German development agency GIZ following a year-long drafting process and public consultation. They will be implemented by CCCMC members on a voluntary basis. The Chinese Guidelines reflect supply chain due diligence guidance established by the UN Security Council and the Organisation for Economic Co-operation and Development (OECD), which set out how companies can carry out checks on the sourcing of natural resources from conflict affected or high-risk areas.

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<sup>105</sup> Fundación Ideas para la Paz, 2010, *Guías Colombia en Derechos Humanos y Derecho Internacional Humanitario*

<sup>106</sup> China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, 2014

According to Global Witness<sup>107</sup>, the Chinese Chamber of Commerce has taken an encouraging step in launching Guidelines that set out how companies can conduct robust supply chain checks and break their association with the conflict minerals trade. This is especially welcome given China's prominent international role as a permanent member of the UN Security Council and the importance of Chinese companies in the Congolese minerals trade. The new Chinese Guidelines also come in the context of established and evolving initiatives in the US, the European Union and amongst industry bodies that are already influencing Chinese company behaviour. According to civil society source in the DRC, it still remains to be seen to what extent Chinese companies are going to implement the new guidelines, but it is seen as a positive step in the right direction.<sup>108</sup>

### 3.2.4 General sectoral initiatives

In this section, a number of sectoral initiatives are outlined that do not have a specific focus on conflict, but which are relevant to companies operating in a context of conflict, such as the Extractive Industries Transparency Initiative and the Roundtable on Sustainable Palm Oil.

#### Extractive Industries Transparency Initiative

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<i>Name:</i>	Extractive Industries Transparency Initiative
<i>Year of implementation:</i>	2002
<i>Secretariat:</i>	EITI International Secretariat, Oslo, Norway
<i>Website:</i>	<a href="https://eiti.org/">https://eiti.org/</a>

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The Extractive Industries Transparency Initiative (EITI), launched in 2002, is a "global coalition of governments, companies and civil society working together to improve openness and accountable management of revenues from natural resources". It aims to increase transparency in transactions between companies and governments. Countries implement the EITI standard to ensure full disclosure of taxes and other payments made by the extractive industry. Its principles state that the wealth from a country's natural resources should benefit all its citizens and that this will require high standards of transparency and accountability. Rules were drawn up to ensure that all EITI member countries commit to a minimum level of transparency in company reporting of revenues paid and government reporting of receipts. EITI is supported by 87 companies, 8 NGO's, 26 compliant countries, and 17 Northern countries.

The relevance of EITI to conflict-affected areas is quite evident. The philosophy behind EITI is that when poorly managed, extraction of natural resources will lead to corruption and even conflict instead of contributing to economic growth and social development. More openness around how a country manages its natural resource wealth is necessary to ensure that these resources can benefit all citizens. A study by IFC argues that EITI has provided tangible governance improvements in

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<sup>107</sup> Global Witness, 2014

<sup>108</sup> Pers. comm. C. Mbenda, December 2014

resource-rich conflict-affected countries. To illustrate this point, the National Coordinator of EITI in Liberia is quoted saying that “through the EITI process, suspicion and distrust are being reduced, helping to diffuse the tensions that led to conflict in the past.”<sup>109</sup>

However, civil society organizations have been critical of EITI. According to one NGO report, some of its main limitations include that EITI is not a mandatory initiative, that EITI data are imprecise and unverifiable and that EITI data does not reveal whether the country is getting a fair deal.<sup>110</sup>

In response to these criticisms, in May 2013, the EITI Board agreed to a revised EITI Standard. The revised Standard encourages more relevant, more reliable and more usable information, as well as better linkages to wider reforms, including new disclosure requirements and disaggregated reporting, which means that the data in the EITI report must now be presented by individual payment type, company and government agency and by project. Project level reporting is to be consistent with requirements in the US and EU.<sup>111</sup>

### Roundtable on Sustainable Palm Oil

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<i>Name:</i>	Roundtable on Sustainable Palm Oil
<i>Year of implementation:</i>	2004
<i>Secretariat:</i>	RSPO Secretariat, Kuala Lumpur, Malaysia
<i>Website:</i>	<a href="http://www.rspo.org/">http://www.rspo.org/</a>

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The Roundtable on Sustainable Palm Oil (RSPO) is a not-for-profit organization that unites stakeholders from the 7 sectors of the palm oil industry: oil palm producers, processors or traders, consumer goods manufacturers, retailers, banks/investors, and non-governmental organisations (NGOs), to develop and implement global standards for sustainable palm oil. The RSPO has developed a set of environmental and social criteria which companies must comply with in order to produce Certified Sustainable Palm Oil (CSPO). When they are properly applied, these criteria can help to minimize the negative impact of palm oil cultivation on the environment and communities in palm oil-producing regions. The RSPO has more than 1,700 members worldwide who represent all links along the palm oil supply chain. They have committed to produce, source and/or use sustainable palm oil certified by the RSPO.

