

Fragile! Handle with Care: Multinationals and Conflict

Lessons from SOMO's Multinational Corporations
in Conflict-Affected Areas programme



Colophon

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November 2016

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ISBN: 978-94-6207-111-7

The author would like to thank the following people for their comments and support: Rhodante Ahlers, Kris Genovese, Esther de Haan, Karlijn Kuijpers, Lydia de Leeuw and Fleur Scheele (all of SOMO).

SOMO would like to thank its partners Indepaz (Colombia), South Sudan Law Society (South Sudan), Green Advocates (Liberia), MADAM (Sierra Leone), ACIDH, Afrewatch and Premicongo (Democratic Republic of Congo) for their contribution to the case studies quoted in this report, and for commenting on a draft version of this report.



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

This publication has been made possible by financial assistance from the Dutch Ministry of Foreign Affairs. The content of this publication is the sole responsibility of SOMO and does not necessarily reflect the views of the Dutch Ministry of Foreign Affairs.



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in Conflict-Affected Areas programme**

SOMO

Mark van Dorp

Amsterdam, November 2016

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Acronyms

| | |
|--------------|---|
| 3TG | Tin, tantalum, tungsten and gold |
| CAO | Office of the Compliance Advisor/Ombudsman of the IFC |
| CSOs | Civil Society Organisations |
| DRC | Democratic Republic of the Congo |
| FPIC | Free, prior and informed consent |
| GDP | Gross Domestic Product |
| IFC | International Finance Corporation |
| IMF | International Monetary Fund |
| LDCs | Least Developed Countries |
| MCAA | Multinational Corporations in Conflict-Affected Areas programme |
| MKM | Minière de Kalumbwe Myunga |
| MNCs | Multinational companies (or corporations) |
| OECD | Organisation for Economic Co-operation and Development |
| OHCHR | Office of the UN High Commissioner for Human Rights |
| RSPO | Roundtable on Sustainable Palm Oil |
| SEK | Société d'Exploitation du Kipoi |
| UNGPs | UN Guiding Principles on Business and Human Rights |

Executive summary

Local communities in fragile and conflict-affected areas are exposed to many challenges, including armed violence, displacement, insecurity and livelihood and ecosystem destruction. An increasing number of businesses operate in fragile and conflict-affected areas, where the risks of human rights abuses are particularly great. Multinational corporations (MNCs) have been involved in human rights violations in these areas, often creating further conflict. However, there are still many gaps in understanding the relationship between private sector actors and conflict.

As part of the Multinational Corporations in Conflict-Affected Areas (MCAA) programme, between 2013 and 2016 SOMO, together with its local partners, undertook research on extractives and agro-industries in five countries. Specifically, the following seven companies were researched:

- ❑ In Colombia: Poligrow (palm oil) and Pacific Exploration & Production (petroleum);
- ❑ In the Democratic Republic of the Congo: Huachin Mining, Minière de Kalumbwe Myunga (MKM) and Société d'Exploitation du Kipoi (SEK) (all cobalt and copper mining);
- ❑ In Liberia: ArcelorMittal (iron ore mining);
- ❑ In Sierra Leone: African Minerals (iron ore mining).

In South Sudan, research was carried out on the oil sector in a context of fragility.

These case studies provide many illustrations of business-related human rights abuses in a context of conflict and fragility. It is important to note that the lessons in this report are based on a limited number of case studies, and can therefore not be generalized. Nevertheless, many of the findings are also relevant for other cases and geographical contexts, for which more research is needed. The following preliminary conclusions can be drawn on the basis of the case studies described in this report.

1. Fragility leads to a lack of corporate accountability

Fragility enables companies to operate without being held accountable, while it allows them to profit from the government's weak bargaining position. The resulting vicious circle contributes to the already fragile situation, and can lead to renewed conflict because of grievances among often traumatised populations that were expecting to benefit from peace. This is compounded by an almost complete lack of access to remedy for victims when human rights abuses take place in conflict-affected areas.

2. Companies influence the conflict dynamics and need to be more aware of this

MNCs in conflict-affected areas influence conflict dynamics – intentionally or unintentionally – and need to be aware of their role in the conflict. This is especially relevant in the case of large-scale acquisition or misappropriation of land by multinational companies, or in the case of financial or material support to security forces or other armed groups involved in human rights violations. MNCs in conflict settings overlook the impact of their operations not only on the conflict situation in general, but also the gender dimension of operating in conflict settings.

3. Some companies operating in fragile and conflict-affected situations adapt their business strategy to benefit from the fragility and the governance gap. This is contradicting the widespread belief that private sector development has a predominantly positive influence on peace building and economic reconstruction.

The business strategies of so-called “hit and run” companies operating in fragile and conflict-affected settings share a number of characteristics, namely that they are mostly short term and high risk; enable rapid growth of the business; involve frequent changes in ownership and management; often use tax havens to minimise or avoid paying taxes; exaggerate claims; and make empty promises. Despite claims that private sector development automatically leads to peace and development, these companies are very unlikely to make a sustainable contribution to peace building and economic reconstruction in the post-conflict phase, and instead tend to create new – or exacerbate existing – conflict. In addition, the absence of proper exit strategies on the part of extractive MNCs often leaves local communities worse off than before the companies arrived.

4. There is a lack of implementation of laws, principles and guidelines in fragile and conflict-affected situations, as well as a lack of “enhanced” due diligence processes.

Despite the emergence of a multitude of principles and guidelines aimed at improving business practices in conflict-affected areas, these principles and guidelines are often not implemented. Also, companies do not apply proper due diligence processes, let alone “enhanced” due diligence, as recommended in international guidelines. This leads to increased risks of exacerbating the conflict and creates adverse impacts on local communities. In addition, steps taken to tackle the conflict-minerals trade by the European Union are not sufficient and will allow companies to continue trading minerals, causing conflict and human rights abuse to continue in conflict-affected countries.

5. Civil society organisations working in fragile and conflict-affected situations face multiple challenges, making it more difficult to hold companies accountable.

The occurrence of unexpected crises, such as the Ebola virus disease outbreak in Liberia and Sierra Leone, and the re-escalating conflict in South Sudan, makes it very challenging for civil society organisations to do research on business-related human rights abuses, thus limiting their ability to hold private sector actors to account. Also, the space for civil society to hold the private sector accountable and to call on the government through judicial or non-judicial means in case of business-related human rights violations is often limited, and is increasingly shrinking.

Based on these lessons, a number of recommendations are provided to host states, home states, multinational companies and international organisations. Among others, it is recommended to MNCs to develop or improve company policies and strategies on how to deal with conflict settings, in line with international standards and guidelines, to prevent them from contributing to new or existing conflict. A more integrated, holistic approach towards peace building by multinational companies is recommended, in which a company’s overall economic, social and environmental performance would be taken as a measure to determine its impact on conflict and peace, and on stabilising the environment in which they operate. Also, there is a need for the inclusion of enhanced due diligence processes in responsible business guidelines, with specific attention to the challenges in fragile and conflict-affected areas.

1 Introduction

“After the pipeline was built, the company banned us from coming here, the children can’t move around freely anymore, because there are people wearing camouflage gear. You know that this was already a war zone. It was a war unleashed by the paramilitaries, and there were a lot of massacres around here, but you didn’t hear about it on the radio.”

Member of an indigenous community affected by oil company Pacific in Colombia¹

1.1 Background and objective of this report

Wars and conflicts continue to destabilize large parts of the world. In 2015, there were more than 400 political conflicts. This includes 19 full-scale wars spread over the entire world, with concentrations of conflict in the Middle East, the Maghreb region and Sub-Saharan Africa.² Worldwide, over 55 million people were forced to flee their homes – as refugees or as internally displaced people.³ The result is that an increasing number of businesses are currently operating in fragile and conflict-affected areas – either because they were already operating in a country when a conflict broke out, or because they arrived in a country that was already engaged in a conflict, or they arrived during the post-conflict phase because they saw opportunities for business. Multinational corporations have been or are still involved in human rights violations in these areas, which further create conflict.

However, there are still many gaps in the understanding of the relationship between private sector actors and conflict, and how conflict dynamics and state fragility influence businesses, and vice versa. There is a great need for research and evidence based information on the role of private sector in conflict-affected settings and how conflict dynamics and state fragility influence business, and vice versa. Research is also needed to fill gaps in knowledge surrounding the implementation of international laws, principles and guidelines for business and human rights in conflict settings.⁴

This report draws lessons from SOMO’s Multinational Corporations in Conflict-Affected Areas (MCAA) programme which started in 2012. This programme investigates the impact of multinational companies (MNCs) on human rights, and analyses the influence that MNCs and conflicts have on each other. The ultimate aim of the programme is to prevent MNCs contributing to conflict and human rights abuses by strengthening corporate accountability, improving government policies and empowering civil society.

1 SOMO and Indepaz, 2016.

2 Data obtained from the Heidelberg Institute for International Conflict Research, which publishes a yearly Conflict Barometer; http://www.hiik.de/en/konfliktbarometer/pdf/ConflictBarometer_2015.pdf.

3 Data from the UNHCR Population Statistics Database: <http://popstats.unhcr.org/en/overview>.

4 SOMO, Tilburg Law School, Oxfam Novib, 2015.

As a key component of the programme, between 2013 and 2016 SOMO undertook research on extractives and agro-industries in five countries: Colombia, Democratic Republic of the Congo, Liberia, Sierra Leone and South Sudan. Each context was very different in terms of the conflict situation, the role of businesses, the prevailing type of governance, and the level of civil society organisation. The studies were carried out in close collaboration with SOMO's local partners in each of the five countries.⁵ This resulted in the publication of seven company case studies dealing with four of these countries (see Table 1). In South Sudan, research was carried out on the oil sector in a context of fragility.

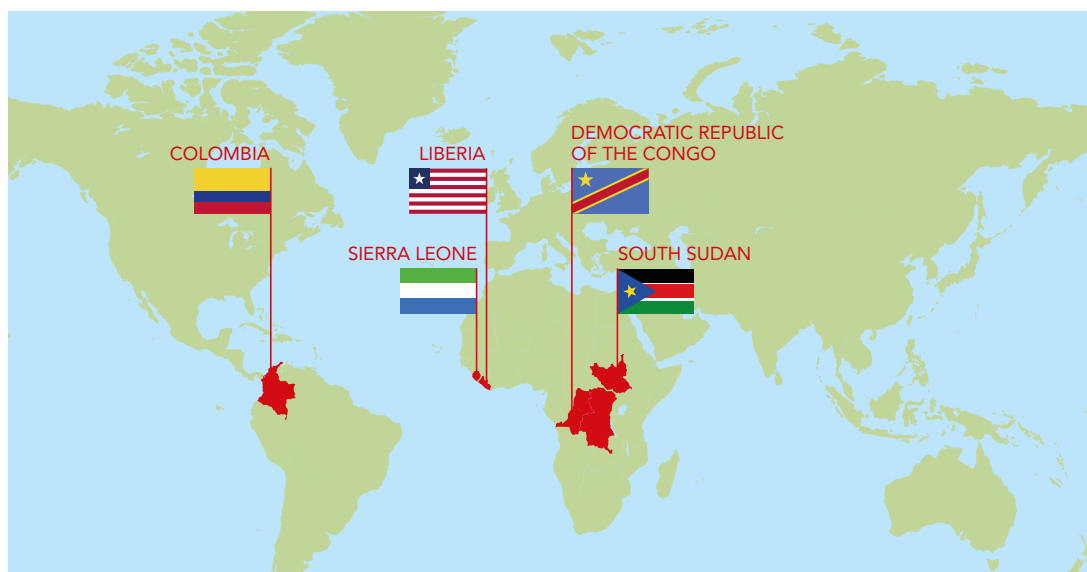
These case studies provide many illustrations of business-related human rights abuses in a context of conflict and fragility. It is important to note that the lessons in this report are based on a limited number of case studies, and can therefore not be generalized. Nevertheless, many of the findings are also relevant for other cases and geographical contexts, for which more research is needed. It is expected that the report will be particularly useful to policy makers, academics, the management of multinational companies (MNCs), and civil society organisations working at the interface between business and conflict, and that it will feed the discussion on the role of the private sector in fragile and conflict-affected situations with evidence based research.

5 SOMO's partners in these countries are: Indepaz (Colombia); Green Advocates (Liberia); ACIDH, Afrewatch and Premicongo (Democratic Republic of the Congo); MADAM (Sierra Leone); South Sudan Law Society (South Sudan).

