

B. Interventions and Inputs

Short Reflections on the U.N. Working Group's July 2020 Report to the General Assembly: "Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action"

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One of the more challenging issues that confronted the process of drafting (and then applying) the UN Guiding Principles for Business and Human Rights, centered on the duty of states to protect--and more relevantly the responsibilities of companies to respect--human rights in conflict zones (as well as in weak governance zones).¹

The problem of business operation in conflict (and weak governance) zones remains a key issue for framing the business, legal, political, economic, and societal risks of operating in the face of conflict or in the absence of the state. It was therefore with great anticipation that I read the UN Working Group for Business and Human Rights Report to the UN General Assembly "Business, human rights and conflict-affected regions: towards heightened action."²

¹ Discussed in more detail at Larry Catá Backer, "Corporate Social Responsibility in Weak Governance Zones, *Santa Clara Journal of International Law* 14(1):297-332 (2016).

² Working Group on the issue of human rights and transnational corporations and other business enterprises, Report: "Business, human rights and conflict-affected regions: towards heightened action, "A/75/212 (21 July 2020); available [<https://undocs.org/en/A/75/212>] (hereafter the "Working Group Report").

The Report's focus is quite specific and quite pragmatic:

In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises clarifies the practical steps and outlines practical measures that States and business enterprises should take to prevent and address business-related human rights abuse in conflict and post-conflict contexts, focusing on heightened human rights due diligence and access to remedy.³

This approach is laudable. And the UN Working Group handled the task with great competence, considering the complexities of the issues and the severe space limitations for its report. For that they are to be congratulated. The Report provides a welcome framework for considering the issues, especially in the narrowly focused context of traditionally defined conflict zones.

The purpose of these reflections is to provide the Working Group, and those who read the Working Group Report, with an analysis from the perspective of an outsider to the Working Group Report's preparation or content. It is followed by the Working Group Report's Recommendation.

1. Paragraphs 9-12 of the Working Group Report make it quite clear that the focus of the report is on conflict zones, and especially those to which it might be asserted that international humanitarian law applies. It more delicately connects that focus with the architecture and institutions of international criminal law built around the Rome Statute and the International Criminal Court. Indeed, the scope of responsibility is rather narrow--it applies where conventional humanitarian law may apply in cases of state to state conflict.⁴ First there are areas in which there remains a sometimes lively dispute about the status of territory between states and non-state actors. As likely action may center on territory in which sovereign title is contested among states.

³ Ibid., Summary.

⁴ Ibid., ¶ 9.

Moreover the linkage to the architecture of the Rome Statute and the International Criminal Court system produces its own challenges. An important consideration in this context is that there are several states that have rejected the architecture and institutions of the ICC, and others that appear to use membership in that community strategically to suit their interests. That presents a sometimes more delicate balancing for enterprises caught between competing pressures in the construction and application of their due diligence. It also changes the focus of human rights due diligence by centering humanitarian law principles (flowing by and through states) to the activities of enterprises. The issue of the effective transfer of sovereign responsibility in that context is assumed but not justified. It suggests a movement by the Working Group toward embrace of a principle (with respect to which there is no consensus) that at least in these contexts enterprises will be treated as sovereign instrumentalities though not necessarily as sovereign instrumentalities whose conduct produces liability to the states whose instrument they are assumed to be.

2. It follows that the Working Group Report's advice works best in the conventional and increasingly old fashioned situations of in which conflict is bound intimately to territory. Yet increasingly conflict occurs outside of the traditional limits, and well beyond the scope for which international humanitarian law was created. Law, of course, tends to be focused on the past and very late to the present. That insight is most telling here. While there remain traditional conflicts (and the territorial spaces within which their existence is confined); increasingly the territorial boundaries of conflict become harder to define. To the extent they are defined by law they miss the point of modern warfare--one that no longer respects the niceties of territory. A classic example: a conflict zone in region A may produce terrorist (one off) attacks in Territories B and C which are otherwise conflict free as those terms are conventionally defined.