A positive aspect of the RSPO is its Complaint System,<sup>112</sup> which can undertake dispute resolution or investigation.<sup>113</sup> The Complaints Panel can recommend the suspension or termination of membership in the RSPO. However, according to critics, the RSPO standards are inadequate since they certify and endorse both deforestation and peat land expansion as sustainable. Furthermore, the RSPO

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109 International Finance Cooperation, 2011

110 Cidse et al., 2011

111 See EITI website: <https://eiti.org/blog/charting-next-steps-transparency-extractives>

112 See RSPO website: <http://www.rspo.org/members/complaints>

113 See RSPO website: <http://www.rspo.org/members/dispute-settlement-facility>

has a poor track record of resolving land conflicts between companies and impacted communities and enforcing its criteria regarding human rights violations.

The relevance to conflict-affected areas of the RSPO standards is twofold: palm oil plantations are often one of the first business investments in post-conflict settings as it requires relatively little investment compared to the extractives industry, and there is evidence that palm oil producing companies are often involved in creating or exacerbating conflict, as argued by a recent report on “conflict palm oil”. In this report, Rainforest Action Network<sup>114</sup> claims that palm oil production is responsible for widespread human rights violations and ongoing conflicts with communities whose rights, livelihoods, and lands are being stolen and developed without their Free, Prior, and Informed Consent. Plantation workers are frequently victims of serious exploitation, including being trafficked into bonded labor, being forced to live and work under extreme conditions, with limited legal recourse, and suffering from abuse or the threat thereof. Child labor is also known to be rampant throughout palm oil plantations. In response to the report, RSPO dismisses the criticism on RSPO certified plantations creating conflict, by stating that “the RSPO was established as a solution to address exactly these detriments”.<sup>115</sup>

### 3.3 NGO tools for doing business in conflict-affected areas

NGOs have been strongly involved in the field of business and conflict. Some have been involved as critical watchdogs, some as participants in multi stakeholder initiatives aimed at solving a particular issue linked to conflict, and some have designed principles, tools or guidance mechanisms themselves. In this section, these tools are briefly presented.

#### 3.3.1 International Alert Conflict Sensitive Business Practice Guidance

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<i>Name:</i>	Conflict Sensitive Business Practice Guidance for Extractive Industries
<i>Year:</i>	2005 (updated version 2013)
<i>Developed by:</i>	International Alert, London, UK
<i>Website:</i>	<a href="http://www.international-alert.org/resources/publications/csbp-extractive-industries-en">http://www.international-alert.org/resources/publications/csbp-extractive-industries-en</a>

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London based NGO International Alert has developed a Conflict Sensitive Business Practice Guidance for Extractive Industries.<sup>116</sup> It was published in 2005 (with an update in 2013) and is based on several years of research and knowledge development. It is a very relevant and comprehensive guide, including easily applicable tools. Even though the IA Guidance is directed towards companies that are willing to adopt a conflict-sensitive approach to their operations, it is also useful for NGOs or

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114 Rainforest Action Network, 2013

115 RSPO, 2013

116 International Alert, 2005



affected communities, as it can improve their insight in the potential risks and impacts of companies operating in conflict-affected areas. International Alert is currently updating the IA Guidance and will publish a revised version in 2015.

