



## Contribution of the Colombian National NGOs Roundtable on business and human rights to the document on Conflict and Post-Conflict of the United Nations Working Group on Business and Human Rights

10 April 2020

With regard to the Working Group's (WG) interest in "identifying and clarifying the policies and practices of States and companies, including public and private investors, throughout the 'conflict cycle' and the three pillars of 'Protect, Respect and Remedy' of the Guiding Principles (UNGPs)", the National NGOs Roundtable on Business and Human Rights submits this contribution - based on the analysis of the Colombian case - with the hope that it will help to "better understand the practical steps that all actors should take to prevent and address business-related human rights abuses".

### General considerations

#### 1. On the concept of conflict and its relationship to business operations

The WG has expressed its concern that companies understand what can be considered an armed conflict and in its working documents it has referred to the term "cycles of conflict". This expression seems to allude to classical conflict theory and tries, above all, to describe the stages of armed conflicts in space and time, with the aim of providing "clarity" (and especially legal protection) to companies. However, this understanding is limited.

The excessive emphasis on temporality (phase-cycles) seems to assume that companies are actors unrelated to armed conflicts. According to Giner<sup>1</sup>, armed conflicts such as the Colombian one have a background of economic interests that need to be unveiled in order to understand not only the intrinsic nature of the armed groups' funding sources in relation to their control over natural resources, as stated by Collier and Hoeffler<sup>2</sup>, but also, following Ballentine and Nitzschke's<sup>3</sup> assertion, the existing relations between state governance of these resources, the greed and injustice that state and non-state actors establish around the inseparable political and economic factors found in this type of armed conflict, which have a correlate in the state's inability to manage these resources equitably and effectively.

Additionally, although the main emphasis of the WG is related to the armed conflict and its "overcoming" stage, the WG should consider an intersectional and historical approach to all other conflicts associated with an armed conflict (socio-environmental, political, cultural, labour, etc.). In other words, the complexity of social reality itself cannot be simplified, making use of the language (used by companies and governments) of "difficult contexts" or "complex environments". Companies are not actors hermetically isolated from the wider contexts and there is sufficient literature on this subject. It is worth to remember that the mere fact of deciding to intervene/operate in a region causes business projects to generate conflicts of various kinds, as they are actors that participate (with criminal, administrative and civil responsibility) in social conflicts and, even much more, in armed conflicts.

<sup>1</sup> Giner Lloret, Agnès. Social Dynamics surrounding oil exploitation in Colombia: a case study of BP's activities in Casanare. In: Anuario de Acción Humanitaria y Derechos Humanos. Bilbao: Universidad de Deusto, #6/2009, 2009, pp. 15-38.

<sup>2</sup> Collier, P. & Hoeffler, A., Greed and Grievance in Civil War, CSAE Working Paper, WPS 2002-01, Washington D.C.: The World Bank, 2002.

<sup>3</sup> Ballentine, K. & Sherman, J. (eds.): The Political Economy of Armed Conflict: Beyond Greed and Grievance, Boulder, Colorado: Lynne Rienner Publishers. 2003.

Even when the WG places greater emphasis on the post-conflict phase, assuming that companies *per se* generate positive impacts on the consolidation of a lasting peace (something that should indeed be a business purpose), it might be ignoring the history of their implementation in local communities and the socio-economic and political factors of discrimination, oppression and marginalisation to which important segments of the population have been subjected to. Cases such as the Colombian one illustrates the importance of strengthening mechanisms for corporate accountability in order to prevent, repair and guarantee the non-repetition of situations of human rights violations, particularly because, in many cases, companies became active subjects in the conflict.

Manichaeism for the linear interpretation of the interactions and dynamics of a conflict blurs from the analytical approach the objective (structural) and subjective causes of conflicts, generally associated to natural resources and land use, and the importance of cultural violence as a justification for physical and structural violence.<sup>4</sup>

## 2. On companies and their relationship to armed conflict

It is widely accepted within the United Nations System that business-related human rights violations occur in areas affected by armed conflict and other situations of systematic and/or widespread violence. However, it has not yet been approved at the international human rights framework that economic actors, such as in the case of Colombia, cannot be considered as neutral or external to the armed conflict.

Companies are actors with a high degree of expertise and planning of their activities, so the lack of knowledge (or even governmental negligence in informing them about high-risk armed conflict scenarios) is a nonsense. Any investment plan is characterized by the identification of market niches, tentative knowledge of resource deposits and even certainties about investment risks. In terms of liability, civil doctrine has called this the degree of expertise, which is fundamental when assessing whether risks are outside the sphere of control of a given actor, such as companies.

Recognizing companies as another actor in armed conflict contexts is an important step forward that the WG should recommend to governments, since, due to the financial capacity and political influence of companies, they may become negative factors (“spoilers”), in an eventual peace-building scenario after an armed conflict, would hinder such process or even contribute to the emergence of new conflicts, the prolongation of existing ones or the denial of them, as identified by authors such as Payne, Olsen & Reiter<sup>5</sup> or Sikkink & Joon Kim<sup>6</sup>. Therefore, economic actors should be presumed to have prior and proper knowledge of the context in which they develop their economic operations, including their value chain and operational and commercial partners.