Table 1 Overview of company case studies carried out by SOMO and partners

| Country | Sector | Company | Parent company/ country of origin | Main issues at stake | Local partners | Reference (see list at the end of this report) |
|--|-----------------------------------|------------------------------------|--|---|------------------|--|
| Colombia | Agro-industry: palm oil | Poligrow | Poligrow Inversiones S.L. (Spain) | Land rights, indigenous peoples, environment, labour rights, security, lack of transparency | Indepaz | SOMO and Indepaz (2015) |
| | Extractives: oil and gas | Pacific Exploration & Production | Pacific Exploration & Production (Canada) | Land rights, indigenous peoples, environment, labour rights, security, lack of transparency | Indepaz | SOMO and Indepaz (2016) |
| Democratic Republic of the Congo (DRC) | Extractives: copper and cobalt | Huachin Mining | China Nonferrous Metal Mining Group Co Ltd (Hong Kong) | Land rights, environment, security | Premicongo | SOMO (2016); Premicongo (2015) |
| | Extractives: copper and cobalt | Minière de Kalumbwe Myunga | China Railway Resources (China) | Land rights, environment, security | Premicongo | SOMO (2016); ACIDH and Afrewatch (2016) |
| | Extractives: copper and cobalt | Société d'Exploitation du Kipoi SA | Tiger Resources (Australia) | Land rights, environment, security | ACIDH, Afrewatch | SOMO (2016); ACIDH and Afrewatch (2016) |
| Liberia | Extractives: iron ore | ArcelorMittal Liberia | ArcelorMittal (Luxembourg) | Lack of compensation, loss of livelihoods, environment, cultural impacts, labour rights | Green Advocates | SOMO and Green Advocates (forthcoming) |
| Sierra Leone | Extractives: iron ore | African Minerals | African Minerals Ltd (Bermuda) | Relocation, access to water, labour rights, tax avoidance, impacts of mine closure | MADAM | SOMO (2015) |

Figure 1 Partner countries of the Multinational Corporations in Conflict-Affected Areas programme



1.2 Methodology

To formulate lessons learned from SOMO's Multinational Corporations in Conflict-Affected Areas programme, the following methodology was used:

- ❑ Desk review of all literature produced under SOMO's Multinational Corporations in Conflict-Affected Areas programme, with a special focus on the seven company case studies produced as part of the programme.⁶
- ❑ Interviews with SOMO partners in fragile states.
- ❑ Analysis of the main findings and clustering them into five categories:
 - Links between state fragility and multinational corporations.
 - Links between conflict and multinational corporations.
 - Multinational corporations' business strategies in fragile and conflict-affected situations.
 - Implementation of national and international laws, principles and guidelines in fragile and conflict-affected situations.
 - Challenges for civil society organisations working in fragile and conflict-affected situations.
- ❑ Formulation of lessons learned and writing the report based upon them.
- ❑ Peer review of the report by local partners.
- ❑ Integration of feedback and finalisation of the report.

⁶ See Table 1. Full references are provided at the end of this report.

1.3 Company review process

SOMO's strict review guidelines stipulate that all companies mentioned in a research report are given the opportunity to review, respond to and comment on those parts of a report that directly relate to them. This is intended to avoid inaccuracies being published and is, as such, an essential part of ensuring high-quality research. However, the authors remain solely responsible for the report's contents.

The review process for this publication involved sharing a draft of the different company case studies with the companies investigated. For six of the seven company case studies referred to in this report, the review was carried out directly by SOMO. Where relevant, the responses provided by the companies have been incorporated in the different reports that were published by SOMO. This concerns the following cases:

- ❑ Poligrow, Colombia
- ❑ Pacific Exploration & Production, Colombia
- ❑ Huachin Mining, DRC
- ❑ Minière de Kalumbwe Myunga, DRC
- ❑ Société d'Exploitation du Kipoi SA, DRC
- ❑ African Minerals, Sierra Leone

For the case study of ArcelorMittal in Liberia, the company review was done by SOMO's partner, Green Advocates, with the local management of the company in Liberia.⁷

For this report, no separate company review process was carried out as all information used is quoted from the earlier published case studies. For those interested in the full case studies, please refer to the detailed reports as mentioned in the List of References.

1.4 Report outline

Chapter 2 presents the main lessons learned from the four-year programme, including examples of research from the programme. The results of the different case studies and research reports are presented in two ways:

- ❑ In a number of boxes, short summaries are provided of the company case studies and general research reports.
- ❑ As an illustration of the lessons learned, some key findings are presented for the different case studies before each lesson.

Chapter 3 presents conclusions and recommendations for host states, home states, MNCs, international organisations and CSOs, to help them improve their understanding of the role of MNCs in conflict-affected areas, and how they can help prevent their operations having negative impacts on workers, communities and the environment in conflict settings.

⁷ The review process consisted of an email correspondence between Green Advocates and ArcelorMittal Liberia as well as a meeting between ArcelorMittal Liberia, Green Advocates and nine community members (June-July 2015).

2 Lessons learned

Lessons learned from SOMO's Multinationals in Conflict-Affected Areas programme fall into the following categories:

- ❑ Links between state fragility and multinational corporations.
- ❑ Links between conflict dynamics and multinational corporations.
- ❑ Business strategies of multinational corporations in fragile and conflict-affected situations.
- ❑ Implementation of laws, principles and guidelines in fragile and conflict-affected situations.
- ❑ Challenges for civil society organisations working in fragile and conflict-affected situations.

2.1 Links between state fragility and multinational corporations

“Gross human rights abuses can take place anywhere, but the risks are particularly great in areas of poor governance, and especially in conflict-affected areas.”

UN Guiding Principles for Business and Human Rights⁸

It is now widely accepted that businesses operating in the world's most fragile contexts bear a share of responsibility to strengthen resilience rather than adding to stress factors.⁹ The UN Guiding Principles for Business and Human Rights, adopted in 2011, emphasize that states (both host and home states) must ensure that businesses operating in conflict-affected areas do not commit or contribute to human rights abuses.¹⁰ According to the OECD Guidelines for Multinational Enterprises, a state's failure either to enforce relevant domestic laws or to implement international human rights obligations does not diminish the expectation that enterprises respect human rights.¹¹ Research by SOMO and its partners on the impacts of multinational companies is particularly revealing in this respect, as many illustrations were found of business-related human rights abuses in a context of fragility.

8 Zerk, 2013.

9 World Economic Forum, 2016, p.4.

10 The UN Guiding Principles on Business & Human Rights, adopted in 2011, reiterate existing duties under human rights law and have become the leading framework in this field; United Nations, 2011.

11 OECD, 2011.

Lesson #1

The governance gap – characteristic of many conflict-affected areas – is leading to a lack of accountability of companies. However, this leads to significant risks of companies becoming entangled in the conflict itself.

Case study illustrating this lesson:

Huachin Mining, Minière de Kalumbwe Myunga (MKM), Société d'Exploitation du Kipoi SA (SEK), Democratic Republic of the Congo:

- Mining companies are not held accountable for their negative impacts because of the Congolese state's weak governance and failure to protect citizens from business-related human rights violations.
- Uncontrolled invasion of mining companies in the Basse Kando Reserve is a symptom of the weak governance of the Congolese state, leading to disappearance of threatened species, including elephants and hippos.



Photo 1: Transporting mineral ores in Lubumbashi – Fleur Scheele, SOMO

Economic globalization over recent decades has been accompanied by a 'governance gap', an 'institutional misalignment' between business actors' influence and their degree of accountability.¹² The calls for greater accountability of business enterprises flow in particular from the perceived greater influence and impact of transnational corporations, especially in countries with weak institutions.¹³ In the UN Guiding Principles for Business and Human Rights, the particular, often acute, challenges posed by conflict-affected areas were identified as one of the most significant 'governance gaps' existing at the international level.¹⁴ This governance gap allows multinational corporations to act without being held accountable. And because in these fragile contexts, state institutions do not function as intended, this leads to significant risk of companies becoming entangled in the conflict itself. It is important to note that where a host state is unable to meet its duty to protect (for example, due to a lack of effective control over its territory), home states of transnational corporations have a role to play in helping both those companies and the host state to prevent business-related human rights abuses.¹⁵

A recent study by Chatham House¹⁶ on the extractives industry and how this sector might support peace, observed that in fragile and conflicted-affected areas, by definition, governments are less able (or sometimes unwilling) to manage large-scale resource development¹⁷ and the risk that it may feed conflict. This observation is supported by the research carried out by SOMO over the last four years. All case studies in this report support the view that in fragile settings, governments do not sufficiently monitor multinational corporation's human rights and environmental impacts. For instance, in DRC, environmental impact assessments or monitoring visits are not published or are not accessible (see Box 1). In Liberia and Colombia, protection of human rights defenders is seriously lacking. Also in Colombia, the rights of indigenous peoples are not always respected and land claims are not adhered to, especially in the case of displaced people returning to their own lands. This leads to a situation in which the government is not always able to fulfil its duty to protect under international human rights law or is not always able to meet its obligations to protect its citizens from human rights abuses caused by third parties. The resulting lack of rule of law leads to impunity on the part of MNCs, and to a lack of protection for communities and CSOs that stand up for their rights in the face of such impunity.

12 Ford, 2015.

13 Ford, 2015.

14 Davis, 2012.

15 Davis, 2012.

16 Bailey et al., 2015.

17 Large-scale resource development is defined as large-scale formal commercial activity by firms in the extractive industries (the mining, oil and gas sectors); Bailey et al., 2015, p.6.

Box 1 Cobalt blues: research and advocacy on cobalt and copper mining operations in the Democratic Republic of the Congo¹

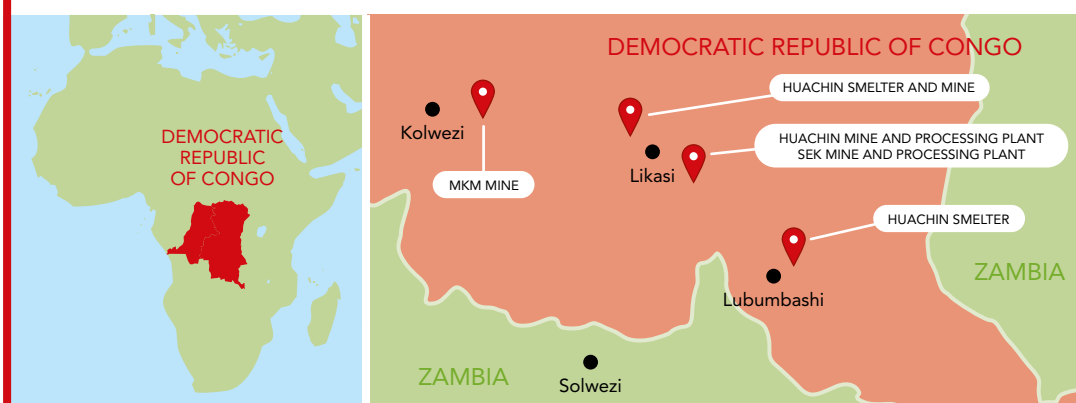
Research by SOMO and its partners reveals the prevalence of serious and structural human rights violations and environmental pollution in Democratic Republic of Congo as a result of cobalt mining, including water pollution and forced evictions. Cobalt is used in rechargeable batteries for smart phones and laptops, and SOMO is calling on electronics companies to take responsibility for the way cobalt in their supply chain is mined. About half of the worldwide cobalt production comes from DRC, mainly from the province of Katanga.

The cobalt mining takes place close to towns and villages. Local communities near mines are regularly cut off from their farmland and water sources, without having had a say in the matter. For instance, mining company Ruashi has blocked local people's access to water sources and has polluted the river, leaving 3,000 households worse off than before their arrival. This has led to local grievances, which left unaddressed may well lead to conflict. There are also serious complaints about air and water pollution.

Whilst the companies do not respect human rights, the rule of law and their obligations to communities whose lives are affected by the mines, DRC's government has also failed to enforce laws to protect its citizens and natural environments affected by mining operations. For instance, violence has occurred between the police or military and illegal miners trespassing on the mine sites. As the illegal miners flee, police open fire indiscriminately and have reportedly hit innocent civilians. Given that some communities live physically very close to mines and their operations, accidental deaths happen.

In addition, the Congolese Ministry of Mines has granted concessions to mining companies in protected natural areas. Government authorities illegally extort money from artisanal miners who are living and working in terrible conditions. The environment and public health are severely impacted by pollution caused by the mining activities, but the Congolese state is not fulfilling its obligation to hold polluters to account.

1 SOMO, 2016a.



Lesson #2

The weak bargaining position of fragile states in relation to multinational companies has often led them to 'sell-out' their natural resources, and multinational companies sometimes specifically seek out fragile states with a weak bargaining position to secure cheap but highly valuable resources.

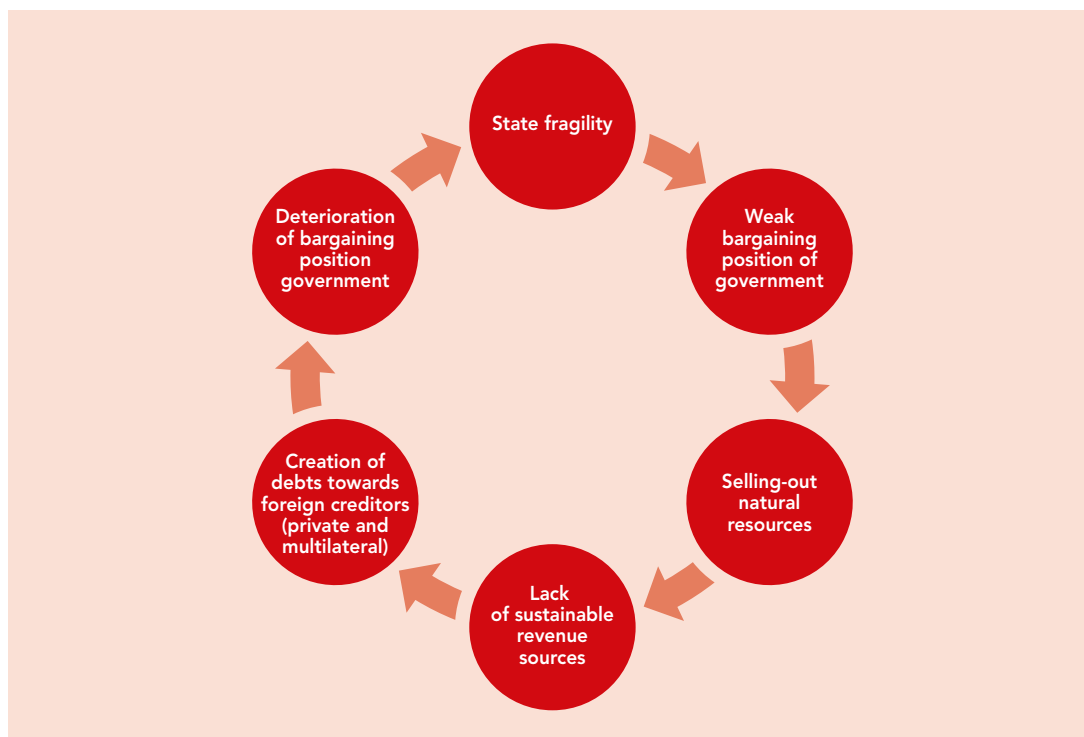
Case study illustrating this lesson

African Minerals – Sierra Leone:

- The mining company abused the weak bargaining position of Sierra Leone's government, maintaining the vicious circle of dependence on natural resource exploitation in unfavourable conditions.
- Due to falling iron ore prices and unsustainability of their financial models, African Minerals has gone bankrupt, adding to the vulnerability of the Sierra Leone's state, which is faced with local grievances and a decrease in its already low tax revenues.

