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INTERNATIONAL REVIEW of the Red Cross



Humanitarian debate: Law, policy, action

Business, violence and conflict



ICRC

Aim and scope

Established in 1869 the International Review of the Red Cross is a periodical published by the ICRC. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law and contribute to the prevention of violations of rules protecting fundamental rights and values. The Review offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the Review informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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EDITORIAL: GLOBALISATION WILL ONLY MEAN PROGRESS IF IT IS RESPONSIBLE

'The world is my country'. Those famous words by Thomas Paine express the idea of a common thread linking all humankind and transcending distances, borders, and nations. The industrial revolution first, and then globalisation, gave that idea new impetus. Today, we are more connected than we have ever been – because of our travels, our means of communication, and our business exchanges. The private sector has largely contributed to this development: the business activities of our national and multinational companies have woven a complex web of mutual interdependencies.

Globalisation is for the better when we derive mutual benefit from our respective advantages but for the worse when what takes place is not an exchange but exploitation. The ambivalence of this phenomenon is sensed the most acutely in those parts of the world that are plagued by conflict and violence: economic factors are often either the direct causes of violence, or are at least likely to inflame and perpetuate violence.

Like the thirst for wealth that drove the conquerors of the New World, countless wars have been driven or prolonged by dynamics associated with acquiring property or resources, gaining control over new markets, and economic expansion. For several decades, Africa has witnessed its share of conflicts being fuelled, among other things, by the existence of resources sought by the opposing parties – one could mention Sierra Leone, Liberia, the Democratic Republic of the Congo and its neighbours, Nigeria, and so on. Central and South America have also had their fair share of conflict or social turmoil linked to the desire to gain access to resources or control of export routes – Colombia, Peru and Mexico come to mind, for example. Turning to Asia, and Afghanistan in particular, the current fear is that the recent awareness of its vast mining potential will cause Afghanistan to experience a deterioration in rivalries, violence, and corruption at the expense of a peaceful transition after the withdrawal of international forces.¹ Afghanistan would thus become a new illustration of what is sometimes called 'the resource curse', or the paradox by which countries rich in resources tend to be less developed and to experience less rapid growth than countries that have none.²

While economic stakes have nurtured conflict throughout history, the imprint of multinational business enterprises on international relations and security matters has never been greater. Thus, in some areas plagued by armed conflict or violence, public authorities can barely exercise any control, whereas business actors have acquired more and more influence and have assumed some functions

traditionally incumbent on the state. It is therefore not uncommon to see private enterprises being directly responsible for the security of a geographical area or equipping and providing supplementary training for public security forces – with minimal involvement by the state or even a total absence of state structures.

What are the main facets of the relationship between business actors and conflict today? What rules exist to regulate their activities? This issue of the *Review* does not address all the relations between war and the economy, such as arms trade, black market economies and trafficking, or the economic aspects of humanitarian aid. Instead, the *Review* has decided to highlight the rights and responsibilities of companies working in areas of armed conflict and other situations of violence. Having devoted a previous issue to the subject of international regulation of private military and security companies, the journal now looks at the latest developments in the interaction between business and conflict.³

Whether they have already been established in a country before a conflict or whether they are investing in a region already in crisis, business enterprises will influence the course of the conflict by virtue of their actions, their influence, or their mere presence. As Hugo Slim explains in his article, business actors play a number of different roles. Only some of them are covered here.⁴

First of all, business actors often find themselves the victims of acts of violence, as illustrated by the recent attack on and hijacking of the oil plant in Amenas, Algeria. They expose themselves to direct risks such as the exertion of pressure, extortion, pillage, hostage-taking, and attacks.

Second, business actors may contribute to the violence – directly or indirectly, voluntarily or involuntarily. They may represent a source of income for the conflict parties or even provide them with the means of fighting. In the most extreme cases, they may take advantage of war, chaos, and violence to engage in criminal activities, like the German enterprises that contributed directly to the implementation of Nazi policies and/or exploited the slave labour in the Nazi camps during the Second World War.

Finally, business actors can play a *positive* role by contributing to relief and the prevention or reduction of violence. Investors who, despite the risks, keep their business operations going in conflict areas enable their employees to maintain an income and may help to ensure a degree of stability. History also provides numerous examples of direct humanitarian action by business companies and their managers. Henry Dunant, who was at the origin of the foundation of the International Red Cross and Red Crescent Movement, was himself a businessman who happened

- 1 See Graham Bowley, 'Potential for a mining boom splits factions in Afghanistan', in *The New York Times*, 8 September 2012, available at: www.nytimes.com/2012/09/09/world/asia/afghans-wary-as-efforts-pick-up-to-top-mineral-riches.html?_r=3& (all internet references were accessed in December 2012).
- 2 A study of developing countries conducted by Jeffrey Sachs and Andrew Warner in 1995 revealed that the more an economy is dependent on mineral resources, the weaker its growth rate. See Jeffrey D. Sachs and Andrew M. Warner, 'Natural resource abundance and economic growth', in *NBER Working Paper Series*, Working Paper 5398, Harvard Institute for International Development, 1995.
- 3 See the edition on the subject of 'Private military companies', *International Review of the Red Cross*, Vol. 88, No. 863, September 2006.
- 4 See the article by Hugo Slim in this issue.

across the horrors of war while on a business trip. The film industry has popularised what the German entrepreneur Oskar Schindler did to help his Jewish employees who were persecuted during the Second World War (*Schindler's List*), and the action taken by Paul Rusesabagina, who used his influence as a hotel manager to protect hundreds of people's lives during the genocide in Rwanda (*Hotel Rwanda*).

Recently, the government and the private sector jointly financed the occupational reintegration of combatants who had formerly taken part in the conflict in Côte d'Ivoire, providing another example of a way in which private enterprises can help.⁵ Lastly, private enterprises are also major donors of humanitarian aid.

Social responsibility and legal responsibility: the increasing regulation of economic activities

Unlike those of states, armed groups, and individuals, the rights and obligations of private companies and their agents during armed conflict have long remained vague and the applicable standards piecemeal and fragmented. Today, various legal and social sources and several confluent movements are helping to make the private sector more aware of its responsibilities.

Binding obligations under international law

Before describing the ever growing web of voluntary initiatives seeking to regulate business behaviour that can impact on human rights, it may be useful to recall that there is already a set of binding rules relevant to business behaviour in volatile contexts.

In international human rights law, states have the primary role in preventing and addressing corporate-related human rights abuses. To fulfil their *duty to protect*, states must be able to regulate and adjudicate on the behaviour of the actors involved in abuses. Such actors include business enterprises.⁶

In times of armed conflict, international humanitarian law (IHL) is the prevailing legal regime. It contains provisions that protect civilians and civilian property, which includes staff and property of companies operating in an armed conflict. It also imposes obligations on states, individuals, and non-state parties to the conflict.

IHL makes it incumbent on states (be they home states, territorial states, or contracting states) to 'respect and to ensure respect for' IHL,⁷ including by adopting appropriate domestic legislation where necessary. States are explicitly obliged to

5 See 'In Côte d'Ivoire the government and private companies are partnering to create jobs for young men and women', in *worldbank.org*, 27 August 2012, available at: www.worldbank.org/en/news/feature/2012/08/27/in-cote-d-ivoire-the-government-and-private-companies-are-partnering-to-create-jobs-for-young-men-and-women.

6 For a detailed study of states' duty to protect, see the article by Rachel Davis in this issue.

7 See Art. 1 common to the four Geneva Conventions of 1949.

criminalise grave breaches of IHL in their national legislation, as well as to investigate and prosecute such offences.⁸ Hence individuals, including executives or employees of business enterprises, may be held individually criminally responsible for violations of IHL.

International criminal law too has evolved significantly since the Second World War, and today executives or staff of corporate entities may be held accountable not just for violations of IHL but also for other international crimes under an ever more sophisticated web of modes of liability. In parallel, many national jurisdictions have increasingly adopted legislation that allows them to address transnational and international crimes through criminal or civil liability.⁹ Civil liability for corporations, in particular, has been one avenue of accountability that has been explored in the past decade.¹⁰ Knowledge of the relevant rules of national law, as well as of international human rights law, IHL, and international criminal law, is therefore crucial for local and international business enterprises operating in volatile contexts.

Development of soft-law instruments

Since the 1990s and the growing awareness of the social and environmental imprint of business enterprises in volatile contexts throughout the world, there has been a marked increase in efforts to regulate business conduct – regardless of whether this takes place under the aegis of the United Nations (UN), industry associations, or multi-stakeholder initiatives.¹¹ Those efforts have generally focused on developing soft-law standards and self-regulation.

There are different ways to explain this push. Sceptics suggest that such soft-law approaches simply conceal the inability of states to govern companies and serve the companies' own public relations interests. Others suggest that soft-law instruments are a more effective means of norm creation because they avoid doctrinal debates about whether business enterprises are actually subjects of international law and because the formal procedures for drawing up treaties take too long to be able to regulate the quickly evolving private sector. Others still point to a genuine search for new forms of global governance, based on a voluntary and

8 See the provisions of the Geneva Conventions relating to grave breaches, Arts. 50, 51, 130, 147 of the First to Fourth Geneva Conventions respectively, and Arts. 11 and 85 of Additional Protocol I to the Geneva Conventions.

9 See the example of Norway, presented in the article by Simon Mark O'Connor in this issue.

10 With regard to civil litigation in particular, see the Alien Tort Claims Act in the United States, which has enabled civil proceedings to be instigated for violations of IHL by business enterprises.

11 At the intergovernmental level, they include the International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises, and the Performance Standards for companies established by the International Finance Corporation. Among the multi-stakeholder initiatives, reference can be made to the UN Global Compact, the Voluntary Principles on Security and Human Rights, the Extractive Industries Transparency Initiative, and the Kimberley Process certification scheme. The Voluntary Principles, in particular, are an example of a multi-stakeholder initiative on companies and human rights that refers specifically to international humanitarian law.

inclusive approach to tackling global problems. Those in favour of such initiatives also say that multi-stakeholder approaches, in particular, tend to blur the distinction between what is voluntary and what is mandatory to such an extent that they could contribute to crystallising future hard law. Whatever approach is adopted, it is now a given that a set of soft-law instruments will develop. However expansive it might be, that set of instruments is increasingly unclear and often specific to a particular forum or industry.

In 2008, in a push towards a holistic legal framework for regulating business behaviour which may have an impact on human rights, the UN established a general framework on business and human rights, addressing the three main stakeholders: governments, business, and civil society. Developed by John G. Ruggie, Special Representative of the UN Secretary-General on the issue of human rights, and transnational corporations and other business enterprises, the Protect, Respect and Remedy Framework is based on extensive consultations with those three sectors. The document introduces a new approach to regulation at the international level: it reminds states of legal obligations, business enterprises of their responsibility and interest in managing the risks of human rights violations, and civil society of its responsibility to understand and use available remedies in case of violations.

The Protect, Respect and Remedy Framework was followed by the adoption of the Guiding Principles on Business and Human Rights, unanimously adopted by the UN Human Rights Council, which aim at operationalising the Framework. Today, the Guiding Principles represent a key reference document in the field of business and human rights. They contain practical recommendations for each of the stakeholders. The next stage will consist of the stakeholders integrating and internalising those Principles. Some progress can already be observed, as Rachel Davis notes in her article.¹²

The regulation of private military and security companies

One particular type of business enterprise which is, by definition, more exposed to armed conflict and other situations of violence is private military and security companies (PMSCs). Following the recent era in which mercenaries hired out their services as soldiers of fortune in the African conflicts, the wars in the Balkans, in Iraq, and in Afghanistan have seen the emergence of new structures providing military and security-type services: PMSCs. In the face of growing demand, there has been an increase in the number of PMSCs, which have extended their range of services to include security, logistics, maintaining and operating military equipment, intelligence, training of police and armed forces, and detention-related activities, to name a few. In fact, one can speak of a veritable private military and security industry that is providing an ever broader range of services, increasingly today in the field of maritime security in response to piracy (delivery of ransom money, negotiations, sea patrols, and so on). This multifaceted and quickly evolving nature

¹² See R. Davis, above note 6.

of the services provided by PMSCs poses significant challenges to developing a coherent legal framework governing their activities.

In terms of the existing legal obligations, the 2008 Montreux Document,¹³ spearheaded by Switzerland and the International Committee of the Red Cross (ICRC), restates and reaffirms the law applicable to the activities of PMSCs in armed conflicts, and recommends a catalogue of good practices for the practical implementation of these existing legal obligations. The document focuses on states' obligations, including the obligations of states that contract PMSC services, of those under whose jurisdiction the PMSCs are incorporated or registered, and of those on whose territory PMSCs operate.

At the UN, efforts focus primarily on monitoring the impact of private military and security providers on human rights and on considering the possibility of elaborating an international convention to regulate the activities of private military and security companies.¹⁴

There is also a recent tendency towards self-regulation within the industry. The most recent initiative of this kind, which is also an example of a multi-stakeholder process, is the International Code of Conduct for Private Security Service Providers (ICoC).¹⁵ Facilitated by the Swiss government and the Centre for the Democratic Control of Armed Forces (DCAF) foundation, this initiative sets out a code to guide private security service providers on how to operate in accordance with IHL and international human rights standards (in particular on questions related to the use of force, detention, sexual exploitation and abuse, human trafficking, and slavery). The ICoC refers to the Montreux Document and importantly provides an *oversight mechanism* – a unique characteristic of this instrument. It remains to be seen how the mechanism will work in the future. In the meantime, it is important to recall that self-regulation is no substitute for the responsibility of states to ensure respect for IHL by PMSCs during armed conflict and that the staff and management of PMSCs remain bound by the rules of IHL when they operate in armed conflict.

Business as usual or a change in global governance?

In light of all these developments, one could say that some progress has been made at the international level in terms of the dialogue between civil society, business, and

13 More than 45 states and the European Union have now signed the Montreux Document.

14 See the mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination in Resolution 2005/2 of the UN Commission on Human Rights (UN Doc. E/CN.4/RES/2005/2, 7 April 2005), extended by Resolution 7/21 of the UN Human Rights Council (UN Doc. A/HRC/RES/7/21, 28 April 2008). See also Resolution 15/26 of the UN Human Rights Council, which provides for the establishment of an open-ended intergovernmental working group to explore the possibility of drafting an international convention to regulate, control, and supervise the activities of private military and security companies (UN Doc. A/HRC/RES/15/26, 7 October 2010).

15 The description of the ICoC is available on the website of the Centre for the Democratic Control of Armed Forces. See 'International Code of Conduct for Private Security Service Providers', available at: www.dcaf.ch/Project/International-Code-of-Conduct-for-Private-Security-Service-Providers.

states on the question of the responsibilities of business actors under IHL and human rights law. There is, however, still a long way to go. Although the Guiding Principles were unanimously adopted by the UN Human Rights Council and thus benefit from an unprecedented legitimacy at the international level, many business enterprises are not yet aware of their existence. They are even less knowledgeable about the ways of implementing the Principles in their operations.

In addition, the fact that several of today's soft-law initiatives tend to focus on corporate conduct should not obfuscate states' own responsibilities under international law. Governments today are thus increasingly expected to think actively about what *concrete* steps they can take in order to prevent and mitigate corporate-related human rights abuses.

Looking ahead, there may be a need to reflect more carefully on available remedies for those bearing the brunt of IHL and human rights violations. What sorts of grievance mechanisms should and could be put in place for sanctioning or repairing the damage caused to vulnerable communities as a result of business operations? Can non-judicial grievance mechanisms work to effectively address community concerns in the future? Or is there a risk that such mechanisms may be unevenly applied, not sufficiently independent, or unable to lead to effective sanctioning? Ought the push in the future be towards more non-judicial remedies, or rather towards better state regulation and access to justice through national courts? These remain open questions, but it seems that initiatives aiming at ensuring better respect for human rights by the private sector can only be given practical meaning if they also include effective accountability mechanisms and recourse for victims.

The role of civil society

International civil society will also have a role to play in monitoring the activity of the private sector, making company directors aware of their responsibilities, and providing advice for affected communities or for victims of abuse. Thus, for example, the non-governmental organisation (NGO) Business & Human Rights Resource Centre has a Corporate Legal Accountability Portal, an 'online information hub providing resources for non-lawyers as well as lawyers – including victims, advocates, NGOs, businesspeople, lawyers bringing lawsuits against companies and lawyers defending companies'.¹⁶ The Institute for Human Rights and Business (IHRB) also strives to be a 'centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards'.¹⁷ More recently, Shift, an independent non-profit centre for business and human rights, was established by experts who had taken part in drawing up the Guiding Principles on Business and Human Rights with a view to providing

16 The Corporate Legal Accountability Portal is available at: www.business-humanrights.org/LegalPortal/Home/ProjectDescription.

17 The IHRB's website is available at: www.ihrb.org.

practical assistance for governments, business enterprises, and their partners on implementing the Principles.¹⁸ Nowadays, local NGOs, countries, and regions directly affected are at the origin of initiatives to implement the Guiding Principles. Hence, at the international level, the move towards full implementation of a framework such as the Guiding Principles will require alignment within the global standard-setting bodies (the UN, intergovernmental and regional organisations) and an effort to strengthen the capacity targeting the three aforementioned groups of stakeholders: governments, business enterprises, and civil society.

Business enterprises and humanitarian agencies: an indispensable dialogue

Business enterprises today have a greater awareness of their social responsibilities. It may be that they feel under pressure from their clients, who increasingly think like citizens of a more interdependent world; it might also be that they are keenly aware of the interests of their own shareholders and of the purely reputational costs of any alleged wrongdoing. The globalisation of communication via the media or social networks is also lending greater depth to Dostoyevsky's affirmation: 'Everyone is responsible to everyone for everything.'

Nevertheless, while the economy has always been one of the core concerns of *development* actors, *humanitarian* organisations have only relatively recently taken account of the role of business actors, often with little support. The development of self-regulation initiatives in the private sector and the awareness by humanitarian agencies of its growing influence calls for an intensification of contacts and cooperation.¹⁹ Humanitarian and business actors operating in a crisis area have all the more reason to communicate with each other as they often share the same interlocutors, such as armed and security forces, armed groups, criminal gangs, and threatened communities.

While business enterprises are geared to profit and are not called to carry out humanitarian action, it is on the basis of complementarities between the two sectors that cooperation mechanisms should be sought. The private sector will be able to step in where humanitarian agencies indicate there is need, which the latter are better placed to identify and assess. Several areas of dialogue could be explored: one could think of joint analyses of the effects on communities of the activities of business enterprises, the exchange of non-confidential information on economic or security risks, the transfer of skills or logistics and communication means, and so on.

The examples of the new media and telecommunications industries provide an illustration of the humanitarian contribution that may be made by the private

18 The Shift website is available at: www.shiftproject.org.

19 See, for example, 'Commercial and humanitarian engagement in crisis contexts: current trends, future drivers', in *Humanitarian Futures Programme*, King's College, London, July 2011, available at: www.humanitarianfutures.org/publications/commercial-and-humanitarian-engagement-in-crisis-contexts-current-trends-future-drivers/.

sector in case of crisis and of the value of strengthening cooperation. For instance, during the violence in southern Kyrgyzstan in June 2010, the ICRC had to deal with problems of gaining access to the conflict areas and turned to the national telecommunication companies, which sent, free of charge, text messages to all their subscribers, appealing for respect for the humanitarian mission.

While close cooperation of this kind may exist in crises, it would evidently be desirable to set up advance coordination and preparation mechanisms. In the 150 years of its history, the ICRC has maintained relatively few relations with the private sector. It was not until recently that the organisation developed a strategy for involving the private sector in a bid to strengthen its capacity to provide assistance and protection for conflict victims.²⁰

The starting point for that strategy is the principle that business may be a force for good – including in situations of armed conflict or in violent contexts – provided that business enterprises demonstrate the greatest diligence in the conduct of their activities. The primary objective of that strategy is thus to help business enterprises to know their rights and to fulfil their obligations under IHL. To that end, the ICRC is endeavouring to establish relations and to conduct a dialogue with companies likely to have a direct or indirect influence on the fate of victims of armed conflict or situations of violence.

As part of initiatives in the area of corporate social responsibility, companies have approached the ICRC to offer their support for its humanitarian activities. The ICRC has also contacted several business enterprises in order to strengthen its capacities for action in the field as a result of exchanges of expertise. In 2005, the ICRC and a group of business companies established the Corporate Support Group,²¹ which brings together enterprises that have decided to support the ICRC's humanitarian mission. The ICRC has also equipped itself with guidelines to determine the framework of its partnerships with the private sector.²²

This issue of the *Review* sets out to be practical and useful first and foremost for members of the private sector who may be seeking to improve their understanding of armed conflict or other situations of violence and to fulfil their obligations in such situations. The *Review* would also like to contribute to reinforcing the understanding of the role and obligations of the private sector among humanitarian agencies in the field and political decision-makers in charge of developing the applicable law.

20 See the article by Claude Voillat in this issue. See also the page 'Relations between the ICRC and the private sector' on the ICRC website, available at: www.icrc.org/eng/what-we-do/other-activities/private-sector/overview-private-sector-relations.htm.

21 See 'The ICRC Corporate Support Group – a mutually beneficial partnership', 18 January 2010, available at: www.icrc.org/eng/resources/documents/misc/private-sector-271008.htm.

22 See 'Ethical principles guiding the ICRC's partnerships with the private sector', available at: www.icrc.org/eng/resources/documents/misc/ethical-principles-220502.htm.

The views assembled in this issue come from researchers and practitioners from different fields: academics, specialist private sector business advisers, and members of international NGOs and UN agencies. The *Review* also wished to solicit the perspective of Professor John G. Ruggie, who, as the Special Representative of the UN Secretary-General led the process that resulted in the Protect, Respect and Remedy Framework and the Guiding Principles – texts which form the basis of many current debates and new initiatives in this field.

‘The world is my country’: that view now reflects the desire of business enterprises working across national borders, traditional structures, and mindsets to take advantage of the globalisation of exchanges. That view is also at the heart of humanitarian work, which recognises the dignity of every individual, irrespective of his or her background, opinions or beliefs. The globalisation of exchanges is a *fact* of life, but will only be *progress* if it is responsible.

Vincent Bernard
Editor-in-Chief



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Interview with John G. Ruggie*

Berthold Beitz Professor in Human Rights and International Affairs, Harvard Kennedy School, Former Special Representative of the United Nations Secretary-General for Business and Human Rights.

The conduct of multinational corporations, particularly those operating in conflict areas, is increasingly becoming subject to public scrutiny. More and more companies profess a commitment to live up to their human rights responsibilities in fragile contexts. In situations of armed conflict, international humanitarian law also applies. The business sector is, however, relatively less aware of this body of law.

In June 2011, the United Nations Human Rights Council adopted unanimously the Guiding Principles on Business and Human Rights, which spell out what measures companies and states could take to strengthen the human rights performance of the business sector around the world.¹ The Review wanted to hear from the person who spearheaded this initiative, Professor John G. Ruggie, and have his views on any emerging good practices amongst governments and companies in implementing the Guiding Principles, on the importance of due diligence criteria and grievance mechanisms, and on the role of regional organisations and civil society in promoting the Principles.

Trained as a political scientist, Professor Ruggie has made significant contributions to the study of international relations, focusing on the impact of economic and other forms of globalisation on global rule-making and the emergence of new rule-makers. In addition to his academic pursuits, Professor Ruggie has long been involved in practical policy work. From 1997–2001, he served as UN Assistant Secretary-General for Strategic Planning, assisting the Secretary-General in establishing and overseeing the UN Global Compact, and proposing and gaining General Assembly approval for the Millennium Development Goals. In 2005, Professor Ruggie was appointed as the UN Secretary-General's Special Representative for Business and Human Rights. Over the course of six years and after extensive research, consultations, and work on pilot projects, Professor Ruggie developed the UN Guiding Principles on Business and

* This interview was conducted at Harvard University in Boston on 29 March 2012 by Vincent Bernard, Editor-in-Chief of the *International Review of the Red Cross*, and Mariya Nikolova, Editorial Assistant.

Human Rights. Today, he chairs the boards of two non-profits, the Institute for Human Rights and Business and Shift: Putting Principles into Practice, and serves as Senior Advisor to the corporate social responsibility practice of the law firm Foley Hoag LLP.

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Professor Ruggie, could you summarize what your mandate as Special Representative on Business and Human Rights tried to tackle? What are the problems that we face today when we talk about business and human rights, especially in conflict areas?

The main problem was the lack of authoritative standards and guidance for states and businesses with regard to their respective obligations in the area of business and human rights. Different countries have different legal requirements at the domestic level. There are no universally recognized and enforced legal rules with regard to the overseas conduct of corporations in relation to human rights. In some jurisdictions it is possible to bring cases against companies for overseas behaviour; in others it is more difficult or impossible. There has been a proliferation of voluntary initiatives but none has reached any scale. So, there was a general lack of clarity and lack of understanding about both what states are supposed to do with regard to regulating businesses and what businesses are supposed to do with regard to their own responsibilities, whatever the local legal requirements may be. This was the overarching problem that my United Nations mandate tried to address.

In different industry sectors, and in different regions of the world, you have different manifestations of the problem. In the case of light manufacturing, for example, the issue typically has to do with inadequate or unenforced workplace standards. In the extractive industry, it has to do with community relations and inadequate consultations and compensation for land, and with physical security of persons. There have been numerous instances of security agents – whether state or private – wounding or even killing people who demonstrate outside a mining operation or outside an oil facility or a plantation. In the information and communication technology sector, the main issues are the right to privacy and freedom of expression, with companies either infringing on those rights directly through their own commercial practices, or by being complicit with governments in invading privacy or curtailing freedom of expression through censorship.

Conflict zones are particularly problematic because nobody can claim that the human rights regime, as it is designed, can possibly function in a situation of extreme duress for the host state. Though it technically has the primary obligation to protect human rights, in times of armed conflict the host state is typically either not functioning, does not control a particular part of a country, or is itself engaged in human rights violations.

1 See UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011.

In short, the specific manifestations vary but the overarching problem is that there was no universally recognized authoritative set of rules that would govern or guide these issues globally. The UN Guiding Principles on Business and Human Rights begin to fill that gap.

You conducted extensive research and consultations before submitting the Guiding Principles to the UN Human Rights Council. What challenges do you identify ahead in terms of their implementation?

Yes, we convened nearly fifty international consultations during the course of the mandate, and at one point we had more than two-dozen law firms and numerous other volunteers from around the world conducting *pro bono* research. The UN Working Group² – and everyone else in this space – can draw on these foundations. All of the materials are posted on the Business and Human Rights Resource Centre website.³

The mandate of the UN Working Group is to promote implementation and disseminate the Guiding Principles; to help build capacity, both among small and medium-sized enterprises as well as in smaller countries; to make country visits in order to get a better sense of how things are working out on the ground; and to convene an annual forum in Geneva where stakeholders come together and reflect on the progress that has been made. On the basis of that mandate the Working Group can also offer further recommendations to the Human Rights Council.

Do you consider that your mission has been accomplished?

Absolutely! I'm done. I signed up for two years and ended up serving for six because governments kept extending and expanding the mandate. When I began, it was intended essentially to identify and clarify existing standards and best practices. There was no normative dimension to it. After the second year I was asked to develop recommendations. So I returned in the third year with the 'Protect, Respect and Remedy' framework. The Human Rights Council welcomed it unanimously.⁴ They also asked me to spend another three years to develop more operational guidance on how to implement the Framework. This is how the Guiding Principles came to be.

Nevertheless, when I presented the Guiding Principles to the Council in June 2011, I stated in my remarks that I was under no illusion that this now solved

2 Editor's Note: The UN Human Rights Council resolution endorsing the Guiding Principles (UN Doc. A/HRC/RES/17/4, 6 July 2011) also established a UN Working Group on Business and Human Rights, whose key mandate is to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.

3 See Business & Human Rights Resource Centre, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home>.

4 Editor's Note: The 'Protect, Respect and Remedy' framework was elaborated in UN Doc. A/HRC/8/5, 7 April 2008, and is discussed in detail in Rachel Davis' contribution in this edition.

all business and human rights problems once and for all time. This is not the end, I said, but it is the end of the beginning. What I meant is that we now have for the first time a common framework and set of normative standards with regard to business and human rights that have been unanimously endorsed by the UN Human Rights Council. This includes not only Western countries, but also Brazil, China, India, Nigeria, Russia, and every other of the forty-seven countries represented on the Council.

The endorsement of the Guiding Principles was quite exceptional. It was the first time that the UN Human Rights Council or its predecessor had ever used the verb ‘endorse’ in relation to a normative text that governments did not negotiate themselves. Furthermore, the Corporate Responsibility to Respect Human Rights component has been incorporated into the new Organisation for Economic Co-operation and Development’s (OECD) Guidelines for Multinational Enterprises,⁵ which have a complaints mechanism. It has been referenced by the International Finance Corporation, which affects access to capital. The International Organisation of Standardization (ISO) recapitulates its core features in ISO 26000, and it has a whole industry of consultants behind it who are eager to help companies become certified as operating in a socially responsible manner. The Guiding Principles are also included in the new European Union (EU) corporate responsibility strategy. All of this makes the Guiding Principles the most authoritative global standard in business and human rights.

I should also note that when the EU and the United States (US) suspended economic sanctions on Burma, both referenced the UN Guiding Principles as benchmarks for investors – indeed, the US did so in the reporting requirements it established for US individuals and entities investing more than US\$500,000 in Burma. So the Guiding Principles have provided short-term guidance, as well as driving a longer-term process.

Could you give some examples of the follow-up work that has been done directly with companies since the adoption of the Guiding Principles?

I have already mentioned several important instances. There are many others. For example, the association of major oil companies called IPIECA has launched a two-year pilot project to pilot the due diligence requirements as well as the grievance mechanisms specified in the Guiding Principles. The mining industry is equally active. The European Commission has undertaken a project to develop sector-specific guidance for businesses in employment and recruitment, information and communication technologies, and the oil and gas industries, as well as for small and medium-sized enterprises.

5 The OECD Guidelines are available to consult online at: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/oecdguidelinesformultinationalenterprises.htm> (last visited June 2012).

Also, when the UN Human Rights Council considered the Guiding Principles, a number of companies posted endorsements on the Internet, ranging from a palm oil company in Malaysia to Coca-Cola, General Electric, and Sakhalin Energy in Russia. A wide variety of companies have endorsed the Guiding Principles and are moving forward with implementation. At the same time, several governments have held public hearings or inter-agency meetings on developing national implementation strategies. So we're off and running. But this type of work does take time: the Guiding Principles were only endorsed in June 2011.

How has civil society responded to, or used, the Guiding Principles so far?

Initially, a number of civil society groups viewed my mandate through traditional lenses, arguing that I should advocate for a single, overarching international business and human rights treaty; that I should receive complaints from victims; and so on. I took great pains to explain why these approaches were not the most effective way to rapidly reduce the incidence of corporate-related human rights harm and that judicial remedy, while necessary for providing remedy in the case of some abuses, needed to be supplemented with non-judicial forms that can deal quickly and fairly with many grievances before they escalate. But those differences are ancient history. Civil society is now using the Guiding Principles as an advocacy tool and as the basis for developing additional, more focused initiatives.⁶ Workers organisations were strongly supportive throughout the mandate. And they, too, are using the Guiding Principles as benchmarks against which to measure both companies and governments and to advocate for improved policies and practices.⁷

How do you see the role of an organisation such as the ICRC in the global impulse to provide a common framework for companies regarding their involvement in conflict situations or situations of violence?

Along with the Guiding Principles I submitted a companion report dealing specifically with conflict situations.⁸ It is my belief that conflict situations warrant special measures on the part of governments, both host and home governments – the latter especially where the host governments may not be in control of a particular part of a country in which a conflict is taking place. These situations also require enhanced due diligence by business enterprises.

6 For examples, see <http://accountabilityroundtable.org/campaigns/human-rights-due-diligence> (last visited June 2012); and SOMO, CEDHA, Cividep, 'How to use the UN Guiding Principles for Business and Human Rights in company research and advocacy', due to be published in 2012.

7 For example, see International Trade Union Confederation, 'The UN "Protect, Respect and Remedy" framework for business and human rights and the UN Guiding Principles on Business and Human Rights: a guide for trade unionists', May 2012, available at: <http://www.ituc-csi.org/the-united-nations-protect-respect,11734.html> (last visited July 2012).

8 Business and Human Rights in Conflict-Affected Regions: Challenges and Options for State Responses, UN Doc. A/HRC/17/32, 27 May 2012.

A greater role is imposed on home and on neighbouring countries to ensure that conflict zones do not end up being law-free zones. My report on conflict zones lays out some of the steps that I believe home and neighbouring states ought to take in that regard.

Also, I think this is an area in which further international legal measures are warranted, because, as I noted earlier, the human rights regime cannot possibly function as intended in a situation of extreme duress or outright conflict. The ICRC has long been active in this domain, and is well positioned to contribute to the further development of legal and other initiatives to deal with these exceptional circumstances.

During the elaboration of the Guiding Principles was there much discussion on the relationship between international human rights and humanitarian law obligations?

Throughout the mandate I stressed that in situations of conflict, companies themselves ought to be looking to international humanitarian law (IHL) to make sure that they do not find themselves either directly or indirectly contributing to violating IHL provisions or end up being complicit in IHL violations. Of course, states have their own obligations under IHL.

The framework Protect, Respect, Remedy has important implications for states. Tell us a bit more about the state duty to protect. How have states seen their obligations with respect to business involvement, and has their understanding evolved since the beginning of your mandate?

The state duty to protect against human rights abuses is foundational. It includes protection against third-party abuse. Business is such a third party. What I found in the course of the mandate is that in many, if not most, instances states had not developed a well-articulated understanding of their specific obligations with regard to business as a third party. Nor had this been spelled out elaborately or authoritatively at the international level. The UN human rights treaty bodies have only episodically referred to it.

One of my tasks in the mandate was to engage states in serious discussions about the fact that ‘business and human rights’ is not a little self-contained box. You do business and human rights when you do corporate law, or when you do securities regulations, when you negotiate investment treaties, or negotiate trade agreements. There are business and human rights implications in all of those areas, and most states had not paid much attention to them. They seemed to think that business and human rights is some isolated thing that you can treat separately with three junior people in the foreign ministry. But it is not. It is a cross-cutting issue that ought to be considered in all areas of law and policy that affect business conduct. Pointing that out to governments and getting them to agree that, indeed, the duty to protect is more expansive

than they had previously thought was one of the major contributions of my mandate.

The most controversial element in the state duty to protect against corporate-related human rights abuse is, of course, extraterritorial jurisdiction. The human rights treaties are silent on the subject. Customary international law suggests that states are not generally required to exercise extraterritorial jurisdiction, but nor are they generally prohibited from doing so where it concerns the most egregious violations and where a recognized jurisdictional basis exists.

Do you find that in the last couple of years there has been more information regarding business and human rights available to corporate lawyers? How, in your assessment, do they perceive their own responsibilities in this domain?

One of the unique features of the mandate was to get the corporate law community involved. At one point we had law firms from sixteen or seventeen countries, including in Africa, Asia, and Latin America working with us to analyse the relationship between human rights law and corporate and securities law in thirty-nine different jurisdictions. All of this research was shared with the UN Human Rights Council and posted on my website.

Getting corporate lawyers involved made an enormous difference to the mandate because this was the first time most of them had paid attention to human rights law. They became engaged, they conducted extensive research, and the word began to spread. As a result of that type of engagement the American Bar Association ended up endorsing the Guiding Principles, as did the International Bar Association. Also, Clifford Chance LLP, which I believe is the largest law firm in the world, put out a public statement saying that they, as a business, will adhere to the Guiding Principles. Finally, the involvement of corporate lawyers raised the visibility of the mandate within companies well beyond corporate social responsibility (CSR) units to include C-suites and boards.⁹

Traditionally, human rights activists have tended to see business enterprises mainly through the prism of litigation. Do you see a sort of warming of relations between the human rights community and the corporate world? Is there a change of focus now?

There will always be a role for litigation. But consider that domestically only a small fraction of disputes are resolved through the courts – the number is in the single digits. This means that the vast majority are not. There are other ways of dealing with them. I would imagine this is equally valid on a global scale. While litigation has an important role to play, one cannot rely on litigation seeking after-the-fact punishment to solve the problem alone. The first priority is to prevent bad things from happening. Moreover, for certain kinds of disputes non-judicial means may be

9 Editor's note: The term is used to designate a corporation's most important senior executives.

more effective or desirable than lawsuits. Judicial remedy, of course, is necessary in some instances. But the idea that you can drive the business and human rights agenda entirely or largely through punishing people who have already harmed someone never made much sense to me – quite apart from the fact that judicial reform takes a lot of time. That is why I put such a strong emphasis on preventative measures and non-judicial grievance mechanisms.

Some would argue that business can also play a positive role in conflict. What do you make of this proposition?

Of course – there is no question about that. I am strongly in favour of business contributing to the solution of societal challenges of all sorts. But the first step is to not infringe on the rights of others; not to contribute to harm or make a situation worse; not to exploit the absence of or weakness in the rule of law in a particular country or situation. Moreover, there is no equivalent to carbon offsets in human rights: ‘doing good’ by building a clinic does not absolve a company from otherwise harming individuals or damaging communities.

Let us now focus on grievance mechanisms. How do companies approach such mechanisms?

I believe all the major mining companies that belong to the International Council on Metals and Mining either have or are developing grievance mechanisms. Some of the oil companies are as well. It is no accident that the extractive industries are moving rapidly in this direction because they operate in communities – typically for a long time. It is likewise no accident that the mining companies are ahead of the oil companies because the mining companies have a bigger footprint in communities. So this is rational behaviour once the option of grievance mechanisms was put on the table and criteria for their effectiveness and legitimacy were laid out. We conducted nearly eighteen-month-long pilot projects with companies and their stakeholders in six countries to test those criteria, which are included in the Guiding Principles.

Grievance mechanisms may be flexible and convenient for companies, but they may not necessarily remedy victims. Do you see any emerging best practices on compensation or other forms of reparation for victims?

As you well know, the world currently does not have an effective system of remedy. It would be an exaggeration even to call it a system. It is a group of fragments that are inadequate in terms of the needs out there. Yet there is no one single solution that is going to solve it all, or all at once. So, in my mandate I talked about how we need to strengthen national human rights institutions, for example. I talked about reducing impediments to access to justice, access to the courts, including in some cases

extraterritorial jurisdiction. I talked about the way corporate law is structured. And so on. There is a menu of things, but there is not any single measure that is going to fix it all. What the Guiding Principles seek to do is to connect these various strands within a single framework so that cumulative progress can be achieved.

In terms of hard law, we are not even sure anymore whether it is possible to hold companies to account for contributing to acts that amount to crimes against humanity under the US Alien Tort Statute (ATS). It is now under review by the Supreme Court and its applicability to companies may not survive. But even if it were to survive, it is still an oddity that a statute adopted in 1789 for different purposes should be the primary global vehicle to hold companies to account for alleged involvement in the most egregious human rights abuses.

One of the most obvious gaps that I found – and one that can be most readily filled – was in non-judicial grievance mechanisms, which a company itself can set up or in which it can participate. That is why I devoted as much time and energy to develop the concept.

What could be the implications of the *Kiobel*¹⁰ case, currently before the US Supreme Court, for holding companies to account in the future?

Obviously I do not follow all court cases in the world, but I do not need both hands to count the number of successful suits against multinational corporations in other countries for human rights abuses abroad. But some 100 such cases have been brought in the United States since the early 1990s under the ATS, the vast majority of which have been dismissed.

If the applicability of the ATS to companies is disallowed, plaintiffs' lawyers would have to find new ways. My sense is that they would go in two directions. First, they would try to bring cases against company executives, which might be even more embarrassing for the individuals concerned than bringing cases against their companies. Second, they would try to bring cases under state law rather than federal law. Recently, a few cases have been brought in Nigeria, so developing host countries are beginning to be more involved. And there are cases in Dutch, Canadian, and UK courts against companies domiciled in those countries. If access to the ATS were to be constricted on nationality grounds, plaintiffs and the activist community also would focus more on other jurisdictions.

I ended up submitting an *amicus* brief to the US Supreme Court in the *Kiobel* case. It was in support of neither party but did point out that the Shell lawyers had misconstrued a key finding of my mandate and used it in support of their argument. They claimed I had found that international law does not impose any direct obligations on companies. What I actually said was that while the

10 Editor's note: The *Kiobel* case (*Kiobel v. Royal Dutch Petroleum Co.*, US Supreme Court, No. 10-1491) was brought under the ATS by members of the Ogoni community in Nigeria against Shell. The plaintiffs alleged that Shell had aided and abetted the Nigerian military dictatorship in the 1990s in the commission of gross human rights violations, including torture, extra-judicial execution, and crimes against humanity. A decision is expected in the first half of 2013.

international human rights treaties are largely silent on this subject, one of the most consequential legal developments in recent years has been ‘the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards’.¹¹

Can you give us some examples of how companies apply the ‘corporate responsibility to respect’ concept?

The sequence is more or less as outlined in the Guiding Principles. Typically, a policy commitment is undertaken. A policy statement is drafted by senior management and shared throughout the company. It may be shared with some outside stakeholders including non-governmental organisations (NGOs) on a confidential basis. Then, it goes to the chief executive officer (CEO) and sometimes the Board of the company for formal adoption. Ownership of the policy is assigned and it gets incorporated into operational policies and practices.

It takes a lot to translate a policy statement into operational guidance for every business function. What does it mean for the human resources department? What does it mean for the procurement department? What does it mean for the marketing department? For operations? And so on.

For every business function you have to have a specially tailored set of guidelines. Then, you have to train people in how to do it. Then you have to have some accountability mechanism in terms of internal reporting and working it into the compensation scheme so that, when the assessments of annual performance are done and bonuses allocated, human rights performance gets reflected in the process. All of this can take anywhere from eighteen months to two years to implement. Some companies began even before the Guiding Principles were approved, but we are not going to see the actual results for a while because it is still work in progress.

What could be the international fora that keep track of all of these developments for companies? Do you see the UN Human Rights Council adopting reports on, say, best practices by companies in the future?

There is a real challenge just to keep up with all these developments. The world is a big place, and governments as well as large companies are complex institutions. I hope the UN Working Group will play a central role in keeping track. NGOs and workers’ organisations are also well equipped to do so.

¹¹ Editor’s Note: The quotations are from ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts’, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035, 9 February 2007, paras. 41, 44, 22 and 84, respectively.

Could you tell us a little bit more about the research project in which you are involved, on the ‘cost of conflict’ for companies?

This is not necessarily ‘conflict’ in the sense of people shooting at each other. It includes lower levels of conflict. The project arose from the following question: we know what the harm is to individuals when companies do not have a sustainable working relationship with the communities, but it cannot be cost free to the companies either, right? What does it actually cost companies in terms of pipelines being blown up, access roads to mines being shut down, facilities attacked, company personnel kidnapped, or simply consuming the time and energy or staff, and so on? I started asking companies what information they had on this. And the answer was that they did not have much.

Then Goldman Sachs came out with a study of 190 projects in the oil industry, which had some interesting findings.¹² One was that the length of time it takes from the beginning of a project to the time the first drop of oil comes out of the ground had doubled over the course of a decade, and that the largest proportion of the added time was not due to technical or financial risk factors. It was something they did not have a name for, which is now called ‘stakeholder-related risk’. So then I started asking, don’t you guys measure this? One oil company actually brought in a consulting firm and gave them access to their data. They discovered that they had lost US\$6.5 billion over a two-year period as a result of stakeholder-related risk. I said: ‘Gee, that’s a big number! Didn’t anybody notice?’ And the answer was: ‘Well, you see, those numbers never got aggregated. They were rolled into local operating costs. We saw a general cost inflation, but we never broke it down.’ My team and I started looking at other companies and other industry sectors.

To cite one example that is in the public domain, Newmont Mining has an operation in Peru they had to shut down because a national state of emergency was declared for safety reasons after massive community demonstrations against the operation – the Conga mine. *The Financial Times* reported that Newmont was losing somewhere between US\$2million and US\$2.5 million a day as a result. This is what I mean by the cost of conflict with communities. One of the reasons these companies are now jumping toward adopting grievance mechanisms is to avoid paying \$2.5 million a day in lost revenue as a result of not managing their relationships with communities properly. The message for businesses is that the cost of conflict is not only imposed on the victim; you are also imposing costs on yourselves. This is a lose-lose proposition that you can and should fix.

What are your views on multi-stakeholder initiatives? They seem to be the newly preferred model for managing relations between state, private actors, and civil society.