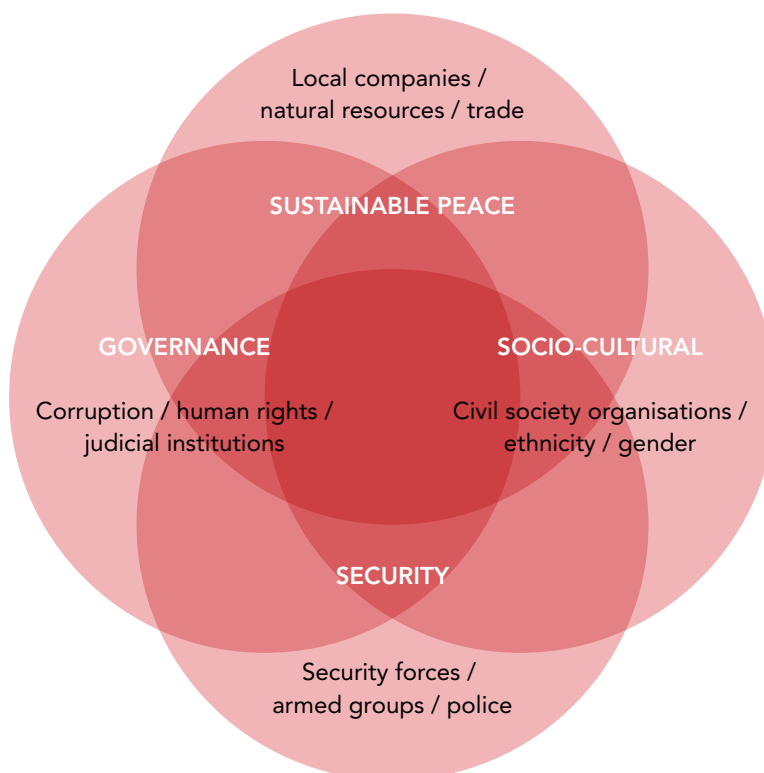
The IA Guidance consists of guidance on doing business in societies at risk of conflict for field managers working across a range of business activities, as well as headquarters staff in political risk, security, external relations and social performance departments. The IA Guidance provides information on understanding conflict risk through a series of practical documents, including an introduction to conflict-sensitive business practice, a screening Tool for early identification of conflict risk and Conflict Risk and Impact Assessment tools. In addition, special guidance on key issues where conflict could arise at any point during a company's operation is provided. These Flashpoint issues are dealing with stakeholder engagement, resettlement, compensation, indigenous peoples, social investment, dealing with armed groups, security arrangements, human rights, corruption, transparency, unions and environment.

The Screening Tool is the departure point for the Conflict-Sensitive Business Practice (CSBP) Guidance, and is particularly useful for new or 'greenfield' projects. It helps a company confirm whether the country is at risk of conflict. With the Screening Tool, information is organised under four categories, capturing four major spheres relevant to the analysis of conflict in any society: the governance, economic, socio-cultural and security sphere. This enables the detection of a range of potential issues (such as those outlined as examples in Figure 4) in any given context.

It then offers a framework for an initial assessment of the type and level of conflict risk, which in turn alerts the company to the level of urgency required for mainstreaming a conflict-sensitive approach. In worst-case scenarios, this includes raising potential 'showstopper' issues that may require a decision not to proceed with the investment at all. In less extreme cases, when investment proceeds, the initial assessment made through the screening should be deepened using the Macro-level Conflict Risk and Impact Assessment tool (M-CRIA) and the Project-level Conflict Risk and Impact Assessment tool (P-CRIA) during subsequent stages of the project cycle.

In the IA Guidance, it is noted that a key failing of most existing corporate political and financial risk assessments is the sole focus on viewing conflict through the lens of the company. The question asked tends to be 'what might the impact of conflict be on the project?' not 'what is the conflict?'. The IA Guidance takes the context of any existing or potential conflict as its starting point, thereby ensuring that the full range of two-way impacts can be understood, anticipated and addressed.

**Figure 4: Major spheres relevant to the analysis of conflict<sup>117</sup>**



### 3.3.2 Redflags Portal

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<i>Name:</i>	Redflags Portal
<i>Year:</i>	2008
<i>Developed by:</i>	International Alert, London, UK and Fafo Institute for Applied International Studies, Oslo, Norway
<i>Website:</i>	<a href="http://www.redflags.info/">http://www.redflags.info/</a>

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The website [www.redflags.info](http://www.redflags.info) is a portal developed by International Alert and Fafo, and consists of a list of activities which should raise a 'red flag' of warning to companies of possible legal risks, and the need for urgent action. The activities identified are drawn from existing international law and court cases. Redflags also presents additional resources for companies, governments, affected communities and researchers. The activities/domains identified are:

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<sup>117</sup> International Alert, 2005, p.41

- ❑ expelling people from their communities,
- ❑ forcing people to work,
- ❑ handling questionable assets,
- ❑ making illicit payments,
- ❑ engaging abusive security forces,
- ❑ trading goods in violation of international sanctions,
- ❑ providing the means to kill,
- ❑ allowing use of company assets for abuses,
- ❑ financing international crimes.