SOMO's research shows that governments of fragile states are often in a very weak bargaining position when it comes to dealing with MNCs, which has led them to 'sell-out' their natural resources to multinational companies simply to stop their public coffers running dry. This creates a vicious circle of fragility, under-selling, and an ever-deteriorating bargaining position of fragile states governments (see Figure 2). This vicious circle is dependent on multinational companies that seek out fragile states with a weak negotiation position to secure cheap but highly valuable resources.

Figure 2 Vicious circle created by fragility and the selling-out of natural resources



This vicious circle contributes to already fragile situations. It can lead to renewed conflict in places where peace is recently established if local, conflict-weary populations – expecting to benefit from peace dividends – remain impoverished (or see their situation worsen) because of natural resource exploitation by national or foreign companies. The case of African Minerals provides an illustration of how this vicious circle works in practice (see Box 2).



Photo 2: Rural area in Sierra Leone – bobthemagicdragon, flickr

Box 2 The case of African Minerals in Sierra Leone¹

Sierra Leone's mineral resources played a major role in the country's civil war, which lasted from 1991-2002. Both the rebel army (the Revolutionary United Front) and the government used resource wealth for their own ends, with each selling so-called booty futures "*the right to exploit mineral resources that the seller has not yet captured*" – to foreign actors in order to finance their military activities. Earlier research, in which the relationship between resource wealth and the initial causes as well as the course of the civil war were analysed, shows that grievances stemming from resource exploitation by companies played a role in the outbreak of civil war.²

1 SOMO, 2015d.

2 Ross, 2004, quoted in SOMO, 2015d.

◉ Box 2 The case of African Minerals in Sierra Leone

In the post-war situation, the government continued to rely heavily on the exploitation of natural resources. In Sierra Leone's Agenda for Prosperity (2013-2018), natural resources are central to the country's long-term vision of being an inclusive, green, middle-income country by 2035. It is stated that: *"Rapid expected growth in minerals production and export, together with the potential for petroleum exploitation, should provide resources to help transform the country and make the Agenda for Prosperity feasible."* The Agenda expresses a major reliance on *"private-led growth"* and increasing exports, *"mainly of iron ore"*. The Agenda acknowledges the risk of relying heavily on natural resources. In particular, possible collapses of commodity prices are identified as a risk.

For resource-rich countries like Sierra Leone, tax revenues are a major contributor to the domestic resources necessary to finance a country's development and reduce poverty. However, in 2014, tax revenues in Sierra Leone were estimated to be only 11% of GDP, far less than the average tax revenues in low- and middle-income countries in sub-Saharan Africa. In 2014, a group of NGOs analysed the so-called tax expenditure of Sierra Leone's government, which is the amount of revenues lost by the government's granting of tax incentives and exemptions. The report calculates that Sierra Leone loses more than US\$40 million a year in corporate income tax due to incentives given to companies, noting that: *"nearly all of these losses are the result of the agreements with African Minerals and London Mining"*.³ The government offers these benefits and exemptions to companies such as African Minerals in the hope of attracting investments. Research by the International Monetary Fund (IMF) has shown, however, that tax incentives have little effect on investment decisions.⁴

In recent years, the IMF, the OECD and the World Bank have been calling for reductions in the use of corporate tax incentives. The problems with their use include not only loss of tax revenue, but also that they can give undue advantage to already established big firms and multinationals at the expense of smaller and domestic industries, and can promote corruption.⁵

3 Budget Advocacy Network et al., 2014, quoted in SOMO, 2015d. London Mining is another iron ore mining company recently bought by the largest shareholder and executive chairman of African Minerals, Frank Timis. SOMO, 2015d, p.15.

4 A study of 40 Latin American, Caribbean and African countries for the period 1985 to 2004 showed no benefit for total investment or economic growth as a result of tax incentives. Similarly, a study of 12 west and central African countries over the period 1994-2006 showed no beneficial relationship between tax holidays and investment; OECD, 2014.

5 ActionAid, 2015.

◉ Box 2 The case of African Minerals in Sierra Leone

Case research was done by SOMO on mining company African Minerals and its Tonkolili mine in Sierra Leone. African Minerals has recently filed for administration and has faced accusations of grave human rights abuses. It appears that the company has had many adverse impacts on workers, local communities and the environment. This includes the relocation of three communities, insufficient compensation for lost livelihoods, the diminishing availability of food and access to water, and labour rights issues. It is unclear whether African Minerals, or a potential new owner, will uphold the agreements made with workers and communities following protests, or even provide the basic services on which community members depend. A definite shutdown of the mine would have a big impact on the local economy as jobs might be suspended or lost.

This example shows that the dependence on natural resource exploitation carried out under unfavourable conditions for the public purse and the population at large is maintained by companies that consciously invest in countries with a weak bargaining position in a post-conflict situation, such as Sierra Leone. The bankrupting of African Minerals and London Mining by the falling prices of iron ore and the unsustainability of their financial models has added to the vulnerability of the state, which is now faced with grievances among the local population and a decrease in its already low tax revenues.



For many fragile states, natural resources are the main source of exports and government revenues. Many resource-rich countries face the problem that the revenues of these commodities, like oil and gas, are only generating revenue or turning a profit after a certain period. In recent decades, developing countries, including many fragile states, have been using their natural resources as collateral to access sources of finance for investment, countervailing the barriers they face when accessing conventional bank lending and capital markets.¹⁸ These resource-backed loans were pioneered in Angola in the 1980s and 1990s, Angola's government had abundant promising or producing oil fields, and an expensive war to fund against the UNITA rebel movement. At the same time, its creditworthiness was at rock bottom. Several Western banks saw this as a business opportunity, and offered Angola an arrangement whereby loans were to be guaranteed by future oil revenues. In weak governance contexts these loans may mortgage the nation's subsoil wealth without much productive investment to show for it.¹⁹

In recent years, several African countries are increasingly looking to borrow from international private lenders to finance their recurrent and capital expenditure needs. Previously, financing largely came from official creditors such as governments or multilateral entities like the World Bank and IMF. The writing off of debt in the last decade, which improved the financial standing of most countries, has ironically led to an accumulation of new debt, this time from private creditors. Much of these credits to African governments are implicitly backed by commodities, a consequence of the continent's reliance on primary commodity exports. So when the prices of commodities fall, the consequences can be quite dire. And the outlook is not encouraging for commodity-reliant economies that borrowed heavily during the recent borrowing boom. Experts, including the IMF, have warned that some countries might find themselves in debt traps as a result.²⁰

In oil rich countries, oil is usually produced by large multinational oil companies, operating in joint ventures with the state oil company. A part of the oil produced is traded directly by multinational oil companies, while another part is bought by oil traders. Some of the major players in this oil trade are Trafigura, Vitol and Glencore. A recent briefing paper by the Natural Resource Governance Institute (NRGI) describes how resource-rich governments negotiate major, high-stakes deals for their oil and gas resources.²¹ These deals include the sale of oil to repay large oil-backed loans – an opaque type of deal used by many resource producers. It is argued that these oil deals merit tight transparency and oversight – especially in fragile and conflict-affected situations, although in practice this is often not the case. These deals are made with both oil producing companies as well as oil traders. According to an expert on commodity trade: *"Trading houses are not shying away from places with high risk profiles if these profiles also lead to higher profit margins. It's about risk versus reward."*²²

18 Canuto, 2013.

19 Canuto, 2013.

20 Quartz Africa, 2015.

21 There is a strong link between oil trade and security, conflict and geopolitical agendas. In the report a number of cases are provided of international traders buying oil from contested governmental entities (e.g. in Iraq and Libya), as well as cases where stolen oil, which is often sold for export, has fueled conflicts in Iraq, Syria and Nigeria. See: Sayne and Gillies, 2016.

22 Farge and Donati, 2012.

A strong example is South Sudan, a country extremely dependent on oil revenues. South Sudan became independent from Sudan in 2011 following a long-running civil war that ended in 2005 by the signing of a peace agreement between the Khartoum Government and the SPLA (Sudanese People's Liberation Army). The country had to build itself from scratch. To do this, the new government has used the oil industry as its primary source of income, financed through oil-backed loans and high oil prices. In Box 3 below, the risks of this model are highlighted.

Box 3 The case of petroleum in South Sudan: oil-backed loans in a context of fragility¹

According to the IMF, oil accounts for 98% of South Sudan's government funds. However, the decrease in oil prices, combined to the fixed price that South Sudan's Government pays to neighboring Sudan for the transportation of oil through its territory has led to severe economic crisis, with the Government facing an acute fiscal crisis. After South Sudan became independent in 2011, the country has turned into a violent kleptocracy dominated by two political rivals, President Salva Kiir and former Vice-President Riek Machar, who have been fighting over the access to the oil wealth.² The renewed conflict that broke out in 2013 is to a large extent due to disagreement over the distribution of oil revenues between the ethnic group in power, the Dinka, and the Nuer, who feel marginalized by the Dinka dominated government.

In 2014, Global Witness voiced its concerns regarding the budget of the Government of South Sudan, indicating that the country was at risk of sliding into a cycle of oil-backed debt, leaving little funds to be spent on projects directly benefiting its citizens. From the 2015 annual government budget, it appeared that a total of US\$1 billion would have to be borrowed from oil companies in that year to cover its financial needs. Most of this money would go straight back to the same oil companies, to pay off last year's debts. More alarmingly, the terms of these loans are not disclosed, which means that South Sudanese citizens cannot judge whether these deals are beneficial to the country.³

A paper on the role of oil in sustainable peace building in South Sudan, produced by SOMO's partner South Sudan Law Society, concluded that South Sudan's petroleum laws are widely considered to reflect many aspects of good practice.⁴ For example, the Petroleum Revenue Management Bill of 2013 provides for a Future Generations' Fund that could ensure that the people of South Sudan enjoy the benefits of the country's oil wealth long after the oil is exhausted. If established, the Future Generations' Fund could be worth as much as US\$50 billion when existing oil fields run dry in a predicted 36 years from now.

1 Map of oil concession blocks at the end of this Box was copied from: <http://www.southsudancivics.info/>

2 The Sentry, 2016.

3 Global Witness, 2014.

4 South Sudan Law Society, 2015a.

◉ Box 3 The case of petroleum in South Sudan: oil-backed loans in a context of fragility

However, as with most laws in South Sudan, the country's petroleum laws remain almost completely unimplemented.⁵

Relatively little attention has been paid to the role of oil traders in South Sudan, who operate in a highly opaque way, as shown above. In recent years, SOMO and South Sudan Law Society have attempted to gain insight into the role of oil traders in South Sudan, but research has been hindered by the lack of public information and the extremely unstable situation in South Sudan.

Oil sales represent South Sudan's largest source of cash income from the oil sector. In 2011, sales to three of the major oil traders (Trafigura, Vitol and Arcadia) totalled US\$1.6 billion, totalling 37 per cent of South Sudan's government revenues during its first year of independence.⁶ In 2013 and 2014 the major buyers were multinational oil trading companies Unipet, Chinaoil, Glencore, Trafigura and Vitol.⁷ As purchasers of oil from the South Sudanese government, international oil traders could influence the renewed conflict within South Sudan because the financial deals are enabling the Government to continue the financing of the conflict.

In conclusion, the South Sudanese Government's weak state capacity and continuous acute financial needs, coupled with its dependency on the Sudanese Government, through whose territory it exports its oil, has led to a weak bargaining position in striking deals for the sale of oil. Since the outbreak of the new internal conflict in 2013, the South Sudanese Government needs even more cash to maintain its security forces. This has led to a greater urgency to sell its oil, even below market prices. Therefore, South Sudan has little space for negotiation with international oil traders regarding the price of their oil.

What is needed is more insight into oil traders due diligence policies, to be able to assess whether these policies are sufficiently taking into account the conflict context and to what extent oil traders are effectively financing conflict. Also, transparency must be improved in both the tender process for oil trade as well as the terms of the oil-backed loans between the oil traders and the Government of South Sudan. This will ultimately contribute to solving one of the root causes of conflict, the unequal and non-transparent distribution of oil revenues.

5 South Sudan Law Society, 2015a.

6 Gillies et al., 2014.

7 Global Witness, 2015, p.8.

◉ **Box 3 The case of petroleum in South Sudan: oil-backed loans in a context of fragility**

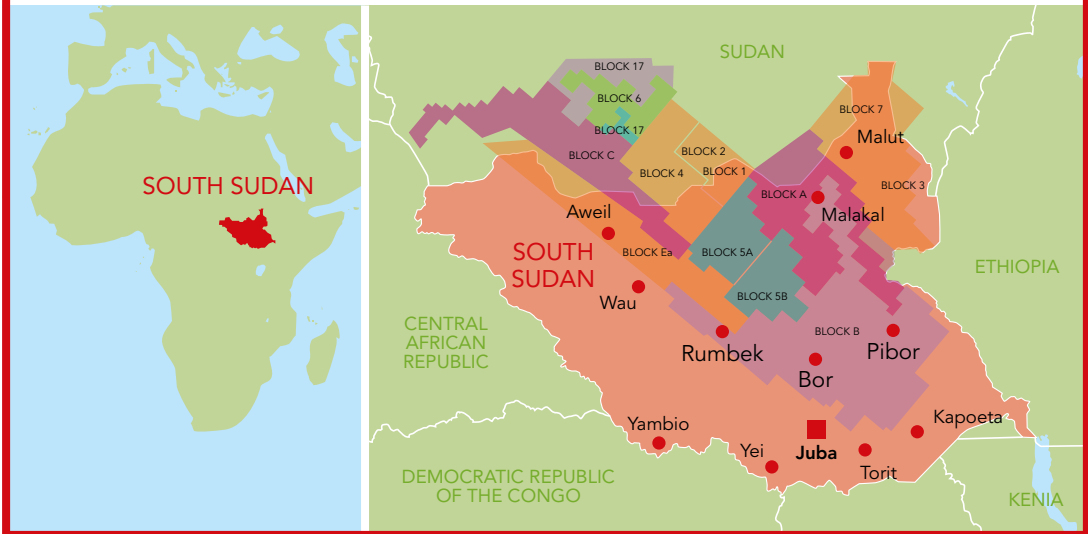


Photo 3: Petrol station in Juba, South Sudan – Mark van Dorp, SOMO

Lesson #3

There is an almost complete lack of access to remedy for victims when human rights abuses are taking place in conflict-affected areas for two reasons:

- fragile state governments are generally not able or willing to fulfil their duty to protect against human rights abuses by corporations, nor their obligation to provide remedy to victims;
- international grievance mechanisms do not function as intended in fragile states because victims do not dare raise their voice for fear of losing their jobs, their land or their lives, and because of a lack of awareness of the existence of these mechanisms.