3. Moreover, it is not clear that there ought to be a sharp division--one developed arbitrarily through the construction of legal categories--that separate conflict from weak governance zones. There may be no traditional conflict in a large portion of province B, for example, yet because of the power of criminal gangs, the state authorities may have very little power to assert effective control over that part of Province B. And yet that is

where Company C operates. No state wants to admit that it lacks effective control over parts of its territory. And that is as true in the heart of Salerno Italy and the portions of Chicago, as it may be in areas of Mexico. And yet, areas of weak governance, like those of traditional conflict, ought to trigger the sort of heightened responsibility for enterprises--and the assertion of a more pro-active duty, by states. In both weak governance and conflict zones the basic insight of the Report ought to apply: "Businesses are not neutral actors; their presence is not without impact. Even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics."⁵

4. It is not clear that the Working Group expects far too much of non-state armed groups. The sensibilities of armed struggle from the perspective of the Anglo-European conception of war, rather than that of wars of liberation or more traditional struggles within the context of developing and post-colonial states might have been more forcefully recognized. But here the Working Group faced a challenge from which there was no easy way out. On the one hand they argue--quite correctly--that business must understand armed non-state groups⁶ and that business must develop some sort of accountability (*post hoc*) based engagement strategy.⁷ And business ought to strive to remain impartial.⁸ This is a particularly ironic suggestion in light of the necessary partiality of business developed by the Report in ¶ 43.⁹ Yet the outlines for this strategy was constructed from out of engagements with all stakeholders other than such armed groups themselves. Indeed the use of strategic consultation¹⁰ in the preparation of the Working Group Report was essential to its focus, scope, legitimacy, and

⁵ Working Group Report, *supra*, ¶ 43.

⁶ *Ibid.*, ¶ 58.

⁷ *Ibid.*, ¶ 59.

⁸ *Ibid.*, ¶ 60.

⁹ The Working Group Report ¶ 60 declares: "This highlights one of the biggest misconceptions of business when operating in a conflict-affected environment. Businesses are not neutral actors; their presence is not without impact. Even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics."

¹⁰ On strategic consultation, see, e.g., Rob Manwaring, "Unequal Voices: 'Strategic' Consultation in South Australia," *Australian Journal of Public Administration* 69(2):178-189 (2010); Gilat Levy, "Anti-Herding and Strategic Consultation," *European Economic Review* 48(3):503-525 (2004);

objectives.¹¹ The good intentions of the Report here stand in danger of failing to produce a workable set of tools that can actually be extracted from the elegance (and it is elegant) theoretical strategic framework proposed

5. The gender lens was particularly lamentable.¹² The lamentation does not arise from the Working Group Report's intentions (which were both necessary and well stated) nor its efforts to translate intention to (corporate) action. The problem was the way in which the gender lens (as it sometimes does precisely because of the sensitivity of the topic in context--in this case the context of a United Nations system riven with quite different views of the practical expression of both gender and its lens), "ghosts" (that is, erases) the state. It does so in three respects. The first is the failure to acknowledge the complicity of international organizations, including the United Nations itself, in perpetrating acts of violence directly primarily against women in places where UN security forces have been deployed. The second is to fail to call the state to account for its own failures of duty to protect human rights, especially when the gender lens is applied. The third is its failure to acknowledge the special obligation of state owned enterprises in the context of the application of the gender lens--a remarkable failure given the recent centering of state owned enterprises in the Annual Business and Human Rights Forum, and because these enterprises are discussed in the context of captive businesses in the very next section of the Report. Here, effectively, almost the entire burden of the gender lens is shifted from the public to the private sector. And that is a great pity.

6. The Working Group Report is to be commended for its initial effort at providing a framework for approaching responsible exit.¹³ Particularly important is the recognition of the challenge for so-called captive businesses.¹⁴ The Working

¹¹ Working Group Report ¶ 57 notes: "The Working Group convened a consultation with business and humanitarian organizations to identify potential good practices that could be transferred from their practice to the business and human rights field."

¹² Working Group Report, *supra*, ¶¶62-63.

¹³ Ibid., ¶ 65 ("The first step is therefore to anticipate and plan a clear exit strategy in advance. This will allow the business to identify and assess the impacts of disengagement with affected people, including business partners and communities, and to develop mitigation strategies.").

¹⁴ Ibid., ¶¶ 66-71.