Redflags assists companies in understanding the legal ramifications of their potential involvement in wrongdoing, and provides a guide for law-abiding companies as to how the expectations for compliance are changing. The website gives basic information about the potential for litigation, based on actual legal actions involving businesses or business people and international crimes. Redflags seeks to help companies avoid participation in the worst forms of human rights abuse and more broadly to strengthen the global trend towards accountability for such participation. It can also help companies with their due diligence activities to avoid company participation in such crimes, while it can be used by communities affected by company activities seeking to better understand what their rights may be.

### 3.3.3 Global Witness Do No Harm Guide

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<i>Name:</i>	Do No Harm Guide for companies sourcing from the DRC
<i>Year:</i>	2010
<i>Developed by:</i>	Global Witness
<i>Website:</i>	<a href="http://www.globalwitness.org/library/do-no-harm-guide-companies-sourcing-drc">http://www.globalwitness.org/library/do-no-harm-guide-companies-sourcing-drc</a>

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The Global Witness Do No Harm Guide for companies sourcing from the DRC<sup>118</sup> provides guidance to companies on how to apply due diligence, in response to its observation that “few companies are actually doing it.” According to Global Witness, the due diligence that companies using minerals or metals originating from eastern DRC needs to undertake consists of:

- ❑ A conflict minerals policy
- ❑ Supply chain risk assessments, including on the ground checks on suppliers
- ❑ Remedial action to deal with any problems identified
- ❑ Independent third party audits of their due diligence measures
- ❑ Public reporting

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118 Global Witness, 2010

With regards to the information-gathering component – the supply chain risk assessment – there is a distinction to be drawn between the measures taken by ‘upstream’ companies that trade or smelt raw mineral concentrate and downstream’ manufacturers that use the refined metals. Supply chain risk assessments by upstream firms should be based primarily on field assessments. They should also include compilation and analysis of chain of custody data. Downstream manufacturers, by contrast, should focus their supply chain risk assessments on verifying that the smelters that produce the refined metal that they use have proper controls in place. The relevance of the Global Witness Guide is in its comprehensiveness, its clarity, and its specific focus on the DRC. One of the strengths of this guide is that companies can no longer argue that there is no practical guidance on how to carry out due diligence in the eastern DRC. As Global Witness puts it, “by putting these measures in place, companies can help to create a mining sector in eastern DRC that brings real benefit to the people who live there. A due diligence-based approach to sourcing minerals and metals is not about imposing blanket bans on trade; it is about ensuring that business does not perpetuate armed violence, serious human rights abuses and other crimes.”

### 3.3.4 IHRB From Red to Green Flags Report

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<i>Name:</i>	From Red to Green Flags Report
<i>Year:</i>	2011
<i>Developed by:</i>	Institute for Human Rights and Business, London, UK
<i>Website:</i>	<a href="http://www.ihrb.org/publications/reports/from_red_to_green_flags.html">http://www.ihrb.org/publications/reports/from_red_to_green_flags.html</a>

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In 2011, the Institute for Human Rights and Business launched the report “From Red to Green Flags – The corporate responsibility to respect human rights in high-risk countries”. It is designed to assist corporate managers as well as NGOs, governments and academics with an interest in business and human rights and related fields. Conceptually, the report builds upon earlier work that was undertaken for the ‘Red Flags’ guidelines (see section 3.3.2). Where ‘Red Flags’ established a list of things that companies should not do when investing in high-risk areas, this report attempts to establish a clearer sense of what companies should do. Companies operating in weak governance zones or dysfunctional states face multiple human rights risks, and their actions may pose risks to others. Building on the UN endorsed Protect, Respect, Remedy framework on business and human rights, this report explores the specific human rights dilemmas and challenges facing companies operating in such contexts and provides detailed guidance for business leaders in meeting their human rights responsibilities.

The guide is divided in two parts: the first part examines the challenges for companies and specific responsibilities associated with them, the second part explores the company responses. A central concept to the guidelines is Enhanced Due Diligence, and it includes a useful summary of measures to be included under such an Enhanced Due Diligence effort.

