



**SUBMISSION TO THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS' PROJECT ON
BUSINESS, HUMAN RIGHTS AND CONFLICT-AFFECTED CONTEXTS**

Contents

What are or should be the home and host States' appropriate policies, regulation and adjudication to protect against corporate-related human rights abuses in conflict and peacebuilding situations?	2
UN human rights bodies and arms transfers	3
States' current practices on arms transfers	6
Arms companies' current practices	10
Recommendations	10
What specific measures should business take in conflict and peacebuilding situations and what does "enhanced" human rights due diligence look like in practice? How does/should the process to identify, prevent, mitigate and account for actual and potential impacts in conflict and peacebuilding contexts differ from "non-conflictual" contexts?	13
Enhanced human rights due diligence should be gender and conflict-sensitive	13
Enhanced human rights due diligence should be gender-sensitive beyond the identification of risks related to sexual and gender-based violence	15
Violations of women's economic and social rights linked to business activities in the Occupied Palestinian Territory	15
Risks of compounding violations of women's rights in the context of investment in Syria	18
Gendered impacts of arms transfers	20
Enhanced human rights due diligence should be an inclusive process and foster a safe environment for dialogue	21
Enhanced human rights due diligence should be preventative and sometimes that can mean suspending business or not doing business	22
Enhanced human rights due diligence must lead to adequate sanctions in case of non-compliance	25
What does responsible and sustainable investment in post-conflict and reconstruction contexts look like in practical terms? What actions should be taken (and avoided) by actors in the financial sector – both public financial institutions and private investors to meet their	

responsibilities under the Guiding Principles and how to use their leverage to support outcomes that do not undermine human rights and sustainable peace?	26
Challenging neoliberal assumptions on what makes sustainable peace	26
Effective reparation schemes must be underpinned by investment in economic, social and cultural rights	27
Sustainable investment in post-conflict contexts must be gender-responsive	28
Recommendations	30
What is the role of business in transitional justice? What are the implications of the Guiding Principles in a transitional justice context?	34
During conflict	35
Recommendations	35
After conflict	36
The example of ArcelorMittal in Prijedor, Bosnia and Herzegovina	36
Recommendations	38

1. *What are or should be the home and host States' appropriate policies, regulation and adjudication to protect against corporate-related human rights abuses in conflict and peacebuilding situations?*

Home and host States of corporations operating in conflict and peacebuilding situations should adopt legislation to ensure enhanced mandatory human rights due diligence of business activities for all sectors. Please see our response to question 2 for more details on our recommended approach to enhanced human rights due diligence.

During the consultations held by the Working Group on the issue of human rights and transnational corporations and other business enterprises (the Working Group) with the Business and Human Rights and Conflict Network in November 2019 in Geneva, several stakeholders underlined that the upcoming guidance must address the arms industry.¹ The UN Guiding Principles on Business and Human Rights (UNGPs) have established a clear global consensus that companies in all sectors have a responsibility to respect all human rights wherever they operate. While high-risk sectors, such as the extractive industry, are under the spotlight, hardly any discussions have taken place on the arms industry in the business and human rights field. The arms industry remains a glaring gap in business and human rights

¹ https://www.ohchr.org/Documents/Issues/Business/BCHR_consultation_28Nov.pdf

frameworks despite its clear and devastating impacts on human rights in conflict-affected areas.²

a) UN human rights bodies and arms transfers

UN human rights bodies are increasingly reminding States of their human rights obligations in relation to arms transfers. This notably follows from the 2013 Arms Trade Treaty (ATT), which includes as one of its principles “ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights” and, in article 7(1), requires that states conduct a risk assessment about the risk that arms and related items “could be used to commit or facilitate a serious violation of international human rights law.”³ The UN Human Rights Council’s resolutions on the ‘Impact of arms transfers on human rights’ have recognised the linkages between arms transfers and armed conflicts, the gendered impacts of transfers, and the human rights impacts of diversion, amongst other areas. In its 2016 resolution on arms transfers, the Human Rights Council has also called on States to “refrain from transferring arms when they assess, in accordance with applicable national procedures and international obligations and standards, that such arms are sufficiently likely to be used to commit or facilitate serious violations or abuses of international human rights law or international humanitarian law”.⁴

The impacts of arms transfers on conflict situations are also increasingly being investigated and criticised by investigative mechanisms created by the Human Rights Council including in relation to work of the Group of Eminent Experts (GEE) on Yemen, the Fact Finding Mission (FFM) on Myanmar and such as the Commission of Inquiry on Syria.⁵ In this regard, it is interesting to

² See for examples *Impact of arms transfers on the enjoyment of human rights, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/35/8*, 3 May 2017, available at:

https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/8 and *Submission from the Women’s International League for Peace and Freedom to the Office of the High Commissioner for Human Rights on the impact of arms transfers on human rights* 3 February 2017, available at:

<https://www.ohchr.org/Documents/Issues/RuleOfLaw/ArmsTransfers/WomensInternationalLeaguePeaceAndFreedom.pdf>

³ https://thearmstradetreaty.org/hyper-images/file/ATT_English/ATT_English.pdf?templated=137253

⁴ A/HRC/RES/32/12, paragraph 3, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/39/PDF/G1615439.pdf?OpenElement>

⁵ See, for example, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/42/51*, 15 August 2019, paragraphs 99 : (g) Comply with obligations to respect and to ensure respect for the Geneva Conventions relating to the protection of victims of international armed conflict, to refrain from providing arms, funding or other forms of support to parties to the conflict when there is an expectation that such support may be used to perpetrate violations of international law, including sexual and gender-based violence, in accordance with Security Council resolution 2467 (2019), as well as resolution 41/20 of the Human Rights Council; *Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/34/CPR.3*, paragraph 117 (a) The Commission recommends that countries with influence over the warring parties, in particular the permanent members of the Security Council, work in concert to engage with the parties to end the violence, in the pursuit of an all-inclusive and sustainable political transition process in the country.

note that the GEE in its latest 2019 report underlines that: “(...) *the continued supply of weapons to parties involved in the conflict in Yemen perpetuates the conflict and the suffering of the population*”.⁶ The FFM on Myanmar in its 2019 report also extensively details arms transfers made to Myanmar by States and companies and their impacts on gross violations of human rights and serious violations of international humanitarian law.⁷

Concerns and recommendations on arms transfers have also been made by the Universal Periodic Review (UPR) and by treaty bodies. For instance, in its latest UPR in 2018, Germany which is one of the world’s major arms exporters, received three recommendations on arms transfers including to: “*155.14 Harmonize arms export control legislation in line with provisions of the Arms Trade Treaty and the Council of the European Union Common Position, and ensure that, before export licenses are granted, comprehensive and transparent assessments are conducted of the impact that the misuse of small arms and light weapons would have on women, including those living in conflict zones (Albania)*.”⁸ Similarly, in its latest UPR, Italy received recommendations to ensure that all arms transfers and exports comply with Italy’s obligations under the ATT,⁹ integrate a human rights impact assessment into its arms export control mechanisms,¹⁰ and take more measures to prevent arms transfers that may facilitate human rights violations, including gender-based violence, and that negatively impact women.”¹¹

The CEDAW Committee has also recommended to several States to ensure effective regulation of the arms trade and gender-sensitive human rights impact assessments of arms transfers.¹² During ATT negotiations, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW) adopted a strong statement on the need for a gender perspective in

The Commission recommends that the international community: (a) In compliance with their obligations to respect and to ensure respect for the Geneva Conventions, to refrain from providing arms, funding, or other forms of support to parties to the conflict when there is an expectation that such support may be used to perpetrate violations of international humanitarian law, and also to ratify treaties that promote respect for international humanitarian law and international human rights law when transferring arms, in particular the Arms Trade Treaty;

6 A/HRC/42/17 paragraph 92, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/240/87/PDF/G1924087.pdf?OpenElement>

7 A/HRC/42/CRP.3, available at:

<https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

8 A/HRC/39/9, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/288/76/PDF/G1828876.pdf?OpenElement>

9 148.15 Ensure that all arms transfers and exports comply with Italy’s obligations under the Arms Trade Treaty (Iceland)

10 148.7 Sign and ratify the Treaty on the Prohibition of Nuclear Weapons, and integrate a human rights impact assessment into its arms export control mechanisms (Ecuador)

11 148.232 Take more measures to prevent arms transfers that may facilitate human rights violations, including gender-based violence, and that negatively impact women (Namibia)

12 Concluding Observations on Sweden, CEDAW/C/SWE/CO/7, paragraph 35; Concluding Observations on France, CEDAW/C/FRA/CO/7-8, paragraph 22; List of issues on Germany, CEDAW/C/DEU/Q/7-8, paragraph 5; Concluding Observations on Italy, CEDAW/C/ITA/CO/7, paragraph 20

the ATT in July 2012. It recalled “that the arms trade has specific gender dimensions and direct links to discrimination and gender-based violence against women with far reaching implications for efforts to consolidate peace, security, gender equality, and to secure development”.¹³ The CEDAW Committee later adopted General Recommendation 30 that, *inter alia*, highlighted the need for “robust and effective regulation of the arms trade” to prevent gender based violence.¹⁴ General Recommendation 30 also noted that increasing rates of gender based violence can serve as an early warning of armed conflict and that proliferation of conventional weapons affects women in situations of armed conflict, domestic violence, and also as protestors or actors in resistance movements. It encouraged states parties to “address the gendered impact of international transfers of arms, especially of small and illicit arms, including through the ratification and implementation” of the ATT. In its General Recommendation 35 on gender-based violence, the Committee recommended that States parties “address factors that heighten the risk to women of exposure to serious forms of gender-based violence, such as the ready accessibility and availability of firearms, including their export, a high crime rate and pervasive impunity, which may increase in situations of armed conflict or heightened insecurity.”¹⁵

The Committee on the Rights of the Child has also regularly addressed the connection between child soldiers and small arms trade in its concluding observations. The Committee has, in particular, recommended: 1) adoption of domestic legislation explicitly prohibiting the trade and export of small arms and light weapons to countries where children are known to have been or are involved in armed conflict;¹⁶ and 2) measures to address the proliferation of small arms and other weapons within the country.¹⁷

13 *Statement of the Committee on the Elimination of Discrimination against Women on the Need for a Gender Perspective in the Text of the Arms Trade Treaty*, Committee on the Elimination of Discrimination against Women, 24 July 2012

14 *General Recommendation No. 30 on Women in Conflict Prevention, Conflict, and Post-Conflict Situations*, Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/30, paras. 29, 32, 33, 1 November 2013

15 *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35, 26 July 2017, paragraph 31 (c).