Case study illustrating this lesson

Poligrow, Pacific Exploration & Production, Colombia:

- Both companies' operations have caused severe human rights violations.
- Lack of protection for communities and CSOs protesting against this impunity and standing up for their rights.
- As a result, grievance mechanisms that are in theory available to victims, including the Colombian National Contact Point of the OECD Guidelines, the IFC Compliance Advisor Ombudsman and the RSPO complaint mechanism, do not function as intended.

States have an obligation to protect against human rights abuses by corporations and to provide access to remedy to victims of these same abuses. Factors such as weak rule of law, failing justice systems and lack of control over territory often render conflict-affected states incapable of holding multinational corporations to account. In certain contexts, authorities may also be unwilling to do so because of their involvement in human rights violations, or because they profit from business activities and seek to create an environment that is conducive to attracting businesses.²³ Failure to do that is a failure to respect and fulfil a host state's own human rights obligations. On the other hand, it should be stressed that it is often the multinational companies that are actively seeking to benefit from these weaknesses in fragile states.

In general, it is observed that remedy is not guaranteed for victims of human rights violations and much remains to be done to improve this. This includes remedy systems at the national as well as at the international level. International mechanisms try to provide a backstop to the failure of national governments to hold other actors to account. However, it appears that these international mechanisms are often not functioning either, as was shown by civil society organisations. In a recent report co-authored by SOMO on the role of Development Finance Institutions investing in activities intended to contribute to economic development, including building hydro-electric dams, railway projects, or reform of laws and institutions, it is shown that there are many hurdles that communities

23 SOMO, 2015e.

and workers face in obtaining remedy from development banks whose projects cause them harm.²⁴ Of course, it is not only the development banks financing corporate activities that need to fulfil their responsibility to provide remedy. Also, multinational corporations must bear responsibility for injustices caused by their international business activities, especially when operating in conflict regions with weak public infrastructures or authoritarian regimes that offer few opportunities to conduct business within the rule of law. To help them do this, there are clear, internationally recognised standards on how corporations can do this in conflict regions and weak governance states.²⁵

Nevertheless, conditions in fragile and conflict-affected areas make it difficult for victims of corporate misconduct to seek justice and hold businesses accountable. To a large extent, this is caused by a context in which there is a lack of rule of law, weak state institutions, and impunity of actors involved in corporate crimes. Victims of business-related human rights abuses often face considerable and well-documented barriers to accessing remedy. Parent companies are rarely held liable for human rights abuses committed by their subsidiaries or along their supply chains, while the environment of local subsidiaries and suppliers is often characterized by weak regulation and enforcement.²⁶

Research carried out by SOMO and partners in Colombia for example, shows that victims of human rights violations are afraid to speak out against these violations, who expressed that this fear prevented them from raising a complaint with international non-judicial grievance mechanisms such as the Organisation for Economic Co-operation and Development (OECD) complaint mechanism and the Compliance Advisor Ombudsman of the International Finance Corporation (IFC). Also in Liberia, it was observed that the communities that expressed complaints or grievances to ArcelorMittal, they received threats from both the company and from local officials.

NGOs also criticized the IFC's poor record in sanctioning companies it finances for non-compliance with its standards in conflict-affected and fragile environments.²⁷ OECD Watch, a network of NGOs, found that allegations of corporate wrongdoing lodged under the OECD Guidelines for Multinational Enterprises over the past 15 years almost never resulted in companies being held accountable.²⁸ In conclusion, the resulting 'accountability gap' needs to be addressed, especially in fragile and conflict-affected areas.

24 Daniel et al., 2016.

25 SOMO, 2014.

26 Brot für die Welt et al., 2016.

27 A case with particular importance to conflict-affected areas is the Dinant case, a foreign palm oil company in Honduras. According to the Compliance Advisor/Ombudsman, key allegations to the company included forced evictions of farmers and inappropriate use of private and public security forces leading to violence against farmers. The CAO concluded that IFC failed to identify early enough and/or respond appropriately to the situation of Dinant in the context of the declining political and security situation in Honduras. This case has been used by CSOs to illustrate the failure of the IFC to understand the context of projects that it finances in conflict-affected areas; Compliance Advisor Ombudsman, 2016.

28 OECD Watch, 2015.

2.2 Links between conflict dynamics and multinational corporations

“If companies do not know in what context they operate, they can easily reignite conflict. In recent years, we have increasingly seen conflicts erupting between companies and communities. In a fragile country like Liberia, this is very dangerous indeed.”

Alfred Brownell, Lead Campaigner, Green Advocates, Liberia²⁹

Private sector development is considered to be a powerful and adaptable tool for reconstruction and regeneration of the economy, especially in post-conflict situations.³⁰ On the other hand, it is also increasingly recognised that private sector development can have significant negative impacts on local communities, the environment and human rights, especially in post-conflict settings. For instance, the United Nations Development Programme’s (UNDP) strategy for working with the private sector acknowledges that the private sector may also contribute to a negative impact on development – including on the environment, social conditions, labour rights, corruption and conflict.³¹ In addition to human rights violations caused by multinational corporations, in fragile and conflict-affected areas these same companies may also spark, drive or intensify conflict. Their business activities may benefit from and support specific parties to the conflict, for example when sourcing from rebel held territory or supplying them with resources. Also, their presence on the ground may spark conflict when community grievances are not adequately addressed.³² This section focuses on the link between conflict dynamics and multinational companies. This includes the various negative impacts that companies have in conflict contexts, as well as the ways in which companies may contribute to or create conflict themselves.

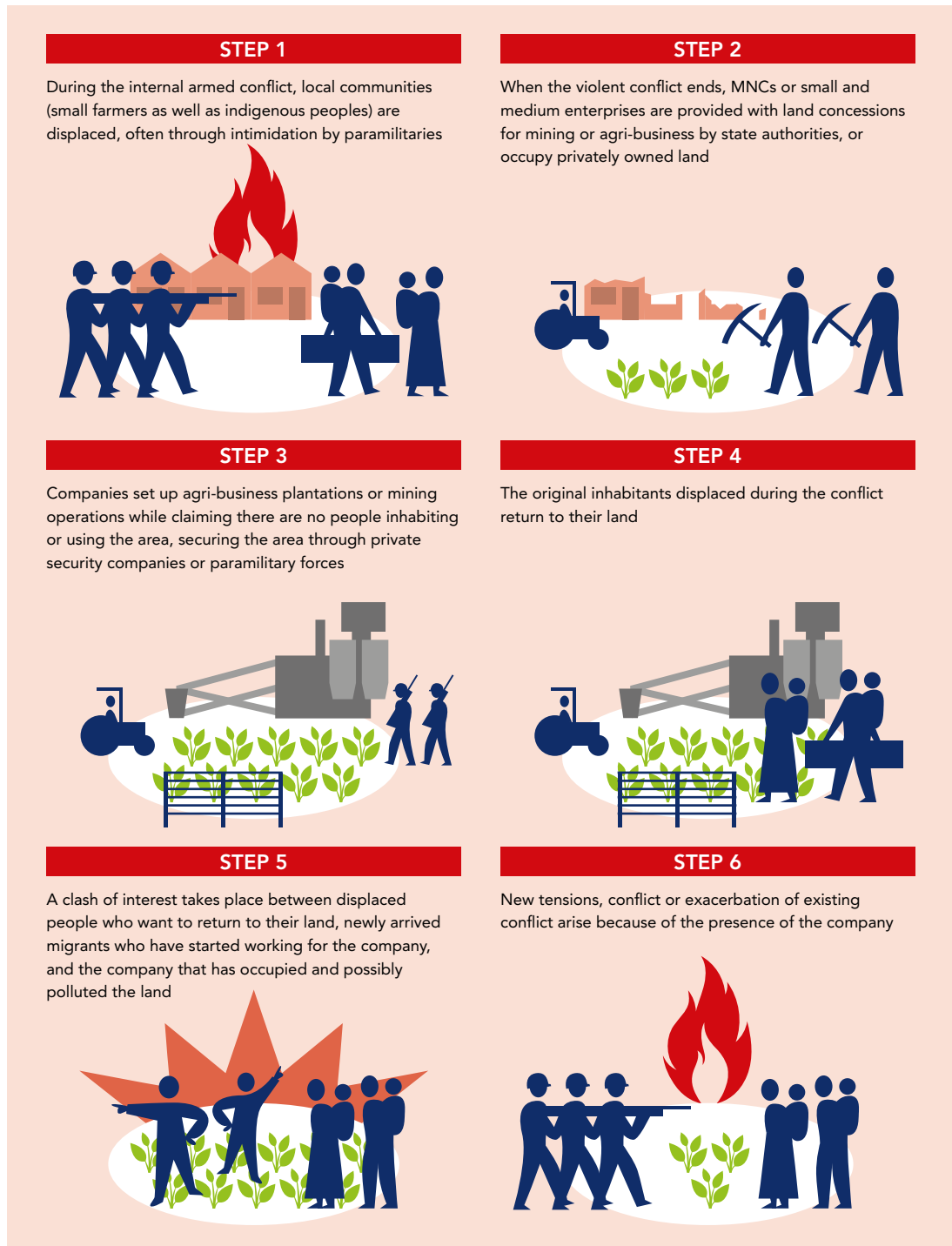
29 SOMO, 2015c.

30 Mac Sweeney, 2008; Porter Peschka, 2010; World Bank Group, 2013.

31 United Nations Development Programme, 2012.

32 SOMO, 2015d.

Figure 3 Chronology of events leading to land rights violations in Colombia



Lesson #4

Issuing of land concessions by the state in a context of fragility has a very high risk of leading to violations of land rights and environmental rights, thus triggering new conflict or exacerbating existing conflict.

Case study illustrating this lesson:

Poligrow, Colombia:

- Lack of free, prior and informed consent (FPIC) of indigenous peoples by the company, and lack of proper due diligence and analysis of the conflict history when acquiring large amounts of land.
- The company has hindered the return of those affected by the internal conflict to the land from which they come, and upon which they strongly depend, including the indigenous Sikuani and Jiw people.
- This has indirectly led to grievances and social unrest, potentially contributing to new conflict.



Photo 4: Palm oil plantation in Colombia – José Luis Sanchez Hachero

Absent or weak state authorities in many conflict-affected areas often leads to problems in safeguarding land rights. Often this is due to the nature of the conflict – for example, large parts of a country may have been under the control of rebel groups, guerrilla fighters or paramilitaries. Due to a lack of clarity about land tenure, double land claims and contradictions between customary law and national law in these areas, or large-scale acquisition or misappropriation of land by MNCs often leads to a conflict between MNCs and local communities. A lack of free, prior and informed consent (FPIC) is especially damaging in fragile contexts, as shown by the case study by SOMO and Indepaz of palm oil company Poligrow in Colombia (see Box 4). Our research in Colombia shows that there is a chronology of events that leads to violations of land rights increasing the conflict potential (see Figure 3).

Box 4 The case of palm oil company Poligrow in Colombia: a story of land grabbing, grievances and social unrest¹

A case study of Spanish-Italian palm oil company Poligrow, located in Mapiripán (Meta department, Colombia), was carried out by SOMO and Indepaz.

Mapiripán has a long history of conflict, having endured four massacres perpetrated by paramilitaries in the late 1990s and early 2000s. Poligrow arrived in Colombia in 2008 as part of a government strategy to develop the eastern plains of Colombia and contribute to economic development. Poligrow's goal is to plant 15,000 hectares for the production of palm oil to be sold on national and global palm oil markets. In recent decades, a large number of land transactions have taken place, which in many cases helped paramilitaries to 'legitimise' their illegal title to the land they controlled.

Many negative impacts of the company's operations were found relate to land rights, security, labour rights, the environment, tax havens, and lack of transparency and community engagement. Even though Poligrow claims not to be involved in the conflict, in a context where different armed groups fight for control over land and the drugs trade (and where most of the land is disputed) it is impossible not to become – directly or indirectly – entangled in the internal armed conflict.

Based on extensive field research, the following conclusions can be drawn:²

- Poligrow has increased the potential for conflict in the Mapiripán region because it has contributed to the unequal distribution of land and its use/property rights – a root cause of conflict.

1 SOMO and Indepaz, 2015; Van Dorp and Kuijpers, 2016.

2 Van Dorp and Kuijpers, 2016.

❏ **Box 4 The case of palm oil company Poligrow in Colombia: a story of land grabbing, grievances and social unrest**

- By acquiring large amounts of land without properly investigating its history, the company has hindered the return of those affected by the internal conflict to the land from which they come, and upon which they strongly depend.
- The company occupies indigenous land for the cultivation of palm oil, which is one of the reasons why indigenous and other local people, currently living in precarious conditions, cannot return to their lands. This has indirectly led to grievances and social unrest, potentially contributing to new conflict.

