FIDH/Business & Human Rights Resource Center Blog series on the UN Binding Instrument

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Companies in conflict-affected situations: gaps in human rights protection and opportunities for clarifying and developing the existing legal framework

The Third Session of the Intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG) of last October 2017 was a prolific and tensed moment of negotiation.

Among its various contributions to the debate on the content of the treaty, FIDH has been unequivocally requesting that the issue of conflict-affected areas would be addressed in the instrument (see the joint oral statement of FIDH the Cairo Institute and Al-Haq that was made during the session). This contribution to the Business and Human Rights Resource Center is an opportunity for FIDH to expand on this issue and call for the re-assessment of the applicable international law framework.

I. Conflict-affected areas: the state of play

Conflict-affected areas are what might be called a "grey zone" in terms of business and human rights,

The applicable international law may vary according to the situations that may qualify as "conflict-affected". While "international armed conflict" calls for the application of a combination of international humanitarian law (IHL) and international human rights law (IHRL), other "conflict-affected areas" such as post-conflict areas do not necessarily fall under humanitarian law provisions. However, all those situations share **similar heightened risks for gross human rights violations**, of which companies may be perpetrators or accomplices. Neither of the two current regimes efficiently prevent, address, mitigate or account for business-related human rights abuses in conflict-affected areas. In ongoing situations of armed conflict, IHL provisions are essentially State-centered and address business issues to the extent that they amount to complicity with violations of humanitarian law committed by States.

In the case of the Occupied Palestinian Territories (OPTs) a recent FIDH report (see, "French banks: dangerous liaisons with the Israeli settlement enterprise", March 2017) highlighted that companies' responsibility in the OPTs rests primarily on complicity to breaches by the Israeli State of Art. 49 and 53 of the Fourth Geneva Convention (forced transfers of population and prohibition of destructions). Others have also referred to Art. 55 of The 1907 Hague Regulations, which poses that "*An occupier may not confiscate, exploit or use the natural resources–including land–in the territory it occupies for its domestic benefit*" (see S. Saadoun, "Responsible Business in Occupied Territories", June 2016). However, neither of these texts directly address the obligations of business enterprises in conflict-affected areas, and even more particularly, in situations of occupation. In addition, IHL provisions are not always applicable to post-conflict or transition contexts, where investment opportunities increase (i.e. Syria, Iraq, Myanmar).

The current framework of international law does not guarantee "enhanced" protections of human rights against business-related violations. This vacuum needs to be urgently filled. As articulated by the former UN Special Rapporteur J. Ruggie, "the most egregious business-related human rights abuses take place in such

environments, where the human regime cannot be expected to function as intended" (see the Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises).

Recognizing that the current State-centric nature of international law does not sufficiently address the realities of conflict-affected areas, the ICRC, the OECD, and the UN Guiding Principles have all proposed frameworks to address business-related violations in these contexts.

II. Soft-law frameworks and the UN Guiding Principles: a stepping stone

Conflict-affected areas have been the subject of much discussion and a number of initiatives, . Including the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and the Kimberley Process on conflict diamonds, among others.

The UN Guiding Principles of 2011 dedicate Principle n°7 and n°23 to States' duties and companies' responsibilities in high risk environments, such as conflict-affected areas. The ICRC extensively relayed those different initiatives, describing the UNGPs as "*provid[ing] authoritative guidance for states and businesses on how to prevent and address business-related human rights harms, including in conflict-affected areas"*.

To that extent, the UN Guiding Principles are a remarkable stepping stone towards binding regulations on business and human rights issues in conflict-affected areas, providing much-needed clarifications on the respective responsibilities of States and companies. Their implementation remains far from ideal. Neither States nor companies have been able to effectively operationalize them and several protection gaps still need to be closed.

As a consequence, progress towards **stronger regulations** is underway. For instance, the 2017 EU regulation on conflict minerals is the first European instrument to impose on European companies importing 3TG minerals from high-risk areas a due diligence obligation throughout their supply chain. Nevertheless, the reach of this regulation remains limited namely because the scope of obligations does not fully cover companies that are lower in the supply chain.

III. The future binding instrument: towards a new horizon

The ongoing discussions on the future binding instrument on Business and Human Rights is an opportunity to further clarify the extent of the obligations imposed both on States and on companies in fragile, high-risk and conflict-affected areas. Remaining silent on this topic would be a missed opportunity In fact, it would go against the current dynamic of responsible regulation.

More specifically, this process is an opportunity to further define and operationalize the content and implications of **enhanced due diligence.** It is important to identify that enhanced due diligence requires more **urgent and immediate measures** to prevent business activities in contexts where systematic and structural violations are occurring, or to **disengage** when the context becomes such that the company is exacerbating or driving conflict.

However, the whole burden of responsibilities cannot be carried by companies alone. It is the duty of States to make **enhanced due diligence process mandatory**, so as to ensure that any company operating abroad actively prevents, mitigates and remedies all human rights and humanitarian law abuses.

In addition, the future instrument should include, as part of the obligations of TNCs and OBEs, compliance and respect for IHL. These obligations should be coupled with **norms on liability and accountability mechanisms** to ensure their enforcement. Currently, one major obstacle to holding companies responsible is the

lack of legislation on **corporate criminal liability**, both at the national and international level. Although companies' directors could be criminally sanctioned, the burden of proof for individual criminal liability is difficult to reach, particularly when taking into account the complexity of corporate structures and their decision making processes.

Since **access to justice and remedy** is a critical issue in conflict-affected areas, it is essential to impose clear **extra-territorial obligations** on States. This would facilitate holding companies accountable when they spark, drive or intensify conflict abroad, engage with parties to a conflict, and contribute to gross human rights abuses.

Finally, we would like to echo the Special Representative, John Ruggie, who called on States to develop "innovative, proactive and, above all, practical policies and tools" to combat corporate abuse. We believe that this treaty could be one of these tools together with others, such as the UN Database on Business in Israeli Settlements that have potential in contributing to address corporate capture and abuse of human rights violations.