### 3.3.5 DCAF and ICRC Toolkit

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<b>Name:</b>	Toolkit for Addressing Security and Human Rights Challenges in Complex Environments
<b>Year:</b>	2014
<b>Developed by:</b>	Geneva Centre for the Democratic Control of Armed Forces (DCAF) and International Committee of the Red Cross (ICRC), Geneva, Switzerland
<b>Website:</b>	<a href="http://www.securityhumanrightshub.org/sites/default/files/publications/DCAF-ICRC%20Toolkit.pdf">http://www.securityhumanrightshub.org/sites/default/files/publications/DCAF-ICRC%20Toolkit.pdf</a>

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The Toolkit is part of a joint DCAF-ICRC project that draws on the experience of the two organisations in order to support companies and other actors facing security and human rights challenges in complex environments. As part of this project, DCAF and the ICRC have also developed a Knowledge Hub.<sup>119</sup>

A scoping study in 2013 concluded that there is an overload of resources on security and human rights related issues. However, existing guidance and tools very often revolve around the same issues, while some challenging aspects of engagement with host governments or with public and private security are under-developed or ignored. Furthermore, resources are found in different locations, are not always publicly accessible or are not available in a user-friendly format that responds to the needs of field and headquarters personnel. Many of those consulted find it time-consuming to identify the information they need. At times the documents consulted provide only limited practical advice on specific issues of concern.

The Toolkit has the form of an overall guidance document with references to a selection of the most relevant existing resources and tools. Based on the priorities identified in the scoping study, the first two tools focus on: 1) "Working with host governments", and 2) "Working with public security forces". The Toolkit is a living document, allowing for ongoing work and updates. Further chapters and sections are under development, including on "Working with private security providers" and on "Working with communities". The Toolkit highlights common challenges surrounding the engagement with host governments and public security forces that companies face in different contexts. Recommendations are provided on how to address these challenges building on what the Voluntary Principles, the VPs Implementation Guidance Tools and the UN Guiding Principles on Business and Human Rights specifically say on those issues. The Toolkit also draws on the body of security sector reform (SSR) good practices and lessons learned.

The primary audience for this Toolkit is any kind of company facing security and human rights challenges in complex environments. Despite being mainly targeted at companies, many of the recommendations included in this Toolkit promote joined-up working, particularly between companies, governments and CSOs. Different actors may find this Toolkit useful as a means to foster common understandings and to identify practical ways of working with companies to address challenges faced on the ground.

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<sup>119</sup> See: [www.securityhumanrightshub.org](http://www.securityhumanrightshub.org)

## 4 Conclusions and recommendations

*Sadly, amid the surge of interest among multinational companies in the developing world, and the concomitant rise in trade, investment and outsourcing, fragile states are unable to garner anything but the paltriest fruits from globalization.*

Seth Kaplan, 2008, Fixing fragile states – a new paradigm for development

### 4.1 General conclusions

Based on the findings of this paper, the following conclusions can be drawn:

- ❑ As described in this paper, a multitude of principles and guidelines aimed at improving business practice in conflict areas have emerged over the last 15 years. The relevance of the two main generic guidelines, the *UN Guiding Principles for Business and Human Rights* and the *OECD Guidelines for Multinational Enterprises*, for conflict-affected areas is significant. The UNGPs make special reference to conflict contexts in several of its principles, and Special Representative John Ruggie has produced an additional report on the implementation of the UNGPs in conflict-affected areas. The OECD Guidelines do not refer to conflict contexts directly, but in two complementary documents to the Guidelines, more specific guidance is provided for companies operating in conflict-affected areas or weak governance zones. In these specific guidelines, the importance for companies to conduct risk assessments of potential negative impacts of their business operations is included, as well as the importance of conflict due diligence. Also, the IFC Performance standards are particularly relevant for conflict-affected areas because this financial institution has a growing portfolio in fragile and conflict affected areas.
- ❑ In addition, a number of guidance tools have been published by the UN Global Compact as well as by NGOs such as International Alert and Global Witness, providing companies with more detailed and practical guidance in dealing with conflict related issues. For specific sectors, especially the extractives industry, many guidelines are available that were mostly sectoral initiatives. There is also a growing number of country-specific initiatives and guidelines for conflict-affected areas, among others for the DRC and Colombia.
- ❑ 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. Such an impact evaluation would be an important step towards more effective use of guidelines.
- ❑ Guidelines and principles do not always offer the possibility to address wrongdoing or harm caused; very few have a non-judicial grievance mechanism attached, with the exception of the OECD Guidelines and the IFC Performance Standards.