They are harder to manage than we thought. In principle, they are a great idea and I have been a supporter. In fact, I helped create what may be the largest in the

12 Goldman Sachs Global Investment Research, ‘Top 190 projects to change the world’, April 2008.

world – the UN Global Compact. But one has to be very careful about how they are structured because often they fail to make it absolutely clear who is supposed to be contributing what. One result is that shirking takes place. Even when specific roles are assigned, multi-stakeholder initiatives can make it easier to pass the buck. A second challenge is that they require far greater resources and commitments than anybody thought. And the individual participants, whatever pillar they work in – whether they're in government or business or civil society – typically do not get a lot of credit in their home institutions for their contribution to the collective effort. One's performance in a government agency generally is not evaluated based on one's contribution to collective initiatives. The same is true with businesses and NGOs. It is often an added burden for all of the participants, who may care deeply about the initiative but without being properly rewarded or incentivized.

So, in principle I think multi-stakeholder initiatives are a good idea and they are making a significant contribution to helping close global governance gaps. But we have to go into them with eyes wide open about what the challenges are and make sure that we are actually dealing with them, not simply hope that they will resolve themselves.

A last word of encouragement for all those who work in the field of business, violence, and conflict?

That's easy: five years ago, we would not have had this interview – certainly not at this length! There would have been too little to talk about. Ten years ago, this subject barely existed. So if you take even a medium-term perspective, we have come a long way in a relatively short period of time. That should be enormously encouraging for all those who are dedicated to making a difference. But as I said earlier, in business and human rights we are only at the end of the beginning. There is much more to be done.

Business actors in armed conflict: towards a new humanitarian agenda

Hugo Slim

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Abstract

The purpose of this article is to give an overview of current understandings of the various roles of business actors in armed conflict. It traces the expanding discussion of business and conflict in today's civil wars, and the discussion's importance to humanitarian, human rights, corporate and peacebuilding policymakers. It shows how the humanitarian understanding of business roles in conflict has progressed beyond some simple and largely negative stereotypes about business in war to become more sophisticated. The article then looks at the significant diversity of business actors, which can determine their experience of armed conflict. It is suggested that there are six potential roles of business in armed conflict – that of victim, perpetrator, supplier, humanitarian actor, peacebuilder, and conflict preventer. Finally, the article recommends a range of ways to improve humanitarian policy so that humanitarian actors engage with business more actively and appropriately on law, business relief, and business continuity.

Keywords: business, armed conflict, humanitarian action, peacebuilding, business relief, business continuity.

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Henry Dunant, the founder of the Red Cross, is naturally remembered as a great humanitarian. His personal humanitarian action at the Battle of Solferino and his subsequent epiphany about the need for a new international organization is now

firmly embedded in the founding history of modern humanitarianism.¹ But Dunant did not go to Solferino deliberately to start a global humanitarian organization. In fact, he was in Solferino on business. He was urgently, perhaps desperately, seeking a meeting with Napoleon III to seek his approval for a new land concession that included a waterfall to irrigate his drought-stricken agricultural business in Algeria.² This should perhaps encourage humanitarians to engage confidently with business people. After all, our modern founder was a businessman. Although by all accounts, he was not very good at it.³

This article encourages humanitarian policymakers and practitioners towards a more varied understanding of the roles and experiences of business actors in armed conflict than has typically been the case among humanitarian agencies. The article starts by briefly surveying the academic and activist debate about business and armed conflict over the last twenty years, with its particular emphasis on war economies and its largely negative view of business as a cause of war. Drawing on more nuanced views of business that have emerged in recent years, the article then suggests that humanitarian policymakers might profit from recognizing the diversity of business in conflicted societies and the six main roles played by business in armed conflicts. Finally, the paper tentatively recommends four ways in which humanitarian actors could engage better with business in the interests of the civilian populations that work in businesses or depend on them for their livelihood and survival during armed conflicts.

Business and war

The relationship between business and armed conflict is ancient and enduring. In human history, goods have just as often been secured by violence as by trade. Armed force has regularly been used to protect trade or to expand business opportunities and develop new markets. Monarchs, states, and warlords have all needed businesses to supply and finance their wars. And, of course, war itself has often been primarily understood as a business activity by many of its foot soldiers because of the unique freedom it offers to pillage, and because of the black markets it creates for commodities made scarce by war.

In his famous 1827 novel, *I Promessi Sposi*, Manzoni describes the conduct and motivation of Wallenstein's pillaging troops,⁴ 200 years earlier, as they moved towards Mantua in the Thirty Years' War:

When they arrived at a village selected as a billeting place, the men quickly spread out over it and literally put it to the sack. Whatever could be consumed

1 See Henry Dunant, *A Memory of Solferino*, originally printed by American Red Cross, 1959, reprinted by ICRC, Geneva, 2009.

2 Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, Harper Collins, London, 1998, pp. 6–7.

3 Francois Bugnion, 'Henry Dunant', in David Forsythe (ed.), *Encyclopedia of Human Rights*, Oxford University Press, New York, 1996, p. 70.

4 Wallenstein was a militarily and commercially successful Bohemian commander who funded his own private army, which he put at the service of the Habsburg Emperor, Ferdinand II.

or carried off vanished at once and everything else was ruined or destroyed. Furniture became firewood; cottages became stables ... they searched every cranny of the houses, knocked down walls, dismantled buildings and quickly identified recently dug spots in the gardens to find where people had hidden their valuables, or tortured them to tell them where they were hidden.⁵

Manzoni's description would fit profiteering military looters from many thousands of wars in human history, most recently in Bosnia and Herzegovina, the Democratic Republic of Congo, Sierra Leone, and Libya, for example.

War can be good for legal and respectable businesses too. The great Frenchman Voltaire is known mostly to humanitarians for his timeless anti-war passages in *Candide* and his determined human rights campaigns against unfair trials, torture, and the death penalty. But in addition to being artistically and politically brilliant, Voltaire was also commercially brilliant. From an early age, he accumulated great wealth, not from his writing and plays but primarily from his business deals. Voltaire's first fortune was made with a group of school friends who worked out a formula with which to win the Paris lottery. His second fortune was made from a business that supplied uniforms to the French army.⁶

Voltaire profited legally from what scholars call a 'war economy'. According to Le Billon, this is 'a system of producing, mobilizing and allocating resources to sustain violence'.⁷ It is a phenomenon that is highly relevant to the precepts of humanitarian law and the practice of humanitarian action. Humanitarian lawyers are concerned to ensure the rights and duties of business actors in war, and need to understand when businesses act lawfully or unlawfully under international humanitarian law. Businesses are protected in armed conflict under international humanitarian law unless they are engaged in roles like arms manufacture, which makes them a legitimate military target.⁸ But they are also bound not to engage directly or indirectly in violations of international humanitarian law.⁹

In the civil wars of recent years, questions about business in conflict have rightly extended beyond the conduct of businesses in war to the role that business interests play in causing and sustaining armed conflict. Scholars and non-governmental organizations (NGOs) have carried out a great deal of research to understand how commerce of various kinds drives and shapes the violent patterns of war.¹⁰ In the 1990s, research in this area heightened the insight that many

5 Alessandro Manzoni, *The Betrothed [I Promessi Sposi]*, (trans. Bruce Penman), Penguin Kindle Edition, London, 1983, p. 532.

6 Ian Davidson, *Voltaire in Exile*, Atlantic Books, London, 2004, p. 4.

7 Philippe Le Billon, *Geopolitics of Resource Wars: Resource Dependence, Governance and Violence*, Frank Cass, London, 2005, p. 288.

8 ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005, Rule 8, 'Definition of Military Objectives', pp. 29–34.

9 See ICRC, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, ICRC, Geneva, December 2006.

10 See e.g., David Keen, *Useful Enemies: When Waging Wars is More Important than Winning Them*, Yale University Press, New Haven and London, 2012, Chapter 2, and *Complex Emergencies*, Polity, Cambridge, 2007, Chapter 2; Philippe Le Billon, *Fueling War: Natural Resources and Armed Conflict*, Routledge,

contemporary civil wars were driven as much by commercial greed as by political grievance.¹¹ In other words, war can be as economic as it is political.

Political actors – as governments or non-state armed groups – can have a primarily economic project that they use violence and politics to deliver, or a primarily political project that uses violence to co-opt the economy necessary to finance it. Warring parties may want to appropriate land and resources for an elite few. Or, in more socialist struggles, they may seek to reappropriate natural resources for the many from the few. In either case, whether as a national or a guerrilla army, they need to finance their forces at the very least. Economic resources are never the whole story of a political contest but they are certainly central in many armed conflicts. For example, the UN has calculated that over the past sixty years, 40 per cent of civil wars have been associated with important contests over mining and natural resources of some kind.¹² Diamonds and gold have been particularly prominent as the sources of armed conflict and the means to finance several African wars. This has led to major industry efforts to end so-called blood diamonds and ensure that gold remains ‘conflict free’.¹³

Humanitarian lawyers struggle to find the point at which a primarily economic conflict becomes an armed conflict proper, or when it remains a violent and protracted policing struggle against organized crime. This can be difficult to discern in some cases. The current ‘drugs war’ in Mexico is an example of this. This struggle amongst a state, its citizens, and organized crime networks has an extremely high rate of violent death higher than many situations considered as armed conflicts proper.

The humanitarian implications of war economies

Insights into the economic rationale of war and its affinity with theft, expropriation, reappropriation, or criminality are not new to political science. Marxist theories, in particular, have long observed the violent patterns of primitive accumulation that go hand-in-hand with the development of capitalism. War has always been a means of economic strategy and a way to the accumulation of wealth. This is particularly true in colonialist violence. The clarion cry of British imperialism was ‘Commerce and

London, 2005. See also, the many reports of Global Witness available at: <http://www.globalwitness.org/news-and-reports> (unless otherwise stated all links in this article last visited 20 September 2012).

11 Christopher Cramer, *Civil War is Not a Stupid Thing: Accounting for Violence in Civil Wars*, Hurst, London, 2006; Mats Berdal and David M. Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars*, Lynne Reiner, Boulder, 2000.

12 United Nations Inter-Agency Team for Preventive Action, *Extractive Industries and Conflict: Guidance Note for Practitioners*, UN, New York, 2010, p. 7.

13 Details of The Kimberly Process on conflict diamonds are available at: <http://www.kimberleyprocess.com/>; details of the World Gold Council’s initiative are available at: <http://www.globalwitness.org/news-and-reports>, http://www.gold.org/media/press_releases/archive/2012/03/world_gold_council_unveils_latest_draft_of_conflict_free_gold_standard/.

Christianity'.¹⁴ The world's first modern business corporation, the British East India Company, famously had a standing army of 200,000 people which it used in massacres and pitched battles, a fact that led to Adam Smith's famous description of the company as 'that bloodstained monopoly'.¹⁵ Pioneering work by Global Witness, Partnership Africa Canada, and the UN on the role of diamonds and minerals in the wars in Angola, Sierra Leone, Liberia, and the Democratic Republic of Congo (DRC) since 2000 has shown how the business interests of government and non-state warring parties still deploy extreme violence against civilians in the late twentieth and early twenty-first centuries.¹⁶

War economies in civil wars take several forms depending on the nature of the conflict and the goals and capacities of the combatants.¹⁷ Naylor distinguishes three main forms of armed group conflict economies: predatory, parasitic, and extractive.¹⁸ In a predatory economy, armed actors raid and pillage the local area, unable to control the territory fully. A parasitic war economy uses violence to control territory and does business by taxing, extorting, or taking over businesses in what then becomes a shadow economy within a state. In an extractive conflict economy, armed forces violently take the necessary territory to appropriate and control profitable agricultural and mining businesses. As Jimmy Kandeh and David Keen have pointed out, government forces as well as rebel forces are just as likely to adopt such business practices in civil wars – the recent archetypal examples being the military millionaires of the Indonesian army, and the soldier-rebels (or 'sobels') of the Sierra Leone government who copied violent rebel practices to exploit local business opportunities.¹⁹ Critics of the invasion of Iraq would say that the new oil, construction, and service contracts awarded to international companies after the Iraqi regime change are clear examples of the United States and its allies profiting from a similar conflict economy.

Humanitarian actors are acutely alive to the role of business in war for a variety of reasons:

- First, humanitarians are aware of the ability of business interests to cause war and encourage commercially predatory, violent, strong men to use atrocities against civilians to increase their market share.

14 David Livingstone, the famous Scottish missionary explorer of Africa, repeatedly framed his vision of colonial progress as a threefold mission of 'Christianity, Commerce and Civilization', a phrase taken to heart by British imperialists.

15 Nick Robins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational*, Pluto Press, London, 2006, see Chapter 6 summarizing Adam Smith's criticism of the company and its monopoly.

16 Investigative research by Partnership Africa Canada and Global Witness, in particular, brought about international political oversight by the United Nations and industry-wide monitoring by the Kimberly Process – a joint government, company, and civil society initiative.

17 Achim Wennmann, 'Conflict economies', in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon*, Oxford University Press, Oxford, 2009, pp. 74–89.

18 R. Thomas Naylor, *Wages of Crime: Black Markets, Illegal Finance and the Underworld Economy*, Cornell University Press, Ithaca, 2002, pp. 45–47.

19 D. Keen, above note 10, Chapter 2; Jimmy D. Kandeh, 'Ransoming the state: elite origins of subaltern terror in Sierra Leone', in *Review of African Political Economy*, Vol. 26, No. 81, 1999, pp. 349–366.

- Second, humanitarians need to mitigate war's terrible effect on local businesses and family assets that soon become unable to sustain people's livelihoods. When war destroys people's small farming or trading businesses, impoverishment follows fast.
- Third, humanitarians rightly worry about the ambivalent role that aid commodities can play in a local economy – potentially undermining markets by creating gluts of certain items or increasing inflation by introducing new cash in wages or relief distributions.
- Fourth, humanitarians are naturally alert to the moral hazard and perverse commercial incentives that can be generated by humanitarian aid. Violent groups may attract aid in order to tax it, divert it, or violently co-opt it. In this way, aid becomes part of the conflict and its presence can increase violence against those who need it. This core risk to humanitarian action in war is most clearly confronted by humanitarian policies that aim to insulate their projects against such risks by actively 'doing no harm' or applying 'conflict-sensitive' programming.²⁰
- Finally, a large new business sector has developed to protect businesses and other organizations in armed conflict, including humanitarian agencies. The sharp rise in the scale, coverage, and profitability of private security companies (PSCs) and private military companies (PMCs), such as G4S, Aegis, and Academi (formerly Blackwater), means that they are now a major new commercial actor in armed conflicts, and one that is frequently armed.²¹ In the last few years, the Montreux Document has been negotiated to outline international standards for operations by PSCs and PMCs in armed conflicts,²² and a more recent multi-stakeholder initiative, the International Code of Conduct for Private Security Service Providers, aims to 'clarify international standards for the private security industry operating in complex environments, as well as to improve oversight and accountability of these companies'.²³

The recent evolution in business ethics

The initial discourse around business and conflict was dominated by a deeply suspicious analysis of 'big bad multinational corporations' who were out for everything they could get, and would cover-up whatever they needed to in order to get it. In his important survey of colonial economies, David Fieldhouse describes

20 Mary Anderson, *Do No Harm: How Aid Can Support Peace or War*, Lynne Reiner, Boulder, 1999; Conflict Sensitivity Consortium, *Resource Pack on Conflict Sensitive Approaches to Development, Humanitarian Assistance and Peacebuilding*, available at: <http://www.conflictsensitivity.org/publications/conflict-sensitive-approaches-development-humanitarian-assistance-and-peacebuilding-res>.

21 See company websites at: www.g4s.com; <http://www.aegisworld.com>; <http://www.academi.com>.

22 The Montreux Document on Pertinent Legal Obligations and Good Practices for States Related to Operations of Private Military Companies and Security Companies during Armed Conflict, 2009, available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

23 For a detailed description of this Swiss-led initiative, see: http://www.icoc-psp.org/About_ICoC.html.

how multinational and transnational corporations (MNCs and TNCs) got a particularly bad press from Marxist economists who saw them as the main instrument in the subjugation of peripheral colonial and post-colonial economies to a dependency on a core global economy structured to suit Western self-interest.²⁴ To these dependency theorists, all TNCs were little better than the British East India Company or Spanish conquistadors of old, and many were still thought to be quite happy to run private or proxy armies of their own. Shell in Nigeria, Lonrho in southern Africa, and Rio Tinto in Papua were regarded as the epitome of this kind of exploitative and irresponsible company, and still are by some NGO campaigning groups like the London Mining Network.²⁵

'Multinational' became a term of abuse in leftist circles during much of the post-colonial period. This began to change in the 1990s when the arrival of corporate social responsibility (CSR) and a deep reappraisal of business ethics across many global corporations brought new cooperation between NGOs and companies.²⁶ In the late 1990s, big business began to respond to ethical prompting by NGO critics and stock market legislators, and also started to recruit former NGO activists to run their social and supply chain teams. NGOs like CorpWatch (1996) began to monitor individual company performance; a new wave of funds emerged to focus on socially responsible investment (SRI); the UN launched its Global Compact (1999); and stock markets developed indices like the Dow Jones Sustainability Indices (1999) in New York and FTSE4Good in London (2001). Most of these built on the 'triple bottom line' model of NGO innovator John Elkington, which asked that companies report on their impact on 'people, planet and profit'.²⁷ At the same time, mainstream development theory – in governments and NGOs alike – also changed to become less leftist and more supportive of the business sector's contribution to human development and human security. The human rights obligations of business also began to be scrutinized and elaborated.²⁸ The culmination of this process was the official adoption of the UN Guiding Principles on Business and Human Rights by the Human Rights Council in 2011.²⁹ These were carefully prepared over several years by Professor John Ruggie while

24 David Kenneth Fieldhouse, *The West and the Third World: Trade, Colonialism, Dependence and Development*, Blackwell, Oxford, 1999, Chapter 9.

25 See, for example, London Mining Network, 'Rio Tinto: a shameful history of human and labour rights abuses and environmental degradation around the globe', available at: <http://londonminingnetwork.org/2010/04/rio-tinto-a-shameful-history-of-human-and-labour-rights-abuses-and-environmental-degradation-around-the-globe/>.

26 John V. Mitchell, *Companies in a World of Conflict: NGOs, Sanctions and Corporate Responsibility*, Earthscan and Royal Institute for International Affairs, London, 1998, Editor's Overview, pp. 1–17.

27 John Elkington, *The Triple Bottom Line for Twentieth Century Businesses*, in J. V. Mitchell, above note 26, Chapter 2.

28 For an excellent summary of the evolution of human rights obligations on business actors before the Ruggie Process, see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, Chapter 6 on corporations and human rights.

29 UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011.

he was the UN Secretary General's Special Representative for Business and Human Rights.

All these developments mean that the boundary between business and humanitarian concerns has become much more porous. Humanitarian agencies and businesses debate together, both profess respect for human rights, increasingly swap staff, and have common participatory approaches to community development and conflict reduction strategies at field level.

Understanding the diversity of business

Just as earlier debates about business and war stereotyped business as big and bad corporations, they often limited discussion to the extractives sector – oil, mining, and timber – and to the arms trade. Other business sectors were overlooked. The fact that the great majority of the world's poor and most civilians in armed conflict were also small businesspeople of one kind or another was equally obscured. As the relationship between multinationals and NGOs became less conflicted, space emerged for a more sophisticated discussion of business in conflict. Useful distinctions were made between different kinds of companies, different sectors, and the variety of business models.³⁰ This more realistic discussion of the diversity of business has enabled more nuanced thinking about how different types of business affect armed conflict and are affected by it.

Business is not monolithic. Proper use of the term business must cover a multitude of different forms of human production and exchange at all levels of society. Only with a full view of all business types, is it possible to gain a full appreciation of the dynamics of business and conflict. Important variations between businesses are determined by several key factors. These differences need to be understood by humanitarian agencies if they are to achieve better working relationships and advocacy with the wide range of businesses present in any armed conflict.

Scale creates immediate and significant differences between businesses. So too does market reach – some businesses are local, some are national, and some are international. Sectors also create variety between businesses and make real differences between banking, retailing, mining, servicing, agricultural, manufacturing, and construction businesses. In a civil war economy, a large, profitable mining business producing a raw material with strong international market demand is likely to be more strategic to an armed force than, for example, a clothing retail chain at a time when local people have little money for consumer goods. Business values are a distinguishing factor too. Some businesses have very high ethical values around corruption, bribery, treatment of employees, high standards of efficiency, good customer service, and a strong notion of what constitutes morally responsible products and services. Others do not.

There are also important ownership differences. Businesses can be privately owned by one or more individuals or be publically owned through a stock market

30 Gilles Carbonnier, 'Private sector', in V. Chetail, above note 17, pp. 245–254.

thousands of miles away. Other businesses may operate a mutual or cooperative business model in which the company belongs to all its members and customers. Increasingly, social entrepreneurs in health, education, food, and micro-finance are also trading as 'social businesses' rather than charitable NGOs. This term, coined by Nobel laureate and founder of Grameen Bank, Muhammad Yunus, describes companies that run commercial operations to meet specific social needs and return all profits into the business. Some of the world's largest businesses are state owned – especially in China, Africa, and South America.

A company's business model is another vital differentiator between businesses. Large high-investment mining companies like BHP Billiton or Xstrata are often described as 'captive' businesses. They are geographically stuck to a small area where natural resources lie. They are financially trapped by the multi-billion dollar upfront investment required to mine an area. They are also trapped in time because of the decades it often takes to deliver a significant return on investment from high-tech extractive businesses. The business model of a mining company also creates very high revenue but relatively very low employment. In contrast, a soft drinks and brewing company can be relatively light on upfront investment and employ or enable a marketing network of hundreds of thousands of people selling its products across a whole country. This gives them real pro-poor reach across the bottom of the pyramid (BoP) – the broadest and poorest part of the population in most countries. Some sectors like mining and banking thrive with a few large businesses because the bar for market entry is set by very high investment. Others, like construction, farming, and retailing, include many thousands of small to medium sized enterprises (SMEs). Some business models are very seasonal. Some are export dependent, like cash crops, and some are import dependent, like tourism whose customers must be attracted from abroad.

Some businesses are highly adaptable in war, even deeply innovative. For example, in many wars, high-end sections of the property, hotel, and restaurant market boom as they adapt by renting to international aid agencies. When international Safari tourism dried up because of armed conflict in Zimbabwe, several local tourist companies adapted to provide logistical and administrative support to international agencies. One of Switzerland's most famous chocolate bars – Ragusa – is also the result of business wartime innovation. When the supply of cocoa became extremely scarce in wartime Europe, Camille Bloch invested in hazelnuts instead and designed the product that became his leading brand.³¹

One of the main distinctions in any analysis of business is between the formal and informal sectors. All economies have a formal and informal sector, but poor and conflict-affected economies have particularly large informal sectors. The formal sector is tax-paying and regulated by government. The informal sector is not. Humanitarian agencies and NGOs work mostly with the informal economy. In an armed conflict every poor family is a family business of some kind, desperately trying to find customers for the labour and products of its adult and child members every day, and struggling to retain or recover its assets. What is often referred to as

31 See Ragusa, 'Historique du produit', available at: <http://www.ragusa.ch/fr/historique-du-produit.html>.

‘livelihoods programming’ or ‘economic protection’ in humanitarian action is really support to family businesses.

The six main roles of business in war

The strong emphasis on business as a potential motivation of armed conflict and atrocity focuses excessively on one potential role of business as a cause or perpetrator and obscures the other roles that business plays in war as victim, supplier, humanitarian actor, peacebuilder, and conflict preventer. Alongside an appreciation of different types of businesses operating in an armed conflict, humanitarian workers also need to have a nuanced understanding of the different roles that business can play in war. These roles can most easily be divided into the six main areas explored below.

Business as perpetrator

The potential for businesses to be perpetrators of violations in armed conflict is well recognized in international humanitarian law. This body of law describes the violations that can take place during armed conflict. In relation to business, these can include pillage, manufacture of illegal weapons, use of forced labour, and unlawful violence by company-hired militias or collusion with state or non-state forces. A company may commit these crimes directly or be complicit with others who commit them.³²

A landmark case of corporate war crimes from World War II is that of I. G. Farben, the German chemical company that cooperated with the Nazi authorities in the planning and co-option of chemical plants in Nazi-occupied countries and also held the patent for and supplied Zyklon B, the gas used in Nazi extermination camps, to German authorities.³³ German, Swiss, and Turkish banks have been shown to have been complicit in dealing in ‘Nazi gold’ that supported the German war effort and was often gained through war crimes and atrocities. ‘Teeth gold’ and jewellery from victims of the Holocaust were made into gold bars, and gold bullion was stolen from banks and individuals in Nazi-occupied countries.³⁴

More recently, NGO activists have been determined to secure modern precedents for corporate crimes in war. One of their most high-profile efforts has been against Anvil Mining in the DRC for alleged logistical support of a massacre of

32 For a comprehensive discussion of corporate complicity in war crimes, see International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crime*, Geneva, 2010; and Salil Triparthi, ‘Business in armed conflict zones: how to avoid complicity and comply with international standards’, Institute for Human Rights and Business, Geneva, 2010, both available at: <http://www.business-humanrights.org/ConflictPeacePortal/Issue/Complicity>.

33 Peter Hayes, *Industry and Ideology: I. G. Farben in the Nazi Era* (2nd edn), Cambridge University Press, Cambridge, 2000. For the original judgment, see *US v. Carl Krauch et al. (I.G.Farben)*, US Military Tribunal sitting at Nuremberg, 30 July 1948, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10*, Vol. VIII, 1952, pp. 1081–1210.

34 Jonathan Steinberg, *The Deutsche Bank and its Gold Transactions During the Second World War*, C. H. Beck, Munich, 1999.

one hundred civilians by DRC forces in Kilwa. Anvil staff were found not guilty in a Congolese criminal court that judged Anvil's vehicles to have been requisitioned by force. The case has since been taken to the Quebec High Court by human rights activists in a class action that was dismissed on grounds of inappropriate jurisdiction, and is now lodged in appeal at the Canadian Supreme Court.³⁵ Global Witness investigations, however, were initially successful in 2006 in the individual case of the Dutch businessman, Guus Kouwenhoven, who was sentenced to eight years in prison by a Dutch court for breaking a UN arms embargo in Liberia.³⁶

Business as victim

Businesses are much more frequently the victims of armed conflict than its perpetrators. As civilian objects staffed by civilians, they endure extreme hardship. In every armed conflict, large businesses and SMEs alike are attacked and looted. Their staff may be wounded, killed, and raped. They may be discriminated against and summarily dismissed and replaced by new staff favoured by the enemy party. Business installations of all kinds, including small market stalls, company warehouses, and large factories are frequently destroyed in armed conflicts. This kind of war damage combines with restrictions on market access, credit, foreign exchange, and supply chains and often results in bankruptcy or dramatically reduced operations that mean lost earnings, wage cuts, and rising unemployment.

Business as supplier

When businesses do survive in war, they frequently thrive as suppliers of commodities and services that are vital to the war effort or indispensable to civilian survival. Arms companies, construction companies, food companies, and banks are critical to any war effort's ability to feed, pay, and equip its forces. Equally, many large and small businesses sustain markets that are essential to the survival of civilian populations. Bakeries keep bread in circulation. Wholesale merchants and small local producers and retailers keep a wide range of food available. These businesses are essential first-line economic resources for endangered civilian populations. Their significance is now widely recognized by humanitarian agencies' increasing policy of market-based programming, cash-transfer, and monetization that are recommended by the Cash Learning Partnership.³⁷ Local procurement is

35 Global Witness, 'Congolese victims' pursuit of justice against Canadian company goes to Supreme Court', 26 March 2012, available at: <http://www.globalwitness.org/library/congolese-victims%E2%80%99-pursuit-justice-against-canadian-company-goes-supreme-court>.

36 Global Witness, 'Arms dealer and timber trader Guus Kouwenhoven found guilty of breaking a UN arms embargo', 7 June 2006, available at: <http://www.globalwitness.org/fr/node/3569>. Both Kouwenhoven and the Prosecution appealed the sentence, and in 2008 the Appeals Court acquitted him on all charges (and he was freed). The Prosecution appealed again, and in 2010 the Supreme Court returned the case for retrial. It is to be seen whether the recently rendered judgment against Charles Taylor by the Special Court for Sierra Leone will have any influence on the final judgment in this case.

37 The Cash Learning Partnership is an association of agencies encouraging best practice in cash-based responses, see: <http://www.cashlearning.org/english/home>.

usually the preferred option for humanitarian action so that local businesses routinely become the main suppliers for humanitarian agencies supporting civilian survival. Local businesses run trucking fleets and produce Plumpy'nut,³⁸ plastic buckets, and generic drugs for humanitarian assistance.

Business as humanitarian actor

During war many businesses do more than just commercially supplying humanitarian agencies. They become direct humanitarian actors and lead operations that protect and assist the civilian population. The paradigmatic example of a business protecting endangered civilians is Oscar Schindler, the German industrialist who saved 1,100 Jewish people during the Holocaust by employing them in his enamelware and arms factories, and hiding their Jewish identity from Nazi authorities. Although under-researched, many businesses have a noble history of aiding and protecting their staff, their families, and the local population in times of war. In Zimbabwe's recent history of violent political conflict and economic meltdown, for instance, many Zimbabwean and international companies have played a vital humanitarian role. They paid their staff in baskets of food and essential items when rampant inflation made money increasingly worthless, and made sure that pensions and life insurance policies were honoured in the best way possible. Even when they were sustaining significant losses year-on-year, several major multinational banks and mining companies like Barclays and Rio Tinto stayed on. This was partly strategic to maintain a positive market position for when the good times returned. But it was also undoubtedly because directors genuinely felt that they could not abandon their staff and their families to whom they had a moral duty.³⁹

While this kind of informal humanitarian action is not well documented, large strategic commitments to humanitarian action by large companies are increasingly common. Many companies have formed practical humanitarian partnerships with UN agencies and NGOs that aim to leverage their expertise in war and disasters. Deutsche Post's logistics partnership with the UN, Siemens' collaboration with the International Federation of Red Cross and Red Crescent Societies, and Motorola's link with CARE International are three examples of such business-humanitarian partnerships.⁴⁰

Business as peacebuilder

The fifth main role of business in conflict that is now clearly recognized in international policy is the contribution that business leaders and their investments can play in peacebuilding and post-conflict economic recovery. Business leaders

38 Plumpy'nut is a widely used emergency food relief item, see: <http://www.nutriset.fr/en/product-range/produit-par-produit/plumpy-nut-ready-to-use-therapeutic-food-ruttf.html>.

39 Field research carried out by the author in Zimbabwe in 2008–2009.

40 See Andrea Binder and Jan Martin Witte, *Business Engagement in Humanitarian Relief: Key Trends and Policy Implications*, HPG Background Paper, ODI, London, 2007.

with trust and trading networks on both sides of a conflict can sometimes play a vital bridging role in building peace. SwissPeace have researched how business people have mediated early-stage peace talks between warring parties in South Africa, Cyprus, Sri Lanka, and Nepal.⁴¹

More than talks alone, big money can bring a new pro-peace logic of its own. Using a win-win commercial logic to build super-ordinate goals around economic benefits from an international coal agreement helped to shape the beginnings of the European Union. Post-war investment by rich diaspora investors or private equity and hedge fund investors looking for first-mover advantage in Sierra Leone, Liberia, South Sudan, Angola, Serbia, Somaliland, and Croatia has helped drive economic recovery and a strong preference for peace in these countries as they emerge from protracted civil wars. One example is Manocap, the private equity group in West Africa formed by two people who had previously worked in humanitarian capacities in Sierra Leone for the United Nations Development Programme (UNDP) and GOAL.⁴²

Business and conflict prevention

In times of peace, companies can play another major role by working to prevent violent conflict. As part of their drive towards socially responsible corporate citizenship and ethical business, many national and international businesses try to limit the risks of conflict escalation in their own commercial operations. Like humanitarian agencies, they too are trying to ‘do no harm’ and reduce the risk of conflict.

Being a good ethical business today means making sure that your company does not cause or sustain armed conflict and human rights abuses in any part of your operations: along its supply chain; in its recruitment policies; in its working conditions; in the way it behaves with the local population; and in the way it uses guards and security forces to protect its installations. Conflict prevention of this kind is ethically good business and it is also evidently good for business. Companies need to guard against political instability in their operational environments and avoid the catastrophic damage to their reputation that can happen overnight. This nexus of commercial interest and morality is a happy one that is now well recognized by many companies.⁴³

There are now a wide range of international industry standards for all main business sectors – including extractives, manufacturing, banking, and tourism – which set guidelines for good practice in conflict prevention and reduction.⁴⁴

41 Andrea Iff, Damiano Sguaitamatti, Rina M. Alluri and Daniel Kohler, *Money Makers as Peace Makers? Business Actors in Mediation Processes*, Working Paper Series No. 2, SwissPeace, Bern, 2010.

42 See Manocap’s website at: <http://manocap.com/>.

43 Havina Dashwood, *The Rise of Global Corporate Responsibility: Mining and the Spread of Global Norms*, Cambridge University Press, Cambridge, 2012.

44 Many of these, including the Voluntary Principles on Security and Human Rights, are available at the Business and Human Rights Resource Centre: <http://www.business-humanrights.org/ToolsGuidancePortal/Issues/Securityissuesconflictzones>. See also, the best practice community relations guidance notes of the International Council on Mining and Minerals (ICMM), available at: <http://www>.

The new UN Guiding Principles on Business and Human Rights represent the most comprehensive international framework to date to ensure that all businesses apply ‘human rights due diligence’ of all kinds to their business activities to prevent or remedy business-related human rights violations.⁴⁵

Several extractives companies, like Rio Tinto, Anglo-American, BHP Biliton, Newmont and Barrick (where John Ruggie has recently been appointed a special advisor), are now adopting the theory and practice of conflict resolution, peacebuilding, and human rights monitoring in their own efforts to reach fair and peaceful relationships with local communities around their mines. Some of the most progressive examples of this work have been by Rio Tinto in Australia.⁴⁶ Being only too aware that mining retains the potential to spark armed conflicts in countries such as Guinea and Peru, Rio Tinto is now trying to apply conflict resolution work in more complex settings with very recent histories of armed conflict.

This adoption of conflict resolution methods has been explicitly encouraged by a number of peace NGOs, like International Alert, who have been keen to show the potentially positive role responsible businesses can play in reducing tension and building peace.⁴⁷ Luc Zandvliet and Mary Anderson have used their humanitarian experience of ‘do no harm’ programming to research and write a new practical text on conflict reduction and peacebuilding for the commercial sector that is now being widely used by mining companies.⁴⁸ Recent mass demonstrations and deaths in Peru and South Africa show that success is still some way off, and suggest mining could still emerge as a major cause of conflict in the twenty-first century.⁴⁹

Making business a normal part of humanitarian action

Humanitarian agencies have frequently proved themselves to be creative and adaptive in their relationships with different actors in armed conflict. It is hoped that a richer and more nuanced appreciation of the many different roles and interests of business in armed conflict will lead to important new developments in humanitarian agency relationships with business. The active engagement of humanitarian agencies with business in its several roles in armed conflict can be expected to bring about some important innovations in the repertoire of

icmm.com/social-and-economic-development; and IPIECA (the oil and gas industry association for environmental and social issues) guidelines, available at: http://www.ipeca.org/library?tid%5B%5D=7&language=All&date_filter%5Bvalue%5D%5Byear%5D=&keys=&x=27&y=9.

45 See above note 29.

46 Bruce Harvey and Simon Nish, ‘Rio Tinto and indigenous agreement making in Australia’, in *Journal of Energy and Natural Resource Law*, Vol. 23, No. 4, 2005, pp. 499–510, University of Dundee.

47 International Alert, *Conflict-Sensitive Business Practice: Guidance for the Extractive Industries*, London, March 2005.

48 Luc Zandvliet and Mary B. Anderson, *Getting it Right: Making Corporate-Community Relations Work*, Greenleaf Publishing, Sheffield, 2009.

49 In August 2012, thirty-four people were killed at Lonmin’s South African mine, see: <http://www.bbc.co.uk/news/world-africa-19292909>; and more than twenty people have been killed in Peru’s recent mining disputes, see: <http://www.bbc.co.uk/news/world-latin-america-19669760>.

humanitarian action. To make this happen, humanitarians will need to engage business people at all levels (small, medium-sized, and big business) as routine interlocutors in armed conflicts.

In the meantime, four main areas of humanitarian policy seem to offer the most fruitful possibilities for greater humanitarian engagement with the business community.

Business and humanitarian law

Greater contact with business at all levels needs to become an important part of the wider dissemination of international humanitarian law and principles. Information and advocacy campaigns at the national and international levels can usefully target different business communities through local chambers of commerce, trade associations, industry best-practice groups, stock exchanges, trade unions, and the extensive business print and broadcast media. Humanitarian advocacy that targets business better will enable business people to have a much clearer understanding of their rights and obligations under international humanitarian law. This will give a good sense of the prosecutions they can expect as perpetrators, the humanitarian support and protection they can expect as victims, and the role they can play as humanitarian actors.

Advocacy for business victims

Humanitarian needs assessment could usefully assess and report in much more detail on the damage to specific businesses and markets during armed conflicts. Greater international awareness of precise business casualties – natural resources, factories, assets, markets, and offices destroyed, and employees killed or rendered unemployed – will help to draw attention to the significance of business losses for the civilian population and encourage the protection of businesses under international humanitarian law.

Protecting business continuity

Humanitarian aid could explore creative ways of aid programming that supports positive business continuity during armed conflicts. New forms of humanitarian aid need to be deployed to support the survival of businesses that are vital suppliers and critical employers, and can have a significant impact on the condition of the wider civilian population. This work could place a particular focus on SMEs and the precarious middle tier (or meso level) of a conflict-affected economy.

One of the best ways to support parts of a war-torn society may be to keep its businesses from going bankrupt. Projects of credit support, asset protection, market access, foreign exchange support, restocking, and destocking that have been used effectively at the micro-level with smallholders and sole traders could be usefully scaled up to keep small businesses employing and supplying vulnerable civilians at the meso level. Business relief at this level could include temporarily

buying assets to keep them productive or to prevent them from being sold to hoarding speculators at knock down prices. It could mean enabling foreign currency exchanges for businesses dependent on key imports for food ingredients or machinery. This kind of business relief can help to sustain employment and supply life-saving goods across the so-called missing middle of so many poor and conflict-affected societies.⁵⁰

All these various kinds of business relief may add real value to more conventional individual targeting of civilian populations and encourage business-based innovations in humanitarian action. Supporting business continuity can be an important part of wider resilience strategies in and after wars.

Involving business people

In many humanitarian agencies to date, business people have been most commonly involved in humanitarian action as funders – in cash or kind. This simple idea of them as donors restricts the contribution they can make to humanitarian programming and also obscures the sense of businesses as victims on the ground. Better engagement and involvement of local business people on the ground in humanitarian needs assessment and planning will help to give a fuller picture of the war economy, its damaging effect on civilians, and its potential for renewal or adaptation to survive chronic conflict.

Business as a new humanitarian stakeholder

The prospect of engaging with a whole new set of business stakeholders and interlocutors in war may seem daunting to a humanitarian community that already feels stretched and tested by a multiplicity of programming agendas in armed conflicts. Indeed, actively engaging with business may seem unwise when humanitarians struggle enough to cooperate in a principled way with two other potentially morally ambiguous communities – political authorities and armed forces. But armed conflicts usually affect everyone and the humanitarian mission of impartial assistance and protection must expect to involve stakeholders of every kind. As described above, humanitarian scholars and activists have uncovered important connections between business and armed conflict in the last two decades. It makes sense to use this knowledge in the interests of civilian populations and, as business people would say, leverage the value.

50 Nancy Birdsall, 'Do no harm: aid, weak institutions and the missing middle in Africa', Working Paper 113, Centre for Global Development, 3 August 2007, available at: <http://www.cgdev.org/publication/do-no-harm-aid-weak-institutions-and-missing-middle-africa-working-paper-113> (last visited 18 April 2013).

The role of business in armed violence reduction and prevention

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Abstract

This article looks at business activities in violent and fragile environments through an armed violence lens and explores the role of business in armed violence reduction and prevention (AVRP) strategies. The article argues that the transformation of armed violence patterns over the last decade requires a new optic on a subject that has traditionally been discussed in the context of 'business and peace' or 'business and conflict', and of armed violence related to inter- or intra-state armed conflict. The article sets out to better understand how different constituencies have dealt with the role of the private sector in reducing armed violence, and to connect the dots between various scholarly and practice communities to identify entry points for AVRP strategies across sectors and institutions. The article suggests that such entry points exist in relation to the costing of armed violence and civic observatories.

Keywords: business, armed violence, fragility, armed violence reduction and prevention (AVRP).

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Reflections about the role of the private sector in violent and fragile environments have abounded over the last decade, but so far they have not explicitly adopted an

* Special thanks go to the Secretariat of the Geneva Declaration of Armed Violence and Development (<http://www.genevadeclaration.org>) for the funding of this study. The Secretariat will soon be publishing a related shorter issue brief. The author also wishes to thank Vincent Bernard, Luigi de Martino, Mariya Nikolova and an anonymous reviewer for comments.

armed violence lens. Such a lens proposes an integrated optic on modern warfare, armed conflict, and criminal violence¹ with a clear operational purpose to improve strategies against armed violence in specific contexts through so-called armed violence reduction and prevention (AVRP) programmes. The debates in the field of business and peace or business and conflict have so far mainly focused on the role of companies in inter-state or civil wars, in human rights abuses, and in local peacebuilding initiatives. What is more, most recent multi-stakeholder practice has focused on the 'Protect, Respect, Remedy' framework developed in the 'Ruggie Principles',² or on the implementation of the Voluntary Principles on Security and Human Rights.³ Thus, the current analytical and practical inventory has emerged from a more traditional conflict perspective – meaning a focus on inter-state and civil wars – and from rights approaches.

Exploring the potential of an armed violence lens for business engagements in violent and fragile contexts⁴ is important for a number of reasons. First, it is an operational framework for strategic, cross-sectorial collaboration that goes beyond the current dominance of rights approaches in this field. Second, it shifts the focus from the declaratory to the operational level in specific contexts. It therefore connects to an emerging trend that voluntary efforts surrounding principles and guidelines have reached a certain saturation point, and that future efforts need to be more concerned about changing practices on the ground.⁵ Third, the armed violence lens is much better adapted for action within the context of changing characteristics and dynamics of violent conflict. This change is exemplified by the fact that only one out of every ten reported violent deaths occurs in traditionally defined armed conflict settings.⁶ Finally, the lens captures a significant amount of promising practice that has so far not been related to business operations in difficult markets. This practice highlights the rise of integrated national or municipal AVRP programmes in countries such as Brazil, Colombia, and South Africa.

This article provides an exploratory analysis of the armed violence lens in relation to business operations in violent and fragile contexts. This analysis intends to raise awareness in the business and rights communities of the armed violence lens developed by the Organisation for Economic Development and Cooperation

- 1 Geneva Declaration Secretariat (GDS), *Global Burden of Armed Violence*, GDS, Geneva, 2008. Organisation for Economic Co-operation and Development (OECD), *Armed Violence Reduction: Enabling Development*, OECD, Paris, 2011.
- 2 UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011.
- 3 Available at: http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf (last visited 14 December 2012).
- 4 'Violent and fragile contexts' are understood to exist where 'political, social, security and economic risks correlate with organised violence'. These occur particularly in 'periods when states or institutions lack the capacity, accountability, or legitimacy to mediate relations between citizen groups and between citizens and the state, making them vulnerable to violence'. See World Bank, *World Development Report 2011: Conflict Security and Development*, World Bank, Washington, D.C., 2011, pp. xv–xvi.
- 5 Brian Ganson and Achim Wennmann, *Confronting Risk, Mobilizing Action: A Framework for Conflict Prevention in the Context of Large-scale Business Investments*, Friedrich Ebert Stiftung, Berlin, 2012.
- 6 GDS, *Global Burden of Armed Violence: Lethal Encounters*, Cambridge University Press, Cambridge, 2011, p. 1.

(OECD) and the Geneva Declaration on Armed Violence and Development. It also highlights the potential this lens has to serve as a strategic tool to operationalize cross-sectorial collaboration in violent contexts. The paper understands 'business' to mean private companies – local or international – that are involved in the financing, production, or trade of legal or legitimate goods and services. It does not focus on private actors associated with organized crime, although it acknowledges that the distinction between formal and informal, public and private, or legal and illegal can be blurred in many violent and fragile contexts. The article also does not focus on private security firms whose business is the provision of security services. Armed violence is understood as 'the intentional use of force (actual or threatened) with arms or explosives, against a person, group, community, or state that undermines people-centered security and/or sustainable development'.⁷ This working definition covers armed violence perpetrated in both armed conflict and non-conflict settings.

The analysis proceeds in five parts. The first part describes the main elements of the armed violence lens. The second part reviews the existing state of knowledge about business and armed violence. The third part tracks different forms of business engagements around, in, or on armed violence. The fourth part places selected business practice within the scope of the armed violence lens. The fifth part explores two convergence points for cross-sectorial collaboration in support of AVRPs programmes. Overall, the article acknowledges the multitude of roles that business has played across various violent contexts. It also highlights that the role of business in AVRPs programmes is not necessarily about the mapping or enhancement of stand-alone corporate projects to reduce armed violence, but about the place of business within comprehensive strategies in specific contexts.