## 3. On International Humanitarian Law and the militarisation of companies

Economic actors are, in principle, considered to be civilians and are therefore protected by the principle of distinction, as stated in common Article 3 of the four Geneva Conventions and their two Additional Protocols. However, phenomena such as the militarisation of companies (under the auspices of the Voluntary Principles on Security and Human Rights)<sup>7</sup>, with the argument of protecting their assets (infrastructure and personnel), for operating in areas affected by armed conflict, allow to affirm that they are actively and deliberately involved as actors in the conflict. The result, which should be informed by the WG, is **that many companies cannot be considered as victims** in the light of International Humanitarian Law and International Human Rights Law, but rather as accountable by action, omission and, in a direct and indirect way, linked to the hostilities and actions of armed actors (legal and illegal).

To explain the above, in the Colombian case, for example, numerous judicial investigations (many of which are still ongoing) indicate that companies have become involved in the armed conflict and in human rights abuses/violations, among other situations, when they sign cooperation agreements with the military and police forces, when they hire private security companies accused of crimes against human rights, and when they finance paramilitary groups. Many companies, by financing public institutions and acts of corruption

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<sup>4</sup>Galtung. *Violencia cultural*. 1898. <https://www.gemikagogoratuz.org/wp-content/uploads/2019/03/doc-14-violencia-cultural.pdf>

<sup>5</sup> Payne Leigh, Olsen Tricia y Reiter Andrew. *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*. *Human Rights Quarterly*, vol. 32, no. 4. 2010. Pag. 980-1007.

<sup>6</sup> Sikkink, Kathryn y Joon Kim, Hun *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*. 2013. Available at: <https://www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-102612-133956>

<sup>7</sup> <https://www.business-humanrights.org/en/conflict-peace/special-initiatives/voluntary-principles-on-security-and-human-rights>

with State and government officials, have fragmented the independence of the legislative and judicial branches in their favour, creating another form of co-option of the State apparatus which has consequently influenced the course of the armed conflict.

#### 4. On the balance of the UNGPs

Despite the fact that the mandate conferred by the United Nations to the WG is circumscribed to the UNGPs, it is important to highlight that these principles have already passed their stage of dissemination and, almost a decade after the promotion of them by the Special Representative, John Ruggie, the balance on their implementation is critical. This document presents some observations for the practical application of the UNGPs in conflict and post-conflict contexts, from a dynamic approach that suggests a logic of overcoming structural problems, rather than explaining and improving what has been discussed by States, companies and some sectors of civil society around societal/business conflicts.

Civil society organizations that subscribe to this communication reiterate that the discussion on the voluntariness of companies (and States) to incorporate UNGPs must move, in a complementary manner, **to the scenario of obligatoriness**, since it seems that in the dominant discourse there is a contradiction when it grants a status to companies similar to that of States, in terms of their legitimacy as social actors, but at the level of accountability they are treated as unimputable, when it concerns infractions of International Humanitarian Law and human rights abuses or violations. The rationale of encouraging respect for human rights cannot be realised if it ignores the universal and protective content of the international framework in which these rights are developed, in addition to their relationship with International Humanitarian Law, International Labour Law, Environmental Law and International Refugee Law. It is necessary to continue to deepen and promote the provisions on protection and respect that the UNGPs have, without forgetting that, in a country like Colombia, even the spirit and contents of the UNGPs are not respected by companies or the State.

#### 5. On the emphasis of the UNGPs (and the WG) on States' action

In the different consultative spaces within the United Nations System convened by the then Representative Ruggie, the need for practical proposals of policies, public and private, that guarantee the respect of human rights by companies in conflicts affected areas was raised to help ensure that business companies operating in those contexts do not incur in violations or abuses, nor use or benefit from the conflict as a scenario for the maximization of their profits. However, after some consultations held by the WG, the focus of stakeholders was that "it is easier to get companies to adhere to the goal of 'business for peace' and 'doing good'", than to the provisions of the UNGPs to focus first on managing human rights risks<sup>8</sup> and preventing harm<sup>9</sup>, with the argument of the greatest "positive impact".

Many of the news items reviewed by the Business and Human Rights Resource Centre, BHRRRC, on corporate behaviour in the context of Colombia's socio-environmental and armed conflict do not share this statement. Their criticism is based on the fact that the official language (of companies and, State and governmental authorities) is expressed in terms of protection or guardianship of companies and assumes that human rights for them should be reduced to the rationale of their self-management, with which the effect obtained is negative, as it does not recognize the binding nature or compulsory nature of human rights for any individual or legal entity acting in the territory of a country, in line with the International Human Rights framework.

Although former Representative Ruggie, considered that "*responsible companies increasingly seek guidance from States on how to avoid contributing to human rights harm in these difficult contexts*"<sup>10</sup>, and, that the

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<sup>8</sup> As defined by the OECD Guidelines in its document on "OECD Due Diligence Guidelines for Responsible Business Conduct (2018), with respect to external business relations.

<sup>9</sup> In this sense, the principles proposed by CDA regarding the elements that must be present for any business action to be governed by the "no-harm action" framework are taken up again: (See the five points on pages 12 to 14 of this document: [https://transformemospaz.com/wp-content/uploads/2019/10/5\\_El-enfoque-de-Accion-sin-Dan-en-el-proceso-de-restitucion-de-tierras.-Sintesis-del-acompanamiento-regional.pdf](https://transformemospaz.com/wp-content/uploads/2019/10/5_El-enfoque-de-Accion-sin-Dan-en-el-proceso-de-restitucion-de-tierras.-Sintesis-del-acompanamiento-regional.pdf))

<sup>10</sup> Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/17/32. Available at: <https://undocs.org/es/A/HRC/17/32>.

commentary to Principle 7 established that “*in conflict-affected areas, the host State<sup>11</sup> may be unable to protect human rights adequately because of a lack of effective control*”<sup>12</sup>; these thesis ignore a key element: in areas affected by armed conflict, host States are generally an **active actor in the armed conflict**, they constitute the official facet of State programmes, which does not strengthen civilian services and institutions, but subordinate them to operations against internal enemies.