Following the publication of NGO reports on Poligrow (including the SOMO and Indepaz report), local people interviewed for the reports were intimidated by the company management and by paramilitary groups. Several local activists (including two members of the indigenous Sikuni tribe) reported receiving death threats and being harassed by suspected paramilitaries for their opposition to plans to expand the large palm oil plantation. One family had to leave Mapiripán for safety reasons.³

Reportedly, the company threatened to leave Mapiripán and to close down Electrimapiri, a local power company that was set up by Poligrow to provide the local community with electricity, by lack of a governmental electricity provider.⁴

The research by SOMO and Indepaz has also led to investigations by the Colombian authorities into the legality of Poligrow's land acquisition.⁵ In addition, the Roundtable on Sustainable Palm Oil (RSPO), of which Poligrow is a member, has decided to formally investigate Poligrow's operations.⁶ In June 2016, the governmental agency Cormacarena (Agency for Sustainable Development of the Macarena region) initiated the process of sanctions against Poligrow for alleged environmental violations, suspending its license to operate as a result of apparent irregularities in the collection of surface water; untreated discharges of industrial wastewater from the palm oil extraction plant and composting area; as well as environmental damage to *morichales* (gallery forests⁷) and soils, and improper handling of by-products from the extraction process.⁸

3 Norman, 2016; Interviews by SOMO and Indepaz, March 2016.

4 Pers. Comm. Yamile Salinas Abdala, Indepaz, Colombia, October 2016.

5 SOMO and Indepaz, 2015.

6 Norman, 2016.

7 Forests that form as corridors along rivers or wetlands and project into landscapes that are otherwise only sparsely treed such as savannas, grasslands or deserts; https://en.wikipedia.org/wiki/Gallery_forest.

8 Comisión Intereclesial de Justicia y Paz, 2016.

Box 4 The case of palm oil company Poligrow in Colombia: a story of land grabbing, grievances and social unrest



Lesson #5

MNCs and their suppliers may contribute to conflict by providing material or financial support to private security companies, public security forces, rebel groups or illegal armed groups; when these security actors are involved in human rights violations, the MNCs that support them are co-responsible for these violations, but in reality they are seldom held to account, let alone convicted.

Case study illustrating this lesson

Pacific Exploration & Production, Colombia:

- The company has signed security agreements with the government, leading to a militarization of the region by a combination of public and private security actors.
- The company is implicated in operations related to the internal armed conflict, but they have never been held to account for violations caused by security forces.



Photo 5: Pacific oil refinery in Rubiales, Colombia – Mark van Dorp, SOMO

In past decades there have been numerous cases of corporate complicity in war crimes. A report for the Office of the UN High Commissioner for Human Rights (OHCHR) highlights a number of cases where corporations were complicit in gross human rights abuses, the majority of which were committed in conflict-affected areas.³³ In fact, it is widely acknowledged that the most serious business-related human rights violations occur in conflict-affected areas.³⁴ However, most cases did not lead to convictions. It appears that international law dealing specifically with this topic is absent and there are no international institutions with the authority to hold corporations accountable. In addition, because of the potential to spark and intensify conflict, business activity in conflict-affected areas is also a concern from the perspective of security and human rights.³⁵

When operating in conflict-affected environments, businesses may find it difficult to avoid becoming involved in the conflict in one way or another – not only their operations, but also their personnel, products or services may become part of the ongoing conflict. In many cases, a financial relationship exists between the MNC and armed groups, for instance by paying taxes or protection money, or by providing material support to police and army in exchange for security. Often the police and army use violence against those protesting against a company's operations (while the company looks the other way), or a company may directly instigate the violence by calling on security forces in the first place. This makes MNCs complicit in human rights violations committed by security forces or other armed groups and may also lead MNCs into direct involvement in illicit activities.

33 Zerk, 2013.

34 Zerk, 2013.

35 SOMO, 2015e.

In some of the case studies carried out by SOMO and partners, the role of security forces and private security companies is highlighted. For instance, as a result of SEK's Kipoi mining activities in the DRC, villagers were prevented from entering the SEK concession area to collect wood, mushrooms and bush meat by company security guards and by mining police. This combined loss of income, forced eviction and inadequate compensation amounts to an overall negative impact of the company's presence on this particular population.³⁶ Also in Colombia, the relationship between security forces and multinational companies was an important topic (see Box 5).

36 SOMO, 2016a

Box 5 The case of Pacific Exploration & Production, Colombia: human rights violations in a militarised environment¹

SOMO and its partner Indepaz carried out extensive research into the operations of Pacific Rubiales (renamed Pacific Exploration & Production in 2016) – the largest foreign oil production company operating in Colombia. The company's rapid growth took place in a context where the Colombian government facilitated the development of the oil industry and large-scale economic projects, and in a time when oil prices were high.

During this boom, state and government policies in Colombia to encourage private investment and promote the oil industry to foster the country's development have brought new risks and conflicts. In theory, the internal armed conflict situation obliges companies to conduct the strictest due diligence, but in the case of Pacific there are instances of a failure to abide by the country's laws and standards for business and human rights in aspects related to security, the acquisition and use of land and indigenous territories, environmental management, transparency and corporate governance.

The research reveals that Colombia's Ministry of Defence has signed security agreements with Pacific Exploration & Production that are kept highly confidential. These Cooperation Agreements are signed between Pacific and the Colombian Prosecutor General's Office, the National Police or diverse units within the armed forces.² Official documents reveal that between 2007 and 2014, Pacific paid a total amount of US\$41 million to the Ministry of Defence, which is higher than any other company in Colombia.³ It should be pointed out that these agreements have had some positive effects, for instance by reducing the number of kidnappings and attacks on oil infrastructure. However, the security model is based on the militarisation of the territory and a combination of military and private security, meaning that the company is implicated in operations related to the internal armed conflict in Colombia. There are reports that Pacific's private security forces are involved with paramilitary groups that are becoming stronger in the region and are hired to threaten local communities.

1 SOMO and Indepaz, 2016.

2 CAJAR, PASO, ENS and FIDH, 2016, p.4.

3 SOMO and Indepaz, 2016, p.8.

◉ **Box 5 The case of Pacific Exploration & Production, Colombia: human rights violations in a militarised environment**

Many local people have complained of restrictions on their freedom of movement and their right to organise. Organisations that defend human and workers' rights have denounced instances of persecution against workers employed by the company and its contractors, and even against members of Colombia's Congress.

It was found that an increase in social, labour, environmental, and trade union conflicts between oil companies, local communities, and industry employees in Puerto Gaitán has coincided with a phenomenon in which individuals involved in social protest have increasingly become the subjects of criminal proceedings. This includes illegal persecution and an excessive use of force by state and private agents, especially targeting trade union leaders, human rights defenders, and others who organize protests in response to labour conditions, environmental mismanagement, contracting models, and the social investment policies implemented by private companies.⁴

Lastly, abuses were documented in which ISVI, a private security company contracted by Pacific, hindered the free movement of trade unionists, members of Congress, community leaders, and residents, as well as the employment of intelligence strategies to investigate workers and community members.⁵

4 CAJAR, PASO, ENS and FIDH, 2016, p.4.

5 CAJAR, PASO, ENS and FIDH, 2016, p.4.



Lesson #6

The gender dimensions of private sector development are often not taken into account when companies start operating. This is especially relevant in conflict settings where potential tensions or discontent over multinational companies' operations may exacerbate pre-existing conflict dynamics, possibly leading to further marginalization of women or gender based violence.



Case study illustrating this lesson

Huachin Mining, Minière de Kalumbwe Myunga (MKM) Société d'Exploitation du Kipoi SA (SEK), Democratic Republic of the Congo:

- In most of these cases, communities had not been consulted properly prior to mining operations.
- In those cases where communities had been consulted, women and youth feel they are not represented because they are not sufficiently involved in the consultations, increasing the risk that women are more adversely affected by the negative consequences of a company's operations.

In a joint report by SOMO and International Alert, the gender dimensions of multinational companies' operations in fragile and conflict-affected areas are explored by highlighting several issues across extractive and agro-industries on a thematic level. The main findings are provided in Box 6 below. The report includes a set of research questions for CSOs and researchers that aim to show the power dynamics at play to achieve a more detailed understanding of MNCs' impact through a 'gender lens'.

Box 6 Reality check: The gender dimensions of the impact of multinational companies' operations in fragile and conflict-affected areas¹

It is important for civil society organisations engaged in the research and monitoring of the impact of multinational companies in conflict-affected areas to consider the gender dimensions of private sector development. Women, who are already at a disadvantage in terms of legal access to land or decision-making opportunities, tend to be relatively more adversely affected by the negative consequences of increased care duties, domestic chores, and reduced yields from traditional, subsistence livelihoods. In some locations, they also face culturally gendered barriers to their participation in public consultations and community decision-making forums. Men, on the other hand, are more likely to benefit in terms of employment opportunities and compensation payments as the registered land owners, traditional decision makers and heads of households. However, they do face their own vulnerabilities related to the gendered expectations of them as providers and protectors.

There are barriers for local women accessing jobs, often due to lack of education and skills at local levels (in places where access to this is gendered), and due to gender expectations and perceptions. Jobs in the extractive industry are frequently viewed as “men’s work”, and organisational culture and workplace practices are masculinised, forming barriers for women. Gender inequalities can block women’s access to land and exclude them from negotiations for compensation, which could lead to future challenges such as access to water in resettlement areas.

Despite increasing attention for the issue, the overlap between gender, conflict and the activities of multinationals requires more consistent attention – particularly in ensuring that increased insights into the importance of these links translate into practical and concrete changes on the ground. Posing gender-related questions during fact-finding missions, for example, is very important. This includes practical questions, such as who gets a seat at the table during public consultations, but also more analytical questions, such as how potential tensions or discontent over multinational companies’ operations exacerbate pre-existing conflict dynamics, ethnic divisions and gender inequalities. This kind of ‘gender lens’ helps to show the power dynamics at play in societies and therefore achieve a more detailed understanding of the impact that multinationals have in conflict-affected areas.

1 SOMO and International Alert, 2015.

2.3 Business strategies of multinational corporations

“Pacific has a number of Panama-based companies which are linked to the acquisition of land, palm oil plantations, and water treatment projects. Colombian authorities observe that [this] increases the risk at tax evasion and avoidance.”

Conclusion of a study on oil company Pacific in Colombia³⁷

Business strategies applied by companies in fragile and conflict-affected situations differ from those of companies operating in more stable environments. Some companies are actually attracted by conflict and have developed their business strategy around the existence of the war economy, such as arms traders, private security companies, and service providers to humanitarian aid agencies. But also some multinational companies in the extractives and agro-industrial sectors are focused on fragile states because they can yield high profits against low costs with little regulation in these war economies.

Lesson #7

The business strategies of so-called ‘hit and run’ companies operating in fragile and conflict-affected settings share a number of characteristics, namely that they are mostly short term, high risk, enable rapid growth of the business, involve frequent changes in ownership and management, often use tax havens to minimise and avoid paying taxes and exaggerate claims and make empty promises.

Case study illustrating this lesson

Pacific Exploration & Production, Colombia:

- The company has grown extremely fast since it was created in 2008, making it the largest foreign oil company in Colombia in less than five years’ time.
- The company is using a very complex network of subsidiaries in tax havens leading to a lack of transparency and a high risk of the company being involved in tax avoidance.
- It is involved in a major change in ownership as a result of a large scale restructuring.

37 SOMO and Indepaz, 2016.

While it is important to stress that these characteristics are not applicable to all companies operating in fragile and conflict-affected areas, many of the companies that were encountered during the SOMO research contained one or more of these characteristics. The characteristics are primarily based on the findings of the case studies carried out by SOMO and partners, but it does not mean that they all apply to every company researched. They were also found with companies that were not part of the case studies. More specifically, it was found that many companies' business strategies in fragile and conflict-affected areas:

- ❑ *are short term* – companies often have a short-term vision and focus, combined with short pay-back periods, and they often lack the willingness to make sustainable investments; as a result these types of companies do not contribute to strengthening peace when conflict has ended.
- ❑ *are high-risk* – companies that are attracted to fragile situations are often willing to accept higher risks than most MNCs, and accept these risks because they expect to extract natural resources over a short period and with high profits. Companies often operate without “social license to operate”, which means that no proper stakeholder consultation is carried out and local economic development is not seen as a priority, leading to higher risks in terms of social unrest and community protest.
- ❑ *enable rapid growth of the business* – due to the fragility of the context, companies can easily enter different sectors and expand rapidly without facing strong competition or strict legal frameworks and the rule of law.
- ❑ *involve frequent changes in ownership and management* – often companies operating in fragile situations are characterised by frequent changes in ownership and key management positions, leading to less community engagement by the company, as well as less transparency as to who can be held accountable.
- ❑ *use tax havens to minimise and avoid paying taxes* – companies often make use of complex corporate structures, involving mailbox companies or finance vehicles in tax havens, to be able to shift profits away to low-tax jurisdictions.
- ❑ *exaggerate claims and make empty promises* – often companies operating in these contexts create unrealistic expectations among local populations in terms of how they can provide employment opportunities, boost the local economy and offer basic services. When these expectations are not fulfilled (for instance after the company unexpectedly decides to leave a country), this can to spark or re-ignite conflict.

Lesson #8

The widespread belief that private sector development has a predominantly positive influence on peace building and economic reconstruction should be scrutinised, because in fragile and conflict-affected areas, many companies are operating without making long-term investments, while benefiting from the fragility and from the governance gap. These companies are very unlikely to make a sustainable contribution to peace building and economic reconstruction, and instead tend to create new conflict or exacerbate existing conflict.