The armed violence lens

The armed violence lens results from a multi-year process of the OECD and the Geneva Declaration. It was developed in consultation with development practitioners and grounded in over a decade of practice on armed violence reduction in conflict, post-conflict, and other violence-affected contexts. This process was built on the recognition that armed violence impedes the achievement of the Millennium Development Goals (MDGs), and on the assumption that measurable reductions in armed violence can lead to significant development gains.

The armed violence lens proposes a strategically integrated approach to combat armed violence. This approach rests on the premise that 'the promotion of effective and practical measures to prevent and reduce armed violence depends on the development of reliable information and analysis of its causes and consequences, and its interrelationships at numerous levels'.⁸ Overall, the armed violence lens cuts

7 GDS, above note 1, p. 2.

8 OECD, *Armed Violence Reduction*, above note 1, p. 49.

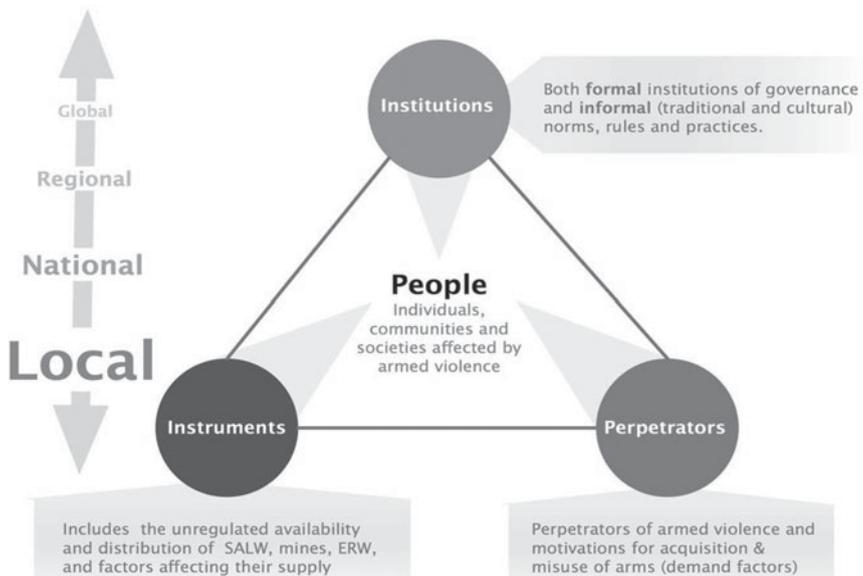


Figure 1. The armed violence lens. © OECD. *Armed Violence Reduction: Enabling Development*, 2011, p. 50.¹⁰

across local, national, regional, and global levels and rests on four elements (see Figure 1). These elements are:

- the people and communities affected by armed violence;
- the perpetrators of armed violence and their motives to use armed violence;
- the instruments of armed violence, including small arms and light weapons; and
- the formal and informal institutions that define the wider environment that enables, or protects against, armed violence.⁹

The armed violence lens ‘underscores the way violence transcends separate development sectors, and highlights the potential for cross-sector and integrated responses’.¹¹ The lens also recognizes the multiple faces of armed violence, including the ‘simultaneous, and shifting motivations of violent actors, and the links between different forms of violence’ including organized (collective) or interpersonal (individual) violence, and conflict (politically motivated) and criminal (economically motivated) violence.¹²

The framework also spells out a series of risk factors associated with armed violence at the individual, relationship, community, and societal levels – a conceptualization also known as the ecological model of armed violence.¹³ At the

9 *Ibid.*, pp. 49–50.

10 ‘SALW’ refers to ‘small arms and light weapons’; ‘ERW’ refers to ‘explosive remnants of war’.

11 *Ibid.*

12 GDS, above note 1, p. 18.

13 World Health Organization (WHO), *World Report on Violence and Health*, WHO, Geneva, 2002, pp. 12–15.

individual level violence is often related to youth, males, poor behaviour control, history of aggressive behaviour, low educational achievement, substance abuse, or previous exposure to violence. At the relationship level, violence has been found to be rooted in poor family supervision, exposure to punishment, low family attachment, low socio-economic status, or association with delinquents. At the community level, low social capital, high levels of unemployment, gangs, guns, and narcotics, and access to alcohol has been related to violence. And at the societal level, quality of governance, laws on social protection, income inequality, urban growth, and cultures sanctioning violence are critical factors.

AVRP programmes exhibit a tremendous diversity, dynamism, entrepreneurship, and social innovation. At the same time, they share a number of common features. These include:

- creative adaptation of conflict, crime, and armed violence prevention approaches to specific contexts;
- a focus on the local level because this is where armed violence is experienced most directly, and where evidence suggests the most promising efforts have occurred;
- a focus on the mitigation of regional and global risk factors that impact on local dynamics; and
- national level efforts that help ensure the sustainability of local prevention efforts, in particular, ensuring learning across local settings, developing a vision of AVRP across different institutions and sectors, and helping prioritization and coordination.¹⁴

One review of promising practice highlights that:

The most promising AVRP programmes are those that bring together a range of violence prevention and reduction strategies across a number of sectors and purposefully target the key risk factors that give rise to armed violence . . . [and that] integrate AVRP objectives and actions into regional, national, and sub-national development plans and programmes.¹⁵

AVRP programmes are frequently distinguished along three lines. Direct programmes address the instruments, actors, and institutional environments enabling armed violence; indirect programmes address 'proximate' and 'structural' risk factors giving rise to armed violence; and broader development programming, while not having prevention and reduction of armed violence as a primary or even secondary objective, can nevertheless generate meaningful dividends. These three categories are not necessarily mutually exclusive or pursued in isolation of one another. Indeed, many cutting-edge AVRP programmes intentionally blur direct and indirect approaches – for example, focusing simultaneously on reducing fire-arms availability and working with at-risk male youth while seeking to mitigate the

14 OECD, above note 1, p. 17.

15 Paul Eavis, *Working Against Violence: Promising Practices in Armed Violence Reduction and Prevention*, GDS, Geneva, 2011, pp. 57–58.

likelihood of misuse through targeted employment schemes, after-school education programmes, psychological support, and even family-planning activities.¹⁶

From the perspective of local businesses – large and small – direct engagement in efforts to combat armed violence is certainly nothing new. In fact, experience from Latin America suggests that business already takes part in AVRP programmes.¹⁷ What is more, in peacebuilding practice, local actors have a long record of working with business to end violence, and consolidate peace.¹⁸ However, what may be new is that the armed violence lens – and the associated practice from AVRP programmes – opens opportunities to strengthen multi-sector partnerships necessary to combat and prevent armed violence – an effort that no actor could claim to be able to effectively do on its own.

The following section starts unpacking the link between business and armed violence in general; further below in the article a reconnection with armed violence will be made.

Business and armed violence

The concept of armed violence has so far not featured explicitly in the large literature on business engagements in violent and fragile contexts. Over the last two decades this literature has focused on a series of overlapping themes which include, for instance, the role of, and policy response to, business in inter-state and civil wars; the complicity of business in human rights abuses in conflict zones; regulatory frameworks, multi-stakeholder initiatives, and business self-regulation in situations of armed conflict and fragility; private-sector role in peacebuilding; the role of business in peace mediation; corporate-community relations; and private-sector development in post-conflict countries.¹⁹

Contributions on these themes represent a huge variety of perspectives and case studies with regard to the role of business in armed conflict situations and in peacebuilding processes. These contributions also added to policy initiatives such as the Kimberly Certification Scheme against conflict diamonds, the Extractive Industries Transparency Initiatives, as well as the Ruggie and Voluntary Principles mentioned above. This discussion and practice has been closely associated with the characteristics of some armed conflicts in the early 2000s (Angola, Democratic Republic of the Congo, Liberia, Sierra Leone) that exposed the link between state and non-state armed actors and natural resource exploitation and the integration of armed conflict areas into the global economy.²⁰ This literature and practice mainly

16 *Ibid.*, pp. 22–23.

17 P. Eavis, above note 15, pp. 9, 57.

18 Jessica Banfield, Canan Gündüz and Nick Killick (eds), *Local Business, Local Peace: The Peacebuilding Potential of the Domestic Private Sector*, International Alert, London, 2006.

19 For a review, see Mary Porter Peschka, *The Role of the Private Sector in Fragile and Conflict-Affected States*, World Bank, Washington, D.C., 2011.

20 See for instance, Mats Berdal and David M. Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars*, Lynne Rienner, Boulder, 2000; Karen Ballentine and Jake Sherman (eds), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, Lynne Rienner, Boulder, 2003.

employed analysis related to inter-state and civil war, and approached the issue mainly from a compliance, self-regulation, peacebuilding, or human rights perspective, with little attention to the linkages between these different perspectives or the possibility of integrating them into a more holistic approach.

A more directed focus on armed violence and business has been developed in crime prevention.²¹ This particular literature highlights that ‘violent crime and the perception of crime can affect a company’s ability to attract customers, recruit and retain employees, boost workplace morale and ensure the productivity of its employees, and in some cases, to stay in business’.²² Research focusing on crime against business (burglary, shoplifting, theft, fraud) finds that commercial premises face greater risk of victimization than private residences.²³ However, the literature remains weak on the impact of crime on the development and survival of urban business.²⁴ Recent efforts have especially focused on expanding the evidence base with regard to public-private partnerships to strengthen community safety as part of broader national crime prevention strategies.²⁵

Given this state of the field study and practice, it is timely to ask: What do we know about the relationship between business and armed violence?

Business and foreign direct investment

First of all, we know that many types of businesses operate in violent contexts. As a proxy for the presence and interests of international companies in violent contexts, [Table 1](#) shows the levels of foreign direct investment (FDI) and remittances in countries with high levels of armed violence. These figures illustrate that high violence contexts are not beyond the reach of private financial flows, be that flows for corporate investments in terms of FDI, or flows from private individual in terms of remittances.²⁶ This is not to say that these flows would increase if violent levels were reduced; it means that investment occurs despite the presence of armed violence. One aspect to note is that the figures of [Table 1](#) are indicators of violence at the national level and may hide important differences between regions or cities within a country. At the sub-national level these figures can mean a spatial overlap of high levels of violence and the concentration of business presence, as exemplified by Johannesburg or São Paulo, which are the respective business hubs of South Africa and Brazil and high violence contexts.

21 For a review, see Laura Capobianco, *Sharpening the Lens: Private Sector Involvement in Crime Prevention*, International Centre for the Prevention of Crime, Montreal, 2005, pp. 13–14.

22 *Ibid.*, p. 13.

23 Jan J. M. van Dijk and Gert J. Terlouw, ‘An international perspective of the business community as victims of fraud and crime’, in *Security Journal*, Vol. 7, 1996, pp. 157–167.

24 L. Capobianco, above note 21, p. 13.

25 International Centre for the Prevention of Crime (ICPC), the World Bank, Bogota Chamber of Commerce (BCC), and Instituto Sou da Paz (ISP), *Public-Private Partnerships and Community Safety: Guide to Action*, ICPC, World Bank, BCC, ISP, Montreal, Washington, D.C., Bogota, São Paulo, 2011.

26 FDI and remittance flows are very different in nature, with the former having a significant concentration in the extractive and infrastructure sectors, and the latter capturing money sent by workers or the diaspora directly to family members in the home country. Remittances can increase the resilience of households and can also represent investments in micro or small family enterprises.

Table 1. FDI and remittances flows in countries with high levels of armed violence, annual averages 2004–2009²⁷

| | Violent death rate by 100,000 population | FDI (US\$ million) | Remittances (US\$ million) |
|--------------------------|--|--------------------|----------------------------|
| El Salvador | 61.86 | 191 | 3,326 |
| Iraq | 59.40 | 913 | 249 |
| Jamaica | 58.10 | 835 | 1,932 |
| Honduras | 48.60 | 699 | 2,231 |
| Colombia | 45.77 | 7,788 | 4,009 |
| Venezuela, RB | 44.64 | 671 | 146 |
| Guatemala | 43.20 | 583 | 3,685 |
| South Africa | 38.39 | 4,629 | 746 |
| Sri Lanka | 37.09 | 457 | 2,434 |
| Lesotho | 33.67 | 83 | 610 |
| Central African Republic | 32.95 | 52 | n/a |
| Sudan | 32.30 | 2,366 | 1,767 |
| Belize | 31.34 | 128 | 63 |
| Congo, Dem. Rep. | 31.29 | 973 | n/a |
| Swaziland | 26.47 | 59 | 93 |
| Congo, Republic of the | 26.10 | 1,157 | 14 |
| Somalia | 26.03 | 75 | n/a |
| Brazil | 25.85 | 26,268 | 4,179 |
| Malawi | 25.47 | 94 | n/a |

The continuation of international business investments in many violent countries supports the proposition that armed violence is just one of a whole series of factors that define business decisions. These factors can include the quality of national legal frameworks, the banking sector, and the justice system, as well as the compatibility between the commercial objectives of the investor and the geography or geology of a country and the skill profile of its workforce. For mainstream investment projects it is therefore not necessarily the end of the conflict or the reduction of armed violence, but rather the construction of a functioning state and other location specific factors that define a willingness to invest.²⁸ The latter point underlines how important the overall political and legislative environment is for business investments.

Attitudes and perceptions of business towards armed violence

The analysis surrounding [Table 1](#) is corroborated by a 2006 survey of 177 executives about attitudes to risk in emerging economies. The study confirms the increasing corporate efforts to address political and operational risk management. Two thirds of respondents confirmed having increased such efforts in the period 2004–2006. The top five risks identified as ‘very significant’ and ‘significant’ were associated with political regime stability, economic problems in the host country, bribery and corruption, abrupt change in policies or ruling party, and the failure to honour contracts. War and social unrest ranked seventh out of eleven risk factors. The survey did not include armed violence as a specific risk factor category.²⁹ Given the diversity of business, attitudes to armed violence can be very different. As regards investment in conflict countries, company attitudes have been found to depend on four principle factors:

- the magnitude of physical assets in specific violence-affected areas (for example, large-scale site-specific investments in non-movable assets such as roads, buildings, production chains);
- the core business of the enterprise (for example, natural resource exploitation, services, construction, or transportation);
- the strategy behind the investment (for example, outputs that are produced for foreign or domestic markets, or the use of integrated production cycles); and
- the level of exit costs (defined as the balance between fixed and mobile assets).

Variations of these characteristics define the costly consequences of armed violence for the company, which in turn can shape company attitudes towards dealing with such violence. According to this analysis, investments in energy and natural

27 Figures for armed violence based on data from the Geneva Declaration Secretariat. The table includes the nineteen most violent countries measured by the violent death rate per 100,000 population. GDS, above note 1, p. 53. Figures for FDI and remittances are based on World Bank Data (<http://data.worldbank.org>) for the annual averages in the period 2004–2009 for the indicators ‘Foreign direct investment, net inflows (BoP, current US\$)’ and ‘Workers’ remittances and compensation of employees, received (current US\$)’.

28 Ashraf Ghani and Claire Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World*, Oxford University Press, Oxford, 2008, p. 133. John Bray, *Foreign Direct Investment in Conflict-Affected Contexts*, International Alert, London, 2010, p. 2.

29 Economist Intelligence Unit (EIU), *Operating Risks in Emerging Markets*, EIU, London, 2006, pp. 2, 3, 5.

resources, for example, tend to be more vulnerable to armed violence, while investments in financial, education, professional services, telecommunication, or construction tend to be less vulnerable.³⁰

This differentiation of the impact of armed violence is also confirmed in the literature on the impact of violent crime on business. Sectors particularly affected are tourism, retail, transport, distribution, and storage businesses.³¹ What is more, increasing levels of armed violence had significant consequences for service delivery in low-income neighbourhoods of large US cities.³²

The risk perception of business depends to a large extent on the sub-national distribution of armed violence. If a company has its main activity in the capital but most armed violence takes place in remote areas, such violence has little effect on business operations. Thus, the measurement of FDI and armed violence as a national aggregate explains why some countries can maintain relatively high levels of FDI despite high levels of armed violence.

Business engagement around, in, or on armed violence

Given the presence of some companies in violent and fragile settings, the question is then how do they adjust their presence or operations to armed violence? Overall, companies have the options to adjust their operations to work around, in, or, on armed violence.³³

Companies working around armed violence

Most mainstream companies work around armed violence, which means that as a result of armed violence they withdraw or temporarily cease activities. Companies adjusting operations in this way, therefore, do not see a benefit to engaging in the reduction of armed violence directly. However, companies can be extremely hesitant to withdraw. As they operate in a competitive market their withdrawal represents an opportunity for a competitor to enter the market. This potential substitutability of commercial actors highlights the importance for companies with a generally reputable record in conflict and fragile settings to stay on because the alternative would be opening the door to profit-makers that purposefully deviate from responsible practice.³⁴ Another argument can be made regarding the temporary closure of

30 Andreea Mihalache-O'Keef and Tatiana Vashchilko, 'Foreign direct investors in conflict zones', in Mats Berdal and Achim Wennmann (eds), *Ending Wars, Consolidating Peace: Economic Perspectives*, Routledge for IISS, Abingdon, 2010, pp. 137–155.

31 L. Capobianco, above note 21, p. 15.

32 This finding is based on research using longitudinal data on business behaviour in five large US cities between 1987 and 1994. Robert Greenbaum and George Tita, 'The impact of violence surges on neighbourhood business activity', in *Urban Studies*, Vol. 41, No. 13, 2004, pp. 2495–2514.

33 This analysis draws on the options for development actors in conflict-sensitive development engagement. See Jonathan Goodhand, *Violent Conflict, Poverty and Chronic Poverty*, Chronic Poverty Research Centre Working Paper No. 6, University of Manchester, Manchester, 2001, pp. 30–31.

34 John Bray, 'Attracting reputable companies to risky environments: petroleum and mining companies', in Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions*, World Bank, Washington, D.C., 2003, p. 309.

business: while bigger companies may have the resources to withstand prolonged episodes of closure, prolonged disruption of production or trading can place the survival of small-to-medium-sized companies at risk.

Companies working in armed violence

Companies can also decide to work in situations of armed violence and attempt to minimize the effect of armed violence on their operations and activities. For bigger companies this means paying for protection from private security companies, which can be a substantial cost factor in some contexts. Oil firms in Algeria, for example, have been estimated to devote 9 per cent of their operations budget to security.³⁵ Small and medium-sized enterprises (SMEs) are unable to afford protection or spread risks in the same way as large investors. Crime victimization surveys in Jamaica have shown that smaller companies pay a higher share of their revenues (17 per cent) for security in comparison to a medium-sized (7.6 per cent), and large companies (0.7 per cent).³⁶ Furthermore, studies from the United Kingdom and Australia have highlighted that small retail businesses are the most vulnerable to victimization, including in terms of the financial and psychological costs of crime.³⁷ Working in armed violence is therefore much more problematic for smaller enterprises than for bigger ones.

Companies working on the drivers of armed violence

Business can also work on the drivers of armed violence, which means that it can take various roles in AVR. As a businessman from Colombia put it: 'It is not true that we all sit with our arms crossed, that nothing is being done, or that everyone is living in Miami'.³⁸ Case evidence from the literature on business and peacebuilding also shows that business can work on the drivers of armed violence by building bridges between different communities and between state and society, engaging directly in talks with belligerents, providing good offices and information, acting as a pro-peace constituency, paying for (part of) a peace process, assisting in the delivery of humanitarian aid, strengthening local economies, building trust, fostering accountability, and limiting access to conflict financing.³⁹ Business representatives

35 Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca, 2003, pp. 81–82.

36 United Nations Office on Drugs and Crime (UNODC) and the World Bank, *Crime, Violence, and Development: Trends, Costs and Policy Options in the Caribbean*, UNODC and World Bank, Vienna and Washington, D.C., 2007, pp. 48–49.

37 British Chamber of Commerce (BCC), *Setting Business Free from Crime: A Crime Against Business*, BCC, London, 2004. Santina Perron, *Crime Against Small Business in Australia: A Preliminary Analysis*, Australian Institute of Criminology, Canberra, 2000.

38 Angelika Rettberg, *Business-Led Peacebuilding in Colombia: Fad or Future of Country in Crisis?*, Crisis States Programme Working Paper 58, London School of Economics, London, 2004, p. 21.

39 For a diverse set of case studies on business engagement in peacebuilding see J. Banfield *et al.*, above note 18; Jane Nelson, *The Business of Peace: The Private Sector as a Partner in Conflict Prevention and Resolution*, The Prince of Wales Business Leaders Forum, International Alert, Council on Economic

can also act as facilitators between conflicting parties if they are perceived as apolitical and have no stakes in the outcomes of the negotiations.⁴⁰

The case for SMEs and large-scale investors in AVRPP

Within the strategies to adjust around, in and on armed violence, there are two types of corporate actors with a particular potential interest in engaging in AVRPP. The first are local small-to-medium-sized enterprises (SMEs) because they cannot isolate themselves from armed violence on their own and therefore rely on a broader effort to end violence in order to maintain business activities. There may be a particular opportunity to strengthen community-level AVRPP because SMEs use bonds between family and community members as a basis of trust to kick-start commercial transactions. In this way they strengthen community bonds and improve livelihoods, and thereby directly impact on the people's experience of life after violence.

The extractive industries, agribusiness, and infrastructure companies are the second type of commercial actor. These business types are dependent on the specific locational factors (presence of natural resources, location of agricultural land, buildings, roads, airports, etc.). As a result, they can find themselves trapped in situations of armed violence in a specific location because the level of investment is too high to allow them to withdraw. Company approaches to managing 'trapped' investments have so far tended to focus on securitized responses: for example, the hiring of a security company to fend off violent attacks against specific sites. Yet these security providers can quickly become themselves part of the armed violence dynamics. With the pressures to cut cost on security expenses, the negative publicity associated with such practices, and the limited long-term impact on reducing the risk to violent attacks against specific sites, some large-scale investors have turned increasingly to non-securitized responses. These include, for instance, informal mediation and engagement models with armed groups, and efforts towards comprehensive agreements between the company and the community. This emergent practice may demonstrate that there is a sub-group of commercial actors that could have a potential interest and ability to engage in AVRPP.

Overall, SMEs, as well as large-scale investors, emphasize the potential resilience of entrepreneurs in the face of armed violence.

Business practice and the armed violence lens

Viewing business practice through the armed violence lens illustrates how such practices relates to two of the four elements of the lens: people and communities affected by armed violence and the perpetrators of armed violence. Companies, for

Priorities, London and New York, 2001, pp. 73–140; Derek Sweetman, *Business, Conflict Resolution and Peacebuilding*, Routledge, Abingdon, 2009, pp. 41–47.

40 Salil Tripathi and Canan Gündüz, *A Role for the Private Sector in Peace Processes? Examples and Implications for Third-Party Mediation*, Centre for Humanitarian Dialogue, Geneva, 2008, p. 25.

instance, can become directly engaged in reducing armed violence if their operations or staff are at risk. In Colombia, the fact that chief executive officers (CEOs) have been kidnapped is said to have contributed to the involvement of business leaders in crime control and violence reduction initiatives.⁴¹ What is more, the perception of armed violence as a risk to the bottom line or the survival of an investment project can motivate business to act swiftly. Escalating levels of violence in Nigeria have made the engagement of armed groups a short-term priority for companies in order to protect investment assets.⁴²

More broadly, the motivation for business to engage in armed violence reduction depends to a large extent on how boards or CEOs perceive the role of the company in relation to the state and society. Some work on the assumption that business is purely profit-driven with the profit being the company's end goal. However, there are leaders who stress that in a forward-looking company profits are a means to achieve commercial objectives and not an end in itself. These objectives are to supply goods and services that customers need or want, and these goods and services have to be constantly innovated in order to stay competitive.⁴³ Yet there are some business leaders who clearly understand that business is as much about business as it is about politics. This is especially the case when company operations are of strategic significance to a host country or when political and business elites are intricately interwoven – even to a point where it makes little sense to separate the public and private sectors.

Another attitude is linked to the long-term sustainability need of business and the consequent need for a stable operating environment. The example of the achievement of a truce between two major gangs in El Salvador illustrates this point. While the truce between the Salvatrucha and 18th Street gangs has led a 32 to 40 per cent reduction of murder rates, there has been relatively little change in the level of extortion attempts against families and SMEs. This is because extortion remains the principal source of income of gang members and the means to pay the legal fees to support imprisoned family members. Business, therefore, would have an interest in a more integrated AVRPP strategy that not only reduces the number of killings, but also addresses the economic and social dimension of armed violence through a long-term process.⁴⁴

For illustrative purposes, the next two sections will look at business practice through the armed violence lens. We will focus on the same two of the four elements: the people and communities affected by armed violence and the perpetrators of armed violence. In general, efforts that directly target the instruments of armed violence as part of a strategy to reduce violence against the company or employees

41 A. Rettberg, above note 38.

42 Personal communication with the author.

43 Mark Moody-Steward, 'Foreword', in Oliver F. Williams, C.S.C. (ed.), *Peace Through Commerce: Responsible Corporate Citizenship and The Ideals of the United Nations Global Compact*, University of Notre Dame Press, Notre Dame, 2008, p. xi.

44 Randal C. Archibold, "'Gangs' truce buys El Salvador a tenuous peace', in *The New York Times*, 27 August 2012. Committee in Solidarity with the People of El Salvador, 'Salvadoran government accused of negotiating with gangs, after 40% drop in murders', 20 April 2012, available at: <http://www.cispes.org> (last visited 24 August 2012).

are less common. As was noted above, however, some companies have made efforts to not mobilize instruments of armed violence and respond to violence or threats of violence through non-securitized means. Furthermore, business practice is very diverse and there would certainly be room for a more systematic analysis of a broader sample of company strategies and their place in the armed violence lens.

People and communities affected by armed violence

There is a tremendous track record of business practice with regard to company-community relationships.⁴⁵ Traditionally, such efforts have been associated with philanthropic investment, which is still used as a tool to structure company-community relations, and are usually part of a company's corporate social responsibility (CSR) engagement. In relation to crime and violence prevention projects in seven Latin American countries, one study finds that cash donations remain the most common form of business engagement. Out of forty-six projects, forty-five received private-sector donations, while many companies also became directly involved in the implementation of the project for which they provided major funding. Most projects are locally based AVRPs programmes, so they focus on the immediate environment of the company.⁴⁶

Beyond such philanthropic efforts, companies have been involved in multiple other ways to strengthen community capacities.⁴⁷ These include, for instance: the sharing of managerial and technical expertise and skills as communities design public safety plans or other AVRPs engagement; the provision of office space for neighbourhood meetings; the sponsoring of neighbourhood events to strengthen community cohesion, and the design of company policies to ensure diversity at the workplace and wider social integration objectives. In South Africa and Brazil efforts of these types have accompanied existing AVRPs programmes of state, municipal or civil society actors.⁴⁸

Such community-level AVRPs could easily be connected to trends in the corporate world to ensure a stable operating environment.⁴⁹ At least at the level of corporate policy most global companies active in fragile environments acknowledge that it is in their best interest to manage their own operations in ways that help prevent conflict and armed violence. Early investments in conflict prevention are increasingly seen as a wise long-term corporate strategy when companies decide to heavily invest in a specific location. Such a strategy in turn has the potential to

45 Luc Zandfliet and Mary B. Anderson, *Getting It Right: Making Corporate-Community Relations Work*, Greenleaf Publishing, Sheffield, 2009. David Brereton, John Owen and Julie Kim, *Good Practice Note: Community Development Agreements*, Centre for Social Responsibility in Mining, University of Queensland, Brisbane, 2011.

46 ICPC *et al.*, above note 25, p. 33.

47 For a case study on South Africa, see Lloyd Vogelmann, *Reducing Violence in South Africa: The Contribution Business Can Make*, Centre for the Study of Violence and Reconciliation, Pretoria, 1990.

48 L. Capobianco, above note 21, p. 20.

49 Brian Ganson and Achim Wennmann, *Safe Communities, Resilient Systems: Towards a New Action Framework on Business and Peacebuilding*, Brief No. 5, Geneva Peacebuilding Platform, Geneva, 2012.

positively impact on a company's balance sheet by reducing risks related to operational disruptions, damage to property, or injury to people.⁵⁰

Among experts within companies, this trend is evidenced by an emerging mindset shift from safe operations to safe communities. Beyond the focus on the safety of people, assets, and operations directly linked to the company and its operations, the concept of safe communities refers to broader investments in community capacities to respond to conflict and risk factors from whatever source, protecting both company and community interests in broader peace and stability.⁵¹ As part of these efforts, some companies position themselves as members of the community, developing their capacity to work collaboratively with both public officials and the communities impacted by their operations. In the context of investments in New Caledonia, for instance, the Brazilian mining company Vale engaged in an inclusive effort with the Kanak people that led to a sustainable development pact which included provisions for education, training, and cultural activities, as well as the establishment of a multiparty committee on which local tribes are represented and which monitors environmental aspects of Vale's operations.⁵²

Extensive case analysis confirms that a safe place for dialogue and dispute resolution is important for both companies and communities.⁵³ There is also an emerging practice of placing consent and grievance processes within the community rather than within the company, and an increased sharing of decision-making control with other stakeholders.⁵⁴

This practice illustrates that many private companies may have engaged in AVRPP practices for years even though they did not call it AVRPP. A similar finding emerged from a global assessment of AVRPP programmes and which highlighted that many development programmes involved conflict prevention, peacebuilding, or security and safety priorities even though they were not described as AVRPP interventions.⁵⁵

Perpetrators of armed violence

While directly engaging with rebel groups, youth gangs, or military factions is a less common practice of companies, there are examples of company representatives – or

50 Brian Ganson, *Business and Conflict Prevention, Towards a Framework for Action*, Paper No. 2, Geneva Peacebuilding Platform, Geneva, 2011.

51 Brian Ganson and Achim Wennmann, *Operationalizing Conflict Prevention as Strong, Resilient Systems, Approaches, Evidence, Action Points*, Paper 3, Geneva Peacebuilding Platform, Geneva, 2012.

52 Rafael Benke, *Vale New Caledonia: Negotiating a Sustainable Development Pact with Local Stakeholders*, 2010, available at: http://baseswiki.org/en/Vale_New_Caledonia,_Negotiation_of_a_Sustainable_Development_Pact_with_Local_Stakeholders,_Canada_2008 (last visited 24 May 2012).

53 Compliance Advisor Ombudsman (CAO), *Annual Report 2010 and Review FY 2000–10*, CAO, Washington, D.C., 2010.

54 Lisa J. Laplante and Suzanna A. Spears, 'Out of the conflict zone: the case for community consent processes in the extractive sector', in *Yale Human Rights and Development Law Journal*, Vol. 1, 2008, p. 115.

55 Robert Muggah and Achim Wennmann (eds), *Investing in Security: A Global Assessment of Armed Violence Reduction Initiatives*, OECD, Paris, 2012, p. 13.

their intermediaries – engaging perpetrators of violence. Such engagement, however, is very poorly documented. Talks occur away from the public eye, especially in the context where gangs or rebel groups pressure companies for protection payments or war taxes. For instance, local business in Sri Lanka and Nepal succumbed to the pressures by making deals with Liberation Tigers of Tamil Eelam (LTTE) and the Communist Party of Nepal-Maoist, respectively, and paying war taxes in order to stay in business and reduce the risk of threats of violence against their staff and operations.⁵⁶

A prominent case in a civil war setting was in Mozambique where the British multinational company Lonrho became involved in the peace negotiations after attacks on its installations in 1990. Previously, it had paid off belligerents to protect its £53 million investments, but as the conflict escalated it was no longer immune to attacks. One of the company's executives, Roland 'Tiny' Rowland, acted as an intermediary and made available company resources and aircraft to facilitate the peace process. The company is also said to have contributed between US\$6 and 8 million to assist in the transformation of the Resistência Nacional Moçambicana (RENAMO) into a political party.⁵⁷

Even though such efforts are not necessarily their core business, companies have played numerous roles in peace processes over the last two decades. They have facilitated communication and provided strategic information on issues such as prospective resource deposits and future economic potential. Using their networks and skills, companies have acted as direct intermediaries and have provided financial resources to pay for peace processes.⁵⁸ Given that much of this work remains discreet, it is difficult to discuss it beyond citing anecdotal evidence.

In addition to such sensitive engagements, companies have engaged with perpetrators, regarding, in particular, the issue of reintegration of offenders and former combatants. Finding jobs for thousands of former combatants or criminal offenders is a known challenge for post-conflict and violent settings. Criminologists have shown that ex-offenders who gain and maintain employment are much less likely to reoffend than those remaining unemployed.⁵⁹ Fostering the creation of private-sector jobs has therefore become an important interest of governments as a means to drive reconciliation strategies and to get at-risk youth populations off the streets.

Companies have, however, expressed certain reservations. These have included, for instance, fears of bad publicity and upsetting staff relations, or concerns regarding the suitability and skill-set of ex-offenders or ex-combatants for

56 Ameer Dhakal and Jhalak Subedi, 'The Nepalese private sector: waking up to conflict', in J. Banfield *et al.*, above note 18, pp. 411–412. D. Rajasingham-Senanayake, 'The dangers of devolution: the hidden economies of armed conflict', in Robert I. Rotberg (ed.), *Creating Peace in Sri Lanka: Civil War and Reconciliation*, Brookings Institution Press, Washington, D.C., 1999, p. 61.

57 A. Vines, 'The business of peace: "Tiny" Rowland, financial incentives, and the Mozambican settlement', in J. Armon, D. Hendrickson and A. Vines (eds), *The Mozambican Peace Process in Perspective*, Conciliation Resources, London, 1998.

58 Achim Wennmann, *The Political Economy of Peacemaking*, Routledge, Abingdon, 2011, p. 103.

59 NARCO, *Recruiting Ex-offenders: The Employers' Perspective*, NARCO, London, 2003.

the specific work necessary.⁶⁰ In Guatemala the reintegration of former gang members faced significant systematic challenges:

Not only are youth short of the basic abilities required for finding a meaningful job, but they also lack basic inter-personal skills for living in society. Trauma and psychological problems are other impediments. With so much of the population refusing to work with gang members, a major challenge is finding the appropriate sectors of the economy that would be willing to give those gang members who have expressed openness to change an opportunity to reinsert themselves into society.⁶¹

These attitudes have been mirrored in the business response to employment creation as part of Colombia's demobilization, disarmament, and reintegration (DDR) efforts:

Businesses had apprehensions regarding the conduct of former combatants, who are often seen as pre-disposed to crime, and the combatants' lack of appropriate skills. Concerns were expressed that hiring former combatants will create unease among the firm's existing employees and scare clients away. Others see the possibility of sabotage or retaliation by the armed groups that remain active.⁶²

Job creation as a means of AVRPP is therefore much clearer in theory than in practice. A recent review on this topic finds that 'the empirical cases for using youth employment programmes as a stand-alone tool for reducing violent conflict are extremely weak. . . . The evidence on using job creation as part of an integrated or comprehensive AVRPP strategy is much stronger'.⁶³

The issue of legitimacy and self-interest

Underlying the multiple roles of business in AVRPP programmes is the question as to when a private-sector role becomes a credible contribution to the reduction of armed violence. Such credibility can depend on the legitimacy of business actors in the eyes of a substantive part of the population, its ability to act as a unified actor, and its attitude towards and experience with social engagement.⁶⁴ The credibility of business in AVRPP programmes depends on previous behaviour of business in a specific context. For instance, the negative effects of large-scale business investments (for example, mining, dams, agriculture) have led to deep-seated mistrust between the private sector, community groups, and the state in some settings, which in turn

60 L. Capobianco, above note 21, p. 23.

61 Isabel Aguilar Umaña and D. Rossini, *Youth Violence in Central America: Lessons from Guatemala, El Salvador and Honduras*, Brief No. 4, Geneva Peacebuilding Platform, Geneva, 2012, p. 3.

62 Alexandra Guáqueta, 'Doing business amidst conflict: emerging lessons from Colombia', in J. Banfield *et al.*, above note 18, p. 298.

63 Oliver Walton, *Youth, Armed Violence and Job Creation Programmes: A Rapid Mapping Study*, Norwegian Peacebuilding Centre, Oslo, 2010.

64 S. Tripathi and C. Gündüz, above note 40, p. 24.

makes the argument for a constructive role of business in AVRP programmes more difficult.

Another aspect of the credibility of business relates to the level of perceived self-interest of the companies engaging in AVRP. In Colombia, private-sector involvement in peacebuilding was mainly motivated by self-interest.⁶⁵ This argument relates to the common saying that whatever business does, it has to relate to the bottom line. So if AVRP programmes do not show results on the balance sheet, in the end they are unlikely to be of major business interest. However, if AVRP programmes show results they make business sense: fewer operational disruptions, fewer people hurt or killed, and a better international reputation. What is more, if armed violence places key strategic investments at risk, mobilization to combat such violence through direct engagement with perpetrators can be rapid and tremendously pragmatic. In this case, self-interest can be an indicator of real commitment by the company to reduce and prevent armed violence.

Convergence points for cross-sector collaboration

This section shifts our attention to the strategic potential of the armed violence lens to operationalize cross-sector collaboration in violent contexts. The relationship between business and armed violence is an emerging topic with multiple research and practical opportunities on the ground that builds on a relatively well-developed literature relating business practice to armed conflict, peacebuilding, human rights, and crime prevention. This section highlights three themes where the interests of business, donors, and national stakeholders in a specific context could possibly converge in support of armed violence reduction and prevention. The three themes are the need for cross-sector collaboration, the costs of armed violence, and the development of civic observatories.

Understanding the need for cross-sector collaboration

Literature on promising practices and anecdotal evidence suggests that the company – as much as government or civil society actors – is not able to reduce violence or prevent armed violence by relying exclusively on its own efforts. The focus is therefore much less on the company's stand-alone contributions to AVRP programmes, but more on how potential corporate contributions can strengthen multi-stakeholder efforts in a specific context. For instance, the Bogota Chamber of Commerce clearly locates its efforts within the broader AVRP strategies and understands its contribution to be in the areas of information generation, objective assessment of security conditions, participation in the formulation of community safety programmes, and development of models strengthening institutional competencies to enable enhancement of community safety.⁶⁶

65 A. Rettberg, above note 38, p. 1.

66 ICPC *et al.*, above note 25, p. 9.

The utility of programming approaches against armed violence is supported by the realization among donors that ‘potentially violent tensions or on-going violence are increasingly insusceptible to one-time external mediation or local conflict resolution’.⁶⁷ What is more, the trend has also moved away from implementing blue-print programmes everywhere in the same fashion, because they disregard context-specific issues.⁶⁸

Placing business within broader AVRP programmes also resonates with the trend towards ‘constructive accompaniment’, which is lending expertise and advice to locally shaped and guided plans and processes.⁶⁹ Constructive accompaniment connects to the local leadership and ownership provisions in the donor guidance, such as the New Deal on Engagement in Fragile States.

Many peacebuilding and development actors perceive the private sector as a positive force in violent and fragile contexts. Investments that facilitate employment growth, skills development, and a more inclusive economy are not only valuable in their own right. As explored in the World Development Report 2011, they also reduce socio-political tensions in ways that help create space for consensus-building on security, civil and economic rights, good government, and other issues critical to stability and development.⁷⁰ The New Deal states that the generation of employment and the improvement of livelihoods is one of five peacebuilding and state-building goals, a stance that opens the door for private-sector actors in a formal peacebuilding and development framework. Drawing on these and other inspirations, the United Nations Secretary-General’s 2012 report *Peacebuilding in the Aftermath of Conflict* calls for ‘the private sector and peacebuilding actors to deepen their interaction’, and for the engagement with ‘foundations and the private sector [to] encourage these actors to contribute to peacebuilding processes’.⁷¹

Thus there is an increasing expectation that donors and international organizations improve their partnering with the private sector on the ground, and that there is an opportunity for business to better achieve its strategic interest in violence and fragile contexts through cross-sector collaboration. Two concrete points of convergence that could foster such collaboration on armed violence reduction and prevention are related to the costing of armed violence and to the benefit of data-gathering and environment-scanning through observatories.

67 Chetan Kumar and Jos de la Haye, ‘Hybrid peacemaking: building national infrastructures for peace’, in *Global Governance*, Vol. 18, No. 1, 2011, p. 13.

68 B. Ganson and A. Wennmann, above note 51, p. 2.

69 Jennifer Milliken, *What the Peacebuilding Community Can Contribute to Political Transitions in North Africa and Beyond*, Paper 4, Geneva Peacebuilding Platform, Geneva, 2012, p. 12.

70 World Bank, *World Development Report 2011: Conflict, Security and Development*, World Bank, Washington, DC, 2011.

71 United Nations Secretary-General, *Peacebuilding in the Aftermath of Conflict*, UN Doc. S/2012/746, 8 October 2012, pp. 5 and 7.

Costs of armed violence

Better knowledge on the magnitude and distribution of the costly consequences of armed violence on companies is an important tool to forge business cohesion and convince stakeholders that conflict or criminal violence makes them lose money. Improving costing techniques – such as accounting, modelling, or contingent valuation approaches – would enable better communication of the cost of armed violence to business, especially with regards to the money made or saved through AVRPP programmes.⁷²

Work on costing could be an important contribution to strengthen efforts by other stakeholders to establish pro-peace or anti-violence constituencies and campaigns. Lining up private sector support behind such efforts is often complicated because companies are not necessarily aware of the magnitude of the cost of armed violence on their operations. While different sectors and companies are affected differently by armed violence – some may even gain from insecurity – existing costing methods are not yet fine grained enough to associate costs to specific sectors or companies.⁷³ A promising innovation using accounting approaches – a balance sheet of the various cost factors – has been applied to the cost of violence to the health sector.⁷⁴ Sectors particularly sensitive to the effects of armed violence include retail, tourism, financial services, and aviation.⁷⁵

Observatories

Finding quality data on key risk factors and the gathering of situational intelligence in violent and fragile contexts is as much a challenge for business as it is for development, government, or civil society actors. This is why the model of observatories could be a point of convergence to nurture multi-stakeholder partnerships that strengthen local capacity for data generation and analysis, as well as evidence-based policymaking. Observatories are ad hoc or permanent mechanisms, networks, or institutions that monitor a specific development (for example, violence, disasters, and quality of life). Depending on their mandate, observatories could generate data, provide analysis, and give advice to decision-makers to strengthen evidence-based policymaking.⁷⁶ They are widely used, especially in Latin America.

72 For a review of costing techniques see GDS, above note 1, pp. 91–97.

73 *Ibid.*

74 WHO, *Manual for Estimating the Economic Costs of Injuries due to Interpersonal and Self-directed Violence*, WHO, Geneva, 2008.

75 Global Peace Index, *The Study of Industries that Prosper in Peace – the ‘Peace Industry’*, Global Peace Index, Sydney, 2008, pp. 14–18.

76 Elisabeth Gilgen and Lauren Tracey, *Contributing Evidence to Programming: Armed Violence Monitoring Systems*, GDS, Geneva, 2011.

For armed violence reduction strategies, observatories are an important force multiplier within a country. Specifically, business could contribute to the following functions of observatories:

- commencing and driving a discussion at the city or national level about the role of data in and monitoring of policymaking,
- pooling professionals in data generation and analysis within a country, and
- organizing a pilot project to generate locally the data necessary to conduct an armed violence baseline analysis or an environment scanning at the sub-national level.

In the urban setting of mega-cities, big international companies can also be the main driver of observatories. One of the most ambitious and private-sector-led initiative in this field is the Operations Center in Rio de Janeiro. Designed by IBM at the request of Rio's mayor, the Operations Center is a citywide system that integrates data from some thirty agencies, all under a single roof:

IBM incorporated its hardware, software, analytics and research. It created manuals so that the centre's employees could classify problems into four categories: events, incidents, emergencies and crises. A loud party, for instance, is an event. People beating up each other at a party is an incident. A party that becomes a riot is an emergency. If someone dies in the riot, it's a crisis. The manuals also lay out step-by-step procedures for how departments should handle pressing situations like floods and rockslides.⁷⁷

Overall, observatories could become a convergence point for business, donors, and national stakeholders. Business investment and participation in observatories could be an important connector on AVRPs programmes. Observatories address the information, data, and analysis needs of all actors in the context of limited or bad information. What is more, information-gathering and analysis processes are useful themes to initiate a multi-stakeholder process in a specific location.

Conclusion

This article has provided an exploratory analysis of the armed violence lens in relation to business operations in violent and fragile contexts. On the one hand, the article sought to raise awareness in the business and rights communities about a rapidly evolving field of practice; on the other hand, it aimed to highlight the potential of the armed violence lens to serve as a strategic tool to operationalize cross-sector collaboration in violent and fragile contexts. The article looked at international and local, big and small companies engaged in legal and legitimate business transactions. The article started from the assumption that the new patterns of armed violence observed by a multitude of actors – including the World Bank, the Geneva Declaration, and the OECD – require a new perspective on a subject that has

77 Natasha Singer, 'Mission control, built for cities: IBM takes "smarter cities" concept to Rio de Janeiro', in *The New York Times*, 3 March 2012.

traditionally been discussed in the context of 'business and peace' or 'business and conflict' streams of research, which are based on a conceptualization of armed violence related to inter- or intra-state armed conflict.