The interest (and focus) of the UNGPs and the WG on the “lack of normative clarity” on the part of the State, for it to advise companies on acceptable conduct in regions affected by conflict, forgets that, in a country like Colombia, the State itself, as part of the armed conflict, has been identified by the judicial system, various UN bodies and by the Inter-American System, as one of the main violators of human rights.

It is not sufficient, therefore, for the protection of human rights, as stated by the then Representative Ruggie, that States be asked to “*examine whether their policies, legislation, regulations and enforcement measures effectively address the heightened risk of flagrant human rights violations by companies operating in conflict situations, including through provisions for companies to observe human rights due diligence*”<sup>13</sup>. Instead, this paper suggests that the WG’s emphasis should be on company policies (to respect International Law of human rights) and towards binding international normative frameworks, such as the proposed treaty currently under discussion at the UN.

## Introduction

According to the database of the most recent report by the Business and Human Rights Resource Centre (BHRRC) on “Business and Human Rights Defenders in Colombia”<sup>14</sup>, between 2015 and 2019 there were 181 attacks on defenders raising concerns about businesses’ conduct, where 90% of the attacks were against defenders raising concerns about only four industries: mining, fossil fuels, agriculture and livestock, hydroelectric plants and dams. The report reveals that Colombia is the second most dangerous country in the world for human rights defenders who raised concerns about corporate cases. In this context, given the breadth of the mandate and the object of the WG’s investigation, the following comments refer to a specific context: *The intervention of national and multinational oil, mining, infrastructure and energy companies (and their respective security companies) in strategic areas of armed conflict and their participation*<sup>15</sup> in it, with emphasis on the Colombian case.

Two central questions are addressed: the first one refers to **mandatory and enhanced due diligence**. This section seeks to suggest some concrete measures that companies should adopt in conflict situations and to establish how the process differs to identify, prevent, mitigate and implement accountability for the real and potential effects in conflict and post-conflict situations. The second section refers to the **relationship between the United Nations Guiding Principles on Business and Human Rights (UNGPs) and transitional justice**, where it is established what the role of companies in transitional justice should be and their relationship with the UNGPs.

## Debate on mandatory and enhanced due diligence

Armed conflicts involve massive human rights violations and the deepening of pre-existing dynamics of inequality, discrimination and social exclusion, which are exacerbated by them. They also force a significant difference between due diligence in conflict contexts and those where there is no armed conflict. In this sense, Principle 23 of the UNGPs allows us to conclude that due diligence cannot be understood as an optional

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<sup>11</sup> In other words, the State that hosts a company, whether national, mixed or transnational

<sup>12</sup> What do the UN Guiding Principles on Business and Human Rights say about protecting and respecting human rights against business-related adverse impacts in conflict contexts? Disponible en:

<https://www.ohchr.org/Documents/Issues/Business/WG/WhatdotheUNGPsayaboutconflict.pdf>

<sup>13</sup> Companies that, with prior knowledge of the situation of armed conflict and human rights violations, consciously decided to invest, intervene and operate with the aim of making a profit despite the “risk”, giving preference to the economic factor, over the protection of the human rights of the population in Colombia.

<sup>14</sup> See: Business and Human Rights Defenders in Colombia <https://www.business-humanrights.org/sites/default/files/Business%20%26%20Human%20Rights%20Defenders%20in%20Colombia.pdf>

<sup>15</sup> Companies that, with prior knowledge of the situation of armed conflict and human rights violations, consciously decided to invest, intervene and operate with the aim of making a profit despite the “risk”, giving preference to the economic factor, over the protection of the human rights of the population in Colombia.



recommendation, but rather as an imperative mandate. It's so mainly because the territories where armed conflicts take place are not in the shadow of an increasingly globalized world, since it is precisely the expansion of the markets of common goods (*natural resources or commodities*) and the depletion of the traditional deposits of such goods that bring companies closer to zones of armed conflict. Thus, when a company develops commercial operations in areas affected by conflict, not only does it increase the risk of losses and damage to its investments, but it also increases the possibility of becoming complicit in serious human rights abuses committed by its personnel or other actors.

Similarly, due diligence in contexts of armed conflict should not only be compulsory, but also enhanced, expressly renouncing the voluntary component of corporate management systems. To claim ignorance of the effects of war on territories implies assuming that companies are incompetent to determine the impact of their commercial operations, which is clearly a contradiction in terms, since the professional essence of these organizations is to fully contemplate any operational or commercial risk, beyond reputation. In fact, a clear criterion for the exclusion of a business actor in the economy of a country affected by an armed conflict is its failure to observe the principles of precaution<sup>16</sup> and precautionary<sup>17</sup> measures, which, in cases such as Colombia, are part of the constitutional interpretation framework, in accordance to the so-called 'constitutionality block'; but, in addition, they correspond to the general framework of International Human Rights Law and its universal jurisdiction.

Therefore, due diligence (DD) in human rights matters implies a binding articulation between companies and States, where a significant preventive approach and monitoring of business conduct in this area should prevail. In this regard, the discussion on the voluntary nature of DD must integrate some binding compliance mechanisms -including monitoring and citizen's participation scenarios- and other follow-up ones, where civil society can have a real impact before, during and after the implementation of a business project, whether of private, public/private or state-owned nature.