Case study illustrating this lesson

Huachin Mining, Minière de Kalumbwe Myunga, (MKM), Société d'Exploitation du Kipoi SA (SEK), Democratic Republic of the Congo:

- No evidence found that these mining companies contributed to the economic development of the Katanga region.
- Instead, they appear to have undermined the development potential by creating serious environmental impacts and human rights violations.

There is a school of thought that believes economic development through extractives and large-scale agriculture, and based on export of unprocessed raw materials, will lead to sustainable economic growth, peace and prosperity. Increasing attention is also given to the concept of corporate peace building or peacemaking, as proposed by many scholars and practitioners.³⁸ This is illustrated by the pyramid of managing corporate-conflict risk (see Figure 4). According to this theory, once companies have complied with national and international laws, and once they have a do-no-harm policy in place, they can actively contribute to the peace building process.

Views differ widely on the value of the role of business in peace building. In an overview article on mapping business-peace interactions, a distinction is made between those who see potential in this approach (the 'potentialists') and those with a more critical attitude (the 'challengers').³⁹ For instance, most critiques of business engagement in formal diplomacy argue that peace building activities are outside the realm of core business activities and carry significant risk. Evidence from Afghanistan, Nigeria and Colombia indicates that business operations exacerbate conflict in conflict settings, notwithstanding explicit ambitions to bring a 'development' or 'peace dividend' to local populations.⁴⁰ In practice, it is only a handful of companies that are actively engaging in peace building or peace making activities, while most companies operating in fragile or conflict-affected areas are either

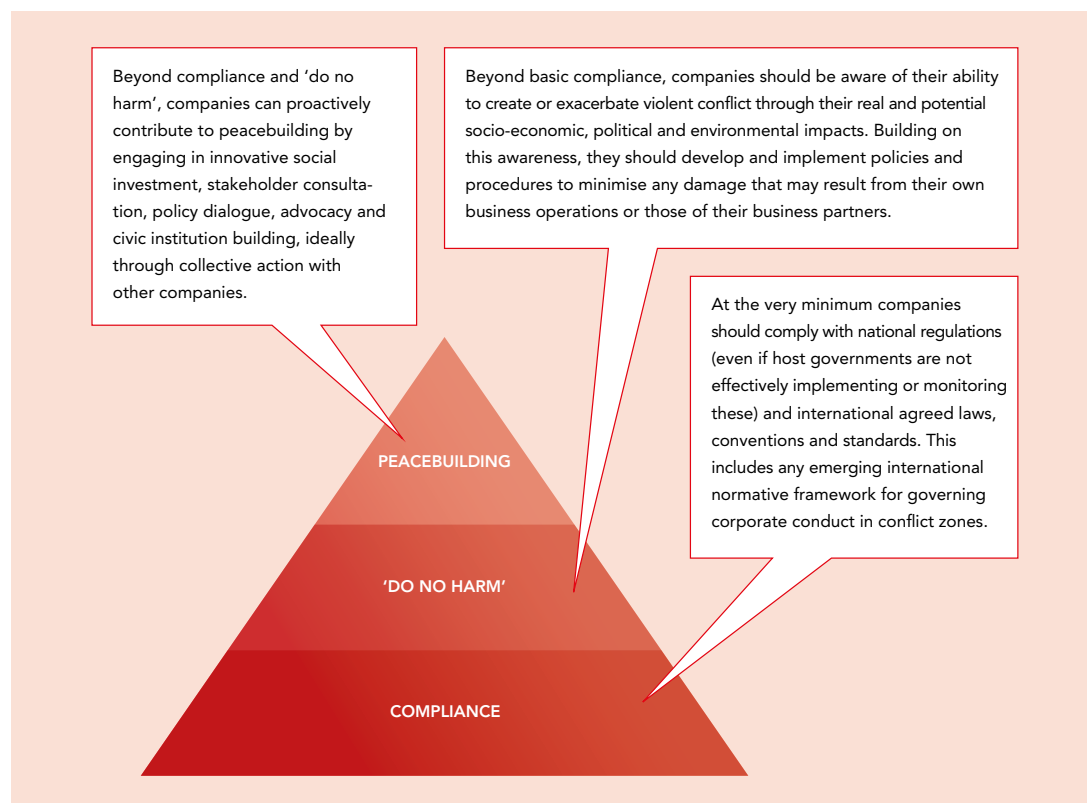
38 See among others: United Nations Global Compact and CDA Collaborative Learning Projects, 2015; Ralph, 2015; Miklian, forthcoming.

39 Miklian, forthcoming.

40 Miklian, forthcoming.

not interested, or they are – sometimes inadvertently – involved in human rights violations and contribute to conflict.⁴¹ As outlined above, some of the companies operating in fragile environments are not making long-term investments and generally have difficulty in complying with the first two layers of the pyramid (compliance and ‘do no harm’).

Figure 4 Pyramid of strategies for managing corporate-conflict risk⁴²



It can be questioned whether the pyramid is the most appropriate way to represent a company's contribution to peace and development. A more integrated, holistic approach towards peace building is therefore recommended, in which a company's overall economic, social and environmental performance would be taken as a measure to determine its impact on conflict and peace, and on stabilising the environment in which they operate. Interesting models are currently being developed by a number of scholars and institutions.⁴³

41 Van Dorp, forthcoming, p.5.

42 Based on Banfield et al. 2003; quoted in SOMO, 2014.

43 For an overview, see Miklian, forthcoming.

Also on a macro-economic level, the theory of private sector-led reconstruction of a post-conflict economy needs to be revisited. For example, Colombia's National Development Plan for the period 2014-2018 includes the extractives industry as one of the country's key economic drivers. But a study on the effects of private sector development policies in the post-conflict setting of Colombia found that, in many regions of the country, foreign companies had taken advantage of the context of displacement and violence and bought land illegally. In many instances the purchase was illegal because violence had taken place on the land, and according to Colombian law, it is not permitted to buy and acquire uncultivated land awarded by the state, as prohibited by the Agrarian Law (*Ley Agraria*). There is no formal prohibition to buy land where displacements and massacres took place. However, this is often the land that companies want to acquire because the land often appears to be unused. The Land Restitution Law (*Ley de Restitución de Tierras*) states that the occupants of properties claimed by displaced people must demonstrate their good faith and prove that they did not take advantage of displacement and other human rights violations.⁴⁴ According to one interviewee: *"There is still a war going on in some parts of Colombia, with the presence of guerrilla or paramilitary groups, which forms an obstacle for successful private sector investments"*.⁴⁵ This leads to the conclusion that in the case of Colombia, human rights obligations are often side-lined for the benefit of private sector development, including obligations under the land restitution law that forms the backbone of the current peace process.

In the case studies carried out by SOMO and its partners in fragile states, the net benefits of private investment remained low, although they were often hard to quantify. According to local communities interviewed, the benefits often did not sufficiently compensate for the heavy economic, social, and health toll associated with private investment. Thus, economic growth through private investment often proved unsustainable, fragile, and inequitable. For example, in Sierra Leone, the Governments' post-conflict development policies rely heavily on "'private-led growth'" and increasing exports, although in practice this has not always led to inclusive growth (see Box 2).

In Liberia, the model for economic development is mainly based on foreign direct investment for natural resource extraction and the export of raw materials. The government's philosophy is based on the belief that this will benefit the country as a whole, but research into the impacts of mining company ArcelorMittal in Liberia has shown this may happen at the expense of local communities (see Box 7).

44 Pers. Comm. Yamile Salinas Abdala, Indepaz, Colombia, October 2016.

45 Interview by students of University of Groningen, who carried out research in Colombia on behalf of SOMO, July 2016.

Box 7 The case of ArcelorMittal in Liberia: who benefits from post-conflict economic development?¹

An extensive case study of steel and mining company Arcelor Mittal was carried out by Green Advocates, SOMO's partner in Liberia. This case shows how a company that is supposedly investing to contribute to post-conflict economic reconstruction, appears in practice not to operate in a responsible and conflict-sensitive way, thus aggravating the situation for local communities.

The mining concession and the railroad used for the export of iron ore limited local communities' access to water and land, as well as causing water pollution and noise. In addition, there is a problem of involuntary resettlement with inadequate compensation, and the company negatively affects the livelihoods of communities living near the company's area of operation. The research revealed that the company did not create significant employment opportunities for local communities, and that workers' health and safety is often not protected.

In July 2014, protests against the misappropriation of ArcelorMittal's Social Development Fund became violent. Four police officers were injured and company property was damaged. Liberia's President Sirleaf Johnson responded by stating that the protest was an attack on the economy and the future of the country, that the government would cover the repairs, and that they would be paid out of development funds earmarked for where the protests took place.

1 SOMO and Green Advocates, forthcoming.



Lesson #9

In conflict situations, the absence of proper exit strategies on the part of extractive MNCs can lead to problems for local communities, often leaving them worse off than before the companies arrived. In the context of fluctuating metal prices, mining companies that suspend operations, cut costs or go into administration can have significant social and environmental impacts, especially in fragile and conflict-affected areas.

Case study illustrating this lesson

African Minerals, Sierra Leone:

- Lack of proper exit strategies led to severe local impacts as villagers relocated by the company's operations lost jobs and livelihoods when the company went into administration.
- Risk that arrangements with the resettled communities will not be upheld by the new owner, leaving them at serious risk.

In fragile and conflict-affected states, disengagement and divestment happen more often than in more stable settings. For some companies this has to do with human rights violations with which they do not want to be associated, but more often it is simply a financial-economic decision based on the lack of a viable business case. The decision on whether or not to disengage from a problematic business relationship is a key consideration within the human rights due diligence process,⁴⁶ with the OECD Guidelines for Multinational Enterprises refer to disengagement as a measure of "last resort".

Research by SOMO on a mining company in Sierra Leone (see also Box 2) shows that the lack of a proper exit strategy when a company disengages can lead to severe local impacts, as shown in Box 8.

In May 2016, a multistakeholder meeting on responsible business conduct was convened jointly by SOMO and the OECD in the context of fluctuating metal prices.⁴⁷ The meeting was organised in response to price decreases in the global metal sector, affecting base metals and several precious metals. Iron ore prices have dropped more than 50% in recent years, while leading investment banks have declared "the end of the iron age". With mining companies suspending operations, cutting costs or going into administration, the social and environmental impacts of these developments can be significant. Communities recently resettled to make way for extractive operations risk losing access to fertile land, food and water when mines shut down and companies leave. Lay-offs of workers on a massive scale are set to take place while mine closures can, unless adequately mitigated, have significant environmental impacts.

46 SOMO, 2016b.

47 SOMO and OECD, 2016; The meeting was a side event to the 10th Forum on Responsible Mineral Supply Chains in Paris, see: <https://mneguidelines.oecd.org/icglr-oecd-un-forum-paris-2016.htm>.

Box 8 Leaving Sierra Leone without an exit strategy: the case of African Minerals¹

When mining company African Minerals left Sierra Leone because the company went into administration, it left local communities – already heavily affected by the conflict – in a very dire situation. The company, which has been implicated in forced resettlements, labour unrest and grave human rights abuses, relocated villages that then became unable to provide for their own livelihoods because the area where they were relocated to were not well suited for agriculture. By way of compensation, the company agreed to provide water trucks and bags of rice to resettled communities. African Minerals’ mining operations have been suspended since December 2014, and with the company’s bankruptcy the mine has been handed over to the Chinese Shandong Iron & Steel Group, a former client and creditor. It remains unclear whether the arrangements with the resettled communities will be upheld by the new owner, leaving the resettled communities at serious risk. Should the provision of food and water be ceased, the impact on these vulnerable communities could be devastating.

1 SOMO, 2015d.

The multistakeholder meeting concluded that companies seeking to disengage have additional obligations in fragile and conflict-affected areas, including ensuring environmental safeguards and respecting community rights, because the impacts of departure can be greater than in more stable situations.

2.4 Implementation of laws, principles and guidelines

“It can be concluded that Poligrow has not sufficiently implemented a policy of enhanced due diligence, (especially) with regard to security arrangements. As a result, Poligrow and its allies run the risk of becoming directly or indirectly related to human rights abuses by Public Forces, illegally armed groups or criminal organisations.”

SOMO and Indepaz case study on palm oil company Poligrow⁴⁸

The UN Guiding Principles on Business and Human Rights, adopted by the Human Rights Council in 2011, provide principles to implement the Protect, Respect and Remedy Framework. With regards to business responsibilities, the UNGPs clearly stipulate that companies need to take the conflict context into account. Some of the worst human rights abuses involving business occur amid conflict

48 SOMO and Indepaz, 2015.

over the control of territory, resources, or a government itself – in other words, where the human rights regime cannot be expected to function as intended.⁴⁹

Other voluntary standards also refer to the conflict context and provide guidance on how companies can enhance their contribution to peace and prevent them from doing harm. A study by Chatham House concludes that: *“in (fragile and conflict-affected) settings the relative significance and responsibilities of industry players are disproportionately high in terms of whether commercial behaviour helps or hinders peace”*.⁵⁰ However, there is still a lack of binding regulations for corporate responsibility, which would be especially relevant for conflict settings.

Lesson #10

Despite the emergence of a multitude of principles and guidelines aimed at improving business practices in conflict-affected areas, the case studies carried out by SOMO and partners reveal that these principles and guidelines are often not implemented. And for those companies that implement international guidelines, there is no monitoring of the impacts on the human rights situation.

Case study illustrating this lesson

Poligrow and Pacific Exploration & Production, Colombia:

- Both companies are not operating in line with the OECD Guidelines and the UN Guiding Principles.
- In addition, Poligrow is not operating in line with RSPO standards, while Pacific’s operations are not in line with IFC Performance Standards.