Overall, understanding the role of business in AVRVP programmes is about understanding the role of business practice within violent and fragile contexts as one of many actors that are managing complexity and risk. It is about identifying specific roles for business within larger AVRVP programmes, and not about standalone corporate philanthropy. Combatting armed violence is a multi-stakeholder effort and no actor on its own is likely to reduce or prevent armed violence sustainability. This observation connects to a broader trend towards the constructive accompaniment of local efforts, and context-sensitive programme designs.

Businesses have played multiple roles with regard to specific elements of the armed violence lens. For instance, philanthropic investments or capacity-building have long been part of company-community relations and fit into the focus on individuals and communities that suffer from or are adversely affected by armed violence. Support given to peace processes or employment creation for ex-combatants or ex-gang members is an example of ways in which companies directly interact with active or former perpetrators of armed violence.

Ultimately, the armed violence lens may act like a new pair of glasses: it provides a new perspective on existing practice and contributes to making business engagements in violent and fragile contexts more sustainable, while at the same time improving the experience of life of people who are living in these contexts.

Regulating the private security industry: a story of regulating the last war

Sarah Percy

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Abstract

This article argues that attempts to regulate the private military and security industry have been stymied by a tendency to be constantly ‘regulating the last war’ or responding to the challenges of a previous manifestation of private force rather than dealing with the current challenges. It argues that states ought to more clearly consider the direction of the industry rather than regulate in response to crises, an approach that has left regulation unequipped to deal with two fields of PSC growth: the use of PSCs against piracy, and to deliver and support humanitarian aid.

Keywords: mercenaries, private security companies, private military companies.

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The idea that generals are always fighting the last war is one of the great military clichés. However, like most clichés, it contains a grain of truth: that in military matters, hindsight is more effective than foresight. The evolution of private military and security companies (PMSCs) and attempts to regulate them demonstrate how hard it can be to respond to quickly changing military and business practices. This article argues that the private military and security industry is agile and innovative, and has responded swiftly to changing market pressures. As a result, regulators at all levels have often been stuck in lengthy negotiating processes while the target of their

regulation is rapidly changing form. In other words, attempts to regulate private actors who use force result in regulating the last war, leaving behind a string of inadequate regulatory instruments. In turn, this string of inadequate regulation has encouraged a perception that the problem is too difficult to regulate formally and resulted in various types of voluntary regulations, which is an important step, but insufficient. This argument is made in three stages. First, there is a brief outline and definition of the nature of the private military industry, and the argument that it has had three main waves of development. Second, there is an examination of how in each of these three transformations, states and other actors have ended up ‘regulating the last war’ and some reasons why this happens are suggested. The article concludes by considering the implications for regulatory bodies seeking to deal with PMSCs. The focus is on international regulatory efforts and discussions in the US and UK, the former because of its status as a major employer of private security and the home state for prominent private security companies, and the latter because of its role as home state for both private military companies and private security companies.

The private military and security industry: an overview

Attempts to define and describe the PMSC are legion,¹ but definitional discussions are not entirely academic exercises. Rather, they reflect one of the particular challenges of private force: it encompasses a great range of activities, from the mundane to the controversial. Many companies specialize in landmine clearance, which is relatively uncontroversial, but also offer close protection, which requires arms. The Blackwater employees that opened fired in a Baghdad market in September 2007 were engaged in close protection. The company Aegis provides both risk analysis services (as do many insurance companies) and security services in combat zones.

While the lines between the types of companies providing domestic security services (such as security guards in commercial buildings) and international services (like combat support) used to be quite clear, in 2008 the company G4S (a US domestic security company) acquired ArmorGroup (an international company), forming an entity that straddles international and domestic services.² Thus, it can be difficult to create a definition that captures the whole industry.

1 See, among others, Deborah Avant, ‘The implications of marketised security’, in *Perspectives on Politics*, Vol. 4, No. 3, 2006, pp. 507–528; Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca and London, 2003; Christopher Kinsey, *Corporate Soldiers and International Security: The Rise of Private Security Companies*, Routledge, London, 2006; Elke Krahnmann, *States, Citizens and the Privatization of Security*, Cambridge University Press, Cambridge, 2010; Sarah Percy, *Regulating the Private Security Industry*, Adelphi Paper Vol. 384, Routledge and the International Institute of Strategic Studies, London, 2006; Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press, Oxford, 2007; Molly Dunigan, *Victory for Hire*, Stanford University Press, Stanford, 2011.

2 Helen Power, ‘Troubled ArmorGroup secures sale to G4S’, in *The Telegraph*, 21 March 2008, available at: <http://www.telegraph.co.uk/finance/markets/2786738/Troubled-ArmorGroup-secures-sale-to-G4S.html> (all links in this article last visited November 2012).

The tendency among academics to argue about definitions has further complicated the situation. While the terms private military company (PMC), private security company (PSC), and private military and security company (PMSC) are in common currency, there is considerable variation about when they are used and their precise content. I argue that one fairly obvious way out of the confusion caused by multiple names is to follow the historical evolution of the industry and to use the terms companies themselves use. In order to explain the definitions I use and to provide a useful snapshot of the history of modern private force, I will turn now to a brief historical explanation before coming back to the question of definitions.

In the mid-1990s, a South African company called Executive Outcomes was hired by the Angolan government to take back oilfields captured by rebels.³ Executive Outcomes, which called itself a private military company, was subsequently hired by the government of Sierra Leone to push back the violent rebel group the Rebel United Front (RUF), which had come extremely close to the capital, Freetown. In both cases, Executive Outcomes planned and executed missions in the same way a national army would. A similar company, Sandline, appeared in the late 1990s, also offering combat services, and was hired in Sierra Leone and in Papua New Guinea. As Tim Spicer, then head of Sandline, put it when asked if his company would go on combat operations: 'of course we will'.⁴

However, ultimately, combat services were simply too controversial and international distaste for the open provision of combat helped push Executive Outcomes and Sandline out of business.⁵ Tim Spicer started a new company, Aegis, which was specifically designed to avoid combat, but would provide other security services.⁶ Aegis and companies like it called themselves PSCs to avoid association with their more controversial forebears.⁷

After the 11 September 2001 attacks and subsequent wars in Iraq and Afghanistan, the nascent PSC industry boomed. Downsizing in the American military, combined with an overall climate in favour of privatization,⁸ led the American government to devolve large numbers of tasks to the private sector, ranging from translation through military interrogation and including armed close protection of individuals and installations. Previously, this protection would

3 P. Singer, above note 1, p. 108.

4 Tim Spicer, 'Interview with Lt. Col. Tim Spicer', in *Cambridge Review of International Affairs*, Vol. XIII, No. 1, 1999, p. 168.

5 Sarah Percy, *Mercenaries: The History of a Norm in International Relations*, Oxford University Press, Oxford, 2007, Chapter 7.

6 *Ibid.*, p. 228.

7 Interestingly, after 2000, the market for combat assistance still existed but went underground. The British government quashed an attempt by a UK company to provide combat assistance to Côte D'Ivoire in 2003. By 2006, when the US company Blackwater said they could offer a battalion-sized contribution to act as peacekeepers in Sudan, the leading academic commentator on the issue remarked that there was as much chance of this being accepted as there was of 'Martians landing on Earth', demonstrating that even in situations of demonstrable need, states had difficulty with the notion of private actors having independent command and control of large military forces. For the Martians remark, see 'Private firms eye Darfur', in *The Washington Times*, 1 October 2006, available at: <http://www.washingtontimes.com/news/2006/oct/1/20061001-114438-5654r/?page=all>.

8 E. Krahnemann, above note 1, p. 197; Alison Stanger, *One Nation Under Contract*, Yale University Press, New Haven and London, 2009.

have been provided by members of the regular armed services. These companies insisted that they did not provide combat services and would only use force defensively,⁹ making the conscious decision to abandon the planning and execution of military operations in favour of less controversial services. Using the terms PMC and PSC highlights this significant shift in the industry, while the term PMSC covers the industry as a whole and both types of company.

The third phase of the development of the PMSC industry covers the post-Iraq and Afghanistan period. The acquisition of ArmorGroup by G4S was in response to the former's economic problems caused by dwindling contracts in Iraq.¹⁰ After the large contracts and 'gold rush' mentality of Iraq and Afghanistan, companies have had to consider their future and are diversifying into a variety of areas: maritime security, particularly against pirate attack; the protection of humanitarian aid; and in some cases the desire to get into the business of actually delivering humanitarian aid; and the expansion of existing non-military services such as risk analysis. I will discuss these areas further below.

In under twenty years, the private military and security industry has had three quite different incarnations, and the international community, as well as individual states, have made many attempts to regulate it. However, states have been trying to regulate a moving target, and to make matters worse, regulation has sometimes been inherently poor. In the next section, I will examine the attempts made to regulate the various manifestations of private force, and point out that in each case, by the time regulation became operable (and occasionally, before it did so), it was out of date.

Regulating the last war: the evolution of private security regulation

Regulation of private force has been a game of catch-up, led by the necessity to respond to problems in the industry, rather than seeking to regulate the direction of the industry's growth. The idea that regulators of private force have been regulating the last war is clearly visible throughout the three stages of the industry's evolution. In all three cases, regulators have been responding to scandals or crises caused by the industry, and have then often found themselves in lengthy regulatory processes during which the industry transforms. The result has been that often as soon as it has been created, the regulation is, at worst, obsolete or, at best, inapplicable to new manifestations of private force. This section traces each stage of the industry's evolution and demonstrates that a combination of a preoccupation with solving pressing problems and a tendency to assume that the latest manifestation of private force is like the previous one, combined with the slow pace of the regulatory process,

9 S. Percy, above note 5, p. 226. The offensive/defensive use of force distinction is problematic in practice, as force used defensively can still be considerable and result in casualties, as the Blackwater market shooting demonstrates.

10 Helen Power, 'Troubled ArmorGroup secures sale to G4S', in *The Telegraph*, 21 March 2008, available at: <http://www.telegraph.co.uk/finance/markets/2786738/Troubled-ArmorGroup-secures-sale-to-G4S.html>.

has led to backward- rather than forward-looking regulation. When PMCs emerged, regulators still attempted to deal with them using tools designed for mercenaries, regardless of their applicability; when PSCs replaced PMCs, regulators were slow off the mark because their focus was still on dealing with the problems caused by PMCs; and while the international community has focused on dealing with PSCs via the Montreux Process¹¹ and the International Code of Conduct for Private Security Providers (ICoC),¹² the industry has evolved again in such a way that these processes may be largely ineffective. Moreover, both Montreux and the ICoC remain voluntary agreements, and represent a shift towards self-regulation that has occurred partly because of the inability of relevant parties to devise formal regulation.

From mercenaries to PMCs

When Executive Outcomes came to international attention in the late 1990s, international law governing mercenaries was widely recognised to be inherently inadequate and, at any rate, inapplicable to companies like Executive Outcomes and Sandline. During the 1960s and 1970s, the common use of mercenaries in Africa created significant international efforts for regulation, but that resulted in ineffective law. Both Additional Protocol I to the Geneva Conventions¹³ and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries¹⁴ set out a definition of mercenaries that renders the law so weak that it has become commonplace to note that ‘any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him!’¹⁵

To make matters worse, the UN Convention was created extremely slowly, with discussions beginning in 1980 and ending with the adoption of the Convention in 1989. It did not come into force until 2001, by which time the world of private force had changed completely. The UN Convention had been designed to eliminate the practice of individual mercenaries organised into groups in order to attempt coups or otherwise undermine states. By 2001, this type of mercenary was no longer

11 The Montreux Document and the history of the process leading up to it are available at the Swiss Ministry of Foreign Affairs’ website, available at: <http://www.eda.admin.ch/psc>.

12 To consult the ICoC, its negotiation process and the list of signatory companies, see: http://www.icoc-ppsp.org/Home_Page.html.

13 Article 47, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter ‘Additional Protocol I’), available at: <http://www.icrc.org/ihl.nsf/WebART/470-750057>.

14 Article 1, United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), UN Doc. A/RES/44/34 (hereinafter ‘UN Convention’), available at: <http://www.un.org/documents/ga/res/44/a44r034.htm>. The UN Convention essentially reproduces the wording of Article 47 of Additional Protocol I. A third document from this period exists: the Convention of the OAU for the Elimination of Mercenarism in Africa, Libreville, 3 July 1977. It attempts to make state support for mercenaries a crime, but its impact has been insignificant. The text is available at: <http://www.icrc.org/ihl.nsf/INTRO/485?OpenDocument>.

15 Originally quoted in Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, Weidenfeld and Nicolson, London, 1980, p. 375, note 83.

common, and PMCs like Executive Outcomes and Sandline provided a different challenge.

One unintended consequence of the lengthy gestation of the UN Convention was that private force evolved with an eye to international law. The reason the international legal definition of mercenaries is so problematic is that it contains a number of loopholes that allow the lawful use of private force. In turn, this reflects the idea that states were trying to control a particular type of mercenary: a foreign individual fighting for financial gain¹⁶ and attempting to destabilize the state. The law deliberately excludes private fighters enrolled in the armed forces of the hiring state, and both Executive Outcomes and Sandline utilised this loophole. As a result, there was widespread agreement that PMCs were not subject to either Article 47 of Additional Protocol I, or the UN Convention.¹⁷ Indeed, by the time the Convention came into force, one of its signatories (Angola) had hired Executive Outcomes.

The appearance of PMCs on the international stage prompted new international and domestic regulatory discussions, some of which took place in familiar venues. The United Nations response was to continue working on the issue through the existing office of the Special Rapporteur for mercenaries,¹⁸ Enrique Bernales Ballesteros. Ballesteros was the UN's longest continuously serving Special Rapporteur until he was replaced in 2004.¹⁹ Ballesteros provides perhaps the *sine qua non* example of a regulator obsessed with the last war: he insisted that there was absolutely no difference between mercenaries of the type operating in Africa during decolonization, PMCs like Executive Outcomes and Sandline, and PSCs.

Ballesteros's main concern was that private force (in whatever manifestation) threatened democracy and self-determination, which indeed they had throughout the period of decolonization. Mercenaries involved in the wars surrounding decolonization in Africa beginning in the 1960s were mainly individuals or loosely organised groups of individuals hired to destabilize newly independent states (as in the Congo). Mercenaries also sought their fortunes

16 For a discussion of the international legal deliberations see Sarah V. Percy, 'Mercenaries: strong norm, weak law', in *International Organization*, Vol. 61, No. 2, 2007, pp. 367–397.

17 Juan Carlos Zarate, 'The emergence of a new dog of war: private international security companies, international law, and the new world disorder', in *Stanford Journal of International Law*, Vol. 34, No. 1, Winter 1998, pp. 75–162; Garth Abraham, 'The contemporary legal environment', in Greg Mills and John Stremmlau (eds), *The Privatization of Security in Africa*, South African Institute of International Affairs, Johannesburg, 1999; Yves Sandoz, 'Private security and international law', in Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder? The Privatization of Security in War-torn African Societies*, Institute for Security Studies, Johannesburg, 1999. The role Executive Outcomes played in Angola is slightly less clear-cut: see Sean Cleary, 'Angola: a case study of private military involvement', in Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder?* As time went on, PMCs were careful to avoid the UN Convention definition.

18 The United Nations Commission on Human Rights created the mandate of the 'Special Rapporteur on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination' in 1987, by Resolution 1987/16 of the Commission on Human Rights.

19 Ballesteros served from 1987–2004. He was replaced by Shaista Shameem, and ultimately in 2005 by a UN Working Group on Mercenaries, which is still in existence. A description of the mandate of the Working Group is available at: <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx>.

by deposing governments (as in Benin, the Seychelles, and the Comoros Islands) or assisting national liberation groups (as in Angola and Nigeria/Biafra).²⁰ In these cases, mercenaries, who were nearly always white, were unquestionably subverting or attempting to subvert national self-determination in newly decolonised states.

While PMCs and their mercenary forebears shared some characteristics, in that they were mainly white foreigners involved in wars in the developing world, they were not identical and treating them as mercenaries was both inaccurate and problematic.

Executive Outcomes and Sandline were employed by states that often saw them as the last alternative to end dangerous rebel movements. In Sierra Leone, the government hired Executive Outcomes because the RUF, infamous for its amputation of arms and legs of those in their path, had advanced to within twenty kilometres from Freetown. Sierra Leonean officials felt abandoned by the international community and that they had no choice but to employ a PMC in order to survive.²¹ It is hard to see how a state hiring private force to defend itself against rebel movements constitutes a violation of the right to self-determination, even if it is otherwise problematic.

PMCs posed a set of regulatory issues that were specific to the context in which they were operating and different from those caused by mercenaries. Both Executive Outcomes and Sandline worked for small states with limited military capacity, meaning that in theory it would have been possible for them to dramatically undermine the state in which they were working. However, in Sierra Leone the armed forces were notoriously corrupt and many soldiers were also rebels, leading to the coining of the term 'sobel'.²² It is hard to see how PMCs were not an improvement on regular troops.

This is not to assert that PMCs were uncontroversial actors. Indeed, Sandline found itself involved in two major scandals: in Sierra Leone, Sandline was accused of violating the arms embargo placed on the country, possibly in collusion with the British Foreign and Commonwealth Office,²³ and in Papua New Guinea, the company's contract was cancelled after the Papua New Guinea armed forces threatened a mutiny rather than work alongside it.²⁴ In addition, there have been a number of accusations in relation to the compensation paid to both Executive Outcomes and Sandline. In Angola and Sierra Leone, Executive Outcomes was paid in long-term natural resource concessions, a move that critics argued mortgaged

20 For details, see Anthony Mockler, *The Mercenaries*, Macdonald, London, 1969, pp. 257–265; S. Percy, above note 5, pp. 187–189.

21 S. Percy, above note 5, p. 219.

22 William Reno, 'War, markets and the reconfiguration of West Africa's weak states', in *Comparative Politics*, Vol. 29, No. 4, 1997, pp. 493–510.

23 For details, see C. Kinsey, above note 1, pp. 72–77. This scandal resulted in a government inquiry, which produced the Report of the Sierra Leone Arms Investigation, or the 'Legg Report', available at: <http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/files/kfile/report.pdf>.

24 For details, see S. Dinnen, 'Militaristic solutions in a weak state: internal security, private contractors and political leadership in Papua New Guinea', in *Contemporary Pacific*, Vol. 11, No. 2, 1999; P. Singer, above note 1, pp. 192–195.

the future of both states for what amounted to short-term security solutions.²⁵ There were also concerns that as a result, PMCs only really provided security in natural resource areas, rather than broadly throughout society.²⁶ Executive Outcomes was also accused of committing abuses in Angola.²⁷ These allegations, however, do not prove that PMCs are similar to mercenaries, but that they are problematic actors. The scandals in which PMCs were involved pushed the regulatory conversation in specific directions that reflected the particular issues PMCs caused, or were perceived to cause.

The Ballesteros reports from the late 1990s are preoccupied with the idea that PMCs are mercenaries, and that mercenaries are wholly illegal under international law. Ballesteros argued that ‘even though existing international law may be . . . full of gaps . . . it would be wrong to invoke the existing rules . . . in such a way as to justify mercenary acts’,²⁸ and that the use of mercenaries in any form (whether in private companies or not) undermined self-determination.²⁹ However, it is difficult to see how, when they were hired by the state to defend itself, PMCs challenged national self-determination, especially when the state in question was facing significant existential threats.

Ballesteros was preoccupied with the previous challenges caused by mercenaries, so his reports do very little to deal with the problems actually posed by the use of PMCs. Regulators ought to have been concerned with a series of important questions instead: how to protect weak states from the potential problems caused by a well-equipped and well-trained private military partner; whether or not payment in natural resources was a sound idea; and how home states might authorize these controversial activities abroad. The blanket view that even though the law did not apply to these actors, it *should* have done so, may have prevented the creation of new regulation to deal with a new problem.

Outside the UN, states were also grappling on an individual basis with how best to deal with new private military actors. The drive for regulation in the UK was created by response to the Sandline arms to Africa affair, which forced a government inquiry. As Foreign and Commonwealth Office (FCO) practices were called into question,³⁰ the FCO became the lead government agency dealing with private force,

25 David J. Francis, ‘Mercenary intervention in Sierra Leone: providing national security or international exploitation?’, in *Third World Quarterly*, Vol. 20, No. 2, 1999, p. 222; Alex Vines, ‘Mercenaries and the privatisation of force in Africa’, in Greg Mills and John Stremlau (eds), above note 17, p. 62.

26 D. Francis, above note 25, p. 32.

27 A. Vines, above note 25, p. 54.

28 See ‘Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, pursuant to Commission resolution 1998/6’, UN Doc. E/CN.4/1999/11, 13 January 1999, para. 41.

29 See ‘Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by the Special Rapporteur of the Commission on Human Rights’, UN Doc A/53/338, 4 September 1998, para. 20.

30 The scandal in question was the supply of weapons by Sandline to the deposed Sierra Leonean leader Ahmed Tejan Kabbah, which violated arms embargo agreements; the main question was whether or not FCO officials (and at what level) had sanctioned the transfer.

continuing in this role throughout the Iraq period to today. The inquiry led, in 1998, to the Legg Report, which concluded that while the FCO itself had never directly sanctioned the transfer of arms to the Kabbah government, but individual FCO personnel were implicated, including the British High Commissioner to Sierra Leone.³¹ The Legg Report also called for a Green Paper on PMCs, and in turn this was to lead to a White Paper and subsequent legislation.³² The Green Paper was released in February 2002 and will be discussed in greater depth below.

The Legg Report began an inadvertently long regulatory discussion in the UK. This process was delayed by three factors: first, the high turnover of foreign ministers in the Labour government and the different priorities they placed on the issue; second, the concentration of important and complicated foreign policy issues after 11 September 2001; and, third, the sense that the issue was a political hot potato that no government department particularly wanted to handle.³³ The long regulatory process meant that the UK was still grappling with companies like Sandline when the war in Iraq began, the implications of which will be discussed below.

Neither the UN nor states were able to respond to the use of PMCs in a particularly timely fashion. As a result, market pressure arguably had the largest impact on altering PMC behaviour. PMCs were deeply engaged in every aspect of combat operations, from the strategic to the tactical. As a result, they had the potential to greatly influence local politics, and because they were willing to fight the wars, their personal lethal effect was high. International discomfort with the idea of combat provision led to its disappearance from the private military industry: there was no market for the private provision of offensive force. The market did not exist partly because few states could afford to pay PMCs without natural resource concessions. Other potential clients were deterred by specific PMC scandals. PMCs themselves recognised that the provision of security services stopping short of combat was less controversial and that powerful states were more reliable clients than the developing states that had once employed Executive Outcomes and Sandline. These powerful states were not interested in privatizing combat, but rather in privatizing support and other less central functions.³⁴

31 See 'Foreign Office savaged over arms to Africa', in *The Guardian*, 9 February 1999, available at: <http://www.guardian.co.uk/politics/1999/feb/09/foreignpolicy.politicalnews>.

32 Green Papers are consultation documents that usually form the first step in changing or creating law; White Papers are the last consultation stage and usually form the substance of bills to go before Parliament. See: <http://www.parliament.uk/site-information/glossary/white-paper/> and <http://www.parliament.uk/site-information/glossary/green-paper>. This process will be discussed in more detail in the next section.

33 Interview with FCO official, London, November 2003.

34 Both Executive Outcomes and Sandline were sacked by their clients. After a coup, the new Sierra Leonean government did not renew Executive Outcomes' contract. In Papua New Guinea, the government fired the company, a decision that led to extensive international litigation, which Sandline ultimately won. For details, see: http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=1534678553®ion_id=1510000351&country_id=450000045&channel_id=210004021&category_id=500004050&refm=vwCat&page_title=Article.

PMCs to PSCs: changing direction in the middle of a war

The start of the war in Iraq in 2003 fundamentally altered the private security industry. New companies, like Tim Spicer's, which had been set up to avoid combat, had not yet found major contracts. The decision of the US to hire large numbers of contractors created a gold rush mentality and explosive growth in the industry.³⁵ These companies again posed a series of new issues: what legal mechanisms exist to control contractors who commit crimes on the battlefield? Do PMCs have a significant impact on counterinsurgency, which requires the delicate application of force? However, regulators did not immediately consider these questions. In the UK, the government was still caught up with the Green Paper, which was released in February 2002 and was neglected during the run-up to the Iraq War. The Green Paper proposed a series of solutions to deal with PMCs and the problems they caused, but did not really consider the use of private companies during large-scale wars when employed by strong states that retained strategic command and control.

The actions of contractors on the ground quickly revealed that neither states nor the international legal community had sufficient regulatory mechanisms to deal with an industry trading in lethal force. PSC employees were complicit in the Abu Ghraib prison scandal in 2004, and in 2007, employees of the American company Blackwater opened fire in a Baghdad market, killing seventeen civilians. These episodes were the most high profile of a series of problems, including issues caused by uncertainties about the role of contractors in the existing chain of command³⁶ and their use to support complex counterinsurgency operations.³⁷ Problems caused by contractors on the battlefield revealed that there were no legal mechanisms that could be used to bring them to justice.

The UK response to the war in Iraq

The UK and US responded differently to events in Iraq. In the UK, the war in Iraq partly rendered the Green Paper process obsolete through simple bad timing. Not only did the war in Iraq begin just over a year after the Paper was released, it had a lengthy run-up that understandably took priority in the relevant government departments. The Green Paper process stalled after Iraq. Reports that regulation was forthcoming emerged,³⁸ but none eventuated. It is likely that the FCO, as the lead agency involved in regulation, continued to be preoccupied by the complex nature

35 Dominick Donald, 'After the bubble: British private security companies after Iraq', Royal United Services Institute, Whitehall Papers, London, 2006.

36 Fred Schreier and Marina Caparini, 'Privatising security: law, practice and governance of private military and security companies', Occasional Paper No. 6, Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2005, p. 47; Caroline Holmqvist, 'Private security companies: the case for regulation', SIPRI Policy Paper No. 9, Stockholm Institute for Peace Research, Stockholm, 2005, p. 26.

37 Jeffrey S. Thurnher, 'Drowning in Blackwater: how weak accountability over private security contractors significantly undermines counterinsurgency efforts', in *Army Law*, Vol. 64, Issue 422, July 2008, p. 64.

38 Clayton Hirst, 'Dogs of war to face new curbs in Foreign Office crackdown', in *The Independent*, 13 March 2005, available at: <http://www.independent.co.uk/news/business/news/dogs-of-war-to-face-new-curbs-in-foreign-office-crackdown-6151383.html>.

of UK foreign policy during this period, especially because of the unexpectedly prolonged commitments in Iraq and Afghanistan. The industry body, the British Association of Private Security Companies (BAPSC), suggested that the 'hot potato' problem was again an issue, with an absence of enthusiasm for an unpopular but headline-grabbing issue.³⁹ Finally, when pressed by the House of Commons Foreign Affairs Select Committee about the reasons for the delay in producing legislation, Lord Malloch Brown, the FCO minister, argued that the complexity of the business was responsible for the lengthy period of negotiation.⁴⁰ Unlike the US, events did not force the UK into more serious regulatory discussions. Many UK-based companies were working in Iraq, but they were primarily employed by the US, which threw the regulatory ball into the American court.

The US response to the war in Iraq

In the United States, the regulatory story was not necessarily one of regulating the last war, but of regulating existing business practices with little eye to their evolution. The Americans were famously underprepared for almost every aspect of the war in Iraq,⁴¹ and were perhaps even less prepared for the potential issues caused by PSCs in Iraq.

The American government had used PSCs with minimal issues since at least the early 1990s, and US had a relatively long history of privatizing other support roles going back at least as far as the 1980s.⁴² American-based PSCs such as Dyncorp and MPRI had provided extensive military training, approved by the US government, to various actors abroad. While these contracts had not been without incident,⁴³ they were largely unproblematic and were useful role for the US government, allowing intervention in places like Croatia where official American assistance would have been diplomatically challenging.

The use of PSCs prior to Iraq was governed by the same procedures that the US used for the control of arms sales abroad, which required Congressional approval for sales totalling more than US\$50,000. However, contracts were routinely segmented into amounts just short of that amount, thereby circumventing the regulations. In the late 1990s, the contract oversight administrators faced considerable cuts,⁴⁴ meaning that despite employing more contractors in more problematic areas, there was no way to oversee them.⁴⁵

39 See 'Mercenary firms seek tighter laws', in *BBC*, 5 December 2007, available at: http://news.bbc.co.uk/2/hi/uk_news/7128046.stm.

40 See 'MPs unimpressed by missing mercenary regulation', in *Politics.co.uk*, 20 July 2008, available at: <http://www.politics.co.uk/news/2008/7/20/mps-unimpressed-by-missing-mercenary-regulati>.

41 For detailed accounts of these problems, see Thomas Ricks, *Fiasco: The American Military Adventure in Iraq*, Penguin, London, 2006; Rajiv Chandrasekaran, *Imperial Life in the Emerald City: Inside Iraq's Green Zone*, Bloomsbury, London, 2008.

42 A. Stanger, above note 8, p. 86.

43 There were claims that the Croatian military, which MPRI trained during the 1990s, had improved beyond all recognition. See S. Percy, above note 5, p. 226. Dyncorp was involved in a prostitution ring in Bosnia; see: http://www.huffingtonpost.com/david-isenberg/its-dj-vu-for-dyncorp-all_b_792394.html

44 Steven L. Schooner, 'Contractor atrocities at Abu Ghraib: compromised accountability in a streamlined, outsourced government', in *Stanford Law and Policy Review*, Vol. 16, No. 2, 2005, p. 560.

45 A. Stanger, above note 8, p. 89.

To make matters worse, the American military in Iraq relied on a legal instrument that had made sense in previous conflicts: a status of forces agreement (SOFA) that immunised accompanying personnel, such as contractors, from local prosecution. SOFA agreements with this provision had been used without incident in previous conflicts and served to protect captured personnel from unfair local trials. However, the US had never used contractors on the scale they did in Iraq, and the SOFA with the Iraqis meant that contractors could not be tried for any abuses in Iraq. Unlike the provisions for American military personnel, there were no provisions that could be used to try contractors in the US.⁴⁶

Events forced the US to drastically alter its regulation of PSCs, but, as one academic noted, this was very much a case of closing the barn door after the horse had already bolted.⁴⁷ The Americans found themselves in this position in part because of complacency: the issues involving PMCs had not had much impact in the US, and the country's relative success with using PSCs through the 1990s meant that the US was, in effect, considering that the past would be the same as the future and that contracting out services on a large scale during a war in which the US was itself involved would be the same as small-scale contracting during peacetime.

In different ways, the US and the UK, preoccupied with existing uses of private force, failed to anticipate how the industry might evolve. In the UK, this meant sitting on a regulatory process that then took some years to complete and will be discussed in greater depth below. In the US, a failure to anticipate how the increased use of contractors would greatly challenge a system that was designed to deal with other phenomena led to significant abuses by contractors and a system that could not punish them. No state or military organisation has a crystal ball, and the speed at which the industry evolved and the length of the war in Iraq were certainly surprising. States cannot be faulted for failing to anticipate all eventualities.

However, the use of private force in both states proceeded unencumbered by any kind of policy discussion about its use. While devising regulation in advance is problematic, policy discussions about what sorts of services the state ought to privatize in the first place never occurred. Many military commanders had, for example, significant reservations about privatizing military interrogation,⁴⁸ and military interrogation at Abu Ghraib was the first serious PSC scandal.

The UN approach to the private security sector most egregiously attempted to regulate the previous incarnation of private military companies. Ballesteros, the UN Special Rapporteur on Mercenaries, was still in office at the start of the 2003 Iraq War. He repeatedly insisted that PSCs (like the PMCs that preceded them)

46 The Alien Tort Statute has been used to sue PMSCs in the United States; however, this type of litigation results from the clever use of existing law rather than the purposeful creation of new regulations. Atteritano argues that its potential scope of application is quite narrow. Andrea Atteritano, 'Liability in tort of private military and security companies: jurisdictional issues and applicable law', in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford University Press, New York, 2011, p. 481.

47 Frederick A. Stein, 'Have we closed the barn door yet? A look at the current loopholes in the Military Extraterritorial Jurisdiction Act', in *Houston Journal of International Law*, Vol. 27, No. 3, 2005.

48 Martha Minow, 'Outsourcing power: how privatizing military efforts challenges accountability, professionalism and democracy', in *Boston College Law Review*, Vol. 46, 2005, p. 1014.

were simply a new incarnation of mercenaries, and considered that both PMCs and PSCs were intricately connected to the mercenaries that preceded them, in that private companies might themselves be considered to be recruiting and hiring mercenaries.⁴⁹ His backward-looking insistence, which failed to recognize any difference between PSCs employed by the United States in Iraq and a ragtag band of mercenaries attempting coups in small African states, meant that the regulatory process was focused on the wrong set of issues, especially as the type of issues posed by both actors were so different. The UN position alienated PSCs themselves, who were and remain staunch advocates of regulation, even if they are far from perfect actors. The result has been that PSCs have actively pursued other avenues of regulation, including the more pragmatic Montreux Document and the ICoC, and sidelined both the UN's and the UK's delayed regulatory processes. This article now turns to examining these attempts at regulation.

The Montreux Process, the ICoC, and the future of PMCs

The International Committee of the Red Cross (ICRC) and the Swiss government were among the first actors to begin advocating for the further regulation of private security companies after the Iraq War began in 2003. While the ICRC maintained (and still maintains) that PMSCs are required to abide by the rules of international humanitarian law (IHL) in the same manner as all other actors on the battlefield, the ICRC nonetheless took note of the under-regulation of the industry and advocated for greater controls.

The Montreux Document seeks to increase control over PSCs on the battlefield and is directed primarily at states. It provides a reminder of the existing relevant international legal obligations under IHL and suggests good practices for states employing PSCs, as well as indicating that relevant criminal law provisions may apply to abuses, both to individuals and to states – home states (where companies are based), territorial states (where companies are operating), and contracting states (which hire companies). States and companies were involved in the negotiations, which began in 2005 and were completed in 2008. The Montreux Document does not constitute formal international law, but is a restatement of existing binding international law. Montreux took a neutral approach to PSCs, treating them as regular actors on the battlefield, an approach that facilitated negotiation and agreement. The Montreux Process has had several notable successes. Efforts to develop regulation via the UN were stymied by Ballesteros's view that PSCs were mercenaries. Even after the Special Rapporteur role was taken over by the UN Working Group on Mercenaries, the term 'mercenary' remains problematic for PSCs, and companies themselves quickly sought to distance

49 See 'Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; report submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur', UN Doc. E/CN.4/2004/15, 24 December 2003.

themselves from the Working Group.⁵⁰ When the non-judgmental Montreux Process began, PSCs and associated industry bodies, such as the International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC), placed their support and interest behind it. Montreux Document was able to achieve clarity on a complicated issue by asserting the basic rules and principles that PSCs and their employers ought to follow.

The Montreux Document also represents perhaps the only possible international agreement at this stage. The abject failure of anti-mercenary law has led to a lack of confidence in international control efforts. Powerful states, such as the UK and the US, have an interest in continuing to use PSCs and, in the case of the latter, rely on them to the extent that war without contractors is probably impossible. Accordingly, creating a wider regulatory discussion might limit the flexibility of states to use PSCs, and so the Montreux Process proved desirable. Because the Montreux Document restates existing law, it is a very low-cost solution for states. They are not required to agree to anything that they have not previously agreed to; they are just required to consider it in a new context. The Montreux Document creates no new binding obligations for states.

The ICoC seeks to set out a clear code of conduct directed at companies rather than states. Shortly after the Montreux Document was completed, PMSCs themselves began the process of creating a parallel international code of conduct that would make the appropriate behaviour of PMSCs clear. After a series of multi-stakeholder meetings, the ICoC was signed in November 2010. Like the Montreux Document, it reminds companies of their obligations under IHL, as well as indicating best practices. In many ways it resembles the UN Global Compact, which encourages corporations to adopt minimum standards of behaviour in relation to a range of human rights issues.⁵¹ The ICoC seeks to provide consequences for those companies failing to adopt the code or uphold standards. The idea is that an industry-led body will only allow membership to those who have adopted the code and will withdraw membership from those who violate it. States will then only employ those PMSCs who are members of the industry body and signatories to the code.

The ICoC, like the Montreux Document, is a significant accomplishment given the very slow pace of regulation, particularly in the UK, and the problems of creating international regulation. Its attempts to provide consequences for a failure to sign the code or for violating it are laudable. The ICoC reflects the fact that PMSCs themselves are often the strongest drivers of regulation because it makes good business sense for them to have clear rules of operation and, as argued above, to weed out companies bringing the industry into disrepute. Accordingly, the ICoC takes what some might consider a surprisingly tough line on human rights

50 Sarah Percy, 'Morality and regulation', in S. Chesterman and C. Lehnhardt (eds), above note 1, p. 26.

51 The UN Global Compact was created in 2000 and seeks to make ten core principles (relating to human rights, the environment, labour, and anti-corruption) part of acceptable practice for corporations. It is the world's largest voluntary corporate conduct organisation. For details, see: <http://www.unglobalcompact.org/AboutTheGC/index.html>.

questions; for example, the standards required of companies in relation to human rights exceed the basic standards of IHL.

Informal agreements and voluntary codes are certainly better than nothing, but neither is robust enough to stand as the only means of regulating the PMSC industry. Informal agreements can be understood as lowest-common-denominator legislation, or the bare minimum on which a variety of actors can agree. Whether or not the bare minimum is sufficient to regulate an industry that has significant lethal potential is questionable. While the ICoC's human rights provisions are tougher than the basic IHL provisions, they are also a lowest common denominator in that they reflect the interests of companies.

The danger of voluntary codes of conduct may have little impact on actual behaviour. The UN Global Compact has had undeniable successes, particularly in highlighting potential problems caused by corporations, but may not have much impact on behaviour in part because it has no real way to investigate or sanction-violating companies and thus it struggles to ensure accountability.⁵² While the use of membership in an industry-led body as a carrot and a stick for good behaviour improves on the Global Compact, questions still remain. No other industries are allowed to regulate themselves entirely, and 'the incentive structures run against a trade group acting as a strict enforcement and punishment agent for members of its own industry'.⁵³ While the industry currently has an interest in strong regulation, it may not always do so, and it may respond differently to new developments than would states or formal regulators. Again, it is questionable whether or not an industry concerned with the provision of potentially lethal force should be the first allowed to experiment with self-regulation.

There are further problems with both the Montreux Document and the ICoC. First, neither seeks to control conventional 'mercenaries' of the type involved in the 2004 coup attempt in Equatorial Guinea. The UN Working Group remains engaged in this process,⁵⁴ but its importance has been sidelined by the higher profile efforts to deal with PSCs. Second, the Montreux Document has, for the most part, let state governments off the tricky hook of domestically regulating the private security industry. The US has been forced by scandals to tighten its domestic rules about how and when PSCs can be deployed, as well as close the loopholes that prevented the prosecution of contractors in Iraq. However, the congressional approval system in the US is still problematic and geared mainly towards accepting contracts in other states, rather than taking contracts from other private actors.

In the UK, the Montreux Process has allowed the government to shelve the difficult question of how to regulate private security companies entirely. The Green Paper identified a number of potential routes for regulation, of which a system

52 Oliver F. Williams, 'The UN Global Compact: the Challenge and the promise', in *Business Ethics Quarterly*, Vol. 14, No. 4, 2004, pp. 755–774.

53 Peter W. Singer, *The Private Military Industry and Iraq: What Have We Learned and Where to Next?*, Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2004.

54 However, as argued above, the UN is trying to do too much: it is probably impossible to regulate the entire spectrum of private force, just as it is impossible to use the same piece of legislation to control drug dealers and pharmaceutical companies, an argument I have previously made in S. Percy, above note 1, p. 45.

of licensing was deemed the most likely to be effective. British regulation did not proceed until 2009, when the new Labour foreign minister, David Miliband, announced that the UK government would require companies to sign up to a code of conduct as a requirement of joining an industry body. The government would then only contract with those companies that were members of the industry organisation, and members could be removed if they violated the code of conduct.⁵⁵

Tougher regulation would also be expensive to implement, and in the current fiscal climate this is probably impossible. Voluntary processes may well prove to be insufficient for the UK, which has been very lucky to avoid problems like those affecting the US thus far. But because the Montreux Document and the ICoC have cast backward and untied a complex regulatory knot related to PSC activity in international armed conflict, states are satisfied.

Implications and future problems

There are three main implications of the tendency among regulators dealing with the private security industry to ‘regulate the last war’. First, there is necessarily a lack of forecasting future problems, leaving two likely uses of PSCs unconsidered by current frameworks: the use of PSCs to defend ships against piracy and to perform humanitarian functions. Second, the combination of a fast-moving industry and slow-moving regulation has created the impetus for self-regulation, which is currently insufficient in this area. Third, shifting attention to informal international processes allows states to avoid difficult but essential domestic conversations about the role of private force.

The ICoC, the Montreux Document, and domestic approaches in the US and UK focus on the type of involvement common in Iraq and Afghanistan, and it is unlikely we will see an Iraq- or Afghanistan-style engagement in the short- to medium-term. As early as 2006, PSCs were considering the implications of the post-Iraq ‘bubble’,⁵⁶ and have actively sought new business. PSCs are considering, among other options, two main routes: growing their commercial business with contracts with private companies, particularly in the maritime security realm, and the protection and potential provision of humanitarian aid. The Montreux Document is silent on both these issues, and the guidelines set out in the ICoC do not really address these particular situations. The American regulation system would likely not apply as contracts will be under the threshold for congressional approval, and the UK has effectively opted out of regulating these areas by relying on the Montreux Document and the ICoC.

PSCs have been keen exponents of the need to protect shipping from Somali piracy in the Gulf of Aden and wider Indian Ocean. An oft-quoted statistic in the maritime shipping community is that no ship with a private security

55 See ‘Government proposes regulation for private security firms’, in *Reuters*, 24 April 2009, available at: <http://uk.reuters.com/article/2009/04/24/uk-britain-security-idUKTRE53N59820090424>.

56 D. Donald, above note 35. Donald is an employee of Aegis.

detachment on board has been attacked by pirates. While this may be true, there is a first time for everything and given that pirates have attempted to take naval vessels hostage (albeit usually by mistake) it may be by luck rather than design. Pirates do not seem to be deterred in all cases by superior firepower. Furthermore, the rules regarding the use of force at sea by private actors are murky in the extreme, and require carefully calibrated judgment. Unlawful shooting incidents in Iraq suggest that this judgment may be in short supply. Finally, a major issue confronting international navies in the region is the problem of mistaken identity, where navies have fired upon fishing vessels and killed innocent people. Again, this is a serious problem requiring careful consideration, and the decidedly chequered history of companies shooting aggressively does not bode well for how it might be solved.

PSCs also see a major market developing in the protection of humanitarian aid and workers in dangerous places. Non-governmental organisations (NGOs) have been increasingly willing to commit resources to very dangerous parts of the world, and the use of PSCs to facilitate this has resulted in considerable debate and controversy.⁵⁷ Some argue that the neutrality of NGOs has already been greatly compromised by the use of private security, while others see it as a necessary evil in order to deliver essential aid.⁵⁸ However, it is only a short step from protecting aid to arguing that companies have the capacity to *deliver* aid, which poses obvious challenges to norms of humanitarian aid. Whether or not a commercial company can deliver aid in a purely humanitarian fashion, untainted by commercial motivation or financial incentive, is highly debatable. Aid that is not purely humanitarian may mean that a private company is not protected by the relevant provisions of IHL that refer to humanitarian aid.⁵⁹ It appears as though some companies are considering just this direction.⁶⁰

In neither case is it clear which international rules apply and under what circumstances, and in both cases the use of force has the potential to cause considerable damage. The story of the evolution of private force and the efforts to control it strongly suggest that states and other regulators will remain complacent and convinced that they have the regulatory answers until a problem occurs, in which case they will have to begin again. The slow nature of regulation and the fast pace of changes in war means that by the time states have solved these new problems, further challenges will have appeared on the horizon. The fast pace

57 James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study*, International Peace Academy, New York, 2006; Abby Stoddard, Adele Harmer and Victoria DiDomenico, *The Use of Private Security Providers and Services in Humanitarian Operations*, Humanitarian Policy Group Report No. 27, Overseas Development Institute, London, 2008; Damian Lilly, Tony Vaux, Chris Seiple, Greg Nakano and Koenraad Van Brabant, *Humanitarian Action and Private Security Companies: Opening the Debate*, International Alert, London, May 2002.