As noted above, the balance against the voluntary component in the nine years of disclosure (2011-2020) of the UNGPs is in the red. Consequently, with respect to the four core components of due diligence, contained in the Guiding Principles<sup>18</sup> on Business and Human Rights, it is necessary to emphasize their enhanced dimension for:

- **Identify and assess actual or potential adverse impacts on human rights:** Businesses should include, as a matter of corporate practice, full respect for human rights, not based on a management language based on CSR, but from the imperative mandate and agreed language of human rights, which binds individuals and States alike, including legal entities, without any ambiguity<sup>19</sup>. As a counterpart, the evaluation of the effects must integrate a prior financial component into the evaluation of the conditions and diagnoses, which imposes on economic actors to assume, in their initial foreseen costs (based on accumulated experience), the ways in which they will repair the victims and, even, to prevent damages, decide the non-intervention in a territory, according to a precautionary rationale. This should be extended to the entire value chain of the productive sectors and has a more restricted standard in aspects such as the approach to security problems related to facilities, staff or any other activities susceptible to creating environmental conflicts.

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<sup>16</sup> Principle 15 of the Rio Declaration on Environment and Development. Available at:

[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

<sup>17</sup> This is an interpretation of Principle 15 of the Rio Declaration, regarding the concept of "absence of certainty", thus imposing that, in order to develop an economic activity, companies must consider the impacts that they will generate and in no case can they remain undetermined. In the context of international arbitration, it is worth highlighting the case of *Industria Nacional de Alimentos S.A. and Indalsa Peru S.A. (formerly Empresas Lucchetti S.A. and Lucchetti Perú S.A.) v Republic of Peru* ICSID Case No. ARB/03/4. In the Colombian legal framework, two judgments should be highlighted. First, Ruling C-703 of 2010, which establishes that in the absence of scientific certainty, it is necessary for the administration to establish presumptions that allow it to apply duly justified transitional restrictions. And finally, Ruling C-595 of 2010 which establishes the principle *In dubio pro ambiens*, which reverses the burden of proof in decision making, so that a high-risk investment must foresee the damage it will cause and how to remedy it, otherwise it could not be made.

<sup>18</sup> Operational Principle 17 states that "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." Available at: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf)

<sup>19</sup> As stated in article 29 of the Universal Declaration of Human Rights and the triple mandate addressed to natural and legal persons and States, relating to: (a) duties towards the community, the law as the sole criterion limiting the enjoyment of rights; and (c) the exclusion of any enjoyment of rights in a manner contrary to the purposes and principles of the United Nations.

- **Integrate the results of impact assessments into relevant company processes:** Companies should integrate into their cost-analysis the criterion of the lowest impact, the highest convenience of the project, but not one of paying for the damage caused. States should guarantee that companies assume initial pre- and post- costs, in order to ensure that the participation of economic actors is done based on the conviction of improving, in a qualitative way, the integrated protection of territories and communities affected by social and armed conflicts.
- **Follow up on the effectiveness of measures and processes adopted to counteract adverse effects:** there must be co-ordination for follow-up, monitoring and evaluation of business activities in human rights matters, in which the State and communities can interact in a meaningful and binding way, through external audits with full guarantees and respect for the mechanisms of constitutional (including non-legislated) and legally available engagement. Strengthening this governance scenario implies that States implement sanctions systems against companies; and even more, develop in their legislation the component of economic actors' criminal, civil and administrative accountability, without leaving an approach of restorative and consensual justice, from the beginning of commercial and productive activities in a given sector in a second place.
- **Communicate how adverse effects are addressed:** The starting point about this aspect is to be determinant in the mandatory nature of human rights respect, as inherent to human beings and their natural environments. In this regard, the rationale of maximizing benefits through a high standard of human rights respect should prevail, and in the event that there are damages, the reference should not be the language of remedy, but rather that of holistic reparation, in line with the United Nations standards in this field. It should be reiterated that due diligence means that priority must be given to the factors that affect people, their livelihoods and their natural environment and, in second place, to business interests and economic profit, so that all productive activities must integrate the criterion of the social and environmental function of property into their business schemes. That, in the Colombian case, it is also articulated to public consultations and to Free, prior and informed consent (FPIC) of mining and energy projects, construction and others that affect indigenous peoples and afro-descendants.

Once adequate appropriation and implementation of the four basic above-mentioned components has been consolidated, it is important to emphasize that a mandatory due diligence process is not static but differs in relation to the time of the conflict, as well as the type of conflict. Therefore, taking into account the criteria of responsible business conduct indicated by the OECD<sup>20</sup>, when considering risk as a negative externality affecting individuals, the environment or society, which could be caused by the company (proportionality of the risk), the economic actors would take an important step forward in terms of due diligence, even more so if it is integrated into this risk analysis for their operational and commercial activities and their value chain relationships.

In addition, the OECD document, referenced above, proposes six phases of implementing due diligence in the business environment: 1. *Embed responsible business conduct (RBC) into policies and management systems*; 2. *Identify and assess adverse impacts in operations, supply chains and business relationships*; 3. *Cease, prevent or mitigate adverse impacts*; 4. *Track implementation and results*; 5. *Communicate how impacts are addressed*; and 6. *Provide for or cooperate in remediation when appropriate*.<sup>21</sup>

The implementation of these phases must concern a strategy that is consistent with the timing of the operations' inception in the conflict zone and, with the company's role in relation to the conflict itself. Similarly, it differs if the company is an active party to the conflict (due to its alliances with armed forces or groups, connection of these forces or groups with human rights violations, among others), from whether the company's operations are affected by the development of the armed conflagration (due to attacks on facilities, death threats, kidnapping or blackmailing of personnel, among others).