Most international standards for responsible business conduct are voluntary and place no obligation on companies and governments to implement them.⁵¹ One of the exceptions is the IFC Performance Standards, which form a part of the loan agreement with the company involved, and are therefore binding on them. However, enforcement of the Performance Standards is often problematic in fragile and conflict-affected areas, as was shown in section 2.1. Even when they exist, monitoring and grievance mechanisms are weak, seldom utilised, or ineffective. For example, Oxfam America withdrew from the Voluntary Principles on Security and Human Rights for lack of third party monitoring.⁵² A major problem is the lack of implementation of international standards, particularly in difficult environments, undermining their effectiveness and credibility.

49 United Nations, 2011.

50 Bailey et al., 2015.

51 International Dialogue on Peacebuilding and Statebuilding, 2015.

52 Oxfam America, 2013.

Part of the solution lies in more legally binding obligations and the consolidation of all standards relevant to operating in these environments. In this respect, the process towards a UN binding treaty for business and human rights is an interesting opportunity for the improvement of responsible business practice in general, and in conflict settings in particular.⁵³

- 53 In 2014, a process has been initiated at the inter-state level to fill the governance gap by introducing a binding treaty on business and human rights. At the 26th session of the UN Human Rights Council, Ecuador and South Africa tabled a resolution which was eventually supported by 20 countries and calls “to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights.” Over the next few years the working group will prepare the building blocks of a legally binding instrument which should form the basis for substantive negotiations; SOMO, 2015e.

Box 9 Challenges of international standards for corporate responsibility in fragile and conflict-affected situations

Many international standards on corporate responsibility have emerged over the last 15 years to address the negative effects of private sector actors.¹ This includes general principles such as the UN Guiding Principles on Business and Human Rights, but also guidelines specifically focused on conflict-affected areas, such as the UN Global Compact’s Guidance on Responsible Business in Conflict-Affected Areas, and the OECD Due Diligence Guidance for Minerals from Conflict-Affected Areas. Despite the wealth of guidelines, there is no single guideline or standard dealing with all aspects of corporate responsibility in fragile and conflict-affected situations. This has led to calls for more specific guidance in which all conflict-specific elements of the existing guidelines are brought together.²

During a series of public debates on this issue, organised by SOMO and Oxfam Novib, a central point that emerged included the need for implementation of existing international principles and guidelines. The biggest challenge is the lack of capacity and willingness on the part of companies to implement the standards. There is also a lack of government capacity or political will in fragile and conflict-affected states to implement and monitor existing guidelines and enforce existing laws. Finally, in such states, there is very limited civil society capacity to monitor human rights abuses and the implementation of international standards.³

1 SOMO, 2014.

2 During the UN Global Compact/PRME Business for Peace Forum in October 2016, a poll was held among the audience on the role of the private sector in conflict-affected areas. According to 79% of the participants, it was confirmed that there is a need for the UN Guiding Principles for Business and Human Rights to be expanded and include specific guidance for companies operating in conflict affected areas; Pers. observation by the author, October 2016.

3 These debates were held during the World Bank Fragility, Conflict and Violence Forum in Washington DC (February 11-13, 2015), and during the UN Global Compact/PRME Business for Peace Forum in Dubai (October 25, 2016).

It is therefore unclear to what extent existing guidelines are implemented in conflict-affected areas, and what their impacts are in terms of preventing corporate misconduct and business-related human rights violations.⁵⁴ Such an impact evaluation would be an important step towards more effective use of guidelines and is therefore recommended.

Lesson #11

In post-conflict situations, companies often operate in areas that belong to communities displaced by civil war. Often, companies do not apply proper due diligence processes, let alone “enhanced” due diligence, as recommended for fragile and conflict-affected environments. This will lead to increased risks of exacerbating the conflict and create adverse impacts on local communities.



Case study illustrating this lesson

ArcelorMittal, Liberia:

- Due diligence process have not been properly carried out, highlighted by the many critical issues that have arisen since the company arrived.
- The most widespread criticism was the lack of community consultation.

The UNGPs explain that: “Business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse (human rights) impacts with which they are involved.”⁵⁵ The leading framework for due diligence has been developed by the OECD and consists of a five-step framework specifically designed for conflict-affected and high-risk areas.⁵⁶

The five steps include:

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

⁵⁴ SOMO, 2014.

⁵⁵ United Nations, 2011.

⁵⁶ According to the OECD, “due diligence is an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict. Due diligence can also help companies ensure they observe international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions”; OECD, 2013.

A call has recently been made by civil society groups for 'enhanced due diligence' from companies. This enhanced due diligence should include conducting a conflict analysis to understand the root causes, dynamics, parties to, and nature of local conflicts. The conflict analysis should also assess the level of adherence to human rights and international humanitarian law standards by the different parties.⁵⁷ In addition, companies operating in conflict-affected areas have a responsibility to avoid situations of complicity, which means indirect participation in human rights abuses by governments and non-state actors.

Based on company case studies in Liberia, DRC and Colombia, it can be concluded that often companies operate in areas that belong to communities displaced by civil war. If companies do not carry out proper due diligence, including a thorough conflict analysis and a stakeholder mapping, this may lead to exacerbation of existing conflict or even to new conflicts. The case of mining company ArcelorMittal in Liberia was one where the due diligence process had not been properly carried out, highlighted by the many critical issues that have arisen since the company arrived. The most widespread criticism was the lack of community consultation. The company now seems to be making strides towards this objective, but more work clearly needs to be done.⁵⁸

In the case of DRC, in the value chain of copper and cobalt, it appeared that electronics manufacturers sourcing from DRC are currently failing to conduct adequate human rights due diligence.⁵⁹

In Colombia, research showed that due diligence procedures were not followed properly, leading to an increased risk of contributing to conflict. In the case of Pacific, in theory, the internal armed conflict situation obliged the company to conduct the strictest due diligence, but in reality it was found that the company failed to abide by the country's laws and standards for business and human rights in aspects related to security, the acquisition and use of land and indigenous territories, environmental management, transparency and corporate governance. In part, these failings are related to incongruities in the state's dual role as human rights guarantor and foreign investment promoter. This is compounded by negligence, leniency and lack of oversight on the part of the public institutions responsible for land issues, environmental sustainability and protecting the rights of indigenous peoples, workers and communities living in the areas of influence of Pacific's operations.⁶⁰

Research on Spanish-Italian palm oil company Poligrow in Colombia (see Box 4) showed that the company has not fulfilled its responsibility to respect free, prior and informed consent (FPIC) of indigenous peoples, as required under the United Nations Declaration on the Rights of Indigenous Peoples. The company, operating in Meta region – one of the most insecure and fragile parts of Colombia – failed to carry out enhanced due diligence before and during its operations. It is therefore recommended to include conflict sensitivity as a key aspect of enhanced due diligence processes and of international standards for responsible business. In particular, the role of FPIC needs to receive more attention so that local communities, especially indigenous groups, benefit

57 Swisspeace and International Alert, 2015; DCAF and ICRC, 2016.

58 SOMO and Green Advocates, forthcoming.

59 Amnesty International, 2016; quoted in SOMO, 2016a.

60 SOMO and Indepaz, 2016.

from private sector development, and companies strengthen peace, not create conflict.⁶¹ It should be noted that the Principles & Criteria of the Roundtable for Sustainable Palm Oil take FPIC into account.⁶² In case Poligrow would receive RSPO certification, this element needs to be strictly monitored.

This finding is confirmed by a recent report by Swisspeace and International Alert, which highlights the risks and impacts of agribusiness companies in conflict-affected areas.⁶³ The report concludes that agribusiness companies need to take extra care on the issue of local stakeholders' participation and act as role models for open, participatory approaches to the management of economic development processes. If they fail to do so, this can result in opposition from local communities, hostility against investors, conflict within and between communities and contributions to larger-scale political violence.⁶⁴

However, as stressed by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the International Committee of the Red Cross (ICRC) *"it should not be assumed that conducting human rights due diligence, by itself will automatically and fully absolve the company from liability for causing or contributing to human rights abuses"*.⁶⁵

Lesson #12

Steps taken to tackle the conflict minerals trade by the European Union are not sufficient and will allow companies to continue trading minerals, causing conflict and human rights abuse to continue in conflict-affected countries. Stronger legal and other measures are necessary to break the link between minerals trade and conflict.

Over the last decade, a broad coalition of European NGOs, including SOMO, has been advocating for more strict and effective measures to tackle the trade in conflict minerals. SOMO research on conflict due diligence by European companies has found that very few companies disclose their use of conflict minerals on a voluntary basis.⁶⁶ From around 200 European companies assessed, only a few are affected by the relevant U.S. legislation, the Dodd Frank Act, and most do not report on conflict minerals at all. The European Commission refers to the SOMO report in its impact

61 Van Dorp and Kuijpers, 2016.

62 RSPO, 2015.

63 Swisspeace and International Alert, 2015.

64 Swisspeace and International Alert, 2015, p.6.

65 DCAF and ICRC, 2016.

66 SOMO, 2013a.

assessment accompanying the regulatory proposal⁶⁷ and the coalition has managed to influence the position of the European Parliament, which voted in favour of a robust law.

However, final negotiations between the European Parliament, Commission and Council resulted in a weak compromise. Although the EU legislation agreement represents a first step in the right direction, the law ultimately falls well short of its intended objective. EU policy makers have caved in to the demands of big business by exempting the vast majority of EU companies trading in minerals from the law. By agreeing to exempt these corporations from the law, the EU has instead put its faith in the hope that companies will voluntarily choose to source minerals responsibly. This has been tried before, through voluntary standards, and had only minimal impact, as there are still far too few companies taking steps to check their supply chains for conflict and human rights risks.

According to Global Witness: *“With EU laws now falling behind those in other countries, the EU is rapidly becoming the weak link in the mineral supply chain. While this is an important step, the EU should have gone much further to make full use of a unique opportunity to make a real difference.”*⁶⁸

In 2015, SOMO published a study on the need for inclusion of not only tin, tantalum, tungsten and gold (the so-called ‘3TG’), but all minerals in EU regulation (see Box 10).

The Dutch parliament has taken note of SOMO’s recommendation to extend the number of minerals to include in the new legislation on conflict minerals.⁶⁹ And while the Dutch Minister for Foreign Trade and Development Cooperation tried unsuccessfully to include more minerals in the EU regulation, the OECD has developed a Risk Minerals Handbook for companies that does incorporate a larger number of minerals.⁷⁰

67 European Commission, 2014.

68 SOMO, 2016c.

69 Tweede Kamer der Staten-Generaal, 2015.

70 OECD, 2016.

Box 10 There is more than 3TG: the need to include all minerals in EU regulation for conflict due diligence¹

Through the use of minerals in their products, companies risk contributing to conflict financing or human rights abuses in their mineral supply chains, especially if upstream operations are situated in conflict zones. This problem is being addressed by the European Commission which is taking steps to break the link between mineral trade by EU companies and conflict. The Commission has proposed a new regulation with a due diligence framework to address the risk of financing armed groups and security forces, and to mitigate other adverse impacts associated with the extraction, transport and trade of four different minerals.

This briefing paper discusses one specific issue in the proposed regulation – the limited number of conflict minerals included in the proposed EU regulation – and argues that the decision to focus on the import of minerals and metals containing or consisting of 3TG is arbitrary and far too limited to achieve the proposal's objective of reducing the financing of armed groups and security forces through minerals procured from conflict-affected and high-risk areas.

Of all worldwide conflicts listed in the Conflict Barometer² as being related to resources, there are a number of conflicts associated with the production of non-3TG minerals. SOMO distinguished violent conflicts in 13 countries that were associated with the production of many non-3TG minerals in 2013. These minerals included copper, nickel, iron ore, silver and diamonds. For instance, it is reported that Mexican drug cartels have been involved in illegal mining in Mexico since 2010, exporting iron ore to Chinese mills. Afghanistan has a history of mining revenues funding local warlords and insurgent groups, especially through illegal chromite mining. Myanmar's mining industry has been militarised for decades, with members of the national army exerting control over mining and export operations, in particular in the production and sale of jade and gems.

1 SOMO, 2015a.

2 Published by the Heidelberg Institute for International Conflict Research; http://www.hiik.de/en/konfliktbarometer/pdf/ConflictBarometer_2015.pdf.

3.5 Challenges for civil society organisations

“It’s very difficult for civil society organizations to monitor what’s really happening in Mapiripán (in Colombia), because at the moment it’s too dangerous to go there. But what we hear is that many local people and leaders have become afraid to speak out against Poligrow, including the people who expressed their concerns about the company before. However, there are signs the pressure is increasing on the company.”

Karlijn Kuijpers, SOMO researcher, on the problems faced in researching Poligrow’s operations in Colombia⁷¹

SOMO and its partners have been researching the impacts of multinational companies on human rights in five countries. Apart from improved insights in the relationship between MNCs and conflicts, one of the main goals of the programme was to empower civil society to do research and hold companies accountable. Over the past four years, valuable lessons have been learned about the institutional and operational challenges and opportunities of civil society in fragile states.

Lesson #13

The occurrence of unexpected crises, such as the outbreak of Ebola in Liberia and Sierra Leone and the re-escalating conflict in South Sudan, makes it very challenging for civil society organisations to do research on business-related human rights abuses, thus limiting their ability to hold private sector actors to account.



Case study illustrating this lesson:

ArcelorMittal, Liberia:

- The Ebola crisis has seriously impacted on the possibilities for CSOs to research the impacts of multinational companies, because of limited accessibility of areas of operation and because most CSO resources were redirected to combat Ebola.

Due to a shift in priorities of CSOs during severe and unexpected crises, it is difficult to focus the attention of CSOs to hold companies accountable for business-related human rights violations, and to influence policies. A long term horizon, sustained investment and tenacity from development partners outside the conflict zone are essential to enable CSOs to carry out this often challenging and risky work. This includes governments (through local Embassies) as well as international CSOs and trade unions.

⁷¹ Quote from Norman, 2016.

For example, in the case of Liberia and Sierra Leone, after the 2014 outbreak of Ebola, local SOMO partners focused their energy and resources on Ebola prevention and as a consequence, focused less on supporting communities to hold companies accountable for business-related human rights violations.