16 See, for example, concluding observations on Ukraine, CRC/C/OPAC/UKR/CO/1 (2011), Tunisia CRC/C/OPAC/TUN/CO/1 (2009), Turkmenistan CRC/C/OPAC/TKM/CO/1 (2015); Montenegro CRC/C/OPAC/MNE/CO/1 (2010); Belgium, CRC/C/OPAC/BEL/CO/1 (2006); Moldova, CRC/C/OPAC/MDA/CO/1 (2009); China CRC/C/OPAC/CHN/CO/1 (2013); Kyrgyzstan, CRC/C/OPAC/KGZ/CO/1 (2007); Hungary, CRC/C/OPAC/HUN/CO/1 (2014); Italy, CRC/C/ITA/CO/3-4 (2011); Australia, CRC/C/OPAC/AUS/CO/1 (2012); Singapore, CRC/C/OPAC/SGP/CO/1 (2014); USA, CRC/C/OPAC/USA/CO/2 (2013); Czech Republic, CRC/C/OPAC/CZE/CO/1 (2006); Egypt CRC/C/OPAC/EGY/CO/1 (2011); Belarus, CRC/C/OPAC/BLR/CO/1 (2011), Bosnia and Herzegovina, CRC/C/OPAC/BIH/CO/1 (2010); The Former Yugoslav Republic of Macedonia, CRC/C/OPAC/MKD/CO/1 (2011); India, CRC/C/OPAC/IND/CO/1 (2014); Slovenia, CRC/C/OPAC/SVN/CO/1 (2009); Canada, CRC/C/OPAC/CAN/CO/1 (2006); Tanzania, CRC/C/OPAC/TZA/CO/1 (2008)

17 See, for example, concluding observations on Sudan, CRC/C/SDN/CO/3-4 (2010); Sri Lanka CRC/C/OPAC/LKA/CO/1 (2010); Philippines, CRC/C/OPAC/PHL/CO/1 (2008)

Finally, the Committee on Economic, Social and Cultural Rights has also addressed this issue, for example, by recommending that the UK “conduct thorough risk assessments prior to granting licences for arms exports and refuse or suspend such licences when there is a risk that arms could be used to violate human rights, including economic, social and cultural rights,”¹⁸ and by asking Italy to provide information on the mechanisms or procedures put in place to ensure that human rights risk assessments are carried out prior to granting licences for arms exports.¹⁹ Moreover, in its review of Germany in 2018, the Committee recalled its concerns relating to the lack of adequate assessment in arms exports of the risks of impacts on economic, social and cultural rights, and asked Germany what lessons it intended to draw from the mistakes of past governments relating to the authorisation of arms transfers, how the risk assessment for arms exports would be improved and whether it would include the risk that importing governments divert scarce resources for much-needed social investments in order to buy weapons.²⁰

b) States’ current practices on arms transfers

Given the specific risks of gross human rights abuses posed by the arms industry, including by fuelling conflict, States have a specific obligation to ensure that business enterprises operating in conflict-affected areas are not involved in such abuses. The UNGPs also underline that States should exercise a higher standard of care to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from state agencies, as is often the case with companies in the arms industry. States are also required to ensure policy coherence between their human rights obligations and the laws and policies they put in place that shape business practices.

Despite a set of common rules and guidance on how to carry out human rights impact assessments based on the Arms Trade Treaty and the EU Common Position for arms export licensing, authorisation practices for instance by EU Member States in relation to arms exports to members of the Saudi-led coalition involved in the conflict in Yemen, show a worrying divergence and illustrate a lack of implementation. Between 2013-2017 Saudi Arabia and the

¹⁸ See E/C.12/GBR/CO/6, paragraph 12 (c)

¹⁹ “Please provide information on the mechanisms or procedures put in place to ensure that human rights risk assessments are carried out prior to granting licences for arms exports by Unita’ per le autorizzazioni dei materiali d’armamento (Unit for the Authorizations of Armament materials); and on the assessments carried out and responses to such assessments so far. In particular, please provide information on any specific measures taken to ensure that the human rights due diligence is implemented by business entities in the arms industry. Please also provide information on the implementation of the motion approved by the Parliament in June 2019 in relation to arms export to Saudi Arabia and the United Arab Emirates.” *List of issues prior to submission of the sixth periodic report of Italy*, E/C.12/ITA/QPR/6, 13 March 2020, paragraph 10,

²⁰ See question by Professor Olivier De Schutter, at <http://webtv.un.org/search/consideration-of-germany-31st-meeting-64th-session-committee-on-economic-social-and-cultural-rights/5839872155001/?term=%22consideration%20of%20Germany%22&sort=date>, at 57:23.

UAE largely increased their arms imports and some EU Member States like France, Italy and the United Kingdom were among their top suppliers.²¹

Some EU Member States have decided to suspend or to halt exports to Saudi Arabia and the UAE, as in the case of Sweden, the Netherlands, the Walloon Region of Belgium and, since November 2018, Germany.²² The German government extended this suspension five times since November 2018, most recently until 31 December 2020.²³ However, the previous decision taken stated that deliveries based on joint European production programmes and related collective licenses were not suspended until 31 December 2019, even if the final destination was Saudi Arabia or the UAE. The government was only required to carry out consultations with its European partners to avoid the use of joint end-products in the war in Yemen and industry was obliged to contractually ensure that its business partners do not export the end-products to Saudi Arabia or to the UAE.²⁴ In June 2019, the Italian Parliament approved a motion²⁵ that committed the government to adopt the necessary acts to 'suspend' the export of aircraft bombs, missiles and their components to Saudi Arabia and the UAE that may be used against civilians in Yemen. While the government publicly announced (and later confirmations came from the industry) that the suspension asked by the Parliament was put in place in July 2019 for a period of 18 months, it has not disclosed the practical and formal measures taken to implement the motion.

In addition, only a handful of national action plans (NAPs) to implement the UNGPs mention the arms industry, including those of the Czech Republic,²⁶ Belgium²⁷ and Switzerland²⁸ but major arms exporters such as the USA, Germany, Italy or France do not mention the arms industry at all.²⁹ The only NAP mentioning concrete actions in this area is the NAP of the Czech Republic,

21 http://armstrade.sipri.org/armstrade/page/trade_register.php

22 *The further development of the Common Position 944/2008/CFSP on arms exports control*, Policy Department for External Relations Directorate General for External Policies of the Union, European Parliament, page 9, available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603876/EXPO_STU\(2018\)603876_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603876/EXPO_STU(2018)603876_EN.pdf); On Sweden, see WILPF Sweden, *Submission to the Universal Periodic Review*, available at: https://www.wilpf.org/wp-content/uploads/2019/11/UPR-Submission_Sweden-2019.pdf

23 <https://www.dw.com/de/der-rüstungsexportstopp-nach-saudi-arabien-gilt-weiter/a-52893125>

24 See *Joint ECCHR & WILPF report to the CEDAW Committee pre-session (LOIPR) of Germany. The Persisting Impact of Germany's Arms Transfers on Women's Rights*,

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fics%2fDEU%2f41684&Lang=en

25 Motion 1/00204, 24 June 2019, <https://aic.camera.it/aic/>

26 Czech Republic NAP, see page 18-20:

<https://www.ohchr.org/Documents/Issues/Business/NationalPlans/NationalActionPlanCzechRepublic.pdf>

27 Belgium NAP, paragraph 33: https://www.sdgs.be/sites/default/files/publication/attachments/20170720_plan_bs_hr_fr.pdf

28 Switzerland's NAP mentions regulation of war material in P13:

https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Switzerland_NAP_EN.pdf

29 The UK's NAP mentions arms very succinctly in paragraph 16:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_I

whereas other NAPs solely describe the applicable framework under arms control legislation and fail to explain how they specifically apply the UNGPs, including in terms of human rights due diligence, to the arms sector. It is important to reiterate that the fact that the state authorities carry out assessments as part of the arms export or licensing authorisation process does not exempt companies located in that state from upholding their responsibilities under the UNGPs.

Even a country with mandatory human rights due diligence legislation like France shows that major gaps remain in the arms industry's implementation of human rights due diligence and in transparent reporting on such efforts. An analysis done by Amnesty International of French arms companies' reports under the French due diligence law indeed shows that these reports remain vague and that information such as risk mapping that analyses specific risk factors, concrete plans to address risks, implementation deadlines, allocated resources and indicators of successful implementation are not provided.³⁰

Research and litigation by the European Center for Constitutional and Human Rights (ECCHR)³¹ also found major obstacles in seeking legal accountability of arms companies, including due to:

- Export authorisations being considered to be exclusively part of foreign policy decisions and thereby exempted from judicial oversight,
- A narrow interpretation of legal standing, allowing only directly affected persons to initiate proceedings, instead of also allowing legal entities such as NGOs to bring proceedings,
- Lack of transparency over information on licensing decisions and physical deliveries, which is not readily available or not even obtainable through freedom of information requests.

It is important to underline that States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies, as is often the case with companies in the arms industry.³² Indeed, some of the top arms companies in the world are partly state-owned,

mplementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf; Norway's NAP mentions arms on page 19: https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/mr/business_hr_b.pdf;

30 For a full analysis, see: *Amnesty International et al, Loi sur la devoir de vigilance: Année 1 : entreprises doivent mieux faire*, https://amnestyfr.cdn.prismic.io/amnestyfr%2F10195ba5-2cc6-4505-8865-6588c05c0b2a_190222_etude_devoir_de_vigilance.pdf

31 *Arms trade and corporate responsibility, Liability, Litigation and Legislative Reform*, Christian Schliemann, Linde Bryk November 2019, available at: <http://library.fes.de/pdf-files/iez/15850.pdf>

32 Lockheed Martin is for instance the U.S. government's largest contractor, see:

<https://www.investopedia.com/articles/personal-finance/081416/top-5-shareholders-lockheed-martin-lmt.asp>; BAE systems is

major suppliers to their own government and, in some instances, receive substantial support from their government in the conclusion of contracts.