58 Christopher Spearin, 'Private, armed and humanitarian? States, NGOs, International private security companies and shifting humanitarianism', in *Security Dialogue*, Vol. 39, No. 4, 2008, pp. 363–382.

59 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge University Press, Cambridge, 2011, pp. 164–165.

60 Confidential interviews with PMSC officials. The company, Aegis, already provides 'humanitarian support services' which can be either 'stand-alone' or 'fully-integrated', presumably indicating that it has the capacity to perform these functions independently. See: <http://www.aegisworld.com/index.php/humanitarian-support-services-2>.

of change in the PSC business, combined with pressure for regulation, has resulted in the growth of self-regulation and voluntary agreements.

We cannot expect states or other regulators to have a crystal ball and attempt to devise regulation that will cover all potential future manifestations of private force. However, what we can expect is that states that host PSCs consider seriously how to draw the lines around private force: what things are acceptable? And unacceptable? Answering these questions will go some way to providing guidance for future activities.

States have failed to consider that businesses have powerful incentives to evolve and find new markets when old ones disappear or are closed down. Regulators play catch-up in many different industries. The challenge of playing catch-up in the private security industry is that the main product, force, has more harmful potential than the main product of perhaps any other industry. Complacent reliance on international humanitarian law or voluntary agreements is both insufficient and worrying.

Conclusion

The tendency to regulate the last manifestation of private force will no doubt continue because of the nature of the problem. Two central issues have combined to make regulating the private security industry complicated. First, creating regulation, either at the domestic or the international level, is rarely a swift process even where there is considerable will and agreement about the need for, and type of, regulation. Second, PMSCs are agile businesses that swiftly evolve in response to market pressures.

Forecasting military change is never easy, and successful PSCs, like any successful business, swiftly respond to market incentives. The private military and security industry has shut down some aspects of business and explored others in response to changes in the market and the closing of some avenues, such as large-scale expeditionary wars in Iraq and Afghanistan, and the opening of others, such as the potential to offer maritime security services. PMSCs have demonstrated their ability to evolve, and to do so quickly, several times since the early 1990s. We should not expect that they will continue to remain static.

In fact, there is good reason to think that they will continue to evolve and seek greater opportunities. One of the consequences of the creation of a large number of PSCs during the Iraq era is that these companies now exist and will actively seek new work to avoid going out of business. Continued military downsizing will mean that further opportunities will emerge. In the UK, significant military cuts announced in 2011 were accompanied by an announcement that further support could come from the private sector.⁶¹

61 James Kirkup, 'British Army forced to rely on foreigners and contractors', in *The Telegraph*, 7 June 2012, available at: <http://www.telegraph.co.uk/news/uknews/defence/9315166/British-Army-forced-to-rely-on-foreigners-and-contractors.html>.

Second, the regulatory process is, by nature, slow. Relevant parties must agree that there is a need for regulation, and agree on how to embark on regulation. In the case of PMSCs, there are a large number of relevant actors: states, NGOs, businesses that require security, international organisations, and the PMSCs themselves. Like many other industries that operate predominantly offshore, PMSCs will require both domestic and international regulation. A good analogy comes from civil aviation, which requires domestic and international legislation to ensure safety. However, the existence of two levels of potential regulation means that there are two processes that may respond too slowly or not at all to growing issues. States themselves are keen to ensure that they will be able to use PMSCs effectively, and have to design regulation that is 'just right' – neither too tight nor too loose – which is a further constraint on speedy regulation. Finally, other actors in the system, particularly NGOs and international organisations, have a troubled relationship with PSCs. Although PSCs are becoming increasingly essential for some operations, these actors retain concern about the notion of private security and issues PSCs might pose.⁶² This complicated relationship has made regulation slower because of a need to demonstrate disapproval or concern and at the same time facilitate regulation that allows continued use of PSCs in the industry.

PMSCs themselves both help and hinder regulation. From the beginning, both PMCs and PSCs have been enthusiastic advocates of regulation, participating in nearly all significant regulatory efforts. This enthusiasm is laudable, but it must not be regarded as selfless. Both PMCs and PSCs have sought states as their main clients and regulation suits them well. It provides legitimacy, and can drive out competitors unable to meet regulatory demands. UK- and US-based PSCs often have particularly well-connected leaders, either in day-to-day operations or on boards, including retired generals and other senior military figures. These connections, combined with the fact that regulators are increasingly reliant on PSCs, makes arms-length regulation more difficult than it might need to be.

It is not surprising, given the definite need for regulation and its slow speed, that voluntary self-regulation has been the most successful avenue. The Montreux Process and the ICoC have proceeded more quickly and convincingly than more formal options. This is not surprising, given that in many other issue areas, states and other actors prefer non-binding informal agreements because they happen more swiftly and allow continued freedom to manoeuvre. The industry also has a stake in advocating this type of regulation because it provides legitimacy without undue constraint. However, while the Montreux Document and the ICoC are undoubted achievements, questions remain as to whether or not they will be sufficient. The Montreux Document does not clearly apply to the use of PSCs by private companies, such as those guarding shipping from piracy. Self-regulation via voluntary codes of conduct is probably not strict enough for an industry that deals in lethal force. Complete self-regulation, without any legislative teeth, is extremely rare: everything from medical associations and legal associations within states to transnational industries operating between states, either has self-regulation enabled

62 J. Cockayne, above note 57, pp. 13–14.

by legislation or formal international regulation, often assisted by permanent supervisory bodies, as in the case of civil aviation. It is hard to imagine that this particular industry does not require at least as much oversight as transnational shipping. To conclude with a different cliché from the one with which this paper began: self-regulation can too easily be putting enthusiastic foxes in charge of the chicken coop, and cannot on its own do enough.

Given that it is quite likely that regulators will continue to regulate the last manifestation of private force, what can be done to ensure that there is some sort of regulation that at least has a chance of keeping pace with the dynamic private security industry? Effective forecasting of military change is very difficult, as the vagaries of state military planning often demonstrate. However, one simple feature has been missing from nearly all domestic discussions about private force and many international ones: the question of how much private force is a good idea, and what sorts of jobs we can envisage PSCs undertaking. This type of conversation can be too easily dismissed as academic, or difficult, but it is essential. If the main host states of PSCs, particularly the UK, seriously considered what they would *like* the future shape of the industry to be, then to an extent the industry could actually dictate the direction of that evolution, rather than being forced to respond to developments as they happen. In the US, regulators were forced to consider some of these questions in response to scandals caused by PSCs, and tightened up their regulation as a result; however, a similar and clearly articulated vision of the role states wish these companies to play would direct the opportunities available.

It is true that the private security genie is out of the bottle. At the moment, however, states are largely letting the genie do what it wants and then disciplining it for going too far, rather than setting the parameters for action from the beginning. A discussion about the appropriate role of private force might be difficult, and it might need to begin domestically, but it is perhaps the best chance of regulating an industry that is always likely to change faster than regulators can respond to it. States and other interested parties must work hard to avoid complacency and assuming that existing regulation is up to the job: the industry will evolve, and regulation must either set the parameters of that evolution or be prepared to be left behind as evolution occurs.

The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities

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Abstract

The UN Guiding Principles on Business and Human Rights provide authoritative guidance for states and businesses on how to prevent and address business-related human rights harms, including in conflict-affected areas. States need to explore a more innovative range of policy and regulatory options in such situations, whether they are engaging with cooperating companies or dealing with uncooperative ones. Companies need to be able to know and show that they can operate with integrity – and avoid being involved in gross abuses of human rights – and that

* See www.shiftproject.org. All internet references were accessed in November 2012, unless otherwise stated.

their risk assessment, mitigation, and remediation processes take full account of the potential risks to affected stakeholders, not just risks to the business.

Keywords: UN Guiding Principles, business and human rights, conflict, responsibilities, risk assessment, Protect, Respect and Remedy Framework.



In June 2011, the United Nations (UN) Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights, developed by the former Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie of Harvard Kennedy School. The Guiding Principles implement the UN Protect, Respect and Remedy Framework, also developed by Ruggie.

When Ruggie began his mandate in 2005, there was no authoritative point of reference for states, business, or civil society on how to prevent and address business-related human rights abuses. Ruggie sought to build consensus among stakeholders by holding consultations and conducting extensive research with the support of experts from around the world. Out of that process came the Protect, Respect and Remedy Framework, which was presented to the UN Human Rights Council in 2008. The Framework rests on three independent but mutually supporting pillars:

1. The **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
2. The **corporate responsibility to respect** human rights, which means to avoid infringing on the rights of others and to address adverse impacts with which a business is involved; and
3. The need for greater access by victims to **effective remedy**, both judicial and non-judicial.

The UN Human Rights Council unanimously welcomed the Framework, and extended Ruggie's mandate as Special Representative until 2011 with the task of 'operationalising' and promoting the Framework. In June 2011, the Council unanimously endorsed the Guiding Principles, making them the authoritative global reference point on business and human rights.¹

The Protect, Respect and Remedy Framework ('what should be done') and the Guiding Principles ('how to do it') reflect a broad consensus on how to address the risks that business can pose to human rights. The Guiding Principles had gained extensive support from businesses, trade unions, NGOs, investors, and other stakeholders already, before their formal consideration by the UN Human Rights

¹ See UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011. The Council also created a new expert Working Group on business and human rights to take forward the dissemination and implementation of the Guiding Principles.

Council in June 2011. There has since been a further convergence of standards around the Guiding Principles at the global level. In particular, the Organisation for Economic Cooperation and Development (OECD), in revising its Guidelines for Multinational Enterprises in 2011, added a new human rights chapter that closely mirrors the Guiding Principles.² The recent International Organization for Standardization *ISO 26000 Guidance on Corporate Social Responsibility* standard also reflects the Guiding Principles in its human rights provisions.³ The International Finance Corporation (IFC) has incorporated the corporate responsibility to respect human rights in its revised Sustainability Framework and Performance Standards, which have in turn been picked up and applied by the private 'Equator Principles' banks and the OECD 'Common Approaches' for Export Credit Agency.⁴ Finally, the European Commission has issued a new communication on corporate social responsibility that calls on all companies operating in the EU to respect human rights in line with the UN Guiding Principles.⁵

For states, the Guiding Principles do not articulate new legal obligations – that was never their intent. Rather, they spell out the policy implications of states' existing duties under international human rights law when it comes to protecting against business-related human rights harms. They place particular stress on the need for greater policy coherence between states' human rights obligations and their regulatory and other actions with respect to business.

For business, the strong convergence around the UN Guiding Principles provides clarity and predictability regarding their responsibility to respect human rights and helps establish a level playing field of expectations. There is an incentive for business to engage with these expectations as governments, investors, civil society organisations, and others increasingly use the Guiding Principles as the benchmark for assessing companies' human rights performance, including in conflict-affected areas.

Ruggie identified the particular, often acute, challenges posed by conflict-affected areas as one of the most significant 'governance gaps' existing at the international level. This short article explores how the respective obligations and responsibilities of states and companies under the Guiding Principles can be relevant to conflict situations. The first part of the article looks at the implications for states, focusing on the outputs from a series of off-the-record discussions convened under Ruggie's mandate with 'home' and 'host' state representatives. The second part turns to the implications for companies and particularly the various

2 See OECD, *OECD Guidelines for Multinational Enterprises*, 25 May 2011 (updated), available at: www.oecd.org/daff/internationalinvestment/guidelinesformultinationalenterprises/oecdguidelinesformultinationalenterprises.htm.

3 See International Organization for Standardization, *ISO 26000 Guidance on Social Responsibility*, 2010, available at: www.iso.org/iso/iso_catalogue/management_standards/iso26000.

4 See International Finance Corporation, *IFC Sustainability Framework and IFC Performance Standards on Environmental and Social Sustainability*, 1 January 2012, available at: www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework.

5 See European Commission, *A Renewed EU strategy 2011–14 for Corporate Social Responsibility*, 25 October 2011, available at: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm.

ways in which companies may be involved in human rights harms, including gross abuses of human rights, in such situations. The final part provides a brief conclusion.

Implications for states

This section briefly sketches the main contours of the ‘state duty to protect’; it then focuses on Guiding Principle 7, which addresses the particular challenge of businesses operating in conflict-affected areas and the series of confidential workshops held with home and host state representatives during Ruggie’s mandate. It outlines the main recommendations arising from those workshops for states when engaging with both cooperative and uncooperative companies in such contexts – recommendations which are yet to be fully reflected in any single state’s practice. It concludes with a discussion of the relevance of multilateral approaches, particularly with respect to remedying gross human rights abuses.

The state duty to protect

The Guiding Principles that address the first pillar of the UN Framework elaborate on how states can create an environment that is conducive to business respect for human rights, including by:

- generating greater policy coherence between their human rights obligations and their actions with respect to business by improving enforcement of existing laws, identifying and addressing key policy or regulatory gaps, and providing effective guidance to business;
- fostering business respect for human rights both at home and abroad, including where there is a state–business nexus (such as with state-owned or state-controlled enterprises, or when a state engages in commercial transactions such as procurement);
- helping ensure that businesses operating in conflict-affected areas do not commit or contribute to human rights abuses (discussed in detail below); and
- meeting their duty to protect in their roles as participants in multilateral institutions.

States also have obligations in relation to remedy under the third pillar of the UN Framework. Even where states and businesses operate optimally, adverse human rights impacts may still result from a company’s activities, and affected individuals and communities must be able to seek redress. Effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect. The Guiding Principles for the third pillar set out how such grievance mechanisms can be strengthened by states and businesses:

- as part of their duty to protect, states must take appropriate steps to ensure that when abuses occur, those affected have access to effective judicial and non-judicial state-based mechanisms;

- non-state-based mechanisms (including company mechanisms at the operational level) should provide an effective complement to state-based mechanisms; and
- all non-judicial grievance mechanisms should meet specific effectiveness criteria by being legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and (in the case of operational-level mechanisms) based on dialogue and engagement.

The duty to protect in conflict-affected areas

Guiding Principle 7 (an operational principle under the state duty to protect) addresses the particular challenge posed by conflict-affected areas, providing that:

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:
 - a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
 - b) providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
 - c) denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
 - d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

The commentary notes that all the measures identified in Principle 7 are ‘in addition to States’ obligations under international humanitarian law in situations of armed conflict, and under international criminal law’.⁶

This principle arose in part from a body of work conducted during Ruggie’s mandate on the particular challenges posed by the implementation of the state duty to protect in conflict-affected areas. As Ruggie explained:

The most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence. Human rights abuses may spark or intensify conflict, and conflict may in turn lead to further human rights abuses. The gravity of the human rights abuses demands a response, yet in conflict zones the international human rights regime cannot possibly be expected to function as intended. Such situations require that States take action

6 The Guiding Principles focus on the implications of international human rights law for states, while acknowledging that international humanitarian law exists as *lex specialis* that must be adhered to by states whenever it applies.

as a matter of urgency, but there remains a lack of clarity among States with regard to what innovative, proactive and, above all, practical policies and tools have the greatest potential for preventing or mitigating business-related abuses in situations of conflict.⁷

He therefore convened three workshops, involving officials from a small but representative group of states, to help generate such proposals. Countries who agreed to participate included Belgium, Brazil, Canada, China, Colombia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom, and the United States. The workshops were structured as brainstorming sessions built around a different scenario each time. Participants were asked to respond with possible policy options to help prevent and deter business-related human rights abuses in conflict-affected areas for home states (where a multinational company is incorporated or has its headquarters); host states (a place other than the home state where the company has operations); and neighbouring states that are in close proximity to the relevant host state.⁸ Participating states were not expected to reach consensus or endorse any particular proposal.

The workshops confirmed the importance of all states – home, host and neighbouring – seeking to address issues early before conditions on the ground deteriorate. 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. Neighbouring states can provide important additional support, whether the situation involves transnational or national companies.

A core observation underpinning the Guiding Principles is that states should not assume that businesses prefer governmental inaction. The workshops highlighted the importance of *proactive engagement by states* with businesses to help those enterprises meet the challenges of operating in conflict-affected areas, including avoiding contributing to human rights abuses. While this engagement should occur at the earliest possible opportunity, states should remain engaged with businesses throughout the conflict cycle as conditions change and/or deteriorate. But while responsible companies increasingly seek guidance from states, not all companies are responsible. Ruggie's recommendations arising from the conflict workshops were divided therefore into those where a business is *willing to cooperate* with the state in preventing and addressing human rights harms, and those where a business is *uncooperative*.

7 See Business and Human Rights in Conflict-Affected Regions: Challenges and Options for State Responses, UN Doc. A/HRC/17/32, 27 May 2011. The report on the workshops was included as one of the four addenda to the report containing the Guiding Principles in 2011.

8 The workshops addressed three scenarios: where business enterprises are physically present in conflict situations; where businesses are involved in foreign investment and trade activities that extend to conflict situations; and states' individual and collective roles in responding where companies refuse to constructively engage. Each scenario assumed conflict situations involving escalating or changing patterns of violence.

Engaging with cooperating companies

In general, states do not currently effectively convey their expectations of business in relation to human rights in conflict situations through policies, laws, or other means (compared to, say, the way state expectations are conveyed in the area of anti-corruption). This means that capitals and in-country embassies lack a clear basis for engaging or advising companies in such contexts. There is also a general lack of awareness of existing information that might help businesses assess and address the risks of human rights abuses, including by identifying useful tools.

The workshops confirmed that home states could do much more to foster cooperation among their own development assistance agencies, foreign and trade ministries, and export credit/development finance institutions in capitals, as well as between those various agencies and the home state's embassies in the relevant country. The lack of cooperation between these various actors and the host state's agencies was also highlighted. A number of practical policy options emerged from the discussions, which are reproduced here in full:

- a) Rules requiring a human rights/conflict sensitivity policy (analogous to an anti-bribery pledge) on the part of business enterprises operating in a violent context;
- b) Gathering and communicating information on legal obligations (for example, home State legislation, Security Council and other sanctions) and advisories (such as advice from the State concerning particular operating contexts, human rights responsibilities and corporate social responsibility tools);
- c) Gathering or making available public domain information about the human rights situation in a particular conflict area;
- d) Establishing and communicating heightened due diligence standards in conflict situations, such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas;
- e) 'White listing' cooperative business enterprises for State procurement, investment, export credit and other transactions based on due diligence policies and practices;
- f) Recommending caution or adopting certain steps/measures in risk areas, for example, a 'travel advisory' model that would trigger greater – or different kinds of – engagement between State agencies and business enterprises;
- g) Ensuring that agencies are able to meet the State's obligations to prevent stolen and looted goods from entering their jurisdiction;
- h) Offering governmental or other conciliation or mediation services where local conflicts arise involving the business;
- i) Offering confidential advice by foreign, trade or industry ministries, either in capitals or via embassies. In addition to trade promotion activities, a number of countries make it an obligation of trade promotion officers to

discourage business enterprises from ... problematic activities, such as corruption. To create a parallel duty concerning, for example, international crimes, would require mandating and training commercial and political officers/sections in embassies and foreign ministries;

- j) Working bilaterally with partner States to ensure effective cooperation among all relevant States with regard to the operation of business enterprises in a particular conflict situation. For example, where a host State requires business enterprises [to engage in] payment directly to the military or security forces (i.e., directly to units and not via taxes to the treasury) or the provision of logistical assistance, bilateral diplomacy could attest that signed and transparent agreements govern those business enterprise-military relationships;
- k) A peer review model could address State responses to business in conflict-affected regions, as adapted from the African Peer Review [Mechanism], which is focused on governance.⁹

Dealing with uncooperative companies

Where a business is unwilling to meet relevant standards, does not implement the necessary policies and processes in good faith, or otherwise refuses to take steps to prevent against human rights risk, a range of steps are possible. Those identified through the workshops included:

- an investigation by an embassy or other agency, or by an official mission, national ombudsperson or similar function;
- an intervention at a senior level (for example, the CEO) if the company is a large business enterprise;
- media statements or statements in parliament questioning the company's behaviour or distancing the state from it;
- the involvement by neighbouring states of partner countries (for example, through regional organisations) in investigation, mediation or conciliation;
- threatened withdrawal of consular and/or business development support; or
- exclusion from procurement, export credit or other state transactions or markets.¹⁰

Where a company commits or contributes to gross human rights abuses, additional measures should be considered, including: exploring appropriate civil or criminal liability (for example, for involvement in international crimes, or for money laundering) on the part of an individual officer or the company, including freezing assets or issuing arrest warrants; imposing unilateral or multilateral sanctions on the individual or business; seizing shipments of goods where there is a reasonable risk that they are illicit or where a ban has been imposed by

⁹ See above note 7, para. 16.

¹⁰ *Ibid.*, para. 17.

a sourcing country or other body; and putting the name of an individual or company forward for listing by the UN Security Council for supporting parties to a conflict.¹¹

Multilateral approaches

Reflecting on the conflict workshops, Ruggie commented that states should consider defining the risks, or activities, that would prompt the sorts of responses identified above in relation to uncooperative companies through a multilateral standard-setting exercise, given states' general reluctance to put their own businesses at a disadvantage.¹² At the conclusion of his mandate, Ruggie submitted to the UN Human Rights Council (in addition to the final Guiding Principles and the four addenda) a note regarding options for follow-up measures.¹³ In addition to recommending measures for embedding the Guiding Principles, he emphasised the need to clarify international legal standards applying to business involvement in gross human rights abuses. In particular:¹⁴

The [Special Representative] has noted that national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes. These typically arise in areas where the human rights regime cannot be expected to function as intended, such as armed conflict or other situations of heightened risk. Such divergence can only lead to increasing uncertainty for victims and business alike.

The [Special Representative's] consultations with all stakeholder groups have indicated a broad recognition that this is an area where greater consistency in legal protection is highly desirable, and that it could best be advanced through a multilateral approach. Any such effort should help clarify standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of jurisdiction abroad may be appropriate, and the acceptable bases for the exercise of such jurisdiction. It could also foster international cooperation, including in resolving jurisdictional disputes and providing for technical assistance. . . . The UN Convention against Corruption could provide an appropriate precedent and model for such an effort.

This recommendation was not taken up by the UN Human Rights Council, however, and it remains an outstanding gap in the international framework for the prevention and redress of gross human rights abuses.

11 *Ibid.*, para. 18.

12 *Ibid.*, para. 21.

13 UN Human Rights Council, 'Recommendations on follow-up to the mandate', note presented to the UN Human Rights Council, 11 February 2011, available at: www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf.

14 *Ibid.*, pp. 4–5.

Implications for companies

This section starts by outlining some foundational concepts in the corporate responsibility to respect; it then discusses the various modes in which companies may be ‘involved’ with adverse human rights impacts and their implications, before turning to an examination of Guiding Principle 23(c) on the risk of complicity in gross human rights abuses and some of its implications in practice.

The corporate responsibility to respect

The second pillar of the UN Framework is the corporate responsibility to respect human rights, which means to avoid infringing on the rights of others and to address negative impacts with which a business is involved. The responsibility to respect is a global standard of expected conduct acknowledged in virtually every voluntary and softlaw instrument related to corporate responsibility, and now affirmed by the UN Human Rights Council itself.¹⁵ It is the baseline expectation of all businesses in all situations. Companies may, and many do, choose to support or promote human rights, but a failure to respect rights in one part of a company’s operations cannot be ‘offset’ by philanthropic or other contributions to promoting rights elsewhere.

The Guiding Principles make clear that companies should respect all internationally recognised human rights – understood, at a minimum, as those rights contained in the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the ILO Declaration on Fundamental Principles and Rights at Work. In certain situations businesses will need to respect additional standards, including international humanitarian law in situations of armed conflict.¹⁶ However, the focus of the Guiding Principles is on the kinds of policies and processes that a business needs in order to ‘know and show’ that it respects human rights in its own activities and through its business relationships. There are six elements that are essential in this regard, four of which are grouped together under the concept of ‘human rights due diligence’.¹⁷ These elements are:

1. **Policy commitment and embedding:** developing and articulating a human rights policy commitment and embedding it through leadership, accountability, and training throughout the company;

15 Although international human rights instruments generally do not currently impose this obligation directly on businesses (hence the term ‘responsibility’ rather than ‘duty’), elements of it are often reflected in domestic laws. However, the responsibility to respect exists apart from national laws.

16 See above note 1, Guiding Principle 12, Commentary. The Interpretive Guide referenced in note 24 below specifically cites the ICRC’s publication in this regard: see ICRC, *Business and International Humanitarian Law: an Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, ICRC, Geneva, December 2006. See also above note 6 regarding states’ obligations.

17 See above note 1, Guiding Principle 15; Guiding Principles 17–21 address human rights due diligence in detail.

2. **Human rights due diligence:**
 - a. **Assessing** the company's actual and potential human rights impacts;
 - b. **Integrating** findings from such assessments into the company's decision-making and taking actions to address them;
 - c. **Tracking** how effectively the company is managing to address its impacts;
 - d. **Communicating** to stakeholders about how it addresses its impacts;
3. **Remediation:** helping remediate any negative impacts that the company causes or contributes to.

Importantly, the elements of human rights due diligence are described as ongoing processes, not one-off 'things' (for example, 'an assessment' or 'a report'). The Guiding Principles take no position on whether the policies and processes that companies need to adopt should be stand-alone or integrated into existing systems; many companies are already managing a range of potential human rights impacts through existing health and safety, environmental, and ethics and compliance systems, among others. However, they stress the need for existing and new systems to recognise what is unique about human rights risks – namely, that understandings of impacts take full account of the perspective of 'affected stakeholders', meaning those whose human rights may be affected by a company's operations, products, or services.

Understanding risks to affected stakeholders distinct from risks to the business

Human rights due diligence and remediation processes need to incorporate an understanding of the severity of impacts – meaning their scale, scope, and irremediable nature – in order to determine what are appropriate measures to prevent or address them.¹⁸ As in traditional risk management approaches, a company's prioritisation of responses to identified impacts is driven by both likelihood and severity – but unlike traditional risk matrices or 'heat maps', which measure severity of impact on the business, understanding the severity of human rights risks is driven by the impact on the affected stakeholder(s).

In order to understand severity in this way, the Guiding Principles stress the importance of meaningful consultation or engagement with stakeholders, including affected stakeholders, as a cross-cutting principle, particularly important when assessing impacts, tracking performance, and handling grievances. For example, while the loss of a field to a farmer may be easily addressed through financial compensation, it may represent half of his livelihood and lead to significant adverse effects over time, including loss of social standing. For women in some societies, it may mean disenfranchisement if they had a stake in the land while the compensation goes to the men. Taking another example, cutting off access to an individual's, or entire community's, mobile phone service in a conflict-affected area

18 *Ibid.*, Guiding Principle 24, Commentary.

may contribute to significant adverse impacts on their personal safety, well beyond the impact on their freedom of expression.

The Guiding Principles recognise that consulting directly with affected stakeholders may not always be feasible, particularly for small companies or those with highly geographically dispersed users (such as Internet service companies). In such cases, the Principles recommend reliance on expert resources (whether human or written) that can credibly convey the likely perspectives and concerns of those directly affected. In complex environments, like conflict-affected areas, such engagement may be all the more challenging; however, company experience demonstrates that it is in these situations that it becomes even more critical. This issue is discussed further below.

While the Guiding Principles are focused on risk to human rights, not risk to the company, the two are increasingly related, as recent research demonstrates. Focusing on the extractive sector, a 2008 study of 190 projects operated by the major international oil companies showed that the time taken for projects to come online has nearly doubled in the last decade, causing significant increase in costs.¹⁹ A confidential follow-up of a subset of those projects, conducted in support of Ruggie's mandate, found that non-technical risks accounted for nearly half of the total project risks faced by these companies, and that stakeholder-related risks constituted the single largest category.²⁰

Building on this, further research was conducted by the author through the Corporate Social Responsibility Initiative at Harvard Kennedy School, together with the Centre for Social Responsibility in Mining at the University of Queensland in Australia, into the costs of conflict with local communities for companies in the extractive industry.²¹ The research found that:

- the most frequent costs are those arising from lost productivity due to delay (for example, an operation with capital expenditure in the US \$3–US \$5 billion range can suffer losses of roughly US \$20 million per week of delayed production, in net present value terms);
- the greatest costs are seen to be the opportunity costs arising from the inability to pursue future projects and/or opportunities for expansion or for sale; and
- the single most often overlooked cost is the additional staff time needed when conflicts arise or escalate. For example, from a working assumption in the industry that such issues should take up about 5 per cent of an asset manager's time, in some cases the proportion was found to be as high as 50 per cent or even, in one instance, 80 per cent.

19 Goldman Sachs Global Investment Research, 'Top 190 projects to change the world', April 2008.

20 See UN Doc. A/HRC/14/27, Business and Human Rights: Further Steps Towards the Operationalisation of the 'Protect, Respect and Remedy' Framework, 9 April 2010, para. 72.

21 Rachel Davis and Daniel Franks, 'The costs of conflict with local communities in the extractive industry', paper presented at the First International Seminar on Social Responsibility in Mining, Santiago, Chile, 19–21 October 2011, available at: www.shiftproject.org/publication/costs-conflict-local-communities-extractive-industry. The research drew on over 40 confidential interviews, including with industry representatives, and an analysis of 25 cases, to focus on the costs incurred by companies in such instances of conflict.

The research found that the costs incurred by companies as a *result* of conflict typically are not aggregated into a single category or number that would get the attention of senior management or boards. They tend to be rolled into operating costs, while the costs incurred by companies trying to *prevent* such conflict show up as direct costs, creating a distorted picture. Understanding and mitigating the potential for such conflict is thus an essential element of corporate risk management, and part of a company's efforts to meet its responsibility to respect.

Modes of involvement in adverse impacts and the concept of leverage

The Guiding Principles identify three distinct ways in which a company may be involved with adverse human rights impacts: (1) by causing an adverse impact, (2) by contributing to an adverse impact, or (3) where an adverse impact is directly linked to the company's operations, products, or services by a business relationship. Each has very different implications for what constitutes an appropriate response.

The concept where a company directly causes a negative human rights impact is clear. An example might be the resettlement by a company of a community that is not in line with international good practice (for example, as set out in the IFC Performance Standards), or a failure to respect freedom of association among the company's own workers.

The concept of 'contribution' is also relatively clear, though it can occur in two distinct ways. In the first, the contribution is via a third party – for example, a supplier or a government. This can occur where a decision or action by a company creates strong incentives for the third party to abuse human rights – for example, where a private security company operating in a conflict-affected area sets such short deadlines for the supply of personnel that the recruitment company it is using is unable to perform adequate background checks on new hires, and one of those personnel then commits a human rights abuse. Contribution can also occur where a company facilitates or enables such abuse – for example, by providing personal information about users of an online social networking service to a repressive regime, enabling it to target those individuals not for legitimate criminal law enforcement purposes but for harassment and persecution in contravention of international human rights law.

The second way in which a company may contribute to an impact is in parallel with a third party, leading to cumulative impacts. For example, an apparel factory located in an area that is dangerous for women at night because of the presence of insurgent groups might change its shifts, requiring women workers to leave or arrive outside daylight hours. As a result, those women may then be attacked as they go to and from work. The impact on their security results from the company's failure to consider the consequences of its decision to change shift times when combined with existing risk factors.

Finally, in the third scenario, an adverse impact on human rights may be directly linked to a company's products, operations, or services through a business

relationship, even though the company has neither caused nor contributed to the impact. For instance, an extractive company has a code of conduct that prohibits the use of force except in clearly circumscribed instances; it requires compliance with that code in all its security contracts; it screens out contractors known for improper use of force, and monitors its business partners for compliance. Yet it nonetheless finds that a security provider has breached those standards. Clearly the company is unlikely to be ‘responsible for’ the impact in a legal sense, since it has done all that could reasonably be expected to prevent the breach. The Guiding Principles make clear that it does not have an obligation to remediate in such cases. However, it does have a forward-looking responsibility to take steps to prevent the continuation or recurrence of the impact, given that the impact is directly linked to its own operations.

Another example of ‘linkage’ is where a company is sourcing components for electronic equipment from suppliers that, in turn, use minerals sourced from conflict-affected areas. As the range of current efforts to address the challenge of ‘conflict minerals’ show, this is far from a straightforward issue for a company to address.²² Under the Guiding Principles, however, the company has a responsibility to consider what steps it can reasonably take to address the fact that the adverse impacts resulting from the production of conflict minerals are directly linked, via a business relationship, to its own products – including through collaborative efforts, as a number of initiatives in this space are now doing.²³

Each of these three scenarios implies very different responses on the part of the company. Where a company has directly caused an impact, ceasing that impact is likely to be in a company’s full control. That may also be possible where a company has contributed to an impact, but there may be complexities in addressing the company’s own contribution, either in terms of its internal decision-making and other processes, or in its external relationships with third parties (like government authorities). This does not reduce the responsibility of the company to act appropriately, but it may make it difficult to address such impacts in the short term.

In the third scenario, a company often has the least control over impacts that are linked to its products, operations, or services, without it having caused or contributed to them. This is where the concept of ‘leverage’ – meaning the company’s ability to effect change in the wrongful behaviour of another party – becomes particularly significant. The Guiding Principles point to the need for a company to consider how it can use its leverage to mitigate the impact and, where leverage is lacking, how it can find ways to increase it (for example, through incentives, collaborating with peer companies, or engaging with government or civil

22 For example, the work being conducted by the OECD on responsible supply chains of minerals from conflict-affected areas. See OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 25 May 2011, available at: www.oecd.org/fr/daf/investissementinternational/principesdirecteurspourlesentreprisesmultinationales/mining.htm. This work is now referenced in the new implementation guidelines developed by the US Securities and Exchange Commission for the implementation of Dodd-Frank Section 1502.

23 See, for example, Public-Private Alliance for Responsible Minerals Trade (www.resolv.org/site-ppa/, last visited February 2013) and Solutions for Hope (<http://solutions-network.org/site-solutionsforhope/>).

| | Have leverage | Lack leverage |
|----------------------------|--|---|
| Crucial Source/partner | <ul style="list-style-type: none"> Mitigate the risk that the abuse continues/recurs If unsuccessful | <ul style="list-style-type: none"> Seek to increase leverage If successful, seek to mitigate risk that the abuse continues/recurs If unsuccessful, consider ending the relationship**; or be able to demonstrate efforts made to mitigate abuse, recognizing possible consequences of remaining. |
| Non-crucial Source/partner | <ul style="list-style-type: none"> Try to mitigate the risk that the abuse continues/recurs If unsuccessful, take steps to end the relationship* | <ul style="list-style-type: none"> Consider ending the relationship* |

* take account of credible assessments of potential harm to human rights from ending relationship

** take account of severity of impact; the more severe, the more quickly change should be seen before decisions are reached on whether to end the relationship

Figure 1. Decision-making matrix in linkage situations.²⁴

society actors). In addition to leverage, critical considerations in determining an appropriate response in such cases include how crucial the business relationship is to the company, how severe the impact on human rights is, and what the implications for human rights are of terminating the relevant business relationship. Importantly, this approach does not presume that the solution is simply to terminate a relationship; indeed, in many cases such a move can produce additional adverse human rights consequences of its own.

The Corporate Responsibility to Respect Human Rights: an Interpretive Guide, issued by the Office of the UN High Commissioner for Human Rights with the support and involvement of Ruggie shortly after the end of his mandate, illustrates the decision processes required in a matrix, reproduced in Figure 1.

As the matrix shows, there are rarely simple answers in such situations, but the Guiding Principles provide companies with a structured approach for working through them.

Treating gross human rights abuses as a legal compliance issue

Guiding Principle 23 provides guidance for businesses in three different situations: where national law is weak or silent, where national standards directly conflict with

24 Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, November 2011, para. 8.5, available at: www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

international standards, and where businesses face the risk of being complicit in gross human rights abuses. All three may be relevant when operating in conflict-affected areas.

Principle 23 clarifies that companies should respect international human rights standards wherever they operate, including seeking ways to do so when faced with conflicting requirements. Clearly, companies should not take advantage of operating contexts that provide little protection for human rights by lowering their own standards, but should instead continue to use international standards as the relevant benchmark.²⁵ Where national standards appear to be in conflict with international standards, businesses need to understand the true extent of any potential conflict through, for example, careful examination of the relevant rules, seeking clarification from government and/or challenging the provisions, learning from what peer companies have done, and testing their proposed approaches with experts and local stakeholders. Again, the Guiding Principles do not assume that ‘exit’ is the solution, but businesses that decide to enter or continue to operate in such contexts need to be able to know and show that they can operate in a way that meets their responsibility to respect human rights – or face the potential legal and reputational consequences.

Principle 23(c) provides that businesses should ‘treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate’. It has already been the subject of concrete action by individual companies – and of debate. It is therefore worth discussing in some detail. The Commentary to Principle 23 states:

Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

Principle 23 focuses on the first two scenarios described above – that is, where a company causes or contributes to an adverse impact. It is about making sure that a company has taken appropriate steps to avoid causing or contributing to gross human rights abuses – for example, when it provides weapons to public or private

²⁵ *Ibid.*, para. 14.2.

contracted security forces, that it does so in line with the Voluntary Principles on Security and Human Rights.²⁶ It is not about imposing a ‘strict liability’ approach on companies.

The Commentary to Principle 23(c) points out that particular attention should be paid to the risk of being involved with gross human rights abuses in part because it is prudent from the company’s perspective to do so, given the ‘expanding web’ referred to above.²⁷ However, the Guiding Principles are intended to be read as a coherent whole,²⁸ and Principle 23 therefore should be understood in light of the importance of the concept of severity in the Guiding Principles, and the explicit direction in Guiding Principle 24 that, where it is necessary to prioritise actions to prevent and address adverse impacts, businesses should prioritise those actions that deal with the most severe impacts (as discussed above). This emphasis on severity – taking into account the perspective of the affected individual – thus informs the guidance in Principle 23.

Principle 23 was not intended as a recommendation as to which function should necessarily take the lead in internal coordination on human rights issues; there are pros and cons to locating responsibility in any particular corporate function. As John Sherman (General Counsel of Shift and another member of Ruggie’s core team) explains:

[Guiding Principle 23(c)] does not mean that a company’s responsibility to respect all human rights should be vested in a company’s legal department and made a matter solely of legal compliance and legal risk. The challenge for a company is also about improving relationships and changing ways of doing business. [It] simply recognizes that regardless of the uncertainty of the law in particular jurisdictions, a company’s involvement in gross human rights abuses would be such an egregious calamity for the company and society that its lawyers should proactively monitor the company’s efforts to prevent its involvement in such abuse, as they would do to prevent its involvement in any serious corporate crime.²⁹

Principle 23 directs companies’ attention to ensuring that they have the appropriate processes in place to address particular operating contexts. There are some existing tools that companies cite as useful when it comes to conflict-affected areas.³⁰ In discussions occurring as part of a collaboration between Shift and the IFC

26 See Voluntary Principles on Security and Human Rights, available at: http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf.

27 The Interpretive Guide makes this clear: see Office of the High Commissioner for Human Rights, above note 24, para. 14.4.

28 See above note 1, General Principles.

29 John Sherman, ‘The UN Guiding Principles: practical implications for business lawyers’, in *In-House Defense Quarterly*, Winter 2013, p. 55, available at: <http://shiftproject.org/sites/default/files/Practical%20Implications%20for%20Business%20Lawyers.pdf>.

30 See International Alert, *Conflict-Sensitive Business Practice: Guidance for Extractives Industries*, London, March 2005, available at: www.international-alert.org/sites/default/files/publications/conflict_sensitive_business_practice_all.pdf; and UN Global Compact and Principles for Responsible Investment, *Guidance on Responsible Business in Conflict-Affected and High Risk Areas: A Resource for Companies and Investors*, 2010, available at: www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.

to develop guidance for IFC clients on human rights due diligence in high-risk contexts,³¹ leading company practice suggested a number of aspects of human rights due diligence that are likely to require particular attention, including:

- the greater need for meaningful stakeholder engagement, evidenced through more extensive and inclusive consultation, supported by strategic stakeholder mapping;
- the increased use of collaborative approaches with independent third parties not only in crafting appropriate mitigation and remediation efforts but also in the assessment phase of due diligence;
- the importance of conducting dynamic rather than event-driven due diligence through processes that are capable of capturing unpredictable as well as rapid changes in risks; and
- the critical role that senior leadership needs to play in decision-making in such settings (for example, some companies with country offices deliberately require hard decisions in such contexts to be made at regional or corporate headquarters level in order to protect local staff on the ground from retaliation).

Conclusion

With the Guiding Principles providing an authoritative blueprint for how companies should prevent and address adverse human rights impacts, and outlining the policy implications for states of their existing obligations under international human rights law, attention can now turn to implementation – including in the most challenging contexts, such as conflict-affected areas.

On the state side, it is clear that much more could – and needs – to be done by states to engage with cooperative companies, and deal with uncooperative ones, operating in conflict-affected contexts to help protect against human rights harms, particularly gross abuses. There is a range of tools at states' disposal, as identified by states themselves through the conflict workshops – with one leading example being the UK government's toolkit for its overseas missions to promote good conduct by UK companies in relation to human rights.³² The process driven by the new EU Communication on CSR, encouraging EU Member States to develop National Action Plans on implementation of the Guiding Principles, should hopefully generate some useful ideas, as should calls within the EU itself for its trade delegations and the revamped External Action Service to be better equipped to support companies on these issues – or at least be able to point them to resources when questions arise.

31 See Shift and IFC, 'Collaborating with the IFC on guidance for high-risk contexts', available at: www.shiftproject.org/project/collaborating-ifc-guidance-high-risk-contexts.

32 See The Foreign and Commonwealth Office, *Business and Human Rights Toolkit: How UK Overseas Missions can Promote Good Conduct by UK Companies*, 2009, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/35451/business-toolkit.pdf.

For responsible companies, the challenge remains ensuring that their policies and processes are robust enough to enable them to know and show that they are proactively addressing the risks of human rights abuses in some of the most challenging contexts in which they operate – conflict-affected areas. While the Guiding Principles are not intended to be a bar on operating in such situations, they do set out a baseline expectation that companies need to be able to meet if they are to continue to operate with integrity.

Responsible companies have been seeking to meet this challenge for some time, and initiatives like the IFC's work on due diligence in high-risk contexts should build on those efforts in seeking to provide greater clarity for other companies – including those who lack capacity – about the most effective approaches.

Developments in international criminal law and the case of business involvement in international crimes

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Abstract

In the wake of the mandate of the Special Representative of the United Nations Secretary-General for Business and Human Rights (SRSG), international criminal law looks set to play a role in measures towards the legal accountability of business actors involved in gross human rights and humanitarian law violations. Against the backdrop of the SRSG's now completed mandate, this article looks at three recent developments in international criminal law to consider the field's potential relevance to business actors involved in conflict. The first is the newest mode of liability recently adopted by the International Criminal Court, indirect perpetration through an organisation. The second is the aiding and abetting doctrine as applied by the Special Court for Sierra Leone in the Charles Taylor case. The third is the potential uptake of a practice of thematic prosecutions focusing on particular under-regulated issues of concern for the international community.

Keywords: international criminal law, business actors, indirect perpetration through an organisation, thematic prosecutions.



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The role of business actors¹ in the commission of international crimes and how this might be addressed through the mechanism of international criminal law has been a subject of sustained attention in recent years.² In the round-up of the mandate of Professor John Ruggie, the Special Representative of the United Nations (UN) Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG),³ attention to the particular promise of this field of international law as a key means of addressing the worst manifestations of business-related human rights abuses seems set to continue. The SRSG in his final Framework and Guiding Principles avoided recommendations towards binding obligations under international law for business entities. However, his treatment of international crimes is something of a special case. The SRSG has highlighted that those human rights abuses that also constitute international crimes are more amenable to direct and immediate judicial application to business entities.⁴ International crimes are generally understood to encompass genocide, crimes against humanity, and war crimes. Individuals who commit these crimes can be held liable under international law.⁵

It is not difficult to see why international criminal law is an appealing tool for addressing negative aspects of the relationship between business and human rights/humanitarian law, especially in conflict situations. The norms it prescribes, whilst not limited to conflict situations, are an outgrowth of international humanitarian law's concern with regulating the worst excesses of armed conflict. The peace and security paradigm has therefore been described as the 'traditional theatre of operation of international criminal law'.⁶ As economists and political scientists increasingly describe modern conflicts as intimately connected to economics, the potential relevance of the field of international criminal law to business actors becomes more pronounced.⁷ International criminal norms are

1 Throughout this paper the term 'business actors' refers to both collective business entities as legal persons, such as corporations, and business officials as natural persons.

2 See, e.g., 'Workshop', in *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 899–979; and *Journal of International Criminal Justice: Special Issue – Transnational Business and International Criminal Law*, Vol. 8, No. 3, 2010.

3 The SRSG's original mandate is set out in *Human Rights and Transnational Corporations and Other Business Enterprises*, Commission on Human Rights (CHR), UN Doc. E/CN.4/RES/2005/69, 20 April 2005. The UN Human Rights Council (HRC) extended the SRSG's mandate for a further three years in 2008. See HRC, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/RES/8/7, 18 June 2008.