- ❑ A recent study by DCAF and ICRC concluded that there is an overload of resources on security and human rights related issues. However, existing guidance and tools very often revolve around the same issues, while some challenging aspects of engagement with host governments or with public and private security are under-developed or ignored. In response to this observation, a toolkit was developed to address common challenges surrounding the engagement with host governments and public security forces that companies face in different contexts. This toolkit offers a very useful guidance for companies and is filling an important gap in terms of practical guidance to cooperative companies.
- ❑ In the case of uncooperative companies that are willingly and knowingly profiting from conflict or contributing to conflict, voluntary international standards may not be the most effective way to change a company's behaviour. In this case, civil, administrative or criminal liability is more appropriate, combined with "naming and shaming" campaigns by civil society organisations and trade unions.
- ❑ Another major problem is the lack of government capacity or political will in conflict-affected states to implement and monitor existing guidelines and to enforce existing laws in the field of business and human rights. The lack of a well-functioning state means that companies can often operate freely and without being held accountable for human rights violations.
- ❑ For civil society organisations, one of the main difficulties is that there is no single guideline or standard for holding companies accountable in conflict-affected areas, and the existing guidelines are not tailored to the specific context of particular conflict settings. In addition, in conflict-affected areas, there is very limited civil society capacity to monitor human rights abuses and to provide follow up actions in holding companies accountable for corporate misconduct. This means that there is a strong need to build capacities in this field, both at government and CSO level.

## 4.2 Recommendations

After reviewing the multitude of international principles and guidelines for conflict-affected areas, it has become clear that there is need for more clarity on how companies in conflict-affected areas can ensure that they are fulfilling their corporate responsibility. At the same time, civil society organisations need to be made more aware of the different principles and guidelines, so they can monitor companies more effectively and question them about their responsibility to respect human and environmental rights. Several problems have been identified: the voluntary nature of the principles and guidelines, the lack of capacity of governments and civil society to monitor companies' behavior and the lack of accountability mechanisms. Unless these problems are solved, Seth Kaplan's observation that "fragile states are unable to garner anything but the paltriest fruits from globalization" will continue to ring true. Therefore, the following recommendations are given:

- ❑ 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 is recommended to hold a discussion on the best way forward, including 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 guidances of the UN Working Group on Business and Human Rights. This guidance should build upon the work of others, including the toolkit recently developed by DCAF and ICRC.
- ❑ Such a specific guidance would benefit greatly from an impact evaluation that looks into the extent to which the existing guidelines are implemented in conflict-affected areas.
- ❑ There is need for more country specific guidances, to be included in the National Action Plans of conflict-affected countries. These country specific guidances should consist of a 'smart mix' of mandatory and voluntary measures.
- ❑ MNCs are generally not very familiar with international humanitarian law, or with international standards and guidelines around corporate responsibility. Therefore, it is recommended to raise awareness among MNCs on these issues, to ensure that they operate accordingly.
- ❑ There is need for an improved legal framework for multinational companies from OECD countries, to make it legally binding to carry out conflict due diligence on the basis of the OECD Due Diligence Guidance for conflict-affected areas.
- ❑ Especially for companies from non-OECD countries, such as China, India, the Middle East or Russia, new ways need to be found to strengthen corporate responsibility standards for these companies. In this light, the recently developed Chinese guidelines for mining companies are a positive sign.
- ❑ Governments of conflict-affected states need to be pressured to provide the necessary legal framework for conflict due diligence, following the initiatives by the US and EU in this field.



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## Multinationals and Conflict

International principles and guidelines for corporate responsibility  
corporate responsibility in conflict-affected areas

This publication aims to bring together existing knowledge about 24 international principles and guidelines for companies operating in conflict-affected areas. Ultimately, this paper hopes to contribute to the private sector's potential of making a positive contribution to sustainable development, peace and security. Over the past 15 years, a plethora of internationally accepted principles and guidelines have been developed for business and human rights, culminating in the adoption of the United Nations Guiding Principles for Business and Human Rights in 2011. Many of these principles have special relevance for conflict-affected areas, as the risk of gross human rights abuse is most prevalent in those areas. However, this multitude of guidelines with relevance for conflict-affected areas has not visibly improved multinational companies' track record in human rights violations and there are still some major problems with the existing principles and guidelines, which are analyzed in this paper. Basically, there is need to provide more clarity on how to implement the different existing international principles and guidelines. It is therefore recommended to hold a discussion on the best way forward, including 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.