Under Guiding Principle 8, States are also to ensure policy coherence between their human rights obligations and the laws and policies they put in place that shape business practices. States parties should, hence, duly identify the conflict of interests that may exist between their arms export control policies, their role in supporting commercial negotiations for arms companies and their obligations under international human rights and humanitarian law, as well as with their commitments under the Sustainable Development Goals (SDGs), in particular SDG 16, Target 16.1, which requires States to significantly reduce all forms of violence and related death rates everywhere, and Target 16.4, which requires States to significantly reduce illicit financial and arms flows.

Finally, in view of the significant risks of corruption related to the arms trade, including in relation to transfers made to countries in conflict and post-conflict situations, stringent safeguards and proportional sanctions regarding corruption, conflict of interest including due to revolving doors, and measures to ensure transparency of lobbying activities of arms companies must be adopted and effectively implemented.³³

While vast sums continue to be spent on militaries, weapons, and waging war, funding gaps still remain in crucial areas such as economic and social rights (see our response to question 3 on responsible and sustainable investments in this regard) and in developing a sustainable and environmentally-friendly economy. Just as States are starting to shift from fossil-fuel based investments to renewable energy, States must stop their reliance on war profiteering economies and seek alternatives.³⁴

the U.K.'s biggest defence contractor, see: <https://www.theguardian.com/business/2017/oct/10/bae-systems-job-cuts-eurofighter-typhoon-orders>; the French government also provided support to the conclusion of arms sales to Airbus, see: <http://www.arabnews.com/node/1336081/saudi-arabia> and, the Italian Ministry of Economy and Finance holds 30.2% of the shares in Italian based arms manufacturer Leonardo, see: <http://www.leonardocompany.com/en/investitoriinvestors/titolo-borsa-stock-quote/capitale-azionariato-share-capital-1-1>

³³ See for instance: *The UK government and arms trade corruption: a short history*, Nicholas Gilby, *Campaign against the arms trade*, available at: <https://www.caat.org.uk/resources/publications/corruption/corruption-report-0605.pdf>; The Fletcher School Tufts University, World Peace Foundation, *Compendium of arms trade corruption*, available at: <https://sites.tufts.edu/corruptarmsdeals/>; <https://www.opendemocracy.net/en/opendemocracyuk/britain-s-warfare-state/>; <https://www.prospectmagazine.co.uk/magazine/raytheon-glenrothes-britain-arms-saudi-arabia>; *Transparency International UK, Defence Companies anti-corruption index 2015*, available at: <http://companies.defenceindex.org/docs/2015%20Defence%20Companies%20Anti-Corruption%20Index.pdf>

³⁴ Nuclear Education Trust, June 2018, available at:

<http://www.nucleareducationtrust.org/sites/default/files/NET%20Defence%20Diversification%20Report.pdf>

c) Arms companies' current practices

It is clear that under the UNGPs, companies operating in the arms industry have responsibilities to conduct robust human rights due diligence before, during, and after weapons transfers, and to take action to address human rights risks and abuses, including through mitigation and remediation. Human rights due diligence covers the use of arms by third parties, including by security forces of the importing states. Companies hold responsibility over the way their arms are used by third parties, which cannot be simply absolved by the State licensing process. These responsibilities exist over and above compliance with national laws and regulations—such as State arms licensing processes—which aim to protect human rights.

For companies headquartered in State parties to the Arms Trade Treaty (ATT), it is important to recall that under international law, the ATT is just one instrument that interacts with international humanitarian and human rights law. These areas cannot be artificially siloed. As such, human rights risk assessments prescribed by the ATT are only one of the aspects that States should evaluate regarding arms transfers. Companies have an independent responsibility under the UNGPs to respect human rights and cannot simply rely on States' authorisations under the ATT.

Research by Amnesty International on arms companies' policies indicates that arms companies consider human rights impacts in very limited and general ways, mainly in terms of internal compliance rather than by considering the external impacts of their products.³⁵ In addition, this research clearly shows that arms companies are not taking their individual responsibility to respect human rights which is distinct and separate from that of the State and continue to ignore the significant human rights risks and abuses that their products often give rise to.³⁶

Recommendations

To States:

- Incorporate human rights due diligence assessments for companies into the arms export and licensing process. For each potential transfer of weapons or licenses, businesses should have to demonstrate that they have thoroughly identified and addressed their

³⁵ *Outsourcing responsibility, human rights policies in the defence sector*, available at: <https://www.amnesty.org/download/Documents/ACT3008932019ENGLISH.PDF>

³⁶ *Ibid.*

actual and potential human rights impacts, including through public reporting requirements.

- Adopt mandatory due diligence laws that include the arms sector, or include mandatory human rights due diligence into the licensing process of arms exports in order to compel arms companies in their territory or jurisdiction to conduct human rights due diligence in their global operations, supply chains, including in business activities with foreign subsidiaries or other types of business relationships and in relation to the use and impacts of their products and services by third parties.³⁷
- Ensure that National Action Plans on Business and Human Rights include a requirement that arms companies in their territory or jurisdiction conduct human rights due diligence in their global operations, supply chains, including in business activities with foreign subsidiaries or other types of business relationships and in relation to the use and impact of their products and services.
- Take additional steps to protect against human rights abuses by arms companies that are owned or controlled by the State, or that receive substantial support and services from State agencies, including by putting in place human rights due diligence as a condition of bidding for procurement contracts, by withdrawing or prohibiting export credit guarantees for arms exports, or by withdrawing public investment.
- Increase transparency in reporting about export licenses, transfers of weapons, parts and components, in particular by providing regular, timely and detailed information on the exact product for which a license was received, the date of the actual export, and the specific end-use of the product, as well as by ensuring democratic oversight of the authorisation process including through independent parliamentary committees or by national human rights institutions.
- Institute mandatory registries that require arms companies to publicly and regularly disclose their lobbying activities including meetings with public authorities in charge of arms exports and introduce penalties for failure to adhere to these standards.
- Facilitate the judicial review of arms licensing and arms transfer decisions in administrative courts by:
 - Establishing legal standing for NGOs or other victims' representatives;
 - Adopt measures to limit the exclusion of relevant information from judicial review due to confidentiality based on foreign policy or national security grounds;

³⁷ <https://www.amnesty.org/download/Documents/ACT3008932019ENGLISH.PDF>; <http://library.fes.de/pdf-files/iez/15850.pdf>; https://www.wilpf.org/wp-content/uploads/2018/09/CESCR_Germany_-Jt-ECCHR-WIPLF-submission-.pdf

- Adopt clear legally binding provisions imposing transparent and robust human rights impact assessments of arms transfers, on which plaintiffs can rely on to challenge the legality of State authorisations.
- Establish specialist units, within enforcement agencies or pursuant to applicable legal regimes, that are responsible for the detection, investigation and prosecution of cases of arms companies involvement in severe human rights abuses, and that have access to expertise relating to the investigation of serious offences involving corporate entities, including in cross-border contexts and ensure adequate training for enforcement agency employees in the legal and technical aspects of investigating allegations of severe business-related human rights abuses, including in conflict-affected areas.
- Ensure that allegations of human rights abuses by arms companies are thoroughly investigated and, where appropriate, lead to criminal prosecutions.

To arms companies:

- Uphold their duty to respect human rights and to this effect, adopt human rights due diligence policies and processes covering the risks of human rights abuses linked to the use of the companies' products and services.
- Adopt a human rights policy at the highest level of management including through robust human rights due diligence policies and processes and communicate the policy internally and externally to all personnel, business partners and other relevant parties, and ensure mandatory human rights training for employees whose responsibility it is to follow and monitor conflict situations and to contribute to human rights due diligence processes.
- Human rights due diligence should identify and assess the human rights impacts of the companies' products and services continuously and before, during and after transfers. Due diligence must be ongoing and conflict-sensitive and include the heightened risk of vulnerability or marginalisation of certain groups in the context of conflict (for example, particularly those at risk of gender-based violence, civilian populations in conflict areas, internally displaced people and refugees).
- Since risks in conflict-affected or high-risk countries can change rapidly, arms companies must have policies and processes in place that allow them to respond to changing human rights risks. Companies should use information from international bodies, including UN Human Rights Council's investigative mechanisms and other human rights bodies, government advice and civil society.
- Companies should transparently report on their human rights impacts and on the measures they are taking to address them, including information on the company's policies and processes and how it has identified and addressed specific human rights

risks and abuses arising in its operations. Such information should be regularly updated in view of changing human rights risks in conflict-affected and high-risk countries.

- In their business relationships, companies should take additional prevention and mitigation measures including:
 - adopt measures to ensure traceability of products for example by requesting non-re-export certificates;
 - include clauses on respect of international human rights law in contracts with business partners regarding the use of arms;
 - limit confidentiality clauses in contracts so as to ensure that business partners can transparently report on their human rights impacts and on the measures they are taking to address them.
- Remediation:
 - where risks are identified, suspend or cease licenses and supplies of arms;
 - cooperate with any enquiries into misuse and adverse impacts and cooperate with official remedy processes used by victims of the misuse;
 - where a company has caused or contributed to an abuse, it has a responsibility to provide for or cooperate in its remediation, even if it has already withdrawn products and services.

To the Human Rights Council:

- Ensure that for countries in conflict, post conflict-situations, country resolutions and investigative mechanisms established by the Human Rights Council consistently address the impacts of arms transfers on human rights and the responsibility of States and arms companies in violations of international human rights and humanitarian law.

2. *What specific measures should business take in conflict and peacebuilding situations and what does “enhanced” human rights due diligence look like in practice? How does/should the process to identify, prevent, mitigate and account for actual and potential impacts in conflict and peacebuilding contexts differ from “non-conflictual” contexts?*

a) Enhanced human rights due diligence should be gender and conflict-sensitive

Enhanced human rights due diligence should be sensitive to conflict dynamics of the context in which the business operates. Doing a *political economy analysis* can be an important tool in understanding conflict dynamics and human rights implications for business. The dynamics in

conflict and post-conflict countries are often fast changing, so doing continuous and systematic political economy analysis can help businesses recognise changes in the given context and help shape timely and adequate actions. Conducting a political economy analysis helps understanding the access to, and distribution of wealth and power in order to analyse why, by whom, and for whom policies are created and how they affect different stratifications of society – politically, economically and socially. Understanding the national context in a comprehensive way will help businesses situate their own planned investments in relation to human rights compliance and their potential positive or negative impact on an existing conflict.