4 See 'The UN SRSG and the special case of international crimes', below.

5 On definitional debates in international criminal law as to what constitutes an international crime, see Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edition, Cambridge University Press, New York, 2010, pp. 3–12.

6 Larissa van den Herik and Daniella Dam-de Jong, 'Revitalizing the antique war crime of pillage: the potential and pitfalls of using international criminal law to address illegal resource exploitation during armed conflict', in *Criminal Law Forum*, Vol. 15, 2011, p. 245.

7 *Ibid.*, pp. 238–250.

also often correlated to gross violations of human rights.⁸ There is a higher propensity for corporate violations of human rights of a more severe nature to take place in conflict situations.⁹ Further, unlike other fields of international law, international criminal law is seen to have functional enforcement mechanisms directed at individuals, both in the public and private spheres, and not at states. It is therefore commonly resorted to as a means of fulfilling gaps in the enforcement of international human rights law.¹⁰ In the context of business and human rights, these gaps include challenges for host states in regulating foreign corporations operating in their territory, for example due to dependence on foreign direct investment or due to unequal technical expertise and bargaining power.¹¹

At its inception at Nuremberg, international criminal law addressed the role of business actors in the commission of international crimes.¹² Since that time, prosecutors of international courts and tribunals have expressed a willingness to consider actions by the private and business sector in conflict areas in their

- 8 See, e.g., the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (ICJ Expert Panel), *Corporate Complicity and Legal Accountability*, Vol. 2, International Commission of Jurists, Geneva, 2008, pp. 2–4.
- 9 See, e.g., HRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5, 7 April 2008 (hereinafter the Framework), paras. 47–49; HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/31, 21 March 2011 (hereinafter Guiding Principles), Principle 7, pp. 10–11. See also HRC, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/32, 27 May 2011. While the Guiding Principles refer only to the inability of the host state to protect human rights in conflict contexts due to a lack of effective control, international criminal law teaches us that another factor often at play is an unwillingness on the part of host states to protect against international crimes due to the state's own involvement in such crimes.
- 10 L. van den Herik and D. Dam-de Jong, above note 6, p. 246. For an analysis of international criminal law as an enforcement tool for human rights law in the context of corporate conduct, see Larissa van den Herik and Jernej Letnar Cernic, 'Regulating corporations under international law: from human rights to international criminal law and back again', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 725–743.
- 11 See, e.g., Stephen R. Ratner, 'Corporations and human rights: a theory of legal responsibility', in *The Yale Law Journal*, Vol. 111, 2001, pp. 461–473; Sarah Joseph, 'Taming the leviathans: multinational enterprises and human rights', in *Netherlands International Law Review*, Vol. 46, No. 2, 1999, pp. 176–181.
- 12 Most significant were the trials of German industrialists before the US Military Tribunal sitting at Nuremberg under Control Council Order 10: *US v. Friedrich Flick et al.*, Opinion and Judgement of 22 December 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. VI, 1952, pp. 1187–1223; *US v. Krauch et al.*, Judgement of 29 July 1948, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. VIII, 1952, pp. 1081–1210; *US v. Alfried Krupp et al.*, Judgement of 31 July 1948, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IX, 1950, pp. 1327–1452. For a summary of the trials of German industrialists in the post-war period see Matthew Lippman, 'War crimes trials of German industrialists: the "other Schindlers"', in *Temple International and Comparative Law Journal*, Vol. 9, No. 2, 1995, pp. 173–267. For a detailed analysis of the legal theories considered for the industrialist trials, see Jonathan Bush, 'The prehistory of corporations and conspiracy in international criminal law: what Nuremberg really said', in *Columbia Law Review*, Vol. 109, No. 5, 2009, pp. 1094–1240.

investigations of international crimes.¹³ Although such intent has yet to be reflected in any formal indictments issued, statements of this kind nonetheless indicate that the role of business is of interest to powerful actors within modern international criminal institutions. All of these factors render international criminal law an appealing tool for addressing phenomena of business involvement in human rights and humanitarian law violations that also constitute international crimes.

There is a wide variety of ways in which business actors can be implicated in international crimes. These can include: the role of private military companies in the torture of prisoners within their custody; the involvement of transnational corporations in the extractive industries in abuses committed by security partners such as forced displacement in order to access land for mining or as retaliatory violence against threats to mining operations; the use of slave labour within business supply chains; the funding and supply of armed conflict through business networks; and the involvement of businesses in the plunder of goods and natural resources.¹⁴ Each is meritorious of detailed study in its own right. This paper, however, speaks in a more generalised way to the appeal of international criminal law for addressing the role of business actors, individual or corporate, in the commission of international crimes where such involvement is of a sufficiently proximate kind. For this reason the term ‘business case’ is used to denote scenarios involving corporations or private individuals acting in a business capacity and involved through that business in the commission of international crimes.

This paper aims to contribute to the growing literature on the prospective role of international criminal law as a tool to address business violations of human rights and humanitarian law in conflict situations. To do so, the paper is structured as follows. The first part considers the future significance of international criminal law to the question of business accountability for human rights and humanitarian law abuses in the wake of the SRSG’s mandate. It argues that in light of the SRSG’s conclusions, international criminal law is likely to continue to be turned to as a principal mechanism for addressing the most egregious examples of business involvement in human rights and humanitarian law abuses. Given this anticipated continued significance of the field, the second part of the paper turns to the assessment of two new developments in international criminal law. The first is the newest mode of responsibility in international criminal jurisprudence, indirect perpetration through an organisation. This part sets out some preliminary reflections on whether this form of criminal responsibility might have any bearing upon prosecutions of business officials for international crimes. It also comments on

13 For example, on the prosecutorial announcements and policies of the Office of the Prosecutor of the International Criminal Court with respect to business actors who finance or support international crimes, see Reinhold Gallmetzer, ‘Prosecuting persons doing business with armed groups in conflict areas: the strategy of the Office of the Prosecutor of the International Criminal Court’, in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 947–956.

14 For a typology of fact scenarios that place companies within legal risk zones with respect to complicity in international crimes, see ICJ Expert Panel, above note 8, pp. 37–43. See also Wolfgang Kaleck and Miriam Saage-Maaß, ‘Corporate accountability for human rights violations amounting to international crimes: the status quo and its challenges’, in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 700–709.

the aiding and abetting doctrine as applied by the Special Court for Sierra Leone in the *Charles Taylor* case. The second recent development considered in the paper is the practice of ‘thematic prosecutions’. This part considers how developments in this direction bode for the likelihood that business actors might become a focus in future international criminal indictments.

The UN SRSG and the special case of international crimes

The SRSG’s mandate: achievements and challenges

From 2005 until the completion of the SRSG’s mandate in June 2011, international discourse on the subject of business and human rights has been focused around the work of the SRSG. From early in his mandate, the SRSG confirmed the existence of a governance gap as it pertains to the conduct of business entities operating in the global economy.¹⁵ The idea of a ‘governance gap’ is the claim that there is a misalignment between the capacity of transnational corporations to contribute to serious human rights abuses and the governance capacity of governments to respond to those harms.¹⁶ The result of this regulatory gap is a permissive environment for corporate human rights abuses.¹⁷ The problem is particularly acute in the context of businesses operating in developing countries and in conflict zones.¹⁸ As a general rule, it is in conflict zones where the most egregious human rights violations can occur and where states hosting foreign business activities tend to be least capable of regulating the potentially negative impacts of those operations.¹⁹

In response to the governance gap problem and following extensive stakeholder consultations, the SRSG promoted the Protect, Respect and Remedy Framework as the overarching policy guide for future thinking and action on business and human rights at an international level.²⁰ The three pillars of the Framework refer to the state duty to protect against human rights abuses by third parties; the corporate responsibility to respect human rights through due diligence; and the right of victims of corporate-related human rights abuses to have access to effective remedies. Both the Framework and the SRSG’s subsequent Guiding Principles,²¹ which are intended to provide guidance as to how the Framework shall

15 HRC, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/4/035, 9 February 2007, (hereinafter the 2007 Report), paras. 1–4 and 82. On the dynamics of the problem see the Framework, above note 9, paras. 3–4 and 11–16.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*, para. 36 (on developing countries) and paras. 47–49 (on conflict zones).

19 *Ibid.*

20 *Ibid.*

21 The Guiding Principles, above note 9.

be operationalised, have been endorsed by the UN Human Rights Council²² and set the future agenda for UN activity regarding business and human rights.²³

The Framework and Guiding Principles have been lauded for a number of successes. These include effectively engaging states and companies in a fruitful dialogue²⁴ and the corporate uptake of policies aimed at ensuring corporate due diligence.²⁵ However, one point of criticism has been the failure of the SRSG to incorporate any explicit role for binding international human rights obligations for business actors.²⁶ Early in his tenure, the SRSG rejected the draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights as a mechanism going forward.²⁷ The Norms had preceded the SRSG as a framework for dealing with issues related to business and human rights. They were intended to direct progress towards treaty-based, legally binding human rights obligations directed at corporations via the domestic laws of states in order to address the lacunae in law.²⁸

In contrast to the Norms, the notion of corporate responsibility with respect to human rights as conceived within the Framework is not equivalent to corporate legal obligations. Rather, the Framework ‘speaks of the corporate responsibility to respect all human rights as part of a corporation’s social license to operate even when not mandated by law’.²⁹ In other words, it defines the recommended conduct of corporations as dictated by the court of public opinion, rather than actual courts, although some conduct will have legal ramifications. The Framework has hence been criticised for continuing the current status quo of regulation via voluntarism³⁰ and therefore as unlikely to create sufficient pressure

22 HRC, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Res. 8/7, 18 June 2008; HRC, *Human Rights and Transnational Corporations and Other Business Enterprises*, Res. 17/4, UN Doc. A/HRC/RES/17/4, 6 July 2011.

23 As a follow-up to the SRSG’s mandate, the HRC has established a Working Group on business and human rights whose work is largely directed towards the implementation of the Guiding Principles. See *ibid.*, para. 6.

24 Penelope Simons, ‘International law’s invisible hand and the future of corporate accountability for violations of human rights’, in *Journal of Human Rights and the Environment*, Vol. 3, No. 1, 2012, p. 9.

25 On the uptake of the Guiding Principles, see HRC, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/20/29, 10 April 2012, paras. 22–40.

26 P. Simons, above note 24, pp. 9–10.

27 See, e.g., the Framework, above note 9, paras. 6 and 51–53 (rejecting the Norms’ attempt to identify a limited set of rights for which corporations have responsibilities) and paras. 66–72 (rejecting the Norms’ reliance on spheres of influence).

28 For an outline of the Norms, their relationship to the work of the SRSG and the political debates that they have engendered, see David Kinley, Justine Nolan, and Natalie Zerial, ‘The politics of corporate social responsibility: reflections on the United Nations Human Rights Norms for Corporations’, in *Company and Securities Law Journal*, Vol. 25, No. 1, 2007, pp. 30–42.

29 Sara L. Seck, ‘Collective responsibility and transnational corporate conduct’, in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, p. 141.

30 See, e.g., Human Rights Watch, ‘UN Human Rights Council: weak stance on business standards’, news release, 16 June 2011, available at: www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards (last visited 30 May 2012).

for corporate compliance with human rights where there are compelling economic reasons for businesses to cut corners.

For some commentators, such as Surya Deva, one of the challenges resulting from the SRSG's approach is that businesses are essentially directed elsewhere to determine the precise contours of legal obligations vis-à-vis societal expectation of conduct.³¹ By framing corporate responsibility broadly and without elaborating legal compliance issues for businesses operating, for example, in conflict areas, the Guiding Principles fail to guide business actors in specific terms as to how they must behave.³² For example, Guiding Principle 23 as it relates to companies operating in conflict zones recommends that companies should treat risks of being complicit in gross human rights abuses committed by other actors (such as security partners) as legal compliance issues. However, the Principle fails to specify what conduct would constitute complicity leading to legal liability.³³ Instead, the commentary of the Guiding Principles refers to international criminal law notions of complicity and the growing web of corporate liability in domestic courts for international crimes to explain the legal compliance ramifications for businesses operating in conflict zones.³⁴

In light of the primarily policy-based rather than law-based approach of the SRSG in his final framing documents, it is interesting to note the SRSG's differentiation of international crimes. From early in his work, the SRSG noted the particular legal risks for business actors complicit in international crimes. Whilst not explicitly stating that corporations are directly bound by the norms of international criminal law, the SRSG has gone as close as otherwise possible to making that case. In his 2007 report, the SRSG noted that 'long-standing doctrinal arguments over whether corporations could be "subjects" of international law . . . are yielding to new realities'³⁵ and that 'the absence of an international accountability mechanism . . . does not preclude the emergence of corporate responsibility today'.³⁶ Focusing in particular upon two parallel developments, the SRSG highlighted that the 'simple laws of probability alone suggest that corporations will be subject to increased liability for international crimes in the future'.³⁷ The first of these two developments is the growing international criminal jurisprudence as to forms of responsibility according to which individuals can be held liable for international crimes. This jurisprudence serves as guidance as to when business actors, individual or corporate, can be complicit in international crimes. The second development is the growing number of states with jurisdiction within their national courts to try corporations, as well as individuals, where such persons are involved in international crimes. This concerns in particular the States Parties to the Rome

31 Surya Deva, 'Guiding Principles on Business and Human Rights: implications for companies', in *European Company Law*, Vol. 9, No. 2, 2012, pp. 101–109.

32 *Ibid.*

33 *Ibid.*, p. 107.

34 Guiding Principles, above note 9, commentaries on Principles 17 and 23.

35 The 2007 Report, above note 15, para. 20.

36 *Ibid.*, para. 21.

37 *Ibid.*, para. 27.

Statute of the International Criminal Court (ICC). According to the SRSG, the interplay between these two developments creates ‘an expanding web of potential corporate liability for international crimes’.³⁸ Indeed, the SRSG has described the domestic implementation of Rome Statute crimes and the extension of those laws to corporate entities as ‘[b]y far the most consequential legal development’ of recent times with respect to addressing the prevailing governance gaps.³⁹ A number of commentators have therefore highlighted the special case of international crimes in the SRSG’s work, identifying these norms as an exception to the SRSG’s reluctance to articulate directly binding human rights norms on corporations under international law.⁴⁰

What is apparent from the SRSG’s work is that, more so than in other areas of human rights, business actors should anticipate that they might be prosecuted or litigated where they breach international criminal norms. Currently, this might happen either through domestic courts applying international criminal law against the business entity itself or in domestic courts or international tribunals against individual business officials. This is particularly pertinent to businesses operating in conflict zones where the risk of being caught up in international crimes is greater. The International Commission of Jurists (ICJ) has issued a similar warning. The ICJ’s Expert Panel on Corporate Complicity in International Crimes found that company lawyers and compliance officers have tended not to recognise the relevance of international criminal law to business operations.⁴¹ Nonetheless, it cautioned that ‘as the field of international criminal law develops and as companies operate in new contexts, international criminal law and its implementation in domestic and international jurisdictions will become evermore relevant to companies’.⁴²

The limitations of international criminal law for capturing business conduct

There is a risk of overemphasising the potential of international criminal law to bring about human rights compliance among businesses and to serve as an

38 *Ibid.*, para. 22. See also paras. 19–32 on ‘Corporate responsibility and accountability for international crimes’. See also the Framework, above note 9, para. 20.

39 The 2007 Report, above note 15, para. 84.

40 See, e.g., S. L. Seck, above note 29, pp. 140–141, 150–151, and 157; P. Simons, above note 24, pp. 9–10; International Law Association Committee on Non-State Actors, *First Report of the Committee: Non-State Actors in International Law: Aims, Approach and Scope of the Project and Legal Issues*, The Hague, 2010, p. 17, available at: www.ila-hq.org/en/committees/index.cfm/cid/1023 (last visited 30 May 2012) (identifying as an exception in the SRSG’s work the violation of *jus cogens* norms). It is worth noting that the SRSG has recently clarified his findings that there is strong evidence to support the idea that corporations may be liable for international crimes. This comes in direct response to claims that his work resolves that corporations do not have binding obligations under international law. See Professor John Ruggie, Professor Philip Alston, and the Global Justice Clinic at NYU School of Law, ‘Brief *Amici Curiae* of Former Special Representative for Business and Human Rights, Professor John Ruggie; Professor Philip Alston; and the Global Justice Clinic at NYU School of Law in Support of Neither Party’, in *Esther Kiobel v. Royal Dutch Petroleum*, No. 10-1491, 12 June 2012.

41 ICJ Expert Panel, above note 8, p. 5.

42 *Ibid.*

accountability mechanism for corporate human rights abuses. This is not only due to the current lack of prosecutorial practice directing international criminal investigations and indictments towards the business case;⁴³ it is also because criminal principles necessarily address only contributions of a sufficiently proximate kind to international crimes. Thus, only some business conduct will be sufficiently related to the commission of human rights or humanitarian law violations, and only certain human rights and humanitarian law violations constitute international crimes. International criminal law covers but a small segment of the field of concern.⁴⁴ For these (and other) reasons, there is value in the recommendations of the SRSG with respect to businesses operating in conflict zones that will 'embrace multiple regulatory sites'.⁴⁵ For example, one of the SRSG's regulatory recommendations, pertinent in particular to transnational corporations directly investing in developing states, is for states to exclude clauses from bilateral investment treaties that are capable of constraining the state from responding to human rights and human security risks created by foreign business operations.⁴⁶ Another recommendation, again relevant to transnational foreign direct investment projects, suggests that home states withhold or withdraw the support that they usually provide through export credit agencies to businesses that fail to engage in conflict-sensitive conduct.⁴⁷

Another problem for over-reliance on extant developments in international criminal law is that there may be grounds for cynicism with respect to the actual application of domestic law to corporations involved in international crimes in the territory of another state. For example, the implementation of domestic international crime laws and their extension to corporate legal persons has been to a large extent 'an unanticipated by-product' of states strengthening their legal regimes for individuals.⁴⁸ It is uncertain whether there will be the political will necessary to apply these laws to businesses as legal entities, particularly in relation to events beyond the boundaries of the prospective adjudicative state.⁴⁹ It is telling to look at the recent fate of the US Alien Tort Statute (ATS). To date, the ATS has been the most utilised law by victims of corporate human rights violations as a civil law

43 On the general exclusion of business actors from prosecutorial policy since Nuremberg, see William Schabas, 'War economies, economic actors and international criminal law', in Karen Ballentine and Heiko Nitzschke (eds), *Profiting From Peace: Managing the Resource Dimensions of Civil War*, Lynne Rienner Publishers, Boulder, 2005, p. 440; Florian Jessberger, 'On the origins of individual criminal responsibility under international law for business activity: IG Farben on trial', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, p. 801.

44 Making a similar point, see L. Van Den Herik and D. Dam-de Jong, above note 6, pp. 247–249.

45 See, e.g., S. L. Seck, above note 29, p. 158, referring to the work of Mark Drumbl. See Mark A. Drumbl, 'Collective responsibility and postconflict justice', in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, pp. 23–60.

46 See, e.g., the Framework, above note 9, paras. 33–42; Guiding Principles, above note 9, Principle 9, p. 12.

47 See, e.g., Guiding Principles, above note 9, Principle 4, pp. 9–10, and Principle 7, pp. 10–11. A criticism of both recommendations, however, is that they fail to address the root conditions that have undermined moves in this direction to date.

48 The 2007 Report, above note 15, para. 84.

49 Joanna Kyriakakis, 'Australian prosecution of corporations for international crimes: the potential of the Commonwealth Criminal Code', in *Journal of International Criminal Justice*, Vol. 5, No. 4, 2007, pp. 809–826.

remedy to what are essentially international criminal norms applied to the business dimensions of conflict.⁵⁰ The case of *Kiobel* recently heard by the Supreme Court of the United States addressed the question of whether the ATS applies to corporate defendants (as opposed to natural persons), as well as whether it operates extraterritorially at all.⁵¹ While the Court did not decide upon the former issue, it determined that a strong presumption exists against the application of the ATS to events in the territory of other states, unless the claims ‘touch and concern the territory of the United States . . . with sufficient force to displace the presumption’.⁵² In doing so, the Court significantly limited the scope of the ATS as a vehicle for human rights claims related to the conduct of corporations in the global economy. Court concern as to the application of the ATS to corporate conduct outside of the United States where there are limited links to the United States reflects the pressures that have been brought to bear by other states, as well as businesses, through *amicus* interventions and otherwise in ATS litigations of that type to date.⁵³ The uncertainty as to whether individual states will use their domestic ‘international crimes’ laws to address corporate actors, and the potential response of other states should they do so, put in doubt the SRS’s faith in unilateral state-centric responses to the phenomenon of business violations of international criminal law.⁵⁴

Despite such sobering factors, in light of the work conducted by the SRS, we can anticipate a continued expectation that international criminal law should function to further the human rights and humanitarian law compliance of business actors in conflict zones and act as a mechanism of accountability where they fail to do so.

50 For a discussion on the relationship between the ATS and the norms of international criminal law as applied to corporations, see Katherine Gallagher, ‘Civil litigation and transnational business: an Alien Tort Statute primer’, in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 745–767.

51 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 2013. The decision under appeal was *Kiobel v. Royal Dutch Petroleum Shell*, 621 F 3d 111 (Second Circuit), 2010. For critical reviews of the Second Circuit’s decision in *Kiobel*, see Odette Murray, David Kinley, and Chip Pitts, ‘Exaggerated rumours of the death of an alien tort? Corporations, human rights and the remarkable case of *Kiobel*’, in *Melbourne Journal of International Law*, Vol. 12, No. 1, 2011, pp. 57–94; Julian G. Ku, ‘The curious case of corporate liability under the Alien Tort Statute: a flawed system of judicial lawmaking’, in *Virginia Journal of International Law*, Vol. 51, No. 2, 2010, pp. 353–396.

52 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (Roberts CJ), 2013. It is not clear what circumstances might meet this threshold, but the presence of a foreign corporation in the United States is not sufficient.

53 For example, the governments of Germany, the United Kingdom, and the Netherlands have all filed *amicus* briefs in the current *Kiobel* litigation, arguing that ATS cases involving extraterritorial conduct and limited links to the United States violate state sovereignty. Companies submitting briefs urging a narrow reading of the ATS in the case include Rio Tinto, BP, Chevron, and Coca-Cola. A full list of *amicus* briefs in the case can be accessed via the Supreme Court of the United States Blog; see ‘*Kiobel v. Royal Dutch Petroleum*’, available at: www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/?wpm_switcher=desktop (last visited 7 January 2013). See also, the comments of Chief Justice Roberts listing the objections of other states to extraterritorial applications of the ATS as evidence of the diplomatic strife such claims engender and favouring a strong presumption against the extraterritoriality of the ATS: *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669.

54 On challenges to the domestic prosecution of corporations for international crimes and the likely encouraging effect of action at an international level, see Joanna Kyriakakis, ‘Prosecuting corporations for international crimes: the role for domestic criminal law’, in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, pp. 108–137.

The following parts of the paper now turn to two recent developments in international criminal law. First, the paper looks at the newest mode of liability being heralded at the ICC, indirect perpetration through an organisation. Second, the paper outlines the potential relevance of thematic prosecutions in future international criminal practice. Both parts consider the bearing, if any, that these developments might have on the promise of international criminal law with respect to accounting for businesses involved in international crimes.

Forms of individual criminal responsibility and the business case

Given the problem of limited fora for prosecuting corporations as legal entities and the underlying premise of individual responsibility in international criminal law, attention to the business case in international criminal law literature has often been directed at the utility of extant forms of individual responsibility to the prosecution of business officials for international crimes.⁵⁵ This issue is sometimes discussed not only in terms of the prosecution of individuals but also for the purpose of establishing guiding principles that could influence domestic actions taken directly against legal entities themselves.⁵⁶

There are numerous works on the subject of how various forms of individual criminal responsibility might be applied to the prosecution of individuals acting in a business capacity, including on the notions of joint criminal enterprise, command responsibility, and aiding and abetting.⁵⁷ Rather than rehearse this vast literature, this section instead looks at two particular aspects: on the one hand, the new form of liability that has emerged on the international stage, indirect perpetration through an organisation, and its relevance to the business case due to its novelty; and on the other hand, the use of aiding and abetting liability in the *Charles Taylor* case by the Special Court for Sierra Leone,⁵⁸ to capture individual criminal conduct through business-like networks. While he is not properly characterised as a business person, the case of Charles Taylor is interesting as it

55 There are a number of excellent analyses of the application of forms of criminal responsibility to the business case. See Hans Vest, 'Business leaders and the modes of individual criminal responsibility under international law', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 851–872; Norman Farrell, 'Attributing criminal liability to corporate actors: some lessons from the international tribunals', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 873–894; Christoph Burchard, 'Ancillary and neutral business contributions to "corporate-political core crime": initial enquiries concerning the Rome Statute', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 934–945; Kyle Rex Jacobson, 'Doing business with the Devil: the challenges of prosecuting corporate officials whose business transactions facilitate war crimes and crimes against humanity', in *The Air Force Law Review*, Vol. 56, 2005, pp. 167–231; Chia Lehnardt, 'Individual liability of private military personnel under international criminal law', in *European Journal of International Law*, Vol. 19, No. 5, 2008, pp. 1015–1034; ICJ Expert Panel, above note 8, pp. 11–36. For some of the limitations of responding to corporate crimes by prosecuting individuals within corporations, see Kyriakakis, above note 49, pp. 823–826.

56 See, e.g., the 2007 Report, above note 15, para. 23; N. Farrell, above note 55, pp. 874–876.

57 See references in note 55, above.

58 SCSL, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgement (Trial Chamber II), 18 May 2012.

emphasises the business-like aspects of Taylor's involvement in the atrocities committed during the Sierra Leonean conflict.

Indirect perpetration through an organisation

One of the newest developments in international criminal jurisprudence with respect to forms of responsibility has been the adoption by the ICC of the notion of indirect perpetration through an organisation.⁵⁹ According to the idea of indirect perpetration through an organisation, a person can be liable as a direct perpetrator of a crime in cases where, despite not being physically present in the actual commission of the crime, they use their control over an organisation in order to ensure that the crime will occur.⁶⁰ It is based on a 'control of crime' theory of responsibility developed primarily in German legal doctrine.⁶¹

The notion of indirect perpetration through an organisation is derived from Article 25(3)(a) of the Rome Statute. Article 25(3)(a) states that a person will be criminally responsible for a Rome Statute crime where such a person 'commits the crime, whether as an individual, jointly with another *or through another person*, regardless of whether that other person is criminally responsible'.⁶² This has been interpreted to include controlling the commission of a crime by using an organisation as the vehicle through which the crime is committed.⁶³

The German control of crime theory, on which the ICC's indirect perpetration through an organisation is based, is a notion of liability developed in

59 ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, paras. 494–518; ICC, *Prosecutor v. Omar Al-Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Application for an Arrest Warrant (Pre-Trial Chamber I), 4 March 2009, paras. 213–216. Some commentators have suggested that this mode of liability looks set to be a leading instrument in the ICC in ascribing liability to military and political leaders; see, e.g., Gerhard Werle and Boris Burghardt, 'Indirect perpetration: a perfect fit for international prosecution of armchair killers?', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, p. 85.

60 For detailed analysis of this form of liability and its origins and application at the ICC, see the Special Symposium in the *Journal of International Criminal Justice*, Vol. 9, 2011, pp. 85–226; Neha Jain, 'The control theory of perpetration in international criminal law', in *Chicago Journal of International Law*, Vol. 12, No. 1, 2011, pp. 159–200; Florian Jessberger and Julia Geneuss, 'On the application of a theory of indirect perpetration in *Al Bashir*', in *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 853–869; Hector Olasolo, *The Criminal Responsibility of Political and Military Leaders as Principles to International Crimes*, Hart Publishers, Oxford, 2009, pp. 116–134 and 302–330; Harmen G. van der Wilt, 'The continuous quest for proper modes of criminal responsibility', in *Journal of International Criminal Justice*, Vol. 7, No. 2, 2009, pp. 307–314.

61 Indirect perpetration through an organisation was originally conceived by German legal theorist Claus Roxin with the particular experience of Nazi state-orchestrated crime in mind: see Thomas Weigend, 'Perpetration through an organisation: the unexpected career of a German legal concept', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, pp. 94–97; F. Jessberger and J. Geneuss, above note 60, pp. 859–862.

62 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), Article 25(3)(a) (emphasis added) (hereinafter Rome Statute).

63 See case references contained in above note 59. For a rejection of the idea that indirect perpetration through an organisation can be derived from the language of Article 25(3)(a), see ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12, Judgement Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (Trial Chamber II), 18 December 2012.

order to capture the ‘armchair’ perpetrator as a principal rather than an accessory to a crime.⁶⁴ One of the core challenges in international criminal law has been to articulate forms of responsibility that respond to crimes organised and carried out in complex institutional and collective contexts in a way that appropriately assigns legal and moral culpability across the hierarchies of people involved in the crimes. Directly converse to most domestic crimes, the worst offenders in international criminal law tend to be those far removed from the messy business of pulling the trigger. Indirect perpetration through an organisation is a form of liability intended to describe those armchair masterminds not as the ones who ‘simply’ ordered, or planned, or aided the crime but as its *direct* perpetrators. Despite the name, it is a means by which the Court attributes direct liability on the perpetrator as a principal to the crime regardless of whether they are physically removed from the direct commission of the offence. Indirect perpetration is hence based upon the idea that principals and accessories are normatively different in terms of moral blameworthiness, an idea that has been challenged.⁶⁵ Through its adoption at the ICC, the Court has therefore ostensibly taken an interpretation that the various Article 25(3) forms of responsibility reflect a hierarchy of moral blameworthiness.⁶⁶

Indirect perpetration through an organisation, while known in some domestic legal systems, is novel in international jurisprudence. Previously the notion of joint criminal enterprise had been the principal vehicle for allocating responsibility to those individuals who, in collective contexts, make decisions at the highest level leading to the commission of international crimes.⁶⁷ However, while joint criminal enterprise was utilised significantly in the ad hoc tribunals, the ICC has rejected this doctrine in its early jurisprudence, adopting instead complex notions of co-perpetration and indirect perpetration based on the concept of control of the crime.⁶⁸

Putting aside the issue of a hierarchy of blameworthiness, the inclusion of the notion of committing a crime ‘through another person’ in Article 25(3)(a) led some commentators early on in the life of the Court to suggest that this form of liability may have a particular value to the prosecution of business officials who commit crimes through the instrumentality of a business organisation.⁶⁹ Indeed, at

64 G. Werle and B. Burghardt, above note 59, pp. 85–89.

65 See, e.g., Concurring Opinion of Judge Christine Van den Wyngaert, above note 63, paras. 24–26.

66 Gerhard Werle, ‘Individual criminal responsibility in Article 25 ICC Statute’, in *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 953–975. Confirming the adoption by the ICC of a hierarchical reading of Article 25, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement (Trial Chamber I), 14 March 2012, paras. 996–999. Dissenting on this issue, see the Separate Opinion of Judge Fulford, paras. 6–12. See also Concurring Opinion of Judge Christine Van den Wyngaert, above note 63, paras. 22–30.

67 For a description of joint criminal enterprise and a comparison of its use in the International Criminal Tribunal for the Former Yugoslavia (ICTY) with the model of indirect perpetration that has been adopted by the ICC, see Stefano Manacorda and Chantal Meloni, ‘Indirect perpetration versus joint criminal enterprise: concurring approaches in the practice of international criminal law’, in *Journal of International Criminal Justice*, Vol. 9, 2011, pp. 159–178.

68 *Ibid.*, p. 163.

69 See, e.g., Andrew Clapham, ‘The complexity of international criminal law: looking beyond individual responsibility to the responsibility of organizations, corporations and states’, in Ramesh Chandra Thakur

first blush the notion does appear to resonate with respect to the business case given the focus upon organisational structures as vehicles for wrongdoing. So at a descriptive level, for example, the American Military Tribunal sitting at Nuremberg described the wrongful conduct of leading industrialists during World War II as the commission of crimes *through the instrumentality* of their respective corporate concerns.⁷⁰ This language is evocative of a similar idea to indirect perpetration through an organisation.⁷¹ Further, notions underlying indirect perpetration through an organisation are similar to ideas found in corporate crime literature. For example, as described by Osiel, one of the strengths of the notion of indirect perpetration through an organisation is in the recognition of how those in control of organisational resources can harness those resources to perpetrate mass atrocities through willing subordinates.⁷² Likewise, crime in corporate contexts can be differentiated from other forms of domestic crime on the basis that the offences tend to involve directing large-scale resources towards certain goals. It is this harnessing of resources (human and otherwise) that means corporate crime can often tend toward far greater levels of community harm than other forms of crime.

Indirect perpetration through an organisation is also concerned with organisations that to some extent develop a life independent of the changing existence of their members.⁷³ A similar idea has been described by Fisse and Braithwaite in their critiques of attempts to individualise accountability in the context of corporate crimes. Fisse and Braithwaite have shown how in various ways business corporations transcend the individuals who may pass through the company without affecting change.⁷⁴ Finally, the centrality of ‘control’ to the notion of indirect perpetration through an organisation might be said to constitute the means by which the organisational veil is pierced in order to find the individual perpetrator behind the organisational structure. This is notionally similar to the centrality of control as the mechanism for piercing the corporate veil in order to identify the liable parent company in a corporate group.⁷⁵

Despite such notional similarities, in its strict form indirect perpetration through an organisation does not easily transpose to crimes committed in corporate contexts. Indirect perpetration through an organisation was originally conceived by

and Peter Malcontent (eds), *Sovereign Impunity to International Accountability: the Search for Justice in a World of States*, United Nations Press, Tokyo, 2004, p. 239.

70 See, e.g., *US v. Krauch et al.*, above note 12, pp. 1096, 1108, and 1297. However, at times the Tribunal also describes the organisation as acting through the individual defendants: see pp. 1147 and 1152.

71 It should be noted that the precise mechanisation of the industrialists’ use of the corporate instrument and how this related to their forms of responsibility is not clearly articulated by the US Military Tribunal in the industrialist cases. However, it did not involve the kinds of considerations that are central to the doctrine of indirect perpetration through an organisation. For an analysis of the elements of liability adopted in the industrialist cases see K. R. Jacobson, above note 55, pp. 177–195 and 210–212.

72 Mark Osiel, *Making Sense of Mass Atrocity*, Cambridge University Press, Cambridge, 2009, p. 95, as described by N. Jain, above note 60, p. 193.

73 N. Jain, above note 60, p. 171; H. Olasolo, above note 60, pp. 119–120.

74 Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press, Cambridge, 1993, pp. 17–58.

75 For a critical analysis of the bases upon which the corporate veil can be pierced, see Peter Muchlinski, ‘Limited liability and multinational enterprises: a case for reform?’, in *Cambridge Journal of Economics*, Vol. 34, 2010, pp. 915–928.

German legal theorist Claus Roxin with the particular experience of Nazi state-orchestrated crime in mind.⁷⁶ According to Roxin's pure theory of *Organisationsherrschaft*, a person is responsible as a principal to a criminal act where they have at their disposal an organised power apparatus through which they can accomplish the offences in question, without having to leave the realisation of their crime to the risk of a change of heart or unexpected action by the direct perpetrator of the physical act.⁷⁷ To show this, there are three main elements in Roxin's theory that must be satisfied: (1) the existence of a hierarchically vertically structured organisation, (2) the fungibility of the direct offender, and (3) that the organisation is detached from law.⁷⁸ Each of these elements, which are interrelated and are directed ultimately towards the necessary conditions of control, poses challenges to the application of the notion to the business context.

First, Olasolo has argued that a rigid hierarchical organisational structure that enables maximised control is less likely to be found in corporate contexts than, for example, in military ones. This is because in the former the division of tasks is based around maximising productivity rather than formalising a culture of obedience to superiors.⁷⁹ Opacity in organisational lines in corporate structures might also undermine attempts to identify clear hierarchical lines of organisation.⁸⁰ We might also consider whether the necessary degree of control can be said to reside with, for example, members of the board of directors of a company or whether such control is diluted through the shareholder model. Looking more broadly at the context of transnational corporate groups, transnational corporations are increasingly organised horizontally on the basis of contractual relationships between formally independent business entities rather than hierarchically and vertically in terms of equity share ownership. This may make a rigid application of the hierarchy criterion harder to satisfy in such contexts. However, it is worth noting that even in such horizontal arrangements, control might still be evident through economic dependency across corporate groups.⁸¹

Second, fungibility refers to the idea that an indirect perpetrator can be assured automatic compliance with their will as directed through control of the organisation because those persons committing the actual crimes are essentially replaceable. In other words, if one person refuses to perform the criminal act, the indirect perpetrator can be assured that others will take their place. This condition can be evidenced by the sheer volume of those at the lower echelons of an organisation, as well as the nature of the organisation being such that compliance is assured (see conditions (1) and (3) above).⁸² In the context of a company, as

76 T. Weigend, above note 61, pp. 94–97; F. Jessberger and J. Geneuss, above note 60, pp. 859–862.

77 N. Jain, above note 60, p. 171.

78 *Ibid.*, pp. 173–178.

79 H. Olasolo, above note 60, p. 134. Note, however, that private military companies are likely to have similar, if not identical, organisational qualities to other military collectives: see C. Lehnardt, above note 54, p. 1026.

80 B. Fisse and D. Braithwaite, above note 74, pp. 36–41.

81 Graf-Peter Calliess, 'Introduction: transnational corporations revisited', in *Indiana Journal of Global Legal Studies*, Vol. 18, No. 2, 2011, pp. 604–605.

82 N. Jain, above note 60, pp. 174–177.

opposed to a state, military, or mafia-like organisation, the (potentially) more limited number of members at the lower levels,⁸³ as well as the potential specialty skills required of those persons to undertake their role, may make the fungibility of such persons difficult to evidence.

The third condition in Roxin's theory, detachedness from law, explicitly precludes the business case. For Roxin, the necessary degree of organisational control in the hands of the indirect perpetrator(s) 'can only be present if the apparatus as a whole is operating outside the legal order'.⁸⁴ As described by Jain, where an organisation acknowledges a legal order independent of itself, it cannot be said that the requisite degree of control exists because law ranks higher and this negates the inevitability that those at the lower end of the organisational hierarchy will act in compliance with the perpetrator's will.⁸⁵ In other words, there is not a sufficient degree of act-domination (meaning control over the perpetrator's acts) by the indirect perpetrator over the criminal act where the organisation in question operates within a polity based on the rule of law.⁸⁶ By their very nature, business entities are created and defined by operational legal orders (meaning they are entities operating under law) and would fail this criterion.⁸⁷

Despite the exclusion of crimes committed through otherwise lawful business organisations from Roxin's pure theory, it is possible that the principles of indirect perpetration may be adapted by the ICC so as to enable the prosecution of such cases utilising this mode of liability, where appropriate. For example, Roxin's doctrine has been adopted with modifications by the German Federal Court, which has explicitly acknowledged its potential relevance to crimes in business contexts.⁸⁸ Neither the German Federal Court nor the ICC has adopted detachedness from law as a separate element of liability.⁸⁹ Further, the ICC has shown some willingness to dilute fungibility by looking at a wider range of factors by which to be satisfied that the heads of an organisation can

83 See H. Olasolo, above note 60, p. 134; but on the application of the notion of fungibility in situations where there are low numbers of potential direct perpetrators and proposing a normative, rather than naturalistic, understanding of this criterion, see Kai Ambos, 'The *Fujimori* judgment: a president's responsibility for crimes against humanity as indirect perpetrator by virtue of organized power apparatus', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, pp. 154–156.

84 Gerhard Werle, Boris Burghardt, and Claus Roxin, 'Crimes as part of organized power structures: introductory note', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, p. 202.

85 N. Jain, above note 60, p. 173.

86 *Ibid.* For Jain's discussion of Kai Ambos' criticism of this third element of indirect perpetration through an organisation theory, see pp. 177–178.

87 See also H. Olasolo, above note 60, p. 134.

88 T. Weigend, above note 61, p. 99; Gerhard Werle and Boris Burghardt, 'The German Federal Supreme Court (Bundesgerichtshof, BGH) on indirect perpetration: introductory note', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, p. 210; German Federal Supreme Court (Bundesgerichtshof), 'Judgement of 26 July 1994 against Former Minister of National Defence *Keßler* and Others', trans. Belinda Cooper, in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, pp. 224–225. It should also be noted that a related, although not identical, notion of functional perpetration in Dutch law has been developed specifically in the realm of economic crime. See Harmen van der Wilt, 'Joint criminal enterprise and functional perpetration', in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 176–181.

89 G. Werle and B. Burghardt, above note 88, p. 210; on the elements adopted by the ICC, see *Prosecutor v. Katanga and Chui*, above note 59, paras. 494–518.

be assured automatic compliance with their will, such as forcible training techniques which are likely to engender obedience.⁹⁰ Such an extension of fungibility might apply to private military companies but is unlikely to be relevant in other business contexts. We might query, however, whether fungibility could be further diluted to include economic pressures and corporate cultural expectations of compliance as it pertains to those at the lowest levels of corporate organisations.⁹¹

Further, if we consider indirect perpetration not simply as a potential model of individual criminal responsibility but also as an idea that might be transposed to the liability of corporations, then its insights with respect to the conditions for control may have some value when applied across corporate entities in a corporate group. As van der Wilt has argued, it is the way in which the theory of indirect perpetration through an organisation has been adapted – for example, its recent application to armed groups operating in African conflicts – that will ensure its longevity and continued utility in the context of international criminal law.⁹² And even if the notion of indirect perpetration through an organisation does not directly apply to many business cases, Bert Swart has argued that it is a development in the direction of corporate liability, as it signifies a shift from naturalistic to social conceptions of action in criminal law.⁹³

Ultimately however, and as discussed above, the current notion of indirect perpetration through an organisation at the ICC operates by holding someone accountable as a principal to the crime in the context of a hierarchy of moral blameworthiness. So long as it is cast in such terms, there is a strong argument that the requirements of this form of responsibility should not be diluted if it is to constitute a means of differentiating those most morally culpable. Further, while it is feasible that some business actors might be properly regarded as among those at the highest level of responsibility and hence appropriate subjects for such a form of principal responsibility, the reality is that more often than not business actors are implicated as accessories to international crimes. For this reason, it is usually the concepts of complicity, especially aiding and abetting, which are most readily transposed to the business case. The next section looks briefly at some current developments in this form of liability to explain its potential for such transposition.

90 *Ibid.*, para. 518; N. Jain, above note 60, pp. 186–187.

91 For reflections on how corporations are organisations that engender obedience, see Maurice Punch, 'Why corporations kill and get away with it: the failure of law to cope with crime in organisations', in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 42–68.

92 H. van der Wilt, above note 60, p. 312. On indirect perpetration through an organisation as a model of liability more concerned with policy responses to the challenges of systemic crime than strict theoretical consistency, see T. Weigend, above note 61, p. 101. For an argument in favour of a narrow application of this mode of liability at the ICC, see T. Weigend, above note 61, pp. 106–110.

93 See 'Discussion', in *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 950–951 (comments of Bert Swart); but see also p. 958 (response of Thomas Weigend).

Aiding and abetting and the Taylor judgement

Aiding and abetting is a form of derivative liability and covers those who assist another in the commission of a crime. There is some uncertainty as to how the notion of aiding and abetting will be applied by the ICC. Article 25(3)(c) of the Rome Statute provides that a person will be criminally responsible for a Rome Statute crime in cases where that person '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.

First, there is the question of how a hierarchical reading of the Article 25 forms of responsibility will be consistent with the use of aiding and abetting at all, given the intention that the ICC should only deal with those most responsible for international crimes. In other words, if forms of principal perpetration rather than accessory liability best characterise the involvement of leading architects of international crimes and if the ICC will focus primarily on those most responsible, will secondary liability ever be the correct characterisation of responsibility in ICC prosecutions?

Second, there is uncertainty as to whether Article 25(3)(c) demands that an accomplice act in support of another with the *purpose of* assisting in a crime, a requirement at odds with the test under customary international law.⁹⁴ Under customary international law it is sufficient if a person provides assistance in circumstances where they *know* of the likelihood that their action will assist in the commission of an international crime.⁹⁵ To require purpose and not simply knowledge would render the notion of aiding and abetting largely inapplicable to the business case, where actors are generally motivated by the purpose of personal profit.⁹⁶

In contrast to inaction at the ICC, the recent judgement of the Special Court for Sierra Leone in the case of *Prosecutor v. Charles Ghankay Taylor*⁹⁷ relies significantly on the notion of aiding and abetting. It is an interesting example of how a person of a high level of authority might be properly cast as an accomplice in

94 It should be noted that there is no expectation that the ICC should apply principles consistently with customary international law. For applicable law at the ICC, see Rome Statute, above note 62, Article 21.