Based on the above steps, we present the WG to consider the **following recommendations**, in order to introduce the mandatory and enhanced dimension of due diligence:

1. Companies' policies and management systems must structurally integrate respect for human rights so that, linked to an updated risk assessment, permanently disclosed, they can persuade the various

<sup>20</sup> OECD. OECD due diligence guidance for responsible business conduct. 2018. Available at: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>21</sup> OCDE. Ibidem. P. 21

actors in operational, commercial or value chain relations to implement this binding perspective on human rights. Similarly, in conflict zones, due diligence prequalification processes for suppliers and all types of commercial relations become especially relevant, in order not to make alliances with involved agents, promoters, generators or deepeners of the conflict.

2. Impact assessments carried out by companies operating in armed conflict affected areas must be in line with International Humanitarian Law. In the case of companies that are going to start their operations in a conflict zone, it is important that risk assessment is carried out in a multi-stakeholder scenario, which includes the community, especially critical groups or sectors, not just allies or supporters of the business model. When companies are already operating in a conflict zone, due diligence in this case should be particularly intensive and should focus on conducting an ongoing assessment of their different operations, supply chains and business relationships to identify potential human rights violations incurred by themselves, their contractors or business partners and to be able to act in a timely manner to prevent or to halt them and provide integrated reparation to those that do occur. States should, therefore, advocate that neglecting the character of human rights impact assessment ratings could be made at a sufficiently persuasive cost.
3. Businesses should involve stakeholders and affected parties in planning strategies to effectively stop or mitigate damage. In contexts of armed conflict, the risk level for human rights violations is higher. Therefore, the prevention component must be expanded and articulated to permanent monitoring and participatory mechanisms, ensuring that the community has sufficient elements to ensure that popular consultations and consent are prior, free and informed.
4. Companies should promote and implement individual and sectoral commitments to evaluate and monitor their human rights policies in their operations. Allowing open and complete flow of information on this subject not only contributes to strengthening human rights safeguards, but also represents a reduction in market asymmetries and greater transparency.
5. Companies and States should be the primary guarantors that all stakeholders are aware of how human rights impacts are being addressed, through timely and clear communication. Likewise, companies should report on the actions they are taking to prevent, cease and mitigate the negative impacts they have previously identified, by facilitating the monitoring of its implementation by those affected actors. In the case of human rights impacts, it is relevant to report on how concerns and demands raised by or on behalf of rights holders were addressed.
6. Companies and States must, at all times, incorporate differential approaches (gender, ethnicity, etc.), from an intersectional reading, in order to guarantee an effective impact evaluation, articulated with effective monitoring and impact mitigation strategy planning, since the effects and impacts of the armed conflict are differential for each one of these populations.
7. Companies should consider mechanisms for the enforcement of sentences in which they are involved, or which involve issues of the sector in which they carry out their activities. Similarly, companies should link the above-mentioned mechanisms to those that should be created or have already been created by States to monitor and comply with judicial human rights decisions. To this end, victim communities must be engaged and companies must support and promote processes to sanction other companies that fail to comply with the rulings of the corresponding State; or that deepen the chain of impunity by supporting and integrating the effects of such decisions in their value or supply chains.
8. Finally, companies must assume the obligatory nature of remedying and restoring the affected persons, for which the reference must be that of transformative reparation, or in the worst case, that of restitution to the state of affairs prior to the violation of rights. In addition, they should integrate preventive measures such as complaint mechanisms at the operational level, with a clear roadmap, with guarantees of due process and follow-up components for compliance with what has been agreed between the companies and the communities. States must ensure that these agreements are respected and enforced.

## Transitional Justice and Guiding Principles

This section explores the implications of UNGPs in a transitional justice context based on the following premises:

(i) Transitional justice only operates when the parties to an armed conflict have signed a political-legal agreement. This does not mean that societies make an automatic transition from armed conflict to a “post-conflict” situation; on the contrary, the signing of this type of agreement tends to take some time to transform the conflicts in the areas in dispute.

(ii) Transitional justice only operates in scenarios where there is already massive victimization of the civilian population, nature<sup>22</sup> and the territory itself, it differs from the context of the UNGPs and their epistemological proposal, which states that companies *can* cause negative impacts.

(iii) Transitional justice functions under human rights standards; therefore, individuals and/or communities affected by business operations, unlike the UNGPs language, are considered entitled to rights and treated as victims in the framework of an armed conflict. In this regard, the rights of the victims<sup>23</sup> are paramount, especially the right to **integrated reparation**, which differs notably from the UNGPs’ concept of remedy. Under this new perspective of safeguards and this new normative framework —besides more akin to human rights, reparation may imply that this type of justice undertakes legal actions with greater effect on companies (such as the temporary or definitive suspension of business operations), since companies must now implement reparation for the damage caused and for their level of accountability in human rights violations.<sup>24</sup>

(iv) Transitional justice operates as per a holistic rationale; therefore, only the adequate combination of Truth, Justice, Reparation and Guarantees of Non-Repetition<sup>25</sup> allows the establishment of suitable satisfaction measures for the victims. This implies that those business, economic actors that are accountable for or related to human rights violations should respond in an integrated manner. This is contrary to what is suggested by the UNGPs, with respect to privileging non-judicial mechanisms of remediation. It is a highly positive guarantee for the victims because it establishes the impossibility of reconciling the maximization of profits and the economic exploitation of an armed conflict as a precedent.