It can help to understand the political and socio-economic context and power divisions in the country; the nexus between political elites and economic interests; investment needs, focuses and priorities; the legal framework for the enjoyment of human rights, in particular of economic and social rights, and so forth. It is imperative that such analysis fully integrate an intersectional and gendered lens. Conflict affects women and men differently but it also has a differentiated impact on people depending on their age, sexual orientation and gender-identity, urban/rural location, minority status, ethnicity, among others. In a post-conflict phase there will be new, and often more complex and overlapping needs that emerge. Understanding how conflict affects people and various groups differently, how it affects their ability to work, their access to healthcare, education, or their access to natural resources such as water and land, as well as their agency and influence over political and economic decision-making, is a prerequisite to fully understanding the impacts of an intended business activity on human rights.

A comprehensive analysis must also be able to capture the complexities and power dynamics within and between different social groups in a given context in order to be able to prevent or mitigate human rights abuses against various groups, including because of pre-existing discrimination patterns. The guidelines developed by the Netherlands on conflict sensitive private sector development provide an interesting and operational framework for the implementation of such an analysis.³⁸

Doing a comprehensive analysis in a conflict context is riddled with difficulties, not least in terms of lack of reliable data, sources of information and validation methods, as well as physical access to relevant areas. In that regard, conflict-sensitive due diligence means that businesses need to ensure that their analytical teams include persons with deep contextual knowledge, including of gender and conflict dynamics, prevailing in the economic sub-sector and

³⁸ *Guidelines for Ministry and Embassy Staff and implementing Partners, Conflict sensitive private sector development*, available at: <https://www.government.nl/binaries/government/documents/reports/2019/11/04/guidelines-conflict-sensitive-private-sector-development/Guidelines+Conflict+Sensitive+Private+Sector+Development.pdf>

geographical areas of operations, of the country in question and that they have created mechanisms to obtain reliable sources of information and through which assessments can be vetted, e.g.: through engagement with local CSOs and activists and INGOs, engagement with investigative journalists, input from UN country office or other humanitarian organisations that might be present on the ground (e.g. International Committee of the Red Cross), contextual assessments made by the home-country's ministries for foreign affairs, development agencies, research institutes or other relevant institutions.

b) Enhanced human rights due diligence should be gender-sensitive beyond the identification of risks related to sexual and gender-based violence

Principle 7 of the UNGPs and its commentary recognise the heightened risks of sexual and gender-based violence in conflict-affected areas. While this is fully relevant, including in relation to risks posed by arms transfers (which impacts we develop below), by private security military companies and by extractive industries, we highlight that gendered-impacts of business activities in conflict-affected and post-conflict areas go beyond sexual and gender-based violence and must be assessed through a holistic gender analysis. According to the OHCHR, *“gender analysis helps to recognize, understand and make visible the gendered nature of human rights violations, including their specific and differential impact on women, men and others, as well as human rights violations based on gender that specifically target LGBTI. (...) Gender analysis is an integral part of a human rights-based approach, allowing one to see the many ways that gender affects human rights.”*³⁹ In this regard, the guidance developed by the Working Group that sets out a three-step gender framework guidance to States and business regarding the integration of a gender perspective in the implementation of the UNGPs should also be fully considered in the context of conflict and post-conflict situations.⁴⁰

The examples below illustrate gendered dimensions of business impacts on human rights including, but not limited to sexual and gender-based violence.

● ***Violations of women's economic and social rights linked to business activities in the Occupied Palestinian Territory***

In its Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, the Working Group

39 <https://www.ohchr.org/Documents/Issues/Women/Publications/GenderIntegrationintoHRInvestigations.pdf>

40 <https://www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf>

explained that: “A situation of military occupation is considered to be a conflict situation even if active hostilities may have ceased or occur periodically or sporadically,”⁴¹ thus stating that it considers that an area under occupation falls within the term “conflict-affected area.” For this reason, in developing its guidance as part of the Project on business in conflict and post-conflict contexts, the Working Group should consider the impacts of business activities in the Occupied Palestinian Territory.

The Israeli government began establishing settlements in the Occupied Palestinian Territory (OPT) since June 1967, and private businesses have been implicated in its settlement policies ever since⁴². In addition, it has been reported that the Israeli arms industry, which is one of the world’s leading arms exporters and made up of over 200 public and private companies, provides a large proportion of the equipment and weapons used by the Israeli army.⁴³ Such business enterprises through the supply of security services, military equipment and materials have also, directly and indirectly, enabled, facilitated and profited from Israeli’ policies vis-à-vis the OPT. The establishment of Israeli settlements in the OPT has been repeatedly qualified as a “flagrant violation of international law”⁴⁴ and a “significant source of human rights violations.”⁴⁵

By making it possible for Israel to establish, maintain and sustain those settlements, businesses contribute to serious violations of international human rights and international humanitarian law.⁴⁶ In fact, the mere fact of doing business with settlements “amounts to complicity in [those

41 <https://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>

42 Human Rights Watch (2016). *Occupation, Inc.: How Settlement Businesses Contribute to Israel’s Violations of Palestinian Rights*: <https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian>; *Report of the independent international fact finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/22/63, paras. 96-99, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-63_en.pdf

43 <https://www.caat.org.uk/resources/countries/israel/israeli-arms-industry>; Targeting Israeli Apartheid, page 124, available at: <https://corporateoccupation.files.wordpress.com/2012/01/targeting-israeli-apartheid-jan-2012.pdf>

44 See, for example, Security Council resolution 2334 (2016).

45 OHCHR (2020). *UN expert applauds database, says Israeli settlements deprive Palestinians ‘land base for genuine state and viable economy’*: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25558&LangID=E>

46 Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem - Report of the United Nations High Commissioner for Human Rights:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_39_EN.pdf; Human Rights Watch (2017) *Israel/Palestine: UN Settlement Business Data Can Stem Abuse*, available at:

<https://www.hrw.org/news/2017/11/28/israel/palestine-un-settlement-business-data-can-stem-abuse>

See also, *How TripAdvisor is fuelling human rights violations in Khirbet Susiya*, Amnesty International,

<https://www.amnesty.org/en/latest/news/2019/07/how-tripadvisor-is-fuelling-human-rights-violations-in-khirbet-susiya/>

abuses]” because they are inherently at the core of the settlement enterprise.⁴⁷ As a result of settlements, Palestinians suffer in multiple ways, including from “restrictions on freedom of religion, movement and education; their rights to land and water; access to livelihoods and their right to an adequate standard of living; their rights to family life; and many other fundamental human rights.”⁴⁸ The impacts of those violations are not gender-neutral and Palestinian women have been impacted in specific ways.

For example, a joint report to the Committee on Economic and Social Rights submitted by the Women’s Centre for Legal Aid and Counselling (WCLAC) and WILPF for the 2019 review of Israel highlighted the impacts of dumping of chemical and industrial waste by Israeli companies in the Occupied Palestinian Territories and its disproportionate impacts on women’s right to food and to health.⁴⁹ Indeed, in its latest report, the Special Rapporteur on the Occupied Palestinian Territory underlines that: “The transfer of Israeli industrial waste to treatment plants in the West Bank (...)– through the creation of so-called ‘sacrifice zones’ that are less rigorously regulated – contributes to the environmental scarring of the occupied territory, without the involvement or consent of the Palestinians.”⁵⁰

WCLAC’s findings show that agriculture is a work sphere common for Palestinian women living close to farmlands. Considering that Israeli solid waste, which is dumped and spread into the Occupied Palestinian Territory highly affects farming, Palestinian women are particularly affected including by the loss of livelihood, and the health risks related to pollution. WCLAC’s research indicates that women express feeling useless, distressed and anxious about the fact that they are no longer contributing to the economy of the family.⁵¹ This in turn affects Palestinian women’s role within the family, as their independence and ability to own and harvest land are hugely hampered. Within a context of economic crisis in the Occupied

47 Human Rights Watch (2017). *Israel/Palestine: UN Settlement Business Data Can Stem Abuse*, available at:

<https://www.hrw.org/news/2017/11/28/israel/palestine-un-settlement-business-data-can-stem-abuse>

48 Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem - Report of the United Nations High Commissioner for Human Rights:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_39_EN.pdf

49 WILPF and WCLAC *Shadow Report for the Committee on Economic, Social and Cultural Rights 66th Session - Israel Review*, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fISR%2f37010&Lang=en

50 *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 15 March 2019, A/HRC/40/73, paragraph 26

51 WILPF and WCLAC *Shadow Report for the Committee on Economic, Social and Cultural Rights 66th Session - Israel Review*, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fISR%2f37010&Lang=en

Palestinian Territory, the loss of agricultural work is a real blow for women who work in this sector as they often tend to have low skills to fit in other forms of skilled labour. Israel's pollution of the land through dumping of industrial waste, therefore, results in violations of the right to health, to work and to an adequate standard of living.⁵²

- ***Risks of compounding violations of women's rights in the context of investment in Syria***

Any investment in Syria must abide by existing international law obligations and be contingent upon accountability and human rights benchmarks. Without compliance with these standards, any investment including in the form of reconstruction assistance could facilitate past, continuous, or new violations of international law, which would in turn give rise to complicity or shared international responsibility. The letter of eminent jurists on legal obligations when supporting reconstruction in Syria, as well as consultations with our Syrian partner organisations also illustrate the need to take into account gendered human rights impacts of investment beyond sexual and gender-based violence in this context. Indeed, as stated in the letter of eminent jurists: *"For example, the location of new reconstruction projects may impact women and girls' security or property rights in a way not experienced by their male counterparts. Additionally, the failure to locate missing and disappeared male relatives is likely to impact property rights and security for women and girls. This can undermine women's ability to participate in the peace process and ultimately lead to a failure to realise the standards in Security Council Resolution 1325."*⁵³

As such, WILPF fully supports the recommendation made in the letter and for any conflict context that: *"Attention must be paid throughout the reconstruction process, and in each new project or initiative, to the potential for gendered-based and intersectional harms. Women from diverse backgrounds should be involved in the planning of new reconstruction processes and should be consulted throughout the process so that gendered and intersectional harms can be identified. Where such impacts are identified, there is an obligation to mitigate and remediate the harm."*⁵⁴

52 Ibid

53 *Statement of eminent jurists on legal obligations when supporting reconstruction in Syria*, 24 september 2018, available at: https://www.business-humanrights.org/sites/default/files/documents/Eminents%20Jurists%20Statement_Syria%20reconstruction.pdf

54 Ibid.

The war in Syria has had a devastating impact on physical infrastructure and on the lives of the population, with women often being disproportionately impacted. Many of those that survive are forced to live with physical disabilities and trauma. Many are displaced or live in the rubbles of what used to be their homes. Employment is scarce and access to basic economic and social rights such as food, shelter, water, healthcare and education are severely impeded. The social networks that previously provided a sense of security and support are gone. Through their unpaid labour in informal “care economies”, women carry out many of the services, such as the provision of health and other care services for the sick and elderly, or to those who suffer from physical or mental harms as a direct consequence of the war. Even supporting those directly involved in the conflict (through the provision of food, clothing, medical assistance, emotional support, etc.) falls to a great extent on women.