In South Sudan, the country's already weak civil society capacity was further weakened after the start of the renewed conflict in 2013, and many CSO leaders had to flee the country. International civil society frames its priorities towards humanitarian support, leaving very little room for local CSOs to focus their attention on tackling some of the root causes of conflict, including the unequal distribution of oil revenues, the negative impacts of oil companies leading to local grievances, and the lack of transparency of the oil sector despite the relatively good legal framework.⁷²

Lesson #14

It is observed that in fragile states, the space for civil society to hold the private sector accountable and to call on the government through judicial or non-judicial cases in case of business-related human rights violations is often limited, and this space is increasingly shrinking. This is due to weak legal frameworks, a lack of political will or a culture of fear and intimidation among local populations, human rights defenders and other civil society members.



Case study illustrating this lesson:

ArcelorMittal, Liberia:

- Civil society organisations and human rights defenders that have been critical towards the company are confronted with intimidation by the Liberian government and are framed as being 'anti-development'.
- NGOs are accused by the Liberian government as challenging the national sovereignty of the country, which led to extensive criticism by international donor countries.

In fragile settings, the shrinking space for civil society, which already has limited capacity due to the conflict setting⁷³, is leading to severe consequences for environmental and human rights defenders and for the communities they defend. This reduces the opportunities to carry out research on the role of multinational companies compared to those in more stable countries. This makes it more challenging to hold companies accountable.

72 Pers. comm. David Deng, SSLS, South Sudan, March 2016.

73 Bailey et al., 2015.

Global Witness reported that there has been a steady increase in murders of environmental rights defenders over past decades.⁷⁴ The report states that: *“2015 was the worst year on record for killings of land and environmental defenders. As demand for products like timber, minerals and palm oil continues, governments, companies and criminal gangs are exploiting land with little regard for the people who live on it. Increasingly, communities that take a stand are finding themselves in the firing line of companies’ private security, state forces and a thriving market for contract killers.”*

This trend is reflected in the work of SOMO’s partners in fragile states, some of whom have received death threats and have been intimidated for their work in investigating human rights violations and representing local communities in voicing their grievances. Due to this culture of fear and intimidation, NGOs and community leaders that attempt to flag business-related human rights violations are being silenced and repressed, leading to a lack of accountability of multinational companies. These problems are especially prevalent in a context of fragility, because of the lack of protection by state authorities and the high levels of insecurity and armed violence, diminishing local people’s ability to protest and stand up for their rights. In some cases, the government is also directly involved in denouncing civil society and human rights defenders or in violating their rights.

In Colombia, local people that stand up for their rights and criticise companies are often threatened and intimidated by armed groups, to prevent them from speaking out. This seriously limits the opportunities for CSOs to support communities to speak up, and there is an increase in threats of human rights activists, even though the forthcoming peace agreement will hopefully change this for the better. Groups known as *bacrim*, or criminal bands – which are mostly dedicated to drug trafficking but also aim for social control in many regions of the country – are and will continue to be the main aggressor against human rights defenders in the transition to peace. In 2015, 63 activists were killed in Colombia, up from 55 the year before.⁷⁵ During the research carried out by SOMO and its partners, death threats have been received by local activists protesting against human rights violations by palm oil and petroleum companies in the Meta region, which is characterised by a climate of impunity and lack of protection of human rights defenders.

In Liberia, civil society organisations and human rights defenders critical of corporations are confronted with intimidation by the Liberian government and are framed as being ‘anti-development’. For example, in 2014, President Sirleaf stated that NGOs challenge the national sovereignty of the country, which led to extensive criticism by international donor countries. And after protests against palm oil company Golden Veroleum, the President said “we cannot allow a few people to undermine the interest of this country; to (make) investors run away and to make sure that we do not attract what we need to achieve our development goals”.⁷⁶ This has contributed to an increasingly dangerous working environment that has compromised the safety and security of human rights defenders in Liberia, as well as their family members and the local community partners with whom they work. The Government of Liberia has imposed a series of criminal charges and offences against community human rights defenders.⁷⁷

74 Global Witness, 2016.

75 The Guardian, 2016.

76 SOMO, 2015b.

77 SOMO, 2015b.

3 Conclusions and recommendations

3.1 Conclusions

Based on four years of evidence-based research into the role of multinational corporations in fragile and conflict-affected areas, a number of lessons have been learned. These lessons have been drawn mostly from case studies on the extractives and agro-industrial sectors carried out by SOMO and its partners in five countries (Colombia, Liberia, Sierra Leone, South Sudan and Democratic Republic of the Congo). In addition, lessons have been drawn on the basis of SOMO's more general research on this issue, as well as the findings of other NGOs and research institutes.

This research shows there are many challenges faced by multinational companies when operating in conflict-affected areas. As a result, many multinational companies are – intentionally or unintentionally – contributing to human rights violations and conflict. Partly, these challenges are related to the context in which they operate, which is characterised by state fragility, insecurity and instability. Another important part of the story is that companies often lack proper policies on how to deal with the conflict setting, which often leads them to make the wrong choices, thereby worsening the situation instead of contributing to peace. More specifically, the following conclusions can be drawn.

Links between state fragility and multinational corporations

- ❑ The governance gap – characteristic of many conflict-affected areas – allows MNCs to act without being held accountable. However, this leads to significant risks of companies becoming entangled in the conflict itself. The lack of rule of law leads to impunity on the part of MNCs and to a lack of protection for communities and CSOs that stand up for their rights in the face of such impunity.
- ❑ Also, fragile state governments are often in a very weak bargaining position, which has led them to sell out their natural resources to multinational companies simply to stop their public coffers running dry. This allows them to continue financing their military and security budget. Multinational companies sometimes specifically seek out fragile states with a weak bargaining position to secure cheap but highly valuable resources. The resulting vicious circle contributes to the already fragile situation and can lead to renewed conflict because of grievances among often traumatised populations that were expecting to benefit from peace.
- ❑ There is an almost complete lack of access to remedy for victims when human rights abuses are taking place in conflict-affected areas for two reasons. Fragile state governments are generally not able or willing to fulfil their duty to protect against human rights abuses by corporations, nor their obligation to provide remedy to victims. Secondly, international grievance mechanisms do not function as intended in fragile states because victims do not dare raise their voice for fear of losing their jobs, their land or their lives, and because of a lack of awareness of the existence of these mechanisms.

Links between conflict dynamics and multinational corporations

- ❑ Issuing of land concessions by the state in a context of fragility has a very high risk of leading to violations of land rights and environmental rights, thus triggering new conflict or exacerbating existing conflict. Often, this is due to the nature of the conflict – for example, large parts of a country may have been under the control of rebel groups, guerrilla fighters or paramilitaries. Due to a lack of clarity about land tenure, double land claims and contradictions between customary law and national law in these areas, large-scale acquisition or misappropriation of land by MNCs often leads to a conflict between MNCs and local communities. A lack of free, prior and informed consent (FPIC) is especially damaging in fragile contexts.
- ❑ MNCs and their suppliers may contribute to conflict by providing material or financial support to private security companies, public security forces, rebel groups or illegal armed groups; when these security actors are involved in human rights violations, the MNCs that support them are co-responsible for these violations, but in reality they are seldom held to account, let alone convicted.
- ❑ The gender dimensions of private sector development are often not taken into account when companies start operating. This is especially relevant in conflict settings where potential tensions or discontent over multinational companies' operations may exacerbate pre-existing conflict dynamics, possibly leading to further marginalization of women or gender based violence.

Business strategies of multinational corporations in fragile and conflict-affected situations

- ❑ The business strategies of so-called 'hit and run' companies operating in fragile and conflict-affected settings share a number of characteristics, namely that they are mostly short term, high risk, enable rapid growth of the business, involve frequent changes in ownership and management, often use tax havens to minimise and avoid paying taxes and exaggerate claims and make empty promises.
- ❑ The widespread belief that private sector development has a predominantly positive influence on peace building and economic reconstruction should be scrutinised, because in fragile and conflict-affected areas, many companies are operating without making long-term investments, while benefiting from the fragility and from the governance gap. These companies are very unlikely to make a sustainable contribution to peace building and economic reconstruction, and instead tend to create new – or exacerbate existing – conflict.
- ❑ In conflict situations, the absence of proper exit strategies on the part of extractive MNCs can lead to problems for local communities and will often leave them worse off than before the companies arrived.

Implementation of laws, principles and guidelines in fragile and conflict-affected situations

- ❑ Despite the emergence of a multitude of principles and guidelines aimed at improving business practices in conflict-affected areas, the case studies carried out by SOMO and partners reveal that these principles and guidelines are often not implemented. And for those companies that implement international guidelines, there is no monitoring of the impacts on the human rights situation.
- ❑ In post-conflict situations, companies often operate in areas that belong to communities displaced by civil war. Often, companies do not apply proper due diligence processes, let alone “enhanced” due diligence, as recommended in international guidelines for fragile and conflict-affected environments. This will lead to increased risks of exacerbating the conflict and create adverse impacts on local communities.
- ❑ Steps taken to tackle the conflict minerals trade by the European Union are not sufficient and will allow companies to continue trading minerals, causing conflict and human rights abuse to continue in conflict-affected countries. Stronger legal and other measures are necessary to break the link between minerals trade and conflict.

Challenges for civil society organisations working in fragile and conflict-affected situations

- ❑ The occurrence of unexpected crises, such as the outbreak of Ebola in Liberia and Sierra Leone and the re-escalating conflict in South Sudan, makes it very challenging for civil society organisations to do research on business-related human rights abuses, thus limiting their ability to hold private sector actors to account.
- ❑ It is observed that in fragile states, the space for civil society to hold the private sector accountable and to call on the government through judicial or non-judicial cases in case of business-related human rights violations is often limited, and this space is increasingly shrinking. This is due to weak legal frameworks, a lack of political will or a culture of fear and intimidation among local populations, human rights defenders and other civil society members. This makes it more challenging to hold companies accountable.

3.2 Recommendations

The above conclusions lead to the following key recommendations:

Recommendations for host states of multinational companies

- ❑ Fragile states' governments should improve their legal and policy frameworks in order to build better safeguards to hold multinational corporations accountable, including in areas where the state is not – or barely – present. In addition to enforcing existing national and international legal frameworks, this includes setting up effective national level grievance mechanisms such as national ombudsperson offices. Also, National Contact Points for the OECD Guidelines should be set up or improved.
- ❑ Fragile states' governments should improve their bargaining position with multinational corporations by (among others) building capacity to better negotiate contracts and to assess the long-term implications of companies' investments, including social cost-benefit analysis.

Recommendations for home states of multinational companies

- ❑ Home states of multinational companies should require companies to uphold their obligations under international humanitarian law.
- ❑ They should engage in dialogue with the fragile state governments where the companies operate in order to address business-related human rights violations.
- ❑ Home states of multinational corporations need to better consider the risks and potential negative impacts of any investments made by these companies.
- ❑ During trade missions, oblige companies that are planning to invest in fragile and conflict-affected areas to carry out a thorough risk-based due diligence process, with special attention to the potential risks of contributing to conflict.

Recommendations for multinational companies

- ❑ Multinational companies should develop or improve policies and strategies on how to deal with conflict settings, in line with international standards and guidelines, to prevent them from contributing to new or existing conflict. This should include conflict-sensitivity and 'do no harm' policies.
- ❑ A more integrated, holistic approach towards peace building by multinational companies is recommended, in which a company's overall economic, social and environmental performance would be taken as a measure to determine its impact on conflict and peace, and on stabilising the environment in which they operate.

- ❑ There is a need for more transparency about the payments made by MNCs to state or private security forces, and more clarity on the responsibility of MNCs in the case of human rights violations by these forces when they are financed by the company.

Recommendations for international organisations

- ❑ Despite the multitude of existing guidelines for operating in conflict-affected areas, there is lack of monitoring mechanisms of their impacts in terms of preventing corporate misconduct and business-related human rights violations. An impact evaluation of implementation of the most important guidelines is therefore recommended, and would be an important step towards more effective use of guidelines.
- ❑ There is a need for the inclusion of enhanced due diligence processes in responsible business guidelines, with specific attention to the challenges in fragile and conflict-affected areas. Ultimately, it is recommended to make enhanced due diligence mandatory through a UN binding treaty for business and human rights.
- ❑ It is recommended to develop a specific conflict guidance as an addition to international standards for responsible business, such as the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises. Such conflict guidance would help prevent some of the worst impacts of multinational companies in conflict environments because it enables companies to operate responsibly, and it allows CSOs and researchers to monitor companies' policies and practices.
- ❑ FPIC (free, prior and informed consent) needs to be a recognised principle in these standards, so that companies do not exacerbate or create land conflicts and related human rights violations.

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Fragile! Handle with Care: Multinationals and Conflict

Lessons from SOMO's Multinational Corporations in Conflict-Affected Areas programme

Local communities in fragile and conflict-affected areas are exposed to many challenges, including armed violence, displacement, insecurity and livelihood and ecosystem destruction. An increasing number of businesses operate in fragile and conflict-affected areas, where the risks of human rights abuses are particularly great. Multinational corporations (MNCs) have been involved in human rights violations in these areas, often creating further conflict. However, there are still many gaps in understanding the relationship between private sector actors and conflict.

As part of the Multinational Corporations in Conflict-Affected Areas (MCAA) programme, between 2013 and 2016 SOMO, together with its local partners, undertook research on extractives and agro-industries in five countries, Colombia, Democratic Republic of the Congo, Liberia, Sierra Leone and South Sudan. These case studies provide many illustrations of business-related human rights abuses in a context of conflict and fragility, and provide valuable lessons on how companies operate in conflict-affected areas.

Based on these lessons, a number of recommendations are provided. Among others, it is recommended to MNCs to develop or improve company policies and strategies on how to deal with conflict settings, in line with international standards and guidelines, to prevent them from contributing to new or existing conflict.