(v) In contexts of transitional justice, the construction of truth, justice, reparation and guarantees of non-repetition implies confronting those crimes resulting from the combination of not isolated, multiple atrocious acts with collective actors impacted, so that the imputation of responsibility cannot be developed through objective or subjective criteria of an individualist nature. These system crimes can only be understood by reconstructing contexts, where the distinction between the role of the crimes planners and that of their implementers is as important as the degree of impacts, which is massive but not indeterminate. Thus, companies that develop their activities in countries where the institutional framework is weak or where they were once victimizers should reflect in their sustainability report how they can contribute to clarifying the context of macro-crime, or at least contemplate it.

Being in ignorance of the level of anticipation noted above has different consequences, depending on whether the economic activity occurs during the conflict or in the peacebuilding process. In the first case, a company may not be able to identify all the actors who commit victimising acts, without being able to exclude those who openly call themselves belligerents. In the second case, when a peace agreement has been signed, the standard is higher, as there are reference frameworks, such as case prioritisation systems<sup>26</sup>, which allow any company that wants to develop its activities to exclude from its operational and business relations those actors engaged or even suspected of being involved in massive human rights violations. In the case of companies involved in the conflict, States must exclude them from all economic activities, including those directly related to the public sector.

(vi) The excessive emphasis of the UNGPs on the prevention and “management” of “negative effects” in a context of armed conflict and systematic and/or widespread human rights violations is not appropriate to guarantee rights. However, the UNGPs can help to determine standards of responsible business conduct

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<sup>22</sup> See: JEP Investigation and Prosecution Unit, “Reconoce como víctima silenciosa el medio ambiente”. <https://www.jep.gov.co/SiteAssets/Paginas/UIA/sala-de-prensa/Comunicado%20UIA%20-%20009.pdf>

<sup>23</sup> See, 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. <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>

<sup>24</sup> In the Colombian case, although it is not regulated in depth in the internal legislation, the existing tension related to land grabbing, tenure and restitution should be taken into account in the companies’ practices and in the State’s demands, in order not to generate revictimization.

<sup>25</sup> See, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff. <https://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf>

<sup>26</sup> De Greiff. Ibidem.



that provide objective, subjective and normative elements related to crimes (especially of business practices, policies and *modus operandi*), as well as facilitate contextual elements for the construction of patterns of macro-criminality, because it provides the necessary body of evidence to demonstrate human rights abuses by civilian economic actors.

(vii) Following the holistic rationale of transitional justice, the UNGPs could be considered complementary to it, in terms of the real access by the victims of the armed conflict in contexts of business operations to truth, justice, reparation and non-repetition measures, as they could provide alternative scenarios in the framework of restorative processes.

(viii) The UNGPs could guide States to implement control, monitoring and, especially, reparation measures to victims who appear before the transitional justice mechanisms, when companies were a key actor responsible for human rights violations, due to their motivation, participation and complicity.

(ix) The UNGPs should consider the suffering of victims who, in addition to facing human rights violations, breaches of international humanitarian law and other abuses, have suffered the loss of their livelihoods due to the implementation of large-scale industrial projects in their territories, and therefore, the very rationale of the UNGPs should be discussed epistemologically in this regard.

(x) It is necessary to distance transitional justice contexts from the so-called “post-conflict scenarios” and “peacebuilding”. While it is true that, during the transitional justice process, companies could give significant contributions to the people, communities and territories affected during the armed conflict, this intervention should be thought of in terms of non-repetition guarantees of the transitional justice system. The following is an operational proposal on this subject, with the aim of enabling companies to distinguish what they should do if they want to start business operations in a country experiencing a conflict of this nature;

- It should be noted that Colombia is a particular case, since there is a transitional justice case *without* transition, because although two active transitional justice processes are currently operating (law 975 of 2005<sup>27</sup> and its complements: law 1448 de 2011<sup>28</sup> and law 1957 of 2019<sup>29</sup>), the internal armed conflict is still ongoing and it has escalated in recent days in certain regions of the country.
- In this context, the role of companies becomes even more complex, both in the conflict and in the post-conflict period, because the intervention of companies in the territories can no longer be understood as unrelated to the previous conflictive situations. Therefore, in many cases, when governments want to implement policies to “recover territories affected by conflict” they seek to incorporate companies because of their investment capacity in “development” projects for the post-conflict.
- However, those economic actors who, during the conflict, were instigators, actors and especially beneficiaries of the conflict, will no longer be able to present themselves as “peacebuilding” actors, since the inception, restarting or continuation of their business operations would constitute a revictimizing behaviour, which would undermine the rights of the victims and would not promote a new, peaceful society.
- Similarly, this transitional paradox in Colombia also highlights the fact that, in countries with serious structural inequalities (as is often the case in societies experiencing armed conflict), even with the signing of agreements between the parties to the conflict, the structural causes, conflicts and risk

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<sup>27</sup> Named the Justice and Peace Law, it contains provisions for the reincorporation of members of organized armed groups outside the law. As highlighted by the Toledo International Centre for Peace and the Universidad Javeriana, this process was notable for “the identification of companies or individuals engaged in business activity who participated in the actions of paramilitary groups”. This study identified 187 businessmen and/or companies linked to judicial processes of justice and peace. See at: <https://www.business-humanrights.org/es/colombia-informe-de-citpax-y-universidad-javeriana-se%20ala-balance-negativo-de-justicia-y-paz-respecto-de-alanzas-de-empresas-y-grupos-paramilitares>. Updated database available at: <https://www.business-humanrights.org/es/colombia-universidad-publica-base-de-datos-sobre-empresas-investigadas-por-la-justicia-transicional>