Almost one in every three Syrian households is now female headed,⁵⁵ with women assuming both the role of caretaker and breadwinner, making them significant participants in the economy, society and family life. Ensuring that women be consulted and included in transitional justice mechanisms in general, and any reconstruction process in particular, is a matter of common sense but is also in line with States’ commitments under UN Security Council Resolution 1325.

For investments in Syria, enhanced human rights due diligence means that they must be contingent upon human rights protection and accountability for committed crimes (see also our discussion under principle c)). In addition, such investments must be coupled with strong public investments in accessible and affordable services such as child and elderly care, quality education and healthcare, as well as by ensuring non-discriminatory access to resources (e.g. land/property/capital), to just and favourable conditions of work and salaries, adequate social benefits, and by addressing the gender pay-gap. Strong public investment in social and economic rights, with gender equality and social solidarity at its core, would enable women to benefit from any private investments on equal grounding with men. This also means that international financial institutions, such as the the World Bank Group and the International Monetary Fund, have a responsibility not to hamper Syria, or other countries in similar situations, from investing in social and economic rights, through conditionalities attached to their loans and grants, which often require countries to cut levels of social spending.

⁵⁵ <https://reliefweb.int/sites/reliefweb.int/files/resources/UNFPA%20Syrian%20women-%20headed%20households%2C%20hoping%20to%20survive%20and%20move%20on.pdf>

- ***Gendered impacts of arms transfers***

The impacts of arms transfers including to armed conflict and post-conflict contexts are not gender-neutral. Weapons such as battle tanks and armoured vehicles can be used to block roads or surround a village in order to force women or men to be cornered or trapped and subsequently raped, killed, or abducted. Warships can be used for trafficking women and girls or to block a harbour for the same purposes as using a tank or armoured vehicle for blocking roads. Weapons that use surveillance to build 'target profiles' for people, such as armed drones, are also capable of being used to facilitate gender-based violence. The practice of considering all males of a military age as militants before or after drone strikes, assuming them to be potential or actual combatants or militants, is a form of gender-based discrimination and violence.

Explosive weapons use blast and fragmentation to kill and injure people in the area where they detonate, as well as to damage objects, buildings, and infrastructure. When used in populated areas they cause high levels of harm to individuals, communities, and infrastructure. Bombing towns and cities results in physical and psychological harm to entire civilian populations. But it can also have specific gendered impacts, including in relation to health-care accessibility and provision, disproportionate burden of care within affected families, and stigmatisation or marginalisation of survivors with wound-related disabilities. Bombing in populated areas also leads to forced displacement, and displaced women, girls, and LGBTQ+ people have a higher risk of gender-based violence, including sexual violence, harassment, trafficking, forced prostitution, and other crimes.

In addition to being used to commit sexual and gender-based violence, the proliferation of small arms and light weapons jeopardises women's ability to participate in conflict resolution, elections, governance and post-conflict reconstruction processes. It negatively impacts on women's equality and bargaining power within the household, their mobility, and access to, and use of, resources and business and employment opportunities.⁵⁶

When it comes to gun violence against LGBTQ+ people, "mass shootings and hate crimes targeting LGBT people are especially potent forms of violence. They terrorise not only those immediately and physically impacted, but the entire community."⁵⁷

⁵⁶ See, for example, *Impact of arms transfers on the enjoyment of human rights*, OHCHR report to the Human Rights Council, A/HRC/35/8, May 2017, paragraph 12.

⁵⁷ Adam P. Romero, Ari M. Shaw, and Kerith J. Conron, *Gun Violence against Sexual and Gender Minorities in the United States: A Review of Research Findings and Needs* (Los Angeles, CA: The Williams Institute, April 2019), page 4
<https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Gun-Violence-Apr-2019.pdf>

c) Enhanced human rights due diligence should be an inclusive process and foster a safe environment for dialogue

A political economy analysis conducted in support of enhanced human rights due diligence should not only look at, and engage with the governmental (formal) level, but also take place at community and informal levels, and with the involvement of civil society to the widest extent possible. In that respect, in a conflict and post-conflict context an enhanced human rights due diligence must recognise the different categories of groups emerging as a result of the conflict, such as for example internally displaced persons, refugees, victims of gross human rights violations or violations of international humanitarian law, victims of land grabbing etc., and ensure effective mechanisms for their inclusion. It must also take into account gender dynamics in the specific context including the changes in gender roles that might arise in post-conflict settings, as well as ensure gender-responsive mechanisms of consultation. Consultations should not only be carried out before investment, but also during the investment as a continuous, dynamic and participatory process. Throughout the investment period businesses should make use of community dialogues, feedback loops and inclusive consultations to capture the human rights impacts of their activities.

Conflict and post-conflict contexts are often complex and unsafe environments for activists, human rights defenders and the community in general, to openly speak about concerns, especially if the investments are beneficial for the ruling elites. As noted by the Special Rapporteur on Human Rights defenders in a recent report on human rights defenders in conflict and post-conflict settings, “Defenders are also at the forefront in documenting, exposing and opposing civilian casualties and wider violations of international law resulting from the operations of armed groups, military and paramilitary forces, intelligence services and civilian authorities working in collusion with private corporations”.⁵⁸ In that regard, businesses as well as home States of businesses must ensure that concerns raised by local communities over the human rights impacts of investments are not used by host governments to deploy repressive measures. The General Assembly in its resolution of 2015 on human rights defenders also underlined the responsibility of businesses to respect the rights of human rights defenders to freedom of expression, peaceful assembly and association, and participation in public affairs.⁵⁹

⁵⁸ Report of the Special Rapporteur on Human Rights Defenders on Human rights defenders operating in conflict and post-conflict situations for further analysis of the specific challenges faced by human rights defenders in such contexts, paragraph 6, A/HRC/43/51, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/355/08/PDF/G1935508.pdf?OpenElement> 59; Resolution adopted by the General Assembly on 17 December 2015, Human rights defenders in the context of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally

The Special Rapporteur on Human Rights Defenders also recommended that: “International and regional reconstruction and development banks should adopt due diligence standards and zero-tolerance policies, protocols and procedures to address intimidation and reprisals against defenders raising human rights concerns in relation to projects financed by them.”⁶⁰

If there is a suspicion that communication with business representatives might cause harm to the local community, activists and human rights defenders, part of due diligence must also put in place mechanisms for safe two-way communication between the investors and the community in question. In the development of safe environments for communication and consultation, businesses can take guidance from existing protection manuals for human rights defenders.⁶¹ While such manuals are broader and often made for human rights defenders, businesses can take practical actions, such as developing a communications strategy that includes threat and risk assessments; ensuring usage of safe telecommunications technology; and development of contingency plans if security concerns materialise. Such contingency plans should be developed with involved activists, be gender-sensitive, and include considerations of appropriate safety measures for persons at risk.

d) Enhanced human rights due diligence should be preventative and sometimes that can mean suspending business or not doing business

Human rights due diligence also needs to be preventative. Structural inequalities increase vulnerability to gendered, racialised, geographic and socioeconomic or other types of violence that can lead to conflict. Businesses that do not take into account existing structural inequalities and see their investments as conflict or gender neutral risk feeding into such inequalities. Inequality does not only constrain achievement of human well-being, it also translates into unequal access to power that affects all parts of society, including resource distribution and opportunities for just economic development. Contributing to such a context also means contributing to rise in tensions and heightening the risks for violence and potentially conflict.

Recognized Human Rights and Fundamental Freedoms, paragraph 22, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>

⁶⁰ *Report of the Special Rapporteur on Human Rights Defenders on Human rights defenders operating in conflict and post-conflict situations* for further analysis of the specific challenges faced by human rights defenders in such contexts, paragraph 71, A/HRC/43/51, available at: <https://undocs.org/en/A/HRC/43/51>

⁶¹ Examples of such manuals have been developed by Protection International <https://www.protectioninternational.org/wp-content/uploads/2012/04/Protection-Manual-3rd-Edition.pdf>; OSCE <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders?download=true>; International Service for Human Rights, available at: http://www.ishr.ch/sites/default/files/article/files/ishr_hrd_toolkit_english_web.pdf; The International Foundation for the Protection of Human Rights Defenders https://www.frontlinedefenders.org/sites/default/files/protection_manual_-_english.pdf

As part of prevention, States must ensure that businesses conduct enhanced human rights due diligence in conflict-affected and high-risk areas, and that business activities, be suspended, terminated or not undertaken in circumstances where it might not be possible to prevent or mitigate risks of violations or abuses of human rights and/or of violations of international humanitarian law. Indeed, in certain situations, the immitigability of adverse human rights impacts is such that no due diligence exercise can ensure the effective respect of international human rights law and of international humanitarian law.⁶²

In addition, where risks cannot be prevented or mitigated, business activities should not be undertaken, should be suspended or terminated depending on the level of risks.⁶³ This is also particularly relevant in the context of arms transfers to countries with poor human rights records and which are enmeshed in armed conflict. When taking a decision on the suspension or termination of business activities, corporations should take into account the impacts of phasing out activities on the affected community and/or workers who depend on it. The decision must be based on an analysis of what such a decision will mean for the socio-economic situation and conflict dynamics in the community, the timeline in which the phase-out of activities should be done and which alternatives could be put in place to avoid disruptions in livelihoods of the affected community.