95 For a description of the test for aiding and abetting under customary international law, see ICJ Expert Panel, above note 8, pp. 17–24. A significant development since the writing of this article has been decisions of the International Criminal Tribunal for the Former Yugoslavia that import a 'specific direction' requirement as a material element of aiding and abetting. This new requirement demands that to constitute an accomplice under international criminal law a person must not only provide assistance that has a substantial effect on the commission of an international crime, but such assistance must additionally be specifically directed toward assisting such crime. See ICTY, *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Judgement (Appeal Chamber), 28 January 2013; ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgement (Trial Chamber I), 30 May 2013. It is beyond the scope of this paper to consider the issues raised by these new decisions; however, the introduction of a 'specific direction' requirement will have significant implications for satisfying aiding and abetting in the context of commercial relationships and international crimes.

96 Acknowledging the debate on the language of aiding and abetting under the Rome Statute but arguing that in practical terms it may have little impact on the application of the test to business, see ICJ Expert Panel, above note 8, pp. 22–24.

97 *Prosecutor v. Charles Ghankay Taylor*, above note 58.

international crimes and illustrates how what are effectively business transactions can fall within the scope of that mode of liability under customary international law.

Charles Taylor is the former president of Liberia and was prosecuted for his participation in various crimes against humanity and war crimes personally committed by members of a number of Sierra Leonean rebel groups, such as the Revolutionary United Front (RUF). Whilst the prosecution attempted to establish Taylor's individual criminal responsibility on the basis of his ordering or instigating the rebel crimes, or on the basis of command responsibility, these efforts failed because the Court found that whilst Taylor was influential with respect to the conduct of the rebel groups, he was ultimately apart from effective rebel command structures.⁹⁸ Further, whilst the prosecution succeeded in proving that Taylor and the RUF were military allies and trading partners, there was insufficient evidence to prove the existence of a plan under a joint criminal enterprise,⁹⁹ a form of principal liability where a group of people execute a common criminal agreement.¹⁰⁰

Instead, the role of Taylor as described by the Court is remarkably analogous to that of a business financier and facilitator of international crimes. According to the test applied by the Special Court for Sierra Leone (SCSL) for aiding and abetting, an offender's acts must provide substantial assistance to the commission of a crime with knowledge that such acts would assist the commission of the crimes or with awareness as to the substantial likelihood that such acts would render assistance.¹⁰¹ The Court describes at length the involvement of Taylor in the illicit diamond trade of the rebel groups, finding that Taylor facilitated that trade through, among other things, providing equipment, fuel, and personnel for mining.¹⁰² Taylor's personal responsibility was in turn based upon, among other things, having aided and abetted rebel crimes by facilitating a steady provision of arms and ammunition in return for diamonds, providing operational support in the form of funds, the use of a guesthouse to facilitate transfers, safe haven for rebels, communications training, and logistical and medical support to rights-violating rebel forces. The common feature of the assistance was to support, sustain, and enhance the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed.¹⁰³ With respect to the provision of arms the Court held that, despite other sources of supply, Taylor's contribution to the armament of the RUF was substantial, as the RUF relied heavily and frequently on it and other suppliers were minor relative to the accused.¹⁰⁴ Overall Taylor's criminal conduct has parallels with the factual zones of legal risk

98 *Ibid.*, paras. 6972–9686.

99 ICJ Expert Panel, above note 8, paras. 6887–6900.

100 For a detailed analysis of joint criminal enterprise as developed in the jurisprudence of the ad hoc tribunals, see Gideon Boas, James Bischoff, and Natalie Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*, Cambridge University Press, Cambridge, 2007, pp. 8–141.

101 *Prosecutor v. Charles Ghankay Taylor*, above note 58, para. 6904.

102 *Ibid.*, paras. 5843–6149.

103 *Ibid.*, paras. 6906–6953. Taylor was also found guilty on the basis of having planned some of the rebel attacks: *ibid.*, paras. 6954–6971.

104 *Ibid.*, paras. 6913–6914.

identified by the ICJ Panel of Experts with respect to business actors and complicity in international crimes, such as providing goods and services to those committing international crimes and engaging with suppliers who commit international crimes.¹⁰⁵

With respect to the mental element of aiding and abetting, the Court held that the accused knew of the nature of atrocities being committed against civilians by the RUF and provided his support regardless.¹⁰⁶ Among other things, widespread public knowledge of the nature of the RUF's conduct was relevant in proving Taylor's knowledge as to his effective contribution through his actions to the commission of international crimes.¹⁰⁷ The Court made no inquiry into the personal goals of Taylor in reaching its determination as to his liability for aiding and abetting. It is also interesting to note that in sentencing Taylor to fifty years' imprisonment, the Court determined that Taylor's exploitation of the Sierra Leonean conflict for financial gain constituted an aggravating factor.¹⁰⁸ The Taylor decision thus provides further clarity as to how effectively business transactions can constitute aiding and abetting international crimes in the context of trading with notoriously criminal actors.

Given the particular relevance of aiding and abetting to the phenomenon of business involvement in international crimes, those interested in the future prospects for business prosecutions at the ICC will wait with particular interest to see how Article 25(3)(c) will be interpreted: whether it will be treated in a manner consistently with the approach adopted by the SCSL, or whether purpose will be a distinct requirement of accessory liability. And whilst perhaps of lesser practical import, so long as indirect perpetration through an organisation remains a favoured form of liability at the ICC, more discussion might be welcomed on how, if at all, it might apply to the prosecution of leading actors in the business world involved in international crimes.

Thematic prosecutions and the 'fourth generation' of international criminal law

Another trend in international criminal law that may have implications for the field's application to the business dimensions of conflict are the so-called 'thematic prosecutions'.¹⁰⁹ This term refers to the prosecutorial practice of selecting certain crimes and prioritising particular phenomena within international criminal indictments, usually for purposes related to the best use of limited

105 ICJ Expert Panel, above note 8, pp. 37–43.

106 *Prosecutor v. Charles Ghankay Taylor*, above note 58, paras. 6947–6952.

107 *Ibid.*, paras. 6948 and 6950.

108 SCSL, *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Sentencing Judgement (Trial Chamber II), 30 May 2012, para. 99. Other aggravating factors were Taylor's abuse of his positions of political power and unique status as a head of state.

109 See, e.g., Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Torkel Opsahl Academic EPublisher, Beijing, 2012.

resources,¹¹⁰ but often also due to the symbology of elevating attention on a given matter of international concern.¹¹¹ As described by deGuzman, thematic prosecutions are designed to ‘orient cases around particular themes of criminality’.¹¹² Examples to date include focusing on the phenomenon of child soldiers,¹¹³ on sexual violence in conflict,¹¹⁴ and on the targeting of peacekeeping forces.¹¹⁵ The literature analysing the justifications and ramifications of thematic prosecution is only beginning to emerge,¹¹⁶ but early indications at the ICC do suggest that thematic prosecution might be a practice adopted into the future.¹¹⁷ For example, the Office of the Prosecutor chose to focus upon crimes related to the use of child soldiers in the *Lubanga* case to the exclusion of other crimes despite the fact that this phenomenon, while a matter of legitimate international concern, did not reflect the full extent of victimisation within the conflict or the accused’s role therein.¹¹⁸

To some degree one might identify the practice of thematic prosecutions in international criminal law as early as Nuremberg, where the so-called subsequent Nuremberg trials were divided according to the particular participation of segments of German society in the war and their spheres of activity.¹¹⁹ So, for example, there were the trials of medical professionals for their role in medical experimentation on human subjects and in the program of mass euthanasia,¹²⁰ and of legal professionals for furthering Nazi programs of persecution, sterilisation, and extermination through the development of legislation and penal processes.¹²¹ Of course, the most relevant, for our purposes, were the trials of industrialists for the role of big industry in the use of slave labour, the spoliation of occupied territories, and the provision of

110 Morten Bergsmo and C. Wui Ling, ‘Towards rational thematic prosecution and the challenge of international sex crimes’, in *ibid.*, p. 4.

111 See, e.g., Margaret M. deGuzman, ‘An expressive rationale for the thematic prosecution of sex crimes’, in M. Bergsmo (ed.), above note 109, pp. 11–44.

112 *Ibid.*, p. 11.

113 See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, above note 66.

114 See, e.g., ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, Judgement (Trial Chamber), 22 February 2001.

115 See, e.g., ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on Confirmation of Charges (Pre-Trial Chamber I), 8 February 2010.

116 The first major book on this subject has just been published. See M. Bergsmo (ed.), above note 109.

117 M. Bergsmo and C. Wui Ling, above note 110, pp. 2–3.

118 *Ibid.* As a result of the indictment’s focus exclusively upon crimes related to the use of child soldiers, the majority of the Trial Chamber held that they were unable to take crimes of a sexual nature into account for the purpose of its judgement, including the systemic sexual abuse of primarily girl child soldiers. See *Prosecutor v. Thomas Lubanga Dyilo*, above note 66, paras. 36, 60, 629–630, 896, and 913. For dissent on this issue see the Separate and Dissenting Opinion of Judge Odio Benito, paras. 15–21.

119 See M. deGuzman, above note 111, p. 11. For an outline of the subsequent Nuremberg trials, see Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011.

120 US Military Tribunal at Nuremberg, *US v. Karl Brandt et al.*, Judgement of 19 July 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. II, 1950, pp. 171–300 (the Medical Case).

121 US Military Tribunal at Nuremberg, *US v. Josef Altstoetter et al.*, Opinion and Judgement of 3 December 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. III, 1951, pp. 954–1199 (the Justice Case).

the material means for war.¹²² Whilst primarily practically driven, the thematic focus of these trials had a symbolic significance and served an important educative function by delineating the specific contributions of significant parts of German society to the atrocities committed.¹²³

The most detailed work on thematic prosecutions as a possible feature of international criminal practice has occurred within the field of sex crimes and armed conflict.¹²⁴ Thinking on this topic may provide some direction as to whether and when thematic prosecution of business actors for their involvement in conflict might also be justified. For example, deGuzman has argued that the strongest justification for the prioritisation of sex crime prosecutions at international courts, sometimes even at the expense of other norms, is to be found in the expressive rationale for international criminal justice.¹²⁵ Expressive theories of criminal justice essentially focus upon the social meaning ascribed to the practice of criminal justice. In particular, they identify as an independent value the normative message that is communicated by criminal pronouncements and punishments. Verdicts and punishments simultaneously stigmatise wrongdoing and reaffirm the real value of victims or goods whose inherent value has been denied in the commission of the wrongdoing.¹²⁶ For deGuzman, the expressive rationale supports prioritisation of sex crimes because those norms are in more urgent need of expression, in part due to the history of under-enforcement of international norms outlawing crimes of sexual violence.¹²⁷

In a different vein, Jain has argued that the institutional structure of the ICC might support thematic prosecutions centred on crimes that are 'less universally regarded, at least in practice, as equally deserving of condemnation'¹²⁸ on expressivist grounds both in light of the Court's explicitly forward-looking agenda, and given its role as an instrument of post-conflict rule of law development.¹²⁹ For Ambos, one of the arguments in favour of thematic prosecutions of sex crimes is the evidence of an increased awareness among the international community as to the use of sexual violence as a war tactic and the risks it poses to peace and security and in light of the trust evident amongst international policy-makers in the role criminal justice should play in addressing this phenomenon.¹³⁰

Might similar arguments be made in favour of prosecutions centred on the theme of business participation in international crimes or on the economic

122 See above note 12.

123 See, e.g., K. Heller, above note 119, p. 47.

124 See above note 108.

125 See M. deGuzman, above note 111, pp. 11–44.

126 See, e.g., Lawrence Friedman, 'In defence of corporate criminal liability', in *Harvard Journal of Law and Public Policy*, Vol. 23, No. 3, 2000, pp. 840–847.

127 M. deGuzman, above note 111, pp. 35–41.

128 Neha Jain, 'Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution', in M. Bergsmo (ed.), above note 109, p. 226.

129 *Ibid.*, pp. 207–232.

130 Kai Ambos, 'Thematic investigations and prosecution of international sex crimes: some critical comments from a theoretical and comparative perspective', in M. Bergsmo (ed.), above note 109, pp. 311–312.

dimensions of conflict more broadly? Many of the ideas mentioned above have in fact been presented as arguments for the value of focusing on the business side of conflict in the future practice of international courts and tribunals. For example, with respect to the expressive rationale supporting a special focus on sex crimes, similar arguments have been made in the domestic and international contexts in defence of the necessity of corporate criminal (rather than civil or administrative) liability in relation to certain forms of corporate misconduct. The justifications provided for this are the particular moral messaging that occurs through the vehicle of criminal law and the need to properly acknowledge those injured by sufficiently severe corporate misconduct.¹³¹ This call is sometimes made on the basis that the role of business and economics in conflict has been a long under-represented phenomenon in international criminal justice, despite the evidence that modern conflicts might best be understood as revolving around economic, rather than political or ethnic, tensions.¹³² Further, it has been argued that given the role of international criminal law as a mechanism of post-conflict transitional justice with forward-oriented goals, the role of economic actors, such as business, and the impact of widespread economic crimes, such as the plunder of natural resources, might in some cases be more important subjects than other categories of international crimes and criminals to the goal of a durable peace.¹³³ The idea here is that it is often economic injustices that, if left unattended, can lead to a relapse into conflict. Finally, inasmuch as the legitimacy of thematic prosecutions might be supported on the basis that international policy-makers have evidenced a particular concern for the relevant phenomenon and a trust in the role of criminal justice to respond, the work of the SRSJ might suggest that a similar time is coming with respect to the role of business in international crimes.

It is beyond the scope of this paper to fully theorise the prospect of thematic prosecutions focusing on the economic dimensions of conflict, and there are of course due bases for caution with respect to the practice more broadly.¹³⁴ A more modest point is being made here, namely that, inasmuch as thematic prosecutions may constitute a feature of international criminal practice in the future, there may be a strong case for the unlawful conduct of businesses to be high on prosecutorial agendas. The question is then whether the current architecture of international criminal law is up to such a task.

In this context it is worth concluding with the recent work of van den Herik and Dam-de Jong, who suggest that it might be time for international criminal law to enter into a 'fourth generation' within which the framework of international criminal law is applied and developed, so as to better respond to the modern

131 See, e.g., L. Friedman, above note 126, pp. 833–858; Joanna Kyriakakis, 'Corporate criminal liability and the ICC Statute: the comparative law challenge', in *Netherlands International Law Review*, Vol. 56, No. 3, 2009, pp. 359–364.

132 On the exclusion of the economic dimensions of conflict from international criminal law and transitional justice more broadly, see Joanna Kyriakakis, 'Justice after war: economic actors, economic crimes and the moral imperative for accountability after war', in Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law*, Cambridge University Press, Cambridge, 2012, pp. 115–120.

133 *Ibid.*, pp. 134–136.

134 M. Bergsmo and C. Wui Ling, above note 110, p. 10.

phenomenon of war as economic activity.¹³⁵ Focusing in particular on the close relationship between modern conflicts and competition for natural resources, they present a compelling argument that existing principles of international criminal law ought to be directed to the economic dimensions of conflict and that, given the limitations of international criminal law's current toolkit, which was developed in the context of different paradigms of conflict, there may be a need for the development of new criminal law tools to remain abreast of the modern realities of war.¹³⁶

Conclusion

The expectation placed on international criminal law to be a vehicle for legal accountability of business actors engaged in egregious human rights and humanitarian law abuses is in many respects driven by the lack of litigation alternatives at the international level. During discussions in 2008 on the subject of international criminal law and business, expert commentators noted that, despite the traditional reluctance of states to extend criminal law notions to abstract entities, questions as to the wisdom of expanding international criminal law are often forfeited given the lack of any established international tort or administrative law that might apply instead.¹³⁷ In the wake of the work of the SRSG and his failure to incorporate any role for binding human rights obligations at an international level, this status quo seems set to continue into the foreseeable future. As noted by the SRSG, it is with the expansion of international criminal law that the prospect of legal accountability for businesses involved in human rights and humanitarian law violations seems most promising. In light of this, we might expect to see continued pressure on the institutions and principles of international criminal law to be applied to cases of business involvement in international crimes.

This pressure for international criminal law to evolve and capture wrongful business conduct is also being generated by the very nature of modern conflicts themselves. With increasing awareness that economic concerns and actors have a central part in many modern conflicts – as financiers and enablers of violence, as direct actors in the case of private military companies, and as partners of rights-violating security forces – the demand that international criminal law evolve to address the business dimensions of conflict is likely to continue. After all, international criminal law has as one of its key goals and justifications the furtherance of peace and security.

This paper has outlined some recent developments related to the promise of international criminal law with respect to the business case. Notions of thematic prosecutions in international courts may augur in favour of future prosecutions dedicated to exposing the role of business actors in international crimes.

135 L. van den Herik and D. Dam-de Jong, above note 6, p. 250.

136 *Ibid.*, pp. 237–273.

137 See, e.g., 'Discussion', above note 93, pp. 978–979 (comments of George Fletcher).

The relevance of indirect perpetration through an organisation to the business case will depend strongly upon whether the Court applies Roxin's theory faithfully or adopts looser notions of control and automatic compliance. And it remains to be seen how the ICC will interpret aiding and abetting, although the SCSL's Taylor trial judgement indicates the ways in which this notion can apply to business-like interactions.

Courts and tribunals should begin to look more seriously at business actors and also at some of the neglected international crimes involving property in which they may be particularly prone to participating, such as the war crime of pillage. A move in this direction will allow a clearer delineation of truly rogue businesses from those businesses making genuine efforts to avoid participation in international crimes. However, there is also a cautionary tale to be told. International criminal law can and ought to capture only those business activities with a sufficiently direct and significant role in the commission of international crimes. It is clear that, even with an increased application of international criminal law to business, many humanitarian law and human rights abuses in which business actors may be implicated when working in conflict situations will not be captured. As emphasised by the SRSG, for these broader concerns the importance of multiple regulatory sites that encourage the development of broader conflict-sensitive business practices will be paramount.

Corporations, international crimes and national courts: a Norwegian view

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Abstract

For a number of reasons, questions regarding the accountability of corporations for actions that might be complicit in the commission of international crimes have gained prominence in recent times. Though initiatives regarding what is more broadly described as business and human rights are to be welcomed, this sometimes distracts from existing systems of accountability, especially when those acts, which may be discussed as human rights violations, equally constitute crimes. Whilst not all criminal jurisdictions extend to legal persons, the Norwegian Penal Code does. This article analyses the Norwegian Penal Code's provisions, in light of amendments made to it in 2008 to include international crimes in it, with the effect of extending those crimes to corporations. The article first addresses the personal, material, temporal, and geographical scope of the penal code. It then addresses the potential consequence of the exercise of jurisdiction in light of the only case in recent times in Norway that deals explicitly with a corporation's potential criminal liability for war crimes. The article then addresses three additional issues with respect to provisions on complicity, intent, and defences under the Norwegian Penal Code, before concluding with some

* Earlier drafts of this paper were presented to an audience at the law faculties of the University of Oxford and University of Oslo. The author is grateful to those present for their comments. The author is especially grateful to Mark Taylor for extensive discussions on the topics covered here.

reflections on the possible future effects of this legislation and the possibility that it will inspire developments elsewhere.

Keywords: corporate liability, war crimes, domestic legislation, jurisdiction, Norwegian Penal Code.

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Introduction

It is axiomatic to state that in order to bring all of those responsible for international crimes to trial, one must ultimately rely on domestic courts. There are a number of reasons for this: jurisdictional, reasons of scope (in terms of the accused), financial, and practical ones, to note but a few. These issues are potentially even more acute when it comes to holding corporations accountable for international crimes.

Interest has piqued recently, through a variety of initiatives, in business activities in times of conflict. Much of the debate has revolved around the notion of corporate responsibility in respecting human rights.¹ As significant as those initiatives are, one should not lose sight of those systems where criminal rather than administrative or self-regulatory mechanisms are available, and that would more properly address the activities for which companies should be held accountable.² It should be recalled that prosecuting and punishing criminality may, and likely does, differ from seeking redress for violations of, or requiring respect for, human rights. Whilst certain human rights violations equally constitute crimes, not all do. Being clear about the proper system of accountability would seem beneficial to all. This is also an observation made by John Ruggie, the Special Representative of the United Nations (UN) Secretary-General for Business and Human Rights and the architect of the UN Guiding Principles on Business and Human Rights. He has noted that 'national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes'.³ He has pointed

- 1 See, for example, the significant volume of material available from the Business and Human Rights Resource Centre (www.business-humanrights.org), though the section on conflict (www.business-humanrights.org/ConflictPeacePortal/Home) arguably addresses issues of tort liability more than criminal liability. Similarly, see the initiatives of Amnesty International (www.amnesty.org/en/business-and-human-rights), the Institute for Human Rights and Business (www.ihrb.org), and the Office of the High Commissioner of Human Rights (www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx). All internet references were accessed in May 2013.
- 2 Significant work has been done, of course, such as the three-volume International Commission of Jurists' (ICJ) *Report of the ICJ Expert Panel on Corporate Complicity in International Crimes*, 2008, available at: www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/. To the author's knowledge, however, neither this nor any other work has addressed the Norwegian jurisdiction in its current form. A special edition of the *Journal of International Criminal Justice* similarly dealt with these issues in broad terms, though with perhaps less focus on domestic criminal systems. See Special Issue: Transnational Business and International Criminal Law, *Journal of International Criminal Justice*, Vol. 8, No. 3, July 2010.
- 3 See 'Recommendations on Follow-Up to the Mandate', February 2011, p. 4, available at: www.globalgovernancewatch.org/docLib/20110218_GGW_-_Ruggie.pdf.

out that this is a typical challenge in areas of armed conflict and reported on a desire for greater consistency in legal protection, as such divergence raises uncertainty for corporations and victims alike.⁴

The aim of this article is to illustrate the certainty that one particular domestic legislation might introduce for both victims and corporations, and to indicate areas where a greater degree of consistency may well be feasible across jurisdictions.⁵

Preliminary remarks on terminology

Whilst often thought synonymous, liability and responsibility are not identical, particularly in this context.⁶ Issues of corporate criminal liability should not be thought of as a facet of, or confused with, corporate social responsibility (CSR).⁷ The need for making this distinction is all the more urgent given the common assumption that CSR activities are acts done out of goodwill rather than out of obligation.

There is also a distinction to be made between the liability of a company and the responsibility of an individual. It is correct to say, for instance, that a company can be liable in the sense that it can be held accountable for the criminal actions of its employees. The tenet upon which vicarious liability rests is that it is because an action attracts individual criminal responsibility that a corporation may incur criminal liability. However, to say that the company is criminally *liable* for the offence is not the same as saying that it is criminally *responsible* for the offence. Though there may be a number of approaches or views that one could take, it is not the case that a company is imbued with a sense of guilt in the way that an individual is (although reference would be made to a company being ‘found guilty’). It is the sense that a company can attract liability for the actions of its employees that is of principal concern here. I will endeavour therefore to refer to *corporate criminal liability* throughout this paper.

4 *Ibid.*

5 This is not to suggest that the Norwegian Penal Code offers the ideal model for all domestic legal systems. Rather, it is to illustrate those aspects of it that will not be inconsistent with others, considering their own jurisdictions or judicial principles or practice. This is not, however, a comparative paper and will not therefore identify similarities across jurisdictions.

6 Both Hart and Dworkin have employed the phrase ‘liability-responsibility’: see H. L. A. Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968, pp. 216 ff; Ronald Dworkin, *Justice For Hedgehogs*, Harvard University Press, Cambridge, 2011, p. 103 (though Hart goes on to qualify his notion in terms broadly in line with how I wish to approach it, namely to talk of – or emphasise on – liability, not responsibility). Descriptions may however differ dependent on the premise or discipline from which the issue is viewed. See, for a legal perspective, Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed., Oxford University Press, Oxford, 2001, p. 1: ‘This is a book about the criminal liability of corporations’, and, for a philosophical perspective, Thomas Donaldson, *Corporations and Morality*, Englewood Cliffs, NJ, Prentice-Hall, 1982, a work in which the word ‘liability’ does not appear once, compared to the pervasive use of the term ‘responsibility’.

7 I do not suggest that this is an endemic fact, but I think clarity of expression is merited here.

This article is intended therefore to offer a review of those provisions of the Norwegian Penal Code relevant to the potential punishment of a company for the actions of its employees amounting to an international crime and to illustrate pertinent issues that would need to be determined in the event that such proceedings were to be pursued.⁸ The article thus briefly addresses the notion of corporate criminal liability and the absence to date of prosecutions based on that mode of liability for international crimes in Norway. The subsequent sections then consider the relevant substantive aspects of personal, material, temporal, and geographical jurisdiction of the Norwegian Penal Code. The remainder of the article addresses issues of accomplice liability, intent, and defences, as well as aggravating and mitigating factors on sentencing, before offering some concluding observations.

Corporate criminal liability for international crimes and the Norwegian Penal Code

National jurisdictions differ in the way they address the question of corporate criminal liability for international crimes,⁹ if indeed they address it at all. The aim of this article is to analyse how one particular piece of domestic legislation – the Norwegian Penal Code¹⁰ – provides for corporate punishment for those crimes and to explore whether this legislation could provide an example of addressing corporations directly in a domestic criminal code.

Whilst, as I will outline in brief below, no international criminal tribunal or court has yet included legal persons within its jurisdiction, that is not to say that international criminal law is unlikely to affect the determination of corporate liability for international crimes. This article proposes to demonstrate why quite the contrary could very well be the case. Certain provisions of the Norwegian Penal

8 A previous review of the scope of Norwegian criminal law in this regard took place in the context of the 'Business and International Crimes Project' at the Fafo Institute for Applied International Studies, Oslo: see www.faf.no/liabilities/Norway.pdf. However, this review, undertaken in 2004, concerned the previous 1902 Penal Code (as amended). It did not therefore consider the newer specific war crimes provisions in the context of corporate punishment. The Fafo review assessed the likelihood of corporate complicity for war crimes but considered their application via a generic provision of the Military Penal Code. How private corporations would fall under the Military Penal Code was not discussed, but in light of the new Penal Code provisions, this issue is now likely moot. This review was similarly relied upon, though cursorily, in the February 2008 report prepared for the Special Representative of the UN Secretary-General on Human Rights and Business. See Allens Arthur Robinson, *Corporate Culture as a Basis for the Criminal Liability of Corporations*, p. 59, available at: <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>. Additional remarks to the Fafo study have been provided by Professor Jo Stigen (p. 9) and can be found at: www.faf.no/liabilities/Additional%20commentary%20Sept%202009.pdf. The Fafo/International Alert Red Flags initiative can be found at: www.redflags.info/index.php?page_id=11&style_id=0.

9 General corporate criminal liability might be thought to exist in different jurisdictions under three forms: vicarious liability, the identification liability, or organisational liability. This paper will not examine the respective merits or details of these variant forms of liability.

10 General Civil Penal Code, LOV 2005-05-20-28, hereinafter also 'Penal Code'. Whilst a formal translation is pending, a working translation was made available by the Norwegian Ministry of Justice and is in the public domain. It is also due to be used in forthcoming updates for Norway in the ICRC Customary Law Study database.

Code will be invoked to explain why this is so and to illustrate that, even before corporations can be directly tried under international criminal law for criminal activity, the jurisprudence of international criminal tribunals can have a significant and determinative effect through domestic courts.

An oft-cited remark from other domestic proceedings has been employed by those seeking to rebut the view that corporations cannot be held responsible for crimes¹¹ and has arguably resonated in the views of international tribunals on the topic of jurisdiction *ratione personae*. In the second winter of the beginning of the eighteenth century, when sitting as Chief Justice of the King's Bench, Sir John Holt is reported to have noted that '[a] corporation is not indictable, but the particular members of it are'.¹² The International Military Tribunal at Nuremberg, nearly 250 years later, famously remarked that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.¹³

Whilst this sentiment was employed to deny abrogation of individual criminal responsibility for actions committed as part of a collective entity, in this case the state of Germany,¹⁴ some might contend that the sentiment has also informed the absence of corporate (though evidently not collective) liability in all international criminal tribunals to date.

Insofar as real persons are concerned, it is settled law in both domestic and international jurisdictions that natural persons engaged in a collective or corporate activity can be held individually responsible for those actions.¹⁵ It is the attribution of that individual act to the corporation that represents a unique feature of the updated Norwegian Penal Code.

Since 1991, the Norwegian Penal Code has contained provisions that provide for a company to be criminally punishable for the actions of its employees. Since 2008, the Penal Code has included specific provisions on war crimes, genocide, and crimes against humanity.¹⁶ The consequence of those later

11 The following comment, though rendered slightly differently as 'the corporation is not indictable, but its members are', was recently quoted in James A. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, Open Society Justice Initiative, Open Society Foundations, New York, 2010, p. 75, available at: www.opensocietyfoundations.org/sites/default/files/pillage-manual-2nd-edition-2011.pdf.

12 This statement appears as a single-sentence citation from an anonymous case recorded in 1701. See Anonymous Case No. 935, 88 Eng. Rep. 1518, 1518 (K.B. 1701).

13 See *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, Vol. I, 1947, p. 223, available at: www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

14 In proceedings, a motion adopted by all defence counsel of 19 November 1945 was submitted, which *inter alia* challenged the jurisdiction of the court to try individual persons on the basis that there was no such premise in international law. The focus on attribution of responsibility for unlawful acts of force was on states and not the 'thought of bringing up for trial the statesmen, generals and industrialists of the state which recurred to force'. *Ibid.*, p. 168.

15 The recent title of an essay by Florian Jessberger on the *JG Farben* trial is illustrative of where the emphasis lay (and continues to lie in some fora). See Florian Jessberger, 'On the origins of individual criminal responsibility under international law for business activity', in *Journal of International Criminal Justice*, Vol. 8, 2010, p. 783.

16 Sections 101 ('Genocide'), 102 ('Crimes against humanity') and 103–107 ('War crimes') of the Norwegian Penal Code can be found on the ICC Legal Tools database, available at: www.legal-tools.org/en/doc/a9b7c1/. A summary of the provisions can also be found on the ICRC's National Implementation

amendments is the possibility for a company to be sanctioned where individuals acting on its behalf commit or are complicit in the commission of war crimes, genocide, or crimes against humanity as defined in the Penal Code. Such sanctions, however, have yet to be imposed by a court in Norway. Domestically, the confluence of the recognition of corporate liability under Norwegian law and extant provisions on international crimes as crimes under domestic law is yet to be fully explored.

There has been only one case in which the Norwegian Public Prosecutor's Office has considered prosecuting a corporation for its alleged complicity in an international crime. In this case, an apparent subsidiary of a Norwegian-based company was providing electricity and infrastructure facilities at Guantanamo Bay. Whilst both for international and domestic lawyers this brief set of facts would raise a range of questions, the principal issue of concern was whether the Norwegian parent company could be criminally liable for its apparent subsidiary providing electricity to the detention facilities at Guantanamo Bay and whether such acts might constitute complicity in alleged acts of torture. Ultimately, the Public Prosecutor's Office reached the conclusion that, on the facts of the case, it was unable to demonstrate a sufficient connection or relationship between the respective entities so that there would be a reasonable prospect of conviction.¹⁷

Jurisdictional scope of the Norwegian Penal Code to corporate punishment for international crimes

In the absence of detailed domestic jurisprudence on corporate criminal liability for international crimes in Norway, it seems prudent to approach the issue through a brief analysis of the relevant jurisdictional aspects of the Norwegian Penal Code. Those aspects include issues of personal, material, temporal, and geographical jurisdiction, each of which are dealt with in turn below.

*Jurisdiction *ratione personae**

Chapter 4 of the Penal Code addresses corporate penalties. Only two sections make up this chapter, the first of which, regarding penalties for enterprises, sets out that:

When a penal provision is contravened by a person who has acted on behalf¹⁸ of an enterprise, the enterprise may be liable to a penalty. This applies even if

Database, available at: www.icrc.org/ihl-Nat.nsf/6fa4d35e5e3025394125673e00508143/5f7063073a44a891c12576ce00589022!OpenDocument.

17 The full rationale for the decision not to proceed is not a public document. However, a press statement (in Norwegian) is available at: www.riksadvokaten.no/no/dokumenter/pressemeldinger/Pressemelding+-Anmeldelse+av+Aker+Kv%C3%A6rner+ASA.9UFRrSZr.ips.

18 Whether an individual has, at the material time (either of commission or assistance to the commission of a crime), acted on behalf of the company will generally be a question of fact. Was the employee acting in the ordinary course of the company's business activities? Were the actions of the employees within their remit? Such questions of fact would also have relevance to the defence companies might wish to advance against being penalised.

no individual person has manifested guilt or fulfilled the condition of accountability¹⁹ for his acts, *cf.* section 20.

Enterprise here means a company, cooperative enterprise, society or other association, one-man enterprise, foundation, estate or public activity.

The penalty is a fine. The enterprise may also by a court judgement be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms, *cf.* section 56, and a sentence of confiscation may be imposed, *cf.* chapter 13.

Whilst evidently it is the natural person acting on behalf of the company who commits the criminal offence by contravening any of the penal provisions, the company through that action may be liable for punitive sanction (criminal punishment) as a result of that action. The qualifying ‘may’ will be addressed in the section below on defences and aggravating and mitigating factors.

The first sentence of this section provides that, insofar as persons contravening a penal provision act on behalf of the company (regardless of their capacity), there is the potential for the company to be held criminally liable for their actions. The second sentence of the section offers a significant argument for broadening the scope further still, particularly with respect to core international crimes. A company may be punished, absent an individual having manifested guilt or fulfilled conditions of accountability, for that individual’s contravention of the penal provisions (including aiding and abetting). The reference to section 20 presents a court with an opportunity to punish a company, notwithstanding the fact that the individual – for want of age or mental capacity – cannot be convicted of the crime.²⁰

In short, the section above provides for the *punishment* of the company for the acts of its employees or agents. Such punishment can follow without a finding of guilt against a specific individual. Rather, a court would need to be satisfied that a crime had occurred, and that either those who committed it or those who aided and abetted its commission did so when acting on behalf of the company.

The notion of punishment following from the acts of an anonymous offender would seem contradictory to the requirement that the offender (as principal or accomplice) contravenes a penal provision when acting on behalf of the company. One would seemingly need to know a person’s identity to ascertain whether they were acting on behalf of the company at the relevant time. It may of course be open to a court to infer that, given a particular set of circumstances, the contravention could only have been committed by an individual or individuals acting on behalf of the company. That said, a perhaps more likely scenario would be

19 The word used in Norwegian (*tilregnelighet*) can translate as both ‘accountability’ and ‘responsibility’. The term *foretakstraff* – the heading of Chapter 4 of the Penal Code – is translated as ‘corporate penalty’; where it is used in the body of the text, such as *foretaket straffes*, it denotes liability.

20 The likelihood of those of diminished mental capacity acting on behalf of a company in the probable scenarios that this paper postulates is perhaps so remote as not to warrant further exploration here, notwithstanding the interesting conceptual discussion of a company being criminally punishable/responsible for the acts of those not capable of being responsible for themselves.

one in which the individual offender(s) are outside the personal jurisdiction of the court for reasons of nationality or residence, but, at the material time, indeed acted on behalf of a company that did fall within the court's purview. In that sense, it is proper perhaps to speak either of an anonymous or absent offender – neither constituting a bar to proceeding against the company.

There is nonetheless perhaps a helpful corollary or analogy that might be drawn here. I will return to what constitutes aiding and abetting or what acts attract accomplice liability later in this paper, but the notion that accomplices may be tried and convicted in the absence of a principal is well founded in domestic criminal systems and has been systematically applied in international criminal tribunals. In its first trial, the International Criminal Tribunal for Rwanda (ICTR) made the following observation:

The issue thence is whether a person can be tried for complicity even where the perpetrator of the principal offence himself has not been tried. Under Article 89 of the Rwandan Penal Code, accomplices 'may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification' [unofficial translation]. As far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.²¹

Similarly, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has concluded that:

A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified. In *Vasiljevic*, the Appeals Chamber found the accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators.²²

Of course, in the context of the present discussions there may be a situation whereby neither the principal nor the accomplice can be tried. Nonetheless, it would appear that, given that aiding and abetting similarly amounts to the contravention of that penal provision which governs the principal's commission, a company could be subject to punishment notwithstanding the inability of the court to try either the principal or the accomplice.

I have just indicated that, in terms of liability, punishment may arise for companies notwithstanding the inability of a court to determine the guilt of principal or accessory offenders. One reason for such inability might be that the

21 International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 531.

22 International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Krstić*, Case No. 98-33-A, Judgement (Appeals Chamber), 19 April 2004, para. 143.

court lacks jurisdiction over them. I will now turn to examine in more detail the extent of jurisdiction *ratione materiae*, *personae*, and *temporae* of the Norwegian Penal Code.

Jurisdiction *ratione materiae*

As noted earlier, the entry into force in 2008 of new specific provisions of the Norwegian Penal Code concerning international crimes, combined with the extant recognition of corporate punishment for criminal acts, has the effect that corporations can be held accountable for war crimes, crimes against humanity, or genocide under this legislation.

In terms of subject matter jurisdiction, the provisions of the Norwegian Penal Code relating to crimes against humanity and genocide mirror almost directly the provisions in the Rome Statute, in particular with regard to the descriptions of the chapeau and the acts which could constitute the crime.²³

With respect to war crimes, however, the domestic offences differ in part from the offences found in the Rome Statute of the International Criminal Court. There are 32 separate war crimes listed in the Norwegian Penal Code.²⁴ Of those 32, modelled in part on the Rome Statute, only three offences specifically relate to international armed conflict. The remaining 29 offences need only to have occurred 'in connection with an armed conflict'.²⁵ The offences are divided into five sections,²⁶ covering war crimes against persons; war crimes against property and civil rights; war crimes against humanitarian missions or distinctive emblems; war crimes consisting in the use of prohibited methods of warfare; and war crimes consisting in the use of prohibited means of warfare. There are two additional provisions on conspiracy and incitement to commit those international crimes,²⁷ as well as a definition of command responsibility.²⁸

Although there are differences in how particular international crimes are defined in the Norwegian Penal Code and the Rome Statute, it is evident that the jurisprudence of international criminal tribunals can (and arguably should) have an influence on the Norwegian Penal Code. One such example is the definition of 'armed conflict'. The term is not defined in the Penal Code, though there is little doubt, in the author's view, that any Norwegian court would not evidently rely on the jurisprudence, in particular of the ICTY, as to how the term 'armed conflict' is to be interpreted.²⁹ If that is the case, then at the very least when a Norwegian

23 See above note 16 for the provision in the Norwegian Penal Code. Arts. 6 and 7 of the Rome Statute are available at: www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEngl.pdf.

24 See above note 16.

25 The chapeau to sections 103–107 reads 'Any person shall be liable to punishment for war crime who in connection with an armed conflict' before listing the particular war crimes each section addresses.

26 See Penal Code, sections 103–107 respectively, above note 16.

27 *Ibid.*, section 108.

28 *Ibid.*, section 109.

29 For a discussion on the way in which Norwegian courts have dealt with this issue see Simon O'Connor, *War Crimes before the Norwegian Supreme Court: The Obligation to Prosecute and the Principle of*

court is addressing an international crime, and the Norwegian Penal Code or domestic jurisprudence do not provide proper interpretive guidance, the court should be cognizant of the manner in which international criminal law has addressed a given issue. This is perhaps particularly so where the Penal Code makes specific reference to international law, or to circumstances where it addresses international crimes committed extraterritorially.³⁰

Jurisdiction *ratione temporis*

In 1991, the Norwegian Penal Code extended its jurisdiction to include corporate criminal liability. In the 2005 amended Penal Code, the temporal jurisdiction is described in terms consistent with the principle of legality in section 3 providing that '[t]he criminal legislation in form at the time the offence is committed applies'. However, the section later clarifies that:

The provisions of Chapter 16 apply to acts committed prior to their entry into force if the act was punishable at the time it was committed under the criminal legislation in force at the time and was regarded as genocide, a crime against humanity or a war crime under international law . . .

In a separate article, I consider the recent proceedings before domestic courts on the subject matter and temporal jurisdiction of the provisions of the Norwegian Penal Code in relation to war crimes.³¹ Those proceedings concerned allegations of unlawful detention of persons protected under international humanitarian law during the armed conflict in Bosnia-Herzegovina in 1992. The accused, a then naturalized Norwegian citizen, was prosecuted under the new war crimes provisions for the offence of unlawful confinement of protected persons.³² Whilst at first instance in 2008,³³ the accused was convicted of war crimes and that conviction was upheld on appeal,³⁴ in 2010 the Norwegian Supreme Court dismissed the conviction,³⁵ substituting it with offences under ordinary penal provisions. It did

Legality – an Incumbrance or opportunity?, Oxford Institute for Ethics, Law and Armed Conflict Working Paper Series, February 2013, p. 17, available at: www.elac.ox.ac.uk/downloads/war%20crimes%20before%20the%20norwegian%20supreme%20court%20-%20working%20paper.pdf.

30 See discussions on section 5(c)(2) of the Norwegian Penal Code in this article.

31 See S. O'Connor, above note 29.

32 Penal Code, section 103(1)(h). The definition of a protected person under the Penal Code is found at section 103(3); see above note 16.

33 Oslo City Court, *The Public Prosecutor v. Misrad Repak*, Case No. 08-018985MED-OTIR/08, Trial Judgement, 2 December 2008. A translation of the trial judgement can be found at: [www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/\\$FILE/Public%20Prosecutor%20v.%20Misrad%20Repak.PDF](http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/$FILE/Public%20Prosecutor%20v.%20Misrad%20Repak.PDF).

34 Norwegian Supreme Court, *Public Prosecuting Authority v. Misrad Repak*, Court of Appeal Case No. 09-024039AST-BORG/01, Appeal Judgement, 12 April 2010.

35 The Supreme Court held two hearings in this case. The first concerned the conviction in Norwegian Supreme Court. *A v. The Public Prosecutor*, HR-2010-02057-P (sak nr. 2010/934), 3 December 2010, available at: [www.domstol.no/upload/HRET/Avgj%C3%B8relser/2010/saknr2010-934-plenum\(anonymisert\).pdf](http://www.domstol.no/upload/HRET/Avgj%C3%B8relser/2010/saknr2010-934-plenum(anonymisert).pdf), see especially paras. 106–111. The second sentencing, Norwegian Supreme Court, *A v. The Public Prosecutor*, HR-2011-00808-A (sak nr. 2010/934), 13 April 2011, is available at: [www.domstol.no/upload/HRET/Avgj%C3%B8relser/2011/saknr2010-934\(anonymisert\).pdf](http://www.domstol.no/upload/HRET/Avgj%C3%B8relser/2011/saknr2010-934(anonymisert).pdf). An English translation of this

so on the grounds that it was unconstitutional to invoke war crimes provisions of the Penal Code that entered into force in 2008 for offences committed in 1992 in Bosnia-Herzegovina. As I have argued elsewhere, the Supreme Court did not, in my view, properly take account of the fact that the acts also constituted grave breaches of the Geneva Conventions of 1949.

This discussion is significant for the temporal scope of the Norwegian Penal Code with respect to corporations' involvement in war crimes prior to 7 March 2008. As noted above, the Penal Code provides for corporate punishment since 1991. It would seem to follow that even if pre-2008 acts constituting international crimes would be prosecutable as such (which, as the discussion above illustrates, is not the case in Norway today), pre-1991 acts would not be prosecutable for want of *ratione personae* with respect to corporations.

Jurisdiction *ratione loci*

The geographical jurisdictional scope (*ratione loci*) of the Norwegian Penal Code is addressed in sections 4 and 5 of the legislation. Section 4 addresses the territorial jurisdiction confirming the Penal Code's application to acts committed on Norwegian territory, on an installation on the Norwegian continental shelf, within the statutory jurisdiction of the Norwegian Economic Zone, or on a Norwegian vessel, including an aircraft or drilling platform or similar moveable installation.

Section 5 addresses the extraterritorial application of the Penal Code and its application in respect of persons (legal and natural). Given the greater likelihood of most international crimes occurring extraterritorially, it seems prudent to cite this section in detail:

Outside the scope and extent pursuant to section 4 the criminal legislation applies to acts committed

- (a) by a Norwegian national,
- (b) by a person resident in Norway, or
- (c) on behalf of an enterprise registered in Norway,

when the acts:

1. are also punishable under the law of the country in which they are committed,
2. are regarded as a war crime, genocide or a crime against humanity,
3. are regarded as a breach of the international law of war,

...

The first paragraph applies correspondingly to acts committed

- (a) by a person who since committing the act has become a Norwegian national or has been granted residence in Norway,
- (b) by a person who is or who since the act has become a national of or is resident in another Nordic country, and who is staying in Norway, or
- (c) on behalf of a foreign enterprise which, since the act was committed, has transferred all its operations to an enterprise registered in Norway.

The first paragraph, items 1, 2, 3, 6 and 7 apply correspondingly to acts committed by persons other than those who fall within the scope of the first and second paragraphs, when the person is staying in Norway, and the maximum penalty for the act is imprisonment for a term exceeding one year.