<sup>28</sup> Named the Victims and Land Restitution Law (*Ley de Víctimas y Restitución de Tierras*), which, among other institutions, created the Land Restitution Unit and established that the Circuit Civil Judges and Magistrates of the Superior Judicial District Court specialized in restitution are competent to hear restitution and formalization processes. In this regard, 33 companies have been identified that are involved in 46 judicial processes ordering the restitution of land, the suspension of contracts or mining titles. Available at: <https://www.business-humanrights.org/es/colombia-ong-informa-a-jurisdicci%C3%B3n-especial-de-paz-sobre-empresas-y-acaparamiento-de-tierras-durante-el-conflicto>

<sup>29</sup> Statutory Law on the Administration of Justice in the Special Jurisdiction for Peace, the judicial body of the Comprehensive System of Truth, Justice, Reparation and Non-Reparation, formally created through Legislative Act 01 of 2017.

factors inherent to human rights violations persist, so conditions continue to suggest that corporate intervention could only exacerbate human rights violations/abuses.

In this sense, based on the above, we consider that, for a case like the Colombian one, where there is the Integrated Truth, Justice, Reparation and Non-Repetition System (SIVJRNR for its Spanish acronym) and trying to respond to the legitimate concerns of the WG, the **following recommendations are made**:

a. All companies required by any of the various bodies of the SIVJRNR<sup>30</sup> must appear without hesitation, as this is their legal obligation.

In other cases, where companies are not adversely requested by the transitional system's judicial or non-judicial bodies, or as in the Colombian case, where regulations provide that third-party civilians (economic actors) may appear before the SIVJRNR on a voluntary basis, in the interest of the accountability goals promoted by the multiple and diffuse voluntary frameworks, all companies with civil society complaints about human rights violations/abuses should appear on their own initiative, demonstrating their ethical and responsible commitment to respect human rights.

In addition to the above, such companies with allegations of human rights abuses of whatever nature should also refrain from engaging in economic projects in the post-conflict phase of a legal-political "peace" agreement, and should consider termination of their operations in conflict-affected areas as a guarantee of non-repetition, respect for victims' rights, and respect for human rights.

b. In their investment risk analysis and sustainability reporting, companies should consider the clear correlation between profit and damage in the context of armed conflicts. In this regard, principle 17 of the UNGPs allows for the so-called "corporate complicity" to be addressed, which refers to those economic actors contributing or considered as contributing to human rights violations caused by other actors, either by exacerbating conditions of vulnerability or by facilitating those violations.

In this regard, companies should clearly and thoroughly anticipate which of their activities or business relationships may be linked to the actors in the conflict, which ones may represent scenarios of institutional weakening or which ones would involve factors that contribute to the violation of rights. As it has been reiterated, when the economy of a country like Colombia depends mostly on natural resource extraction models, the risk of armed conflict is greater<sup>31</sup>. Therefore, economic actors are aware, from the beginning of their activities, that these can contribute to an exacerbation of existing conflicts or generate new ones. Therefore, failure to take initial preventive measures constitutes damages to be compensated.

c. Businesses must make an honest and considered balance between the criminal benefits and the exoneration from liability that all transitional justice offers. It seems paradoxical that, while the above-mentioned justice generally offers benefits and less punitive sanctions than ordinary retributive justice, economic actors are usually reluctant to participate with truth and reparation trade-offs, becoming -even- open opponents and saboteurs of the processes of implementation of the peace agreements. Therefore, it is a fundamental task for the States to strengthen their system of accountability aimed at economic actors and to integrate into transitional justice conditionality regimes, clear partial and definitive benefits which, in the face of non-compliance, should represent a criterion for the immediate exclusion of the beneficiaries.

On the other hand, it is an unavoidable duty of States and economic actors to collaborate to dismantle the doctrine of militarisation of companies<sup>32</sup>, which is based on rethinking policies that have been harshly criticized by civil society. Such as those of the agreements between the public forces and companies. This objective implies establishing policies of possible exclusion of investments as a sanction mechanism, based on the articulation of three principles: a) the precautionary principle, understanding with this that in many cases, the extraction of natural goods can imply a double victimization due to the environmental conflicts that

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<sup>30</sup> In the case of Colombia, the SIVJRNR is composed of the Jurisdicción Especial para la Paz (JEP), a judicial body; the Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición (CEV) and the Unidad de Búsqueda de Personas dadas de Desaparecidas (UBPD), extrajudicial bodies.

<sup>31</sup> Collier et al (2003), Guerra civil y políticas de desarrollo. Cómo escapar de la trampa del conflicto. Available at: <http://documents.worldbank.org/curated/en/226021468176946955/pdf/261210SPANISH018168215201501PUBLIC1.pdf>

<sup>32</sup> Lazala & Romero. Hacer negocios en un país en conflicto armado: Análisis de la relación reciente entre empresas y derechos humanos en Colombia. En: IIDH. Derechos Humanos y Empresas: Reflexiones desde América Latina. Costa Rica. 2017. Available at: <https://www.business-humanrights.org/es/am%C3%A9rica-latina-nuevo-libro-del-instituto-interamericano-de-derechos-humanos-explora-la-situaci%C3%B3n-de-empresas-y-derechos-humanos-en-la-regi%C3%B3n>

it entails<sup>33</sup>; b) the impossibility of investment of companies on which their undue profit was demonstrated on the occasion of the armed conflict (for example, the cases of Drummond<sup>34</sup>, Chiquita<sup>35</sup>, BP<sup>36</sup>, etc.); c) the prioritization of those investors who are willing to integrate into their business schemes, mechanisms of transformative reparation and prioritisation of development investments in these territories, even if this delays the capitalization of profits.