In relation to investment by International Financial Institutions, the Independent Expert on foreign debt in his report on lending to States involved in gross human rights abuses also underlined that: *“unless lending decisions are subjected to human rights impact assessments, appropriately targeted or mitigated by contractual measures, financial lending can have a persistent impact on authoritarian regimes, making it possible for them to consolidate autocratic rule and perpetuate political exclusion and human rights violations, and reducing the need for political concessions. However, it may sometimes be best not to lend on any*

62 See, in particular, the Report of the UN High Commissioner for Human Rights, Database of all enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/37/39, 1 February 2018, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_39_EN.pdf
Para. 40 “The scale, scope and immitigability of the human rights impacts caused by settlements must be taken into consideration as part of businesses’ enhanced due diligence exercises.”; Para. 41 “OHCHR notes that, considering the weight of the international legal consensus concerning the illegal nature of the settlements themselves, and the systemic and pervasive nature of the negative human rights impact caused by them, it is difficult to imagine a scenario in which a company could engage in listed activities in a way that is consistent with the Guiding Principles and international law. This view was reinforced in Human Rights Council resolution 34/31 on the Israeli settlements, in which the Council referred to the immitigable nature of the adverse impact of businesses’ activities on human rights.”

63 Recommendations to this effect have been made by the Independent Fact-finding mission on Myanmar in its report *“The economic interests of the Myanmar military”*, see para.189 a) to e), A/HRC/42/CRP.3, 5 August 2019, available at: <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

condition, as financial inflows could impair the human rights situation, either immediately or over the longer term.” (emphasis added)⁶⁴

States should also take an active role in prevention by cautioning business enterprises operating in their territory and/or jurisdiction against operating in armed conflict-affected and high-risk areas where it might not be possible to prevent or mitigate risks, as well as ensuring that adequate and effective liability regimes are in place to deter and sanction businesses which would still engage in activities in such areas. States should also create disincentives, including withdrawal of economic diplomacy and financial support, to deter business enterprises domiciled in their territory and/or jurisdiction from causing, contributing to, or being directly linked to human rights abuses and violations arising from their business activities or business relationships in occupied territories, conflict-affected and high-risk areas.⁶⁵

Several soft law and legally-binding instruments refer to “high-risk areas” in relation to enhanced human rights due diligence by businesses, including OECD and UN Global Compact guidelines, as well as the EU conflict-minerals regulation. While there is no unified legal definition of “high-risk areas”, they seem to refer to situations of political instability and repression that may lead to violent conflict.⁶⁶ High-risk areas could also cover internal

⁶⁴ *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Juan Pablo Bohoslavsky Report on financial complicity: lending to States engaged in gross human rights violations, A/HRC/28/59, available at: <https://undocs.org/en/A/HRC/28/59>

⁶⁵ *Business and human rights in conflict-affected regions: challenges and options towards State responses*, A/HRC/17/32, 27 May 2011, see paras. 17 and 18, available at: <http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf>

⁶⁶ The EU conflict minerals regulation provides the following definition:

“‘conflict-affected and high-risk areas’ means areas in a state of armed conflict or fragile post-conflict as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”, see REGULATION (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Article 2 f), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>; The OECD Guidelines on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provide the following definition:

“Conflict-affected and high-risk areas – Areas identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars. High-risk areas are those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law.”, see OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas Third Edition, see p. 66: <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>; Finally, the UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas provides the following definition: “Conflict-affected or high-risk areas are countries, areas, or regions: that are not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely, in which there are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently present, that are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organized violence, that are

disturbances and tensions, e.g. riots, isolated and sporadic acts of violence, violent responses to peaceful protests, not reaching the threshold of an [non-international] armed conflict under international humanitarian law, as well as certain post-conflict situations where there has been a general close of military operations but there is still violence/ high risk of violence breaking out. Enhanced human rights due diligence should extend to high risk situations and not be limited to armed conflict or post-armed conflict contexts in order to ensure more effective and comprehensive prevention of business-related human rights abuses.

e) Enhanced human rights due diligence must lead to adequate sanctions in case of non-compliance

Voluntary codes of conduct and non-binding standards adopted by governments and/or companies are not enough to prevent human rights violations and abuses related to business activities, particularly in the conflict and post-conflict context. States must adopt mandatory human rights due diligence legislation that incorporates an obligation to carry out enhanced human rights due diligence in conflict and post-conflict context. Due diligence should not be a mere procedural and “tick-the-box” exercise for business and formal compliance with due diligence obligations should not automatically shield businesses from liability for human rights abuses. Likewise, and in the case of arms companies, States’ authorisations processes should not shield arms companies or their managers from liability, since these companies hold an individual responsibility to respect human rights.

States should take adequate measures to ensure that businesses not complying with enhanced human rights due diligence obligations related to business activities in conflict and post-conflict affected areas can be held liable with adequate criminal, civil and administrative sanctions for this failure. In addition, in certain contexts, human rights due diligence, even enhanced, will not be able to ensure that businesses would not be committing or contributing to human rights abuses/violations and/or international crimes. Indeed, in certain situations, the immitigability of adverse human rights impacts is such that no due diligence exercise can ensure the effective respect of international human rights law and of international humanitarian law. This notion of immitigability has been recently

currently in transition from violent conflict to peace.” Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors A joint UN Global Compact – PRI publication, United Nations Global Compact, 2010, p. 7, available at: https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf

articulated in particular in the 2018 Report of the UN High Commissioner for Human Rights, on the Database of all enterprises involved in the activities in Israeli settlements.⁶⁷

3. *What does responsible and sustainable investment in post-conflict and reconstruction contexts look like in practical terms? What actions should be taken (and avoided) by actors in the financial sector – both public financial institutions and private investors to meet their responsibilities under the Guiding Principles and how to use their leverage to support outcomes that do not undermine human rights and sustainable peace?*

a) *Challenging neoliberal assumptions on what makes sustainable peace*

Countries coming out of conflict will inevitably be faced with difficult economic situations requiring massive investments, in physical infrastructure but also in social infrastructure in support of human well-being. However, while investments in infrastructure are prioritised, people's well-being is often left behind. As WILPF points out in our analysis of post-conflict reconstruction and recovery period in Bosnia and Herzegovina, peace agreements should prioritise social and economic rights, creating a platform from which, a sustainable and just transition from war to peace can take place.⁶⁸ Furthermore, any investments in a conflict or post-conflict country must be closely tied to transitional justice processes, safeguarding against impunity for crimes committed during the conflict and any future human rights violations.⁶⁹

The difficult economic situation post-conflict countries find themselves in leaves them often with no other choice than to turn to International Financial Institutions (IFIs) for grants and loans. Unfortunately, IFIs rely on the neoliberal assumption that a free and unregulated market, facilitated by a minimal state administration, is most likely to sustain the conditions for peace; and that low labour costs are necessary for the successful development of the economy. Conditionalities tied to such loans and grants are often used as 'tools' to push macro-economic reforms viewed as "necessary to free the market" from state regulations and ensure enough

67 See, in particular, the Report of the UN High Commissioner for Human Rights, Database of all enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/37/39, 1 February 2018, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_39_EN.pdf

68 <https://wilpf.org/wp-content/uploads/2017/08/Feminist-political-economy-ENG-FINAL.pdf>; see also Christine Chinkin, 2014. 'Gender and Economic, Social and Cultural Rights' in E. Riedel, G. Giacca and C. Golay (eds.) Economic, Social and Cultural Rights in International Law (OUP, 2014) 134-163

69 As an example, see also a policy paper done by the Syrian Women's Political Movement on a Feminist Plan for Reconstruction in Syria <https://www.wilpf.org/wp-content/uploads/2019/07/Reconstruction-EN.pdf>

fiscal space for repayment of debts. This results in the imposition of fiscal consolidation via austerity measures and the depletion of the public sector.

Austerity measures typically consist of cuts in public spending in healthcare, education, pensions, social welfare and so on, which is the opposite of what post-conflict countries need and in contradiction with their obligations to ensure the progressive realisation of socio-economic rights. Depletion of the public sector also negatively affects women's ability to recover from conflict, to actively participate in political and economic decision-making, and thus in extension it has a negative effect on gender equality.⁷⁰ Responsible and sustainable investments in post-conflict and reconstruction context must put the interest of the public at the centre, creating enabling mechanisms for coherent long-term peacebuilding. In doing so, attention must be focused on fundamentally challenging structural inequalities through the progressive realisation of socio-economic rights.

b) Effective reparation schemes must be underpinned by investment in economic, social and cultural rights

According to international law, states are obliged to ensure reparations to victims in cases of gross human rights violations and violations of international humanitarian law. The purpose of reparations is to address the harms caused by violations, to ensure satisfaction for harms suffered, and to publicly recognise victims as right-holders entitled to redress. In general, reparation programs should be put in place as soon as possible after the end of a conflict. They should be included as benchmarks in peace agreements as a way of ensuring government commitment. In order to properly address the need for reparations, an inclusive peace process is a prerequisite. Through the meaningful inclusion of civil society, and in particular of women, the understanding of the differentiated experiences of women and men, and subsequently the ability to properly address them, increases substantively.

In Bosnia and Herzegovina, for example, 25 years have passed since the end of the war, without comprehensive reparations measures being put in place. The line between the needs stemming from the war and the needs directly related to a prolonged failure of the state to ensure economic and social rights are currently completely blurred. At this point in time, it is no longer possible to discern what a war-related harm is and what is not. The population is faced with a spider net of interwoven and mutually reinforcing problems, needs and injustices that can easily overburden the already scarce resources available within the public sector. A

⁷⁰ Ibid.

comprehensive and gender-sensitive reparations program, incorporated into a peace agreement, would, if implemented early on, help create a bedrock for progressive realisation of social, economic and cultural rights.