Group notes the contradiction in their own approach to the issues of captive business but then delegates its resolution to the enterprises themselves--no longer as autonomous collectives, but as pieces of a much larger geopolitical puzzle that requires them to behave for the benefit of others. That contradiction involves the use of captive business for post conflict peace building and restorative justice¹⁵ while at the same time noting that they may be subject to irresistible pressure from human rights violating combatants (including the state)¹⁶ and should they depart cause human rights harms to employees and other left behind.¹⁷

The issues of exit, though, ought to involve more than just a humane withdrawal, and persistent presence sensitive to human rights concerns. There may well be circumstances where withdrawal, however humane, will produce more severe human rights, environmental and sustainability consequences than a decision to stay. It is in those circumstances--again--that enterprises ought not to be left to their own devices. Rather these are precisely the context in which home states, often pushed by the human rights community to "do something" have something quite significant to do. It is the exploration of that "to do" arising from a salutary interlinking of First and Second Pillar obligations that remains to be fleshed out in a way that makes sense. Yet again however, the state disappears. Here, however, some of the insights form the discussion of captive businesses may be useful, though in the end in both cases, support arising from state duty ought to have a greater bearing on the due diligence for which enterprises are burdened with responsibility.

7. In fairness, one cannot say that the Working Group is unaware of the role of home states (though they remain less willing to acknowledge the robust and quite profound role of host states). That awareness, however, kicks into high gear in the context of finance and in the larger context of post conflict issues.¹⁸ The Working Group's heart is in the right place--but here, especially, its aspirational character is hard to avoid.¹⁹ (Of

¹⁵ Ibid., ¶ 71.

¹⁶ Ibid., ¶ 70.

¹⁷ Ibid., ¶ 68.

¹⁸ Working Group Report, *supra*, ¶ 79.

¹⁹ Ibid., ¶¶ 78, 80 and focus on the issues around the civil war in Syria.

course, one wonders why examples of actions in the wake of the fall of the Soviet Union in Eastern Europe in the 1990s might not have served the Working Group in the context of this discussion.

8. The Report's consideration of issues of access to justice ought to be welcomed by anyone committed to the emerging "harm principle" of business and human rights. Harm requires redress, and one ought not to be too fussy about the form of that redress as long it is acceptable. But that is an impossible principle to apply. There can be no neutrality respecting remedy where, especially in the context of business and human rights, remedy is inexorably tied to accountability to the collective as well as to the individuals directly harmed and where remedy is understood in its relationship to those harmed (the disempowering term *victim* is not used by CPE)²⁰ as only one (small?) part of the larger prevention-mitigation-remediation project at the heart of the Third Pillar. One is grateful that the report, at note 70, took the time to mention the OHCHR Accountability and Remedy Project--a valuable source of the sort of practical tool which were a core objective of the Working Group's Report.

²⁰ The Coalition for Peace & Ethics has maintained that the development and use of the term "victim" contributes to the disempowerment of individual rights holders. It detaches remedy from rights and vests the former in the hands of either public officials or non-governmental collectives in ways that strips the individual rights holder of autonomy- The irony of course is that the move to systems of reifying the legal category "victim" itself can produce human rights harms." See discussion in Larry Catá Backer, "On the Victimization of International Law and the Ethos of the Treaty Project in Article 1," *Emancipating the Mind in the New Era: Bulletin of the Coalition for Peace & Ethics* 14(2):191-195 (2019).

Working Group on the issue of human rights and transnational corporations and other business enterprises, Report: "Business, human rights and conflict-affected regions: towards heightened action," A/75/212 (21 July 2020)

VII. Conclusions

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

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

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

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

VIII. Recommendations

104. To States:

- Home and host States should use their key policy tools and levers to ensure that business engages in conflict-sensitive heightened due diligence when operating in conflict-affected areas. This may include linking access to export

credit, investment approvals and access to investment finance, to demonstrable heightened human rights due diligence.

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

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

106. Businesses should:

- Seek advice from embassies and investment and trade-related functions to receive conflict-sensitive advisory services and tools to assist them in respecting human rights in conflict-affected settings.
- Engage in heightened human rights due diligence that incorporates tools from atrocity prevention and conflict prevention to augment their existing due diligence frameworks.
- Develop operational-level grievance mechanisms that have a conflict-sensitive approach.
- Commit to active engagement with local communities and groups in conflict and post-conflict settings.
- Ensure that a gender-responsive approach is used to develop heightened human rights due diligence and in grievance, remedy and transitional justice mechanisms.
- Actively participate in truth and reconciliation processes and provide reparations and guarantees of non-repetition as part of their commitment to building peace.