Finally, in view of the possibility of participation by economic actors in humanitarian activities, common article 3 of the Geneva Conventions and their additional Protocols impose particular restrictions on such intervention, establishing as a main criterion for exclusion, attaining profit that characterises companies. This provision makes it possible to infer that, after an armed conflict, economic activities in territories affected by armed conflict are not *per se* neutral and may be subject to possible scenarios of re-victimization, not to mention the fact that many economic actors carried out their business activities during the armed conflict, which imposes the recognition of possible damages caused; the contribution to the reparation and construction of the truth for the victims; and their total demilitarisation as *sine qua non* requirements for the continuity of their activities.

d. An imperative measure that companies must incorporate is to isolate those economic actors (both in their business relationships and in their supply chains), in line with Guiding Principle 7, which establishes the obligation to deny access to services and public support for any business enterprise involved in human rights violations and which insists on refusing to cooperate to address the situation or to remedy it.

In addition, in order to isolate the above-mentioned economic actors, companies must resort to three criteria that make it possible to establish the appropriateness of business activities in territories that are victims of armed conflict: (a) profit (whether through direct contracting with the State, through compensation measures for non-payment of taxes or similar ones) cannot be understood as a neutral interest; (b) certain activities involve higher levels of risk, due to their intrinsic relationship with armed conflict. A good example of this can be found in extractive and natural resource exploitation activities, since in their illegal and in some cases legal facets, they were the engines and fuel of the conflict itself, because they attract large economic profits; and c) the militarisation of companies and their direct participation, financing, organising and, in many cases, facilitating economic transactions of the groups in conflict (both States and illegal groups).

e. Finally, we can establish three possible scenarios for companies that were directly linked to the armed conflict. Firstly, companies that want to operate in territories affected by armed conflict and that never had a presence in those territories or were totally distanced from the conflict; secondly, companies whose participation has been proven or is publicly known, through the testimony of victims and judicial evidence, even if States have not sanctioned such conduct; and finally, those companies that during the peacebuilding phase become opponents or saboteurs of such a process:

- Scenario 1: The mechanism of *naming and shaming* should be implemented in order to obtain a transparent response from the companies, without its precariousness or incipient implementation serving as an argument to justify the denial or ignorance by the companies of the actors that make up their value chain or their commercial relations.
- Scenario 2: Any company that has made a profit from an armed conflict directly or through its value chains, or that participated in the conflict directly, should be excluded, *prima facie*, from those territories directly affected by the conflict, for a period of no less than ten years. After this time, companies that have contributed to the construction of justice and truth, that are willing to make comprehensive reparations and that want to contribute to the measures of non-repetition,

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<sup>33</sup> See the AGROMAR case in the Collective Territory of Pedeguita Mancilla, Chocó, a banana agribusiness that is consolidated by the environmental destruction of primary forest and water sources, in the midst of a context of intensified conflict and the assassination of leaders: <https://www.business-humanrights.org/es/colombia-empresa-bananera-agromar-vinculada-por-la-justicia-a-violaciones-de-derechos-humanos-y-grupos-paramilitares> See the AMERISUR case in Zona de Reserva Campesina Perla Amazónica, Putumayo, a company that has been granted licenses for exploration and exploitation in campesino territory, contrary to the interests of the communities, generating socio-environmental impacts and damage to wetlands and rivers: <https://www.business-humanrights.org/es/colombia-informe-de-ong-se%3%B1ala-abusos-de-derechos-humanos-por-petroleras-en-putumayo>. See the Poligrow case in Mapiripán, Meta, a company that has an extensive palm monoculture that has generated social divisions and environmental impacts on soils and main water sources for the Jiw and Sikuani indigenous communities: <https://www.business-humanrights.org/es/colombia-ong-denuncian-graves-violaciones-de-derechos-humanos-por-paramilitares-que-estar%C3%ADan-relacionados-con-poligrow>

<sup>34</sup> See case at: <https://www.business-humanrights.org/es/perfil-de-las-demandas-judiciales-contra-la-empresa-drummond-0>

<sup>35</sup> See case at: <https://www.business-humanrights.org/es/perfil-de-las-demandas-judiciales-contra-chiquita-por-actividades-en-colombia-0>

<sup>36</sup> See case at: <https://www.business-humanrights.org/es/perfil-de-demandas-judiciales-contra-bp-por-actividades-en-casanare-colombia>

should be associated with companies (public or private) that have an excellent reputation, in order to reduce the asymmetries and the accumulation of power inherent to the economic actors.

- Scenario 3: Those companies that use their economic activities to weaken the implementation of what has been agreed to achieve peace<sup>37</sup> should be considered direct actors in the conflict, in which case they should be excluded *in perpetuum* from developing activities in the territories affected by the conflict, a mandate that should be extended to all commercial or operational relations related to the value chain.

## NATIONAL NGOs ROUNDTABLE ON BUSINESS AND HUMAN RIGHTS

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<sup>37</sup> One way of weakening peace processes, for example, are those companies that appear before the SIVJRNR and do not provide truth, justice, reparation and non-repetition.