Reparation programs can be financed in a number of ways depending on the economic situation of the country. IFIs can play a positive role by linking lending conditionalities to increased investments in the public sector (as opposed to cuts in public spending). Most notably, IFIs can support investments in areas such as healthcare, which is crucial for the physical and mental recovery of the population in a post-conflict setting and can thus be conceptualised within a larger framework of collective reparative measures.⁷¹ Safeguarding and investing in social and economic rights is key to ensure that the potential restorative effects of reparations in a transitional justice context are not undermined by a lack of access to opportunities to a decent life.

c) Sustainable investment in post-conflict contexts must be gender-responsive

The failure to prioritise the realisation of human rights, in particular of economic and social rights, in macro-economic policies, can contribute to ongoing conflicts in the country and increase the risk of conflict reoccurring. Furthermore, any investments that are not underpinned by a rigorous feminist conflict and gender analysis will contribute to a continuum of entrenched structural and gender inequalities.

As mentioned above, WILPF conducted a feminist political economy analysis of the post-conflict reconstruction and recovery processes in Bosnia and Herzegovina. The analysis highlighted how neoliberal economic policies, translated through the so-called “Reform Agenda for Bosnia and Herzegovina” negatively affected both gender equality, human rights, and sustainability of the peace.⁷² These measures were not preceded by a thorough gender and human rights impact assessment, and, hence, resulted in disproportionate impacts on women, particularly with regard to poverty. This is illustrated, for example, in WILPF’s submission to the UN Committee on the Elimination of Discrimination against Women for the review of Bosnia and Herzegovina.⁷³ Favouring large infrastructure projects such as highways and hydroelectric

71 See WILPF’s Concept and Framework for Development of Gender Sensitive Reparations Programme for Bosnia and Herzegovina, can be found at <https://www.wilpf.org/wp-content/uploads/2018/04/Gender-Sensitive-Reparations-Program.pdf>

72 <https://www.wilpf.org/wp-content/uploads/2017/08/Feminist-political-economy-ENG-FINAL.pdf>

73 Joint submission to the UN Committee on the Elimination of Discrimination against Women, 74th Session (21 Oct 2019 - 8 Nov 2019), review of Bosnia and Herzegovina, available at: https://www.wilpf.org/wilpf_statements/joint-submission-to-the-committee-on-elimination-of-discrimination-against-women-review-of-bosnia-and-herzegovina/

power dams over measures to eradicate poverty, to improve health, educational and care infrastructure has an implication on women's position in society.

When investments in public sectors are reduced in favour of private investments in male-dominated industries, women are disproportionately affected. Many women work in the public sector⁷⁴ and depend on public resources to support unpaid care work. Lack of affordable and accessible child and healthcare can impede women from participating in the formal labour market, as they are culturally expected to provide care for sick/wounded family members, children and the elderly. Thus, investment in the public sector plays a critical role in creating an enabling environment for women's participation at large in society, and particularly also in post-conflict reconstruction and recovery, which is in line with the Women, Peace and Security Agenda's provisions on women's meaningful participation.

In her expert paper to the UN Women Expert Group of the 64th session of the Commission on the Status of Women, Professor Jacqui True of Monash University discusses how IFIs could concretely provide sustainable financing for gender-inclusive peace. The paper also examines how a post-conflict context is an opportunity to address structural inequalities by reversing the depletion of the public sector and introducing what she calls "regenerative politics".⁷⁵ At the core of such politics, Professor True lists: 1) the recognition of social reproductive work; 2) rebuilding of social infrastructure, that would support the inclusion of women and other groups in the society in democratic processes; and 3) the incorporation of accountability mechanisms, such as gender-sensitive human rights impact assessments of economic reforms.⁷⁶ In this regard, the guiding principles developed by the Independent Expert on Foreign Debt and his report on the impact of economic reform policies on women's rights provide a useful analytical framework.⁷⁷

74 For example: "In accordance with IMF requirements, during 2014-2015, 165,000 civil service jobs were cut, with overall plans of a 20% reduction in the civil service workforce [...] Women comprise more than 75% of the civil service, predominately in non-managerial positions, and, therefore, have been disproportionately impacted", WILPF's UPR submission *Obstacles to Women's Meaningful participation in Peace Efforts in Ukraine*, 2017

75 UN Women Expert Group Meeting, Sixty-fourth session of the Commission on the Status of Women (CSW 64), *'Beijing +25: Current context, emerging issues and prospects for gender equality and women's rights'*. New York. 25-26 September 2019., available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/64/egm/true%20jexpert%20paperdraftegmb25ep13.pdf?la=en&vs=1128>

76 Ibid.

77 *Guiding principles on human rights impact assessments of economic reforms - Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights*, available at: <https://daccess-ods.un.org/TMP/5991202.59284973.html>; *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights - Impact of economic reforms and austerity measures on women's human rights*, available at:

https://www.ohchr.org/Documents/Issues/Development/IEDebt/WomenAusterity/UserFriendlyVersionReport_EN.pdf

The guidance to be developed by the Working Group should hence include gender analysis in its recommendations, including by building on the framework developed in the gender guidance to the UNGPs. Ensuring gender analysis and women's participation in human rights due diligence regarding business activities and investment including by International Financial Institutions in conflict, post-conflict contexts is essential to:⁷⁸

- securing women's economic, social and cultural rights;
- bringing a gender perspective and women's participation into economic recovery e.g. in reforms and reconstruction projects;
- integrating gender budgeting within post-conflict financing;
- conceptualising reparations and other transitional justice mechanisms in a transformative way so that they contribute to dismantling of structures of inequalities and empower women economically, politically and socially.

Recommendations

Based on the analysis conducted over the post-conflict reconstruction and recovery process in Bosnia and Herzegovina, WILPF developed the following detailed recommendations that could be relevant to consider in other post-conflict contexts:

In relation to the negotiations of project and lending agreements

For International financial institutions:

- International Financial Institutions, as well as States, whether acting alone or within International Financial Institutions, should not compel borrowing/receiving States to compromise satisfying their international human rights obligations or contribute to such compromise, either directly or indirectly. As a consequence, international financial institutions, bilateral lenders and other public donors, when granting a loan or giving policy advice in the context of economic reform measures, have an obligation to assess the human rights impact of those measures.⁷⁹

⁷⁸ *Exposing the gendered myth of post conflict transition: the transformative power of economic and social rights*. Madeleine Rees and Christine Chinkin, available at: https://wilpf.org/wp-content/uploads/2015/05/NYU_JILP_48_4_Rees_Chinkin.pdf

⁷⁹ In this regard, it is worth recalling the recommendations addressed to Germany by the CESCR: "Obligations of a State party under the Covenant as a State member of international financial institutions: 16. The Committee regrets that the State party, as a State member of international financial institutions, such as the International Monetary Fund and the European Stability Mechanism, has not sufficiently exercised its great leverage to ensure that the conditionalities that these institutions attach to a loan do not result in unjustified retrogression in the enjoyment of Covenant rights in borrowing States. 17. The Committee recommends that the State party make every effort to exercise its great leverage to ensure that all international financial institutions, to which it is a State member, ensure that the conditionalities attached to a loan do not lead borrowing States to

- Ensure an inclusive process of consultations with all relevant stakeholders in the early preparatory and analytical stages of a strategy and program process. Ensure broad meaningful consultations with civil (and wider) society, specifically including with women and women civil society, in the World Bank Systematic Country Diagnostics and development of the Country Strategic Framework and the International Monetary Fund “Art V” consultations and prior to approval of lending agreements.
- Always include gender, conflict and context expertise in the lead thematic and country teams, and ensure the inclusion of a gender and conflict analysis in the approval process of strategic documents by the Board of Directors of the international financial institutions.
- Carry out a clear, systematic and independent conflict-sensitive human rights impact assessment at all stages of programming to ensure that, at the minimum, the implementation of processes and programmes does no harm.
- Develop positive conditionalities on budgetary support loans and private finance such as gender-related targets to facilitate and support women’s participation in education and training, employment and business.
- Introduce a requirement for gender sensitive reparations programme as part of ‘positive’ conditionalities.
- Set targets for gender-responsive financing in line with the UN Secretary-General’s recommendation that 15 % of funding be allocated to peacebuilding initiatives that address women’s specific needs, advance gender equality or empower women (S/2010/466): by guaranteeing a portion of all funds dedicated to infrastructure and economic development is committed to projects that address women’s specific needs and advance women’s empowerment.

For States:

- Ensure transparency of the negotiation process and approval of the public for lending agreements and aim for equal representation of women and men in the negotiation and decision-making process. This includes the setup of an information channel towards the

violate their obligations under the Covenant. In particular, these conditionalities should not lead to the adoption of unjustified retrogressive measures, the violation of core obligations required by the Covenant, or have a disproportionate impact on marginalized individuals and groups. In this regard, it also recommends that the State party ensure that the international financial institutions of which it is a member to carry out a human rights impact assessment prior to the provision of the loan to this end. The Committee draws the attention of the State party to its statement on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2016/1) and the Letter by the Chairperson of the Committee on austerity measures of 16 May 2012." E/C.12/DEU/CO/6, 27 November 2018.

public and feedback mechanism on the negotiation process to ensure a consultative and inclusive process.

- Ensure specific gender analysis on all conditionalities linked to lending agreements with IFIs or other lending institutions before approval. This means, in any situation where austerity measures are proposed by an IFI there must be a comprehensive study of the gendered impact of such measures and an action plan to mitigate the adverse consequences, especially on women and girls, by all actors.
- Bilateral lenders and public donors should ensure that the terms of their transactions and their proposals for reform policies and conditionalities for financial support do not undermine the borrower/recipient State's ability to respect, protect and fulfil its human rights obligations.

In relation to the implementation of lending agreements with IFIs

For International financial institutions:

- Always include gender expertise in the project management team, and allocate resources for capacity building on a conflict sensitive gender approach to the specific area of macroeconomic reform and restructuring.
- Throughout project/programme implementation make use of community dialogues, feedback loops and meaningful and inclusive consultations to capture the effects of intended programmes on gender equality and peace.

For States:

- Ensure meaningful consultations with civil and wider society, including women and women civil society in the implementation of economic reform programs, and make these consultations mandatory in the mid-term review process and with renewal or extension of agreements.
- Ensure equal and meaningful representation of women and men in the decision-making process for any project related to economic reform and reconstruction, including large-scale infrastructure and extractive industry projects.
- Increase labour market productivity through improving female labour skills, training and employment conditions as well as women's access to the labour market. These activities need to be supported by: mapping of the care-economy and female-headed households; and an understanding of how the consequences of war impact women's health and general wellbeing, and thus their ability to participate in the labour market.
- Increase government expenditure on women's health services, including for maternal and child healthcare and treatment.

- Develop inclusive and gender competent economic planning and alternative strategies for livelihoods that enable communities to mitigate the effects of the conflict, such as displacement.

In relation to the monitoring and evaluation of lending agreements with IFIs

For International financial institutions

- Ensure mandatory gender and human rights indicators in the monitoring and evaluation mechanisms for program and agreement reviews. Always include senior gender competent members in the lead evaluation teams, and provide adequate resources for integration of gender, conflict and context sensitive analysis.
- Establish an independent, effective and accessible complaints mechanism for violations of economic, social and cultural rights and sex-based and gender discrimination in the host country embedded in the framework for economic restructuring.
- Establish an internal human rights compliance and gender monitoring and accountability process within the IFIs, that would serve as accountability mechanisms in relation to IFIs poverty reduction, human rights and equalities responsibilities.

For States:

- Integrate baseline data on gender equality and women's empowerment with conflict, governance, livelihoods and ecosystems to identify weak capacities and develop targeted, evidence-based policy and programming responses.
- Conduct frequent gender impact analysis and facilitate implementation of corrective measures in cases where adverse effects on gender and other inequalities are detected.
- Compare the impact of reducing budget deficits with the impact of strengthening investments in human capacities and needs on economic growth, poverty reductions and gender equality.
- Throughout project/programme implementation make use of community dialogues, feedback loops and meaningful and inclusive consultations to capture the effects of intended programmes on gender equality and peace.

4. What is the role of business in transitional justice? What are the implications of the Guiding Principles in a transitional justice context?

In 2006 the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁸⁰ (the Basic Principles). The Basic Principles provide a framework for the obligations of states with regard to gross violations of international human rights law and serious violations of international humanitarian law, listing among other things: equal and effective access to justice, adequate, effective and prompt reparation for harms suffered (restitution, compensations, rehabilitation, satisfaction, guarantee of non-repetition), access to relevant information concerning violations and reparations mechanisms.⁸¹

However, few post-conflict countries have engaged in comprehensive, or even partial, transitional justice processes that would provide victims with all or some of the rights listed by the Basic Principles. Guiding principle 11 on Business and Human Rights states that “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”. Businesses are, thus, expected to respect human rights independently of States’ ability or willingness to meet their obligations. In conflict and post-conflict contexts, transitional justice can be one of the most important frameworks for the respect and realisation of human rights. Even if the State where a business enterprise intends to invest has not created a context in which transitional justice mechanisms are made available, businesses are not relieved of their responsibility to respect the rights of victims and victims’ families.

The role of businesses in transitional justice can be looked at from two perspectives:

1. *During conflict*: the involvement of businesses during conflict and their potential implications in fueling conflict and profiteering from conflict through their activities, either in the facilitation or commission of abuses;
2. *After conflict*: Business investments in post-conflict contexts and their obligations to respect human rights including by ensuring that their activities do not contribute to the recurrence of conflict and/or compound human rights violations resulting from the conflict.

80 Resolution 60/147 (2006)

81 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution 60/147 (2006)

a) During conflict

Companies that decide to invest and to carry out business activities during conflict must expect to be doing business in a context where human rights violations take place on a daily basis and where there is a chronic lack of access to effective human rights protection mechanisms. Doing business in such contexts, as discussed in detail above, should come with effective accountability mechanisms and with heightened due diligence obligations on companies. Where established, transitional justice mechanisms must therefore ensure that any business activities conducted in conflict-affected areas and related allegations of human rights abuses are carefully investigated. Businesses must on the other hand, make all relevant information on their business activities in conflict-affected settings, including on their human rights impact assessments, available for review by competent authorities. This is particularly important where access to justice might be sought by victims in the home State of the company, rather than in the host State where abuses have been committed. Businesses should fully collaborate in such investigations including in cross-border cases and should not use corporate structuring as a way to evade liability or to shield certain business information from judicial scrutiny (e.g. government license authorisations in the case of the arms industry).

States should also take effective measures to investigate and prosecute abuses committed by companies - and to develop systems of corporate criminal liability for legal persons where non-existent - by their managers and by individual “war profiteers”. Regarding the specific issues posed by the arms industry and in view of litigation and research carried out by the European Center for Constitutional and Human Rights, in order to be able to prosecute individuals acting in their corporate capacity or businesses for their complicity in the commission of international crimes, the *mens rea* standard of recklessness or negligence needs to be applied. Higher standards such as proving intent create unreasonable burdens in holding businesses and their managers accountable as their main intention is to make profits rather than contributing to or causing crimes.⁸²

Recommendations

- Provisions on investigation and accountability for human rights abuses and international crimes facilitated or committed by businesses are included in peace agreements and in the mandates of transitional justice mechanisms.

⁸² *Arms trade and corporate responsibility, Liability, Litigation and Legislative Reform*, Christian Schliemann, Linde Bryk November 2019, available at: <http://library.fes.de/pdf-files/iez/15850.pdf>

- If claims are made regarding the facilitation or commission of a business enterprise in human rights abuses during conflict, businesses and their management should act in good faith, including by not seeking to obstruct investigations and proceedings, and must fully collaborate and make all relevant information available to any investigative body including in cross-border cases. The company must conduct its own investigation, fully disclose to the public the findings of such investigation and make available appropriate grievance mechanisms and reparations to the victims and families of the victims. Reparative measures should be agreed upon in close consultation and cooperation with victims, their families and where relevant their representatives.

b) After conflict

When it comes to transitional justice settings, businesses need to be especially attentive to how their investments can impede the ability of victims and communities to access remedies and understand the relationship between investment in economic and social rights, the sustainability of peace and people's ability to rebuild their lives. These aspects have been explored extensively above. In addition, in a transitional justice context businesses need to take into consideration the relationship between their investments, including in physical infrastructure — e.g. land, mines, industrial complexes and other infrastructure — and their potential impacts on access to reparations for gross violations of international human rights law and serious violations of international humanitarian law. In this regard, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law state commemoration as an important component of victims' rights to satisfaction.⁸³ Memorialisation also plays an important role in documentation, education and public understanding of past abuses.

The example of ArcelorMittal in Prijedor, Bosnia and Herzegovina

The city of Prijedor in Bosnia and Herzegovina is infamous for the many war crimes committed in and around the city during the 1992 - 1995 war. Some of the most brutal concentration camps for war prisoners were set up around the city, one of the most infamous was *Omarska camp*, set up in what before the war used to be an iron ore mine. During the war more than 3,334 people were detained and tortured in that camp.⁸⁴ In 2004, ArcelorMittal, a UK-based

⁸³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Resolution 60/147 (2006)

⁸⁴ https://www.icty.org/x/file/Outreach/view_from_hague/jit_prijedor_en.pdf

company and a global steel giant, purchased the site of the Omarska camp along with a complex of other ore mines and facilities around the city to use as part of its mining operations. Some of the purchased sites were used during the war by the Serbian army, which ran Omarska and other concentration camps around Prijedor, to hide the bodies of people that were murdered in the camps.⁸⁵

Since the end of the war, victims' associations have demanded from the city mayor not to privatise the Omarska mine and instead to build a memorial, but were unsuccessful. When ArcelorMittal purchased the land, victims' associations approached the company's management, which, pressured by the negative publicity, made a promise in 2005 to build and finance a memorial on the site. To date, this has not been done. On the contrary, the company has limited access to the site by victims' associations to 6 August each year, when the associations commemorate the date in which the camp was closed.⁸⁶ ArcelorMittal's management has stated that they are willing to meet the demands of former detainees but that it is up to local authorities to grant permits to this effect.⁸⁷

Even though the construction of the memorial is impeded by the local authorities, it is still within the scope of the obligation of the investing company, which owns the site where past violations took place, to use its leverage to ensure that human rights, including the rights of victims to reparations are not violated. In the case of ArcelorMittal and victims' associations in Prijedor their right to reparations, which includes memorialisation and remembrance, is being severely infringed upon.

A site in which gross human rights violations took place should never be fully privatised, since the site is essential for remembrance and falls within the scope of the right to *satisfaction* as described by the UN Basic Principles. Even though ArcelorMittal did not participate to the human rights violations committed during the conflict, by purchasing the Omarska mine and its infrastructure while knowing the history of the site, ArcelorMittal also 'acquired' responsibility towards the victims. Thus, it should have effectively exercised its leverage on local authorities to support a dignified approach to victims' right to commemoration.

85 <https://balkaninsight.com/2013/08/06/prijedor-camp-victims-commemorated/>

86 <https://balkaninsight.com/2012/04/20/mittal-suppresses-memories-of-omarska/>

87 <https://uk.reuters.com/article/uk-bosnia-camp-idUKBRE8750X020120806>

Recommendations

- Prior to purchasing any land, infrastructure or similar in a post-conflict setting, businesses must, as part of their human rights due diligence, thoroughly investigate the recent history of the site/infrastructure in order to understand any relationship it might have with past human rights violations and the risk of compounding such violations.
- If such risks are identified, the management of the company should conduct a thorough human rights impact assessment of the intended investment based on consultations with victims and their representatives.
- After such an assessment, the management of the company should hold consultations with victims in order to agree on the best approach forward, and ensure that the needs of the victims, including to avoid re-traumatisation, are adequately met.
- If in agreement with the victims, the company decides to continue with the investment it must use its leverage with relevant authorities to ensure that the needs expressed by the victims, including in terms of commemoration are met and supported.
- If possible, the company should assign the ownership and/or management of the memorial (or any other agreed upon solution) to victims' associations or an entity of their choosing, so as to avoid the privatisation of sites that are in the public interest of the community, such as sites of commemoration of gross human rights violations.