In the case of acts mentioned in the first paragraph, item 2, the second and third paragraphs apply only if the act is regarded as genocide, a crime against humanity or a war crime under international law.

In a prosecution under this section, the penalty may not exceed the highest statutory penalty for a corresponding act in the country in which it was committed.

A prosecution under this section is only instituted when required in the public interest.³⁶

In reviewing the extent of extraterritoriality from the perspective of corporate complicity for core international crimes, the Norwegian Penal Code offers significant food for thought, in terms of material offences, their location, and the persons who commit them. Section 5(c) extends the jurisdiction of the Penal Code to acts committed *outside* of Norway or its territories, vessels, installations, or platforms, but restricts that extension to specific acts. It should be noted that the list is given in the alternative, so that the jurisdictional criterion is met wherever one of the scenarios occurs. It is clear from this provision, for instance, that war crimes, crimes against humanity, and genocide, when committed on behalf of a Norwegian registered company outside of Norway, fall within the jurisdictional scope of the Norwegian Penal Code. There are of course two additional issues raised in section 5 that this author is unable, for want of space, to address in detail here.³⁷

It is necessary, however, to make a brief remark about the war crimes prosecution and Supreme Court dismissal before Norwegian courts discussed above,³⁸ insofar as they dealt with the issue of extraterritoriality. In neither first instance, appellate nor Supreme Court proceedings, did any of the courts

36 Equally, where those crimes are committed by a Norwegian national or resident outside of Norway, they similarly fall within this jurisdiction.

37 Those are issues of prosecutions for extraterritorial international crimes only being instituted when in the public interest and the apparent scope of successor or acquisition liabilities (though likely addressed through due diligence defences). Both, of course, merit sustained attention.

38 See above notes 33 to 35.

consider that the fact that the offences were committed in Bosnia-Herzegovina constitutes a jurisdictional bar to prosecution in Norway. That Norwegian courts had no *ratione loci* over the offences committed was not a substantive ground of appeal.

The defendant had however, on appeal before the Supreme Court, raised an additional challenge: in effect a *nullum crimen* argument that he could not be tried for the offences in question as they fell within the provisions of a 1999 amnesty law passed by the Parliamentary Assembly of Bosnia and Herzegovina. The Supreme Court rejected this argument.³⁹ Its rationale was that under the 1902 Penal Code, the particular offence for which the accused was sentenced was one of those offences specifically listed as falling within the Court's jurisdiction when committed by foreign persons abroad.⁴⁰ The Supreme Court reasoned that given those domestic provisions, '[t]he acts in question could thus have been prosecuted in Norway even if they had not been criminalized in Bosnia and Herzegovina', from which it followed that '[t]he same must apply if criminal liability for an act is repealed in the country where the acts were committed'.⁴¹ Even though these remarks relate to the previous penal code, the argument as to the significance of amnesties in respect of the new Penal Code provisions on core international crimes could be sustained in light of the relative constructions of the respective Norwegian Penal Codes, and significantly strengthened in light of international jurisprudence as to the weight attributable to amnesties with regard to those crimes. As can be noted above, the typologies of acts that may fall within the jurisdiction of the Norwegian Penal Code are listed in the alternative. The consequence would be that, even where an act was not punishable under the law of the country in which it was committed (section 5(b)1), it would still fall within the jurisdiction if it was regarded as a war crime, genocide, a crime against humanity, or a serious violation of international humanitarian law (section 5(b)3, 4, and 5). Were an amnesty offered in a particular country such that one would argue section 5(b)1 applied, this could equally be negated (though evidently not necessarily required) by the fact that the jurisprudence of the international tribunals has made it clear that amnesties offered at the cessation (or to facilitate the cessation) of hostilities cannot cover the most egregious crimes.⁴² The Supreme Court could have been much more robust in negating the amnesty under Bosnian law had the offences been successfully

39 See above note 35. Norwegian Supreme Court, *A v. The Public Prosecutor*, 13 April 2011, para. 98.

40 *Ibid.*

41 *Ibid.*

42 See ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement (Trial Chamber), 10 December 1998, para.155; Special Court for Sierra Leone (SCSL), *The Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber), 13 June 2004, paras. 82–84 as to the customary status of such a notion. Additionally, see the detailed reference *inter alia* to national practices of amnesties not covering core international crimes in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. II*, Part 2, Cambridge University Press, Cambridge, 2005, pp. 4017–4044, available with updated material at: www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159.

prosecuted as war crimes and not as the 'ordinary crimes' the accused was ultimately sentenced for.

Complicity: the likely mode of an employee's individual criminal responsibility

In the first section of this paper, I emphasised that corporate criminal liability should be properly distinguished from issues of responsibility. With the exception of those companies whose very business involves the direct use of force, the most likely manner in which corporate employees or agents would be involved in international crimes would be by assisting in their commission. A court is most likely, then, to be faced with a situation where it first needs to determine an individual's responsibility by virtue of their being complicit in the commission of a crime or acting on behalf of the company at the relevant time, before attributing liability to the company in question.

Section 15 of the Norwegian Penal Code, similar to other jurisdictions, equates aiding and abetting with the principal offence. In other words, to aid and abet in the contravention of provision of the Norwegian Penal Code is to similarly contravene that provision. Thus, in the context of this discussion, the reference to an individual whilst acting on behalf of a company contravening a penal provision includes those who aid and abet.

With respect to extraterritoriality, section 5 requires that for the Penal Code to apply to acts committed outside of Norway in the context of our present discussion, the act must be regarded as genocide, a crime against humanity, or a war crime under international law. Where the act is one of assistance, it would seem nonetheless to follow that, for the purpose of the exercise of jurisdiction by Norwegian courts, assistance must equally constitute an international crime. This author does not consider that this presents difficulties in terms of individual criminal responsibility, as under international law, aiding and abetting genocide, crimes against humanity, and war crimes constitute those crimes.

Therefore, when deliberating on whether a company's employee has aided and abetted the commission of an international crime, a Norwegian court (which is required to be satisfied that the act of the accomplice is a crime under international law) ought to draw guidance from the extensive jurisprudence on accomplice liability of international criminal tribunals.

A recent significant judgement in this regard is the conviction of the former Liberian president Charles Taylor by the Special Court for Sierra Leone (SCSL). In a lengthy judgement, the SCSL convicted Taylor on the basis of his having aided and abetted in the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law.⁴³ The judgement deals with

43 SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgement (Trial Chamber), 18 May 2012.

the applicable law under the SCSL's Statute. In its remarks on legal findings on responsibility, the Trial Chamber summarised the elements of aiding and abetting those international crimes in the following way:

In order to find the Accused criminally responsible pursuant to Article 6.1 of the Statute for aiding and abetting the planning, preparation or execution of the crimes charged in Counts 1 to 11 of the Indictment, the Trial Chamber must be satisfied beyond reasonable doubt that the Accused provided practical assistance, encouragement, or moral support which had a substantial effect upon the commission of the crimes (*actus reus*). Furthermore, the Trial Chamber must be satisfied beyond reasonable doubt that the Accused knew that his acts or omissions would assist the commission of the crime, or that he was aware of the substantial likelihood that his acts would assist the commission of the crime, and that the Accused was aware of the "essential elements" of the crime committed by the principal offender, including the state of mind of the principal offender (*mens rea*).⁴⁴

Whilst still subject to appeal (with the decision pending at the time of writing), the SCSL's trial judgement relied on what might be thought of as settled law regarding the definition of aiding and abetting international crimes.⁴⁵ The SCSL thus demonstrated that it applies a knowledge rather than purpose *mens rea* standard for accomplice liability – it is required that the accomplice *knew* of the likelihood of their assistance benefiting the commission of the crime, rather than provided assistance with that *specific purpose* in mind. Given that as a matter of general Norwegian criminal law, an accomplice need only know of the likelihood of their assistance affecting the commission of the crime, it seems not unrealistic that any domestic Norwegian court would follow the SCSL's reasoning.

Individual intention

Returning to domestic provisions, section 22 of the Norwegian Penal Code, dealing with the intention of individual perpetrators, lists three standards of intention or volition: purpose, knowledge, and recklessness. These standards extend to the majority of crimes under the Norwegian Penal Code, including war crimes, crimes against humanity, and genocide. Section 23 additionally provides for criminal liability on the basis of negligence. We will not address the issue of negligence here,

⁴⁴ *Ibid.*, para. 6904.

⁴⁵ Whilst there are certain aspects of accomplice liability across tribunals that may differ, the broad sense articulated in the *Taylor* trial judgement is one on which a domestic court considering international crimes could properly rely. This is particularly so where that test is markedly similar to the test for accomplice liability for domestic crimes, as is the case in Norway. At the time of writing there had been a further two trial judgements, three appeal judgements and one retrial judgement from the ICTY. The most recent articulation of the test before the ICTY can be found in ICTY, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Judgement (Trial Chamber), 27 March 2013, paras.107–108.

but will instead focus our attention on the lower threshold for intent: that of recklessness or, as it is often described, *dolus eventualis*.⁴⁶

Before the international ad hoc tribunals and the International Criminal Court (ICC), somewhat different views have been expressed as to what reliance can be placed on a *dolus eventualis* standard as the basis of establishing the subjective (*mens rea*) element of a crime.

In proceedings before the ICTY, the tribunal was satisfied that both *dolus directus* and *eventualis* were sufficient to establish the *mens rea* standard under Article 3 of the Tribunal's Statute.⁴⁷ It offered a technical definition in that where one engages in life-endangering behaviour, killing in those circumstances would be intentional where the assailant "reconciles himself" or "makes peace" with the likelihood of death.⁴⁸ The ICTY Trial Chamber expressly excluded, however, a standard of negligence as being incorporated into *dolus eventualis*.⁴⁹

By contrast, in a number of decisions the ICC has sought to exclude recklessness as a basis for *mens rea* in its interpretation of the relevant provision of Article 30 of the Rome Statute. In its first confirmation of charges hearing, Pre-Trial Chamber I of the ICC, when considering the meaning of the phrase 'in the ordinary course of events' (concerning an accused's awareness of the likelihood of the occurrence of a crime), refined what constituted *dolus eventualis* into two further conceivable situations: first, where the risk of bringing about the objective elements of the crime is substantial and the suspect is aware of that substantial likelihood and continues nonetheless; and second, where that risk (or likelihood) is low, there must be a clear or express acceptance that the objective elements of the crime will result from the suspect's actions or omissions.⁵⁰

In two further decisions confirming charges, the Pre-Trial Chambers of the ICC have made it clear that reliance on *dolus eventualis* is unfounded based on Article 30 of the Rome Statute.⁵¹ In part, the rationale for the exclusion of *dolus eventualis* as a form of liability under the Rome Statute is a result of the drafting of the Statute itself. As some suggest, the reason may well be the absence of a uniform interpretation in all domestic systems to which it applies.⁵² Alternatively, there are those who argue that notwithstanding the exclusion of a

46 There may be some discussion as to whether recklessness and *dolus eventualis* are directly related. Whilst for some they may seem synonymous, see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 168.

47 ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement (Trial Chamber), 31 July 2003, para. 587.

48 *Ibid.*

49 *Ibid.*

50 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. 01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, paras. 353–355.

51 ICC, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. 01/09-01/11, Decision on the Confirmation of Charges (Pre-Trial Chamber II), 23 January 2012, para. 336; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. 01/05-01/08, Decision on the Confirmation of Charges (Pre-Trial Chamber III), 15 June 2009, paras 358–360.

52 See Donald K. Pigaroff and Darryl Robinson, 'Article 30: mental element', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck, München, 2008, p. 860, footnote 67.

draft article⁵³ on recklessness during the negotiations of the Rome Statute, such a standard should apply in the context and meaning of the perhaps qualifying remarks that begin Article 30, 'unless otherwise provided.'⁵⁴

In the context of the Norwegian Penal Code, it is clear however that, insofar as *mens rea* is concerned, an acceptable standard from which to infer intent is *dolus eventualis*, and this can clearly be distinguished by a comparison between the respective subjective elements in Article 30 of the Rome Statute and section 22 of the Norwegian Penal Code. Article 30 of the Rome Statute reads in part:

For the purpose of this article, a person has intent where

- (a) in relation to conduct, that person means to engage in the conduct;
- (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Section 22 of the Norwegian Penal Code provides:

There is intent where a person

- (a) acts with the intention of committing an act that meets the description of an act in a penal provision,
- (b) acts with the awareness that the act certainly or most probably meets the description of an act in a penal provision, or
- (c) considers it possible that the act meets the description of an act in a penal provision, and decides to commit the act even though the description of the act would certainly or most probably be met.

There is a clear correlation between subsections (a) and (b) in each of the respective provisions. Explicitly including a third tier of intention has the consequence that, insofar as war crimes are concerned, whilst *dolus eventualis* cannot at present form a basis for *mens rea* before the ICC, it can for prosecutions under the Norwegian Penal Code.

53 An additional paragraph to the three that now make up Article 30 was included in draft Article 29. It read: 4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if: (a) The person is aware of a risk that the circumstance exists or that the consequence will occur; (b) The person is aware that the risk is highly unreasonable to take; and (c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur. See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June–17 July 1998, Official Records, A/CONF.183/13 (Vol. III)*, pp. 33–34.

54 Gerhard Werle and Florian Jessberger, 'Unless otherwise provided: Article 30 of the ICC Statute and the mental elements of crimes under international criminal law', in *Journal of International Criminal Justice*, Vol. 3, 2005, pp. 51–55.

Defences, aggravating and mitigating factors on corporate punishment

Beyond generic provisions that would apply to the conviction and sentencing of principals or accomplices, section 28 the Norwegian Penal Code provides the following with respect to corporate punishment:

In deciding whether to impose a penalty on an enterprise pursuant to section 27 and in assessing the penalty account shall be taken, *inter alia* of

- (a) the preventative effect of the penalty
- (b) the seriousness of the offence
- (c) whether an enterprise could by guidelines, instruction, training, control or other measures have prevented the offence
- (d) whether the offence has been committed in order to promote the interests of the enterprise
- (e) where the enterprise had or could have obtained any advantage by the offence
- (f) the enterprise's financial capacity
- (g) whether other sanctions have as a consequences of that offence been imposed on the enterprise or on any person who acted on its behalf, including whether a penalty has been imposed on any individual person, and
- (h) whether an agreement with a foreign State stipulates the imposition of corporate penalties.

This section intentionally includes a reference to 'defence', as section 28 might seem on the face of it to address both the amount of any fine and the question of whether a court would 'impose a penalty' in any event. The Penal Code provides for the concept of 'discharge', familiar in many other criminal systems, where an accused is found guilty yet not subject to any sentence, financial, custodial, or otherwise. But, as we saw above, the liability that corporations face under section 27 is to penalties and not to findings of guilt. However, it is worth recalling that this provision leaves the possibility open that a company *may* be liable to a penalty. The question which follows is whether any of the illustrative factors listed would provide the company with a 'defence' to the imposition of a penalty. Whilst many of the provisions (section 28(b), (d), and (e)) read as potentially aggravating factors regarding the level of fine imposed, there is a question as to whether section 28(c) is merely a point for mitigation or perhaps a form of due diligence defence. Whilst in this author's view, this is perhaps not the intention and that it remains a factor to be considered in mitigation, it remains an issue that a court must address.

In terms of sentencing, it will be recalled that section 27 in its second paragraph provides that in principle the penalty awarded would be a fine, but that on the basis of additional provisions in the Penal Code, it can include a discontinuation of a company's activities or the confiscation of proceeds from crime. Evidently these may be cumulative penalties.

Concluding observations

This article has sought to outline in brief some of the salient provisions of the Norwegian Penal Code relating to corporate punishment in the event that those acting on behalf of companies have committed or been complicit in international crimes. It has illustrated a number of aspects of the Penal Code which, whilst not unique, offer a considerable breadth in their cumulative effect that others might find encouraging or surprising. It has addressed the Norwegian Penal Code's personal, temporal, and material jurisdiction, its vicarious liability standard for corporations for the criminal acts of their agents, its knowledge test with respect to accomplice liability, recklessness as a standard of intent, and the question of what acts constitute international crimes domestically in Norway.

The number of corporations, as opposed to persons, convicted under individual criminal responsibility jurisdictions for crimes committed remains, for all intents and purposes, low, if not indeed nonexistent. The purpose of this article is therefore illustrative and – in parts – necessarily speculative, as Norway has yet to consider a case concerning corporate involvement in international crimes. The intention has been to offer a view on the range of issues likely to be raised and to contribute to the debate informing corporations of extant systems of law to which they might be subject, and lawmakers of the opportunities or challenges for ensuring that accountability mechanisms properly address questions of liability beyond traditional individual criminal responsibility.

However, the confluence in the Norwegian Penal Code of international crimes and corporate punishment has enabled the Norwegian Red Cross as a National Society to invoke international humanitarian law (in the context of discussions on international criminal law, at the very least) with corporations in Norway.⁵⁵ Conscious as they are of initiatives concerning corporate responsibilities in areas of armed conflict, many companies have been receptive to learning and appreciating more the significance of international humanitarian and criminal law and their effects on companies' potential criminal liability under domestic law. For those for whom the topic is relevant, either as a result of similar domestic provisions to Norway's or because they aspire towards such characteristics of accountability, the opportunity to educate and disseminate (with the usual outcome one expects – of refraining from unlawful acts) is not to be missed.

55 Readers might ask whether this activity (i.e. dialogue on international humanitarian law) could enable a corporation to claim that it fulfilled its duties under section 28(c) above. This is arguably not the case, since the factor in mitigation would seem to go beyond mere education but rather to the inculcation of the understanding of the possible implications of international humanitarian law for the company's operations into its corporate practice.

Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda

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Abstract

Growing reliance on 'multi-stakeholder initiatives' (MSIs) aimed at improving business performance with respect to specific human rights-related challenges has become a significant dimension of the evolving corporate responsibility agenda over recent decades. A number of such initiatives have developed in direct response to calls for greater state and corporate accountability in areas of weak governance and violent conflict. This article examines the evolution of key MSIs in light of the 2011 adoption of the United Nations (UN) Guiding Principles on Business and Human Rights and addresses challenges facing these initiatives in the future.

Keywords: multi-stakeholder initiatives, UN Guiding Principles on Business and Human Rights.

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Growing reliance on so-called ‘multi-stakeholder initiatives’ (MSIs) to address governance gaps and improve business performance on human rights-related challenges has become a significant dimension of the evolving corporate responsibility agenda over recent decades. Such initiatives have taken multiple forms, with varying combinations of participation from companies, non-governmental organisations (NGOs), individual experts, and governments. Their unifying feature is a collaborative approach to the development of standards of expected conduct and systems of implementation.

A number of MSIs, such as the Voluntary Principles on Security and Human Rights, the Extractive Industries Transparency Initiative (EITI), and the Kimberley Process Certification Scheme, each of which will be discussed in this article, have developed in response to calls for greater state and corporate accountability in areas of weak governance and violent conflict. Extractive industries have been among those most involved in such efforts as they have faced particular scrutiny given their pursuit of valuable natural resources wherever they are located. Corporate relationships with repressive regimes have also led to legal cases on charges of complicity in human rights abuses. These developments have informed decisions by a small but growing number of states, major companies, and civil society actors to pursue strategies which include participation in initiatives aimed at clarifying expected conduct in challenging operating contexts.

In his 2007 report to the UN Human Rights Council, the UN Secretary-General’s Special Representative on Business and Human Rights, Professor John Ruggie of Harvard University, devoted particular attention to the development of MSIs, noting that:

Driven by social pressure, these initiatives seek to close regulatory gaps that contribute to human rights abuses. But they do so in specific operational contexts, not in any overarching manner. Moreover, recognising that some business and human rights challenges require multi-stakeholder responses, they allocate shared responsibilities and establish mutual accountability mechanisms within complex collaborative networks that can include any combination of host and home states, corporations, civil society actors, industry associations, international institutions and investors groups.¹

This article will examine the evolution of key MSIs addressing the promotion and protection of international human rights and humanitarian law standards, in particular those initiatives of direct relevance to situations of armed conflict, violence, and fragile governance. It will do so in the light of Ruggie’s work and the adoption in 2011 by the United Nations Human Rights Council of the UN Guiding Principles on Business and Human Rights.

The first section will provide a broad overview of relevant policy and academic debates concerning the turn to multi-stakeholder forms of governance.

1 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. A/HRC/4/35, 19 February 2007, para. 53.

The second section will examine the development of three MSIs of relevance to high-risk contexts: the Voluntary Principles on Security and Human Rights, the EITI, and the Kimberley Process for certification of diamonds. The third section will explore the extent to which the UN Guiding Principles on Business and Human Rights may inform and contribute to efforts aimed at improving the overall effectiveness of these initiatives and other forms of multi-stakeholder consultation and governance. The final section of the article looks ahead at some of the potential steps that could be taken in the short term to address challenges facing MSIs and considers implications for the future of global governance.

Pursuing 'multi-stakeholderism': an overview of the debate

The increasing reliance on multi-stakeholder approaches to addressing global governance challenges is widely seen as having emerged first in the realm of international environmental policy. The UN Conference on Environment and Development held in Rio de Janeiro in 1992 and its substantive outcome, Agenda 21,² embedded non-state participation in international environmental policy processes and confirmed the role of non-state actors in environmental decision-making.

Debates concerning non-state involvement in environmental and development policymaking have been and continue to be framed largely in the context of public-private partnerships (PPPs). PPPs are typically understood as projects that involve governments, often acting within inter-governmental organisations (IGOs), along with multinational firms and in some cases large civil society organisations as well, with the aim of advancing specific governance objectives or addressing collective action problems. One recent study³ points out that since the 2002 Johannesburg World Summit on Sustainable Development, hundreds of new transnational partnerships in addition to those addressing environment-related concerns have proliferated across a wide range of policy domains, including health, food safety, and disaster management. Many more such partnership initiatives were announced at the recent Rio + 20 Summit on Sustainable Development.⁴

Scholars interested in the broad trend of hybrid, privatised, and partnership-oriented forms of governance have provided a range of explanations for these developments. Some suggest that governments' 'lack of requisite technical expertise,

2 United Nations Sustainable Development, 'United Nations Conference on Environment and Development, *Agenda 21*', Rio de Janeiro, Brazil, 3–14 June 1992, available at: www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf. All Internet references were accessed in 2012 unless otherwise stated.

3 Liliana B. Andonova, *Boomerang to Partnerships? Explaining State Participation in Transnational Partnerships for Sustainability*, paper prepared for Princeton University Conference on Research Frontiers in Comparative and International Environmental Politics, Niehaus Center for Globalization and Governance, December 2011, available at: www.princeton.edu/~pcglobal/conferences/environment/papers/andonova.doc.

4 See, for example, United Nations Global Compact, 'Rio + 20: action pledges by business kick off Rio drive for sustainability solutions', 18 June 2012, available at: <http://unglobalcompact.org/news/246-06-18-2012>.

financial resources, or flexibility to deal expeditiously with ever more complex and urgent regulatory tasks⁵ lead them to develop new governance arrangements of this kind. Others contend that non-state actors have become increasingly involved in standard-setting and public functions, ‘in particular in areas where inter-governmental efforts fail, or where stakeholders, such as civil society or private business, feel that regulation by international treaty does not adequately take into account their concerns’.⁶ A counter-perspective argues that states have deliberately turned away from traditional regulatory approaches in favour of new forms of collaborative governance. As one author has suggested: ‘The fact that actual governments routinely obfuscate their final authority . . . is no accident. Blurring the boundary lines between public and private, indeed, is part of an intentional effort to render opaque political responsibility for the wrenching adjustments entailed in late capitalist development’.⁷

Some scholars question the potential of such governance strategies. They argue that multi-stakeholder approaches face a substantial number of challenges, including inadequate participation among all actors due to time constraints or conflicts of interest, difficulties in achieving consensus on key decisions, power and capacity imbalances across stakeholder groups, and a lack of broader social and political legitimacy. One recent critique concludes that multi-stakeholder groups may be best used ‘as a means of promoting dialogue and building consensus, not as the locus of policy implementation and oversight’.⁸

Counter-perspectives suggest that in several cases, multi-stakeholder engagement has actually proved to be a more effective strategy than traditional legislative measures, resulting in enhanced standards of corporate conduct, new certification procedures, and new monitoring mechanisms, as well as in greater public awareness of corporate activities and influence. All of these combined have changed the landscape and discourse concerning the roles and responsibilities of the private sector in an increasingly global economy.⁹

Archon Fung argues that social issues involving the private sector, such as improving protection of basic labour standards, should be dealt with in a decentralised deliberative process involving NGOs, international institutions,

5 Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press, Princeton, 2001, p. 5.

6 Anne Peters, Lucy Koechlin, Till Förster, and Gretta Fenner Zinkernagel, ‘Non-state actors as standard setters: framing the issue in an interdisciplinary fashion’, in Anne Peters, Lucy Koechlin, Till Förster, and Gretta Fenner Zinkernagel (eds), *Non-State Actors as Standard Setters*, Cambridge University Press, Cambridge, 2009, p. 2.

7 Louis W. Pauly, ‘Global finance, political authority, and the problem of legitimation’, in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance*, Cambridge University Press, Cambridge, 2002, p. 77.

8 Rory Truex and Tina Søreide, *Why Multi-stakeholder Groups Succeed and Fail*, World Bank Policy Research Working Paper 5495, Sustainable Development Network, Finance, Economics and Urban Development Unit, December 2010, p. 3, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/3977/WPS5495.txt?sequence=2>.

9 John L. Campbell, ‘Why would corporations behave in socially responsible ways? An institutional theory of corporate social responsibility’, in *Academy of Management Review*, Vol. 32, No. 3, 2007, pp. 946–967.

companies, workers, and consumers.¹⁰ This approach goes against conventional methods of norm and regime formation which involve, in Fung's words, 'establishing international conventions of minimum decency, cajoling nations to adopt those conventions, and fortifying an international popular consensus to support them'.¹¹ He suggests that the potential effects of decentralised and multi-stakeholder approaches may 'make both conventional binding regulation and unconventional pressure for improving labor standards more compelling and effective'.¹²

Anne-Marie Slaughter, a former director of policy planning in the US State Department, a Princeton University professor, and an advocate for fostering networks of state and non-state actors to advance foreign policy objectives, has argued that:

The most effective strategy for addressing transnational or global problems involves mixed networks of public, private and civic actors created under the rubric of public-private partnerships (PPPs), global alliances, global campaigns or collaborative networks. Although not a panacea, such arrangements can stretch scarce government resources and ensure that they leverage other contributions of money, expertise and other in-kind resources.¹³

As Slaughter suggests, PPPs have tended to come about in significant part as a response to financial or other resource constraints faced by governments and IGOs. The term 'multi-stakeholder initiative', in contrast, is generally understood to refer to efforts aimed at addressing regulatory gaps and negative impacts of corporate practices. Another key feature of MSIs can be seen in their reliance on negotiated standards and more defined governance structures, ideally based on principles such as transparency, accountability, and equitable stakeholder participation. In terms of participants, whereas PPPs by their nature always involve governments or inter-governmental organisations in prominent roles, MSI participation varies considerably. Some MSIs in the human rights domain have developed with active government involvement, while others see government representatives playing a much more limited role, as will be discussed in the next section.

MSIs and human rights: experiments in governance

Over the past decade in particular, rising attention to corporate impacts with respect to internationally agreed humanitarian, labour and human rights standards has led to a number of experiments with multi-stakeholder forms of voluntary engagement

10 Archon Fung, 'Deliberative democracy and international labor standards', in *Governance: An International Journal of Policy, Administration and Institutions*, Vol. 16, No. 1, 2003, pp. 51–71.

11 *Ibid.*, p. 67.

12 *Ibid.*

13 Anne-Marie Slaughter, 'A grand strategy of network centrality', in Richard Fontaine and Kristin M. Lord (eds), *America's Path: Grand Strategy for the Next Administration*, Center for American Security, May 2012, p. 54, available at: www.cnas.org/files/documents/publications/CNAS_AmericasPath_FontaineAndLord.pdf.

and accountability. Given that MSIs in this area are still a relatively new innovation, multiple questions remain concerning their legitimacy and effectiveness in shaping state and corporate practices. For some observers, MSIs addressing human rights-related issues are inherently sub-optimal arrangements, in part because they may be used by companies to enhance image and keep potential litigation at bay while achieving only modest changes in corporate performance.

Advocates point out that MSIs potentially play critical roles in circumstances where government oversight and enforcement of standards is absent or deficient and can provide new platforms to advance state and corporate accountability.¹⁴ Others suggest that such alliances are better equipped to draw on local knowledge and pool learning from the experience of diverse actors to address complex problems that governments are unable to address alone, in particular when faced with mounting financial shortfalls.¹⁵ A recent report¹⁶ concludes that while all such efforts begin as voluntary initiatives, over time the trend towards more formalisation, including in governmental policies and regulation, is a distinct possibility. For example, the growth in sustainable procurement guidelines for governments is seen as increasing the demand for MSI-certified products.

It is noteworthy that early MSIs addressing human rights concerns such as the Ethical Trading Initiative¹⁷ and the Fair Labor Association (FLA)¹⁸ – which brought together companies, NGOs, and other key societal actors committed to protecting worker rights in member company operations worldwide, focusing in particular on the garment industry – have matured in their governance arrangements. These voluntary efforts, which involved initial support from the UK and US governments respectively, have grown over the past decade into well-established institutions with limited direct government involvement. In addition, they have begun to expand their reach to address labour-related supply chain challenges for companies in a wider range of industry sectors, as can be seen in the recent decision by computer maker Apple to join the FLA.¹⁹

More recent efforts have seen the MSI model used in other industry sectors, such as the Global Network Initiative (GNI)²⁰ established in 2008 by leading information technology companies, NGOs, academics, socially responsible investors, and experts to set standards on freedom of expression and user privacy on the

14 Caroline Rees, *Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes. Report of 2nd Multi-Stakeholder Workshop, 19–20 November 2007*, Corporate Social Responsibility Initiative, Report No. 27, John F. Kennedy School of Government, Harvard University, Cambridge, MA, 2008, available at: www.hks.harvard.edu/m-rcbg/CSRI/publications/report_27_accountability%20mechanisms2.pdf.

15 See, for example, Anne-Marie Slaughter, ‘The future of foreign policy is public-private partnerships’, in *CNN’s Global Public Square Blogs*, 25 November 2011, available at: <http://globalpublicsquare.blogs.cnn.com/2011/11/25/slaughter-the-future-of-foreign-policy-is-public-private-partnerships/>.

16 Mariëtte van Huijstee, *Multi-Stakeholder Initiatives: a Strategic Guide for Civil Society Organizations*, Stichting Onderzoek Multinationale Ondernemingen (Center for Research on Multinational Corporations), March 2012, p. 49, available at: http://somo.nl/publications-en/Publication_3786.

17 For more information on the Ethical Trading Initiative, see: www.ethicaltrade.org.

18 See the Fair Labor Association (FLA) website: www.fairlabor.org.

19 FLA, ‘Apple joins FLA’, 13 January 2012, available at: www.fairlabor.org/blog/entry/apple-joins-fla.

20 For more information on the Global Network Initiative, see: www.globalnetworkinitiative.org.

Internet. This initiative took shape largely without direct government leadership, although the US State Department has been supportive of the process. The GNI developed in response to the difficult experiences of leading information technology companies in China. For example, in 2004 one of the GNI's corporate participants, the search engine firm Yahoo!, provided the Chinese government with account information connected to the e-mail address of a Chinese journalist who was imprisoned as a result. In addition to Yahoo!, Google and Microsoft, which have faced their own challenges in China, have joined GNI as well in the hope of developing shared approaches to responding to such situations in countries around the world.

Multi-stakeholder initiatives in areas of violence and armed conflict

A number of key MSIs have emerged over recent decades that are of particular relevance to situations of armed conflict, violence, and other high-risk contexts. These initiatives have notably featured more active government involvement than those mentioned previously. This section examines three leading MSIs of relevance in this area: the Voluntary Principles on Security and Human Rights, the EITI, and the Kimberley Process Certification Scheme.

The Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights²¹ were launched in 2000 with strong support from the US State Department and the UK Foreign Office. The Voluntary Principles are a multi-stakeholder initiative that brings together major companies in the extractive and energy sectors, along with a number of governments and NGOs, for the purpose of guiding companies in maintaining the safety and security of their operations consistent with respect for human rights and fundamental freedoms.

The events that led to the development of the Voluntary Principles are widely viewed as being linked directly to growing activist concerns during the 1990s about the responsibilities of major oil and mining companies operating in conflict or weak governance zones. For example, companies such as BP faced growing scrutiny during this period over the hiring of security forces in Colombia known to have been complicit in abuses of human rights in communities where the company operated.²² Similarly, Shell faced strong criticisms of its operations in the Niger Delta, including alleged complicity in the 1995 execution by a Nigerian military

21 For more information on the Voluntary Principles on Security and Human Rights, see: www.voluntaryprinciples.org.

22 See, for example, Jon Mitchell, 'British Petroleum finds oil – plus a war: Colombian rebels frequently target pipelines and rigs', in *Christian Science Monitor*, 29 January 1997, available at: www.csmonitor.com/1997/0129/012997.econ.econ.1.html.

tribunal of activist Ken Saro-Wiwa, who had led a campaign protesting against the negative impacts of oil companies in the region.²³

As Bennett Freeman, a senior official in the US State Department in the Clinton administration and a key figure in the development of the Voluntary Principles, has noted:

These allegations, whether right or wrong, fair or unfair, have attracted the attention not only of NGOs and the media, but also of the home governments of the companies involved – including the United States and the United Kingdom. Those two governments have shared a concern over the risk to the operations and reputations of their flag companies. They have also shared an economic and political stake in ensuring that those companies are able and willing to continue to operate in key countries such as Nigeria, Indonesia and Colombia. And, most importantly, they share a common commitment to the protection and promotion of human rights throughout the world.²⁴

The Voluntary Principles are framed around three sets of issues. The first involves criteria that companies should consider in assessing the risk of complicity in human rights abuses in connection with their security arrangements, including their relationships with local communities and diverse other stakeholders. The second set of issues concerns company relations with state security forces, both military and police. The third area addresses direct company relations with private security forces. The overall aim is to provide practical guidance to companies on how to incorporate respect for international human rights standards into their policies and operational decision-making around the world.

Over its first decade of existence, the Voluntary Principles Initiative has faced a range of criticisms largely around lack of progress by companies in implementing the principles on the ground, lack of significant monitoring and reporting requirements, and an absence of clear admission criteria for new participants.²⁵ Some studies have concluded that expectations for the Voluntary Principles have been unreasonable, noting that while more could be done to improve corporate performance with respect to the principles, 'broader issues including conflicts over property rights and the (re)distribution of economic and political resources . . . will not be solved by the prevailing managerial approach to the governance of business and human rights'.²⁶

23 See, for example, Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, January 1999, available at: www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf.

24 Bennett Freeman, Maria B. Pica, and Christopher N. Camponovo, 'A new approach to corporate responsibility: the Voluntary Principles on Security and Human Rights', in *Hastings International & Comparative Law Review*, Vol. 24, 2000–01, p. 427.

25 Gilles Carbonnier, Fritz Brugger, and Jana Krause, 'Global and local policy responses to the resource trap', in *Global Governance: A Review of Multilateralism and International Organizations*, Vol. 17, No. 2, 2011, p. 252.

26 Tanja A. Börzel and Jana Hönke, *From Compliance to Practice: Mining Companies and the Voluntary Principles on Security and Human Rights in the Democratic Republic of Congo*, SFB-Governance Working Paper Series, No. 25, Research Center (SFB) 700, Berlin, October 2011, p. 29, available at: www.sfb-governance.de/publikationen/sfbgov_wp/wp25/wp25.pdf?1325771404.

Information available on the Voluntary Principles website includes initial assessments of company efforts to implement the principles.²⁷ It shows that although participating companies believe the initiative has provided critical guidance and its multi-stakeholder nature has contributed significantly to the credibility of the effort, a number of weaknesses are evident as well. These include lack of clarity in the text of some of the principles, difficulties in monitoring and auditing performance against the standards, and a perception of the initiative being an 'exclusive club', which undermines efforts to make the principles widely known and used by a range of business sectors experiencing security and human rights-related challenges.

The addition of a number of other governments in the initiative, including Canada, Colombia, the Netherlands, Norway, and Switzerland, and renewed commitment by the Obama administration to push its mission forward, have led to further steps aimed at strengthening the Voluntary Principles' governance and effectiveness. This can be seen in the outcomes of the September 2011 plenary meeting in Ottawa at which participants adopted a set of new Governance Rules²⁸ for the initiative, decided to pursue the formation of a legal entity for the initiative based in the Netherlands,²⁹ and committed to prioritising host government outreach and in-country implementation through the creation of a Host Government Outreach Working Group to facilitate dialogue and engagement with potential government participants.³⁰ At the annual Voluntary Principles plenary meeting in March 2012, an independent pilot project by oil, gas, and mining companies to develop indicators intended to measure the ways these participants fulfil their commitments as part of the initiative was discussed.³¹

These steps, along with the recent additions of a new participating company – Total – and civil society participants – Global Rights and the Pearson

27 See Voluntary Principles on Security and Human Rights, 'Overview of company efforts to implement the Voluntary Principles', Information Working Group, Company Implementation Report, available at: http://voluntaryprinciples.org/files/vp_company_efforts.pdf.

28 See Voluntary Principles on Security and Human Rights, 'The Initiative of the Voluntary Principles on Security and Human Rights: Governance Rules', as approved by the Plenary on 16 September 2011, available at: www.voluntaryprinciples.org/files/VPs_Governance_Rules_Final.pdf.

29 The Voluntary Principles Association, a non-profit organisation based in the Netherlands, was announced on 21 November 2012. The Association is intended to address administrative needs of the Voluntary Principles Initiative 'in order to enhance the Initiative's capacity to pursue its objective of facilitating the collaborative work of companies, governments, and non-governmental organizations seeking to find solutions to complex security and human rights challenges'. See Voluntary Principles on Security and Human Rights, 'The Voluntary Principles Initiative announces the formation of the Voluntary Principles Association: new organization will facilitate efforts by extractive sector companies to protect human rights', available at: www.voluntaryprinciples.org/files/Voluntary_Principles_Association_Press_Release_-_November_21_2012.pdf.

30 See Voluntary Principles on Security and Human Rights, 'Summary of Proceedings, Voluntary Principles on Security and Human Rights, Extraordinary Plenary Session', Ottawa, Ontario, 16 September 2011, pp. 1–2, available at: www.voluntaryprinciples.org/files/FHE-DC-130591-v1-VPs_Summary_of_Proceedings_Extraordinary_Plenary_Meeting.pdf.

31 See Voluntary Principles on Security and Human Rights, 'Chair's Summary of Proceedings, Voluntary Principles on Security and Human Rights, Annual Plenary Meeting', Ottawa, Ontario, 29 March 2012, p. 1, available at: www.voluntaryprinciples.org/files/Summary_of_Proceedings_VPs_Plenary_March_2012.pdf.

Centre – indicate the continuing interest in the Voluntary Principles Initiative. Only time will tell whether current reform measures are successful in bolstering the initiative’s legitimacy and effectiveness.

The Extractive Industries Transparency Initiative

A second key MSI relating to the extractive sector that is also of particular relevance to conflict and post-conflict situations is the Extractive Industries Transparency Initiative (EITI).³² The proposal for the EITI was initially presented by UK Prime Minister Tony Blair at the 2002 World Summit on Sustainable Development in Johannesburg. The EITI seeks to encourage greater transparency and accountability in resource-rich developing countries largely dependent on revenues from oil, gas, and mining. The initiative is centred on the conviction that greater public knowledge of company payments to governments will serve to improve public financial management and will in turn help foster more equitable and sustainable long-term economic growth.

Since 2006, the initiative has been overseen by a board comprising an independent chair (currently Clare Short, former UK State Secretary for International Development) and twenty representatives from implementing countries, supporting countries, civil society organisations, industry, and investment companies. A small international secretariat based in Oslo and hosted by the Norwegian government is accountable to the board. A World Bank-managed multi-donor trust fund provides technical assistance to countries in EITI implementation.

In contrast to the Voluntary Principles, in which companies are the primary actors in terms of agreeing to implement the principles and monitor progress, the EITI involves a system whereby governments themselves commit to meeting a range of requirements concerning revenue transparency. To move from ‘candidate’ (implementing but not yet meeting all requirements) to ‘compliant’ (meeting all requirements) status within the initiative, countries must complete an independent assessment known as the EITI validation every five years. This quality assurance mechanism is not an audit but seeks to evaluate, in consultation with relevant stakeholders, the implementation of the EITI global standard at the national level. The EITI board has established a network of accredited EITI validators who are selected by participating countries to work with key stakeholders in reviewing national-level performance. To date, 16 countries³³ have achieved ‘compliant’ status and 21 countries³⁴ are listed in the ‘candidate’ category, indicating involvement in the initiative but not yet meeting all requirements.

32 More information on the Extractive Industries Transparency Initiative is available at: <http://eiti.org/>.

33 As of November 2012, these include Azerbaijan, the Central African Republic, Ghana, the Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Mozambique, Niger, Nigeria, Norway, Peru, Timor-Leste, Yemen, and Zambia. See: <http://eiti.org/countries>.

34 As of November 2012, these include Afghanistan, Albania, Burkina Faso, Cameroon, Chad, Côte d’Ivoire, the Democratic Republic of Congo, Gabon, Guatemala, Guinea, Indonesia, Iraq, Kazakhstan, the Republic of the Congo, São Tomé and Príncipe, Sierra Leone, the Solomon Islands, Tanzania, Togo, and Trinidad and Tobago. See: <http://eiti.org/countries>.

The benefits of the EITI for the stakeholders are straightforward. Participating governments see their involvement as signalling that their countries are taking the steps necessary to achieve a stable investment climate, including by committing to more accountable and transparent governance. For the many companies and investors involved, the EITI is seen as a useful structure to help mitigate reputational risks faced when operating in countries where revenue payments to governments have been questioned. Civil society actors benefit from the initiative in that it provides them with added legitimacy in their dealings with governments and companies, as well as more public information about the revenues states receive, which they can use in their own advocacy aimed at holding public officials accountable for their performance.

In March 2011, the EITI's global conference brought together over 1,000 participants from 80 countries, clearly indicating strong support for the initiative. An independent evaluation of the initiative completed in 2011 concluded that the EITI has established itself as an important international brand with impressive support from governments, the private sector, and civil society.³⁵ Its focus on financial transparency has been seen as a strategic entry point for strengthening global consensus around greater democratic control of resources, and its multi-stakeholder approach has been widely credited with enhancing the voice and legitimacy of civil society in countries around the world.

In highlighting a number of shortcomings in the implementation of the EITI to date, the evaluation report points out that while the initiative has fostered greater transparency, accountability does not appear to have been improved, in part because of the lack of progress in areas of political, legal, and institutional reforms and capacity development in multiple countries involved in the initiative. The EITI has been criticised as being a tool used by Western donors to link calls for democratisation and good governance with those for economic liberalisation.³⁶ As one commentator has noted,³⁷ this in part explains why countries such as Angola, Algeria, Iran, and Saudi Arabia, which represent an estimated 90% of the global production of oil and gas, are not participating in the initiative. Similarly, only a small number of state-owned oil companies are participants in the EITI.³⁸ Powerful nations including China and Russia have not joined. US President Barack Obama announced in September 2011 that the US will implement the EITI.³⁹

35 See Scanteam, *Achievements and Strategic Options: Evaluation of the Extractive Industries Transparency Initiative, Final Report*, Oslo, May 2011, available at: <http://eiti.org/files/2011-EITI-evaluation-report.pdf>.

36 See, for example, Sarah Bracking, *Hiding Conflict over Industry Returns: a Stakeholder Analysis of the Extractive Industries Transparency Initiative*, Brooks World Poverty Institute, Working Paper 91, University of Manchester, May 2009, available at: www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-9109.pdf.

37 Liliane C. Mouan, 'Exploring the potential benefits of Asian participation in the Extractive Industries Transparency Initiative: the case of China', in *Business Strategy and the Environment*, Vol. 19, No. 6, 2010, pp. 367–376.

38 *Ibid.*

39 See EITI, 'President Obama: The US will implement the EITI', 20 September 2011, available at: <http://eiti.org/news-events/president-obama-us-will-implement-eiti#>.

The 2011 evaluation report concludes that as the EITI approaches its tenth anniversary in 2013, central challenges include the need for a broader agenda and strengthened certification scheme, combined with a more rigorous results framework for tracking performance. Such steps will require political leadership and increased capacity but are seen as being crucial to maintaining the EITI's relevance and building on its success.

The Kimberley Process

A third MSI of relevance to conflict situations is the Kimberley Process for certification of diamonds.⁴⁰ This initiative has its origins in the late 1990s, when the UN Security Council began to highlight the links between trade in rough diamonds and continuing conflicts in Africa. Security Council resolutions calling for national certification schemes for the diamond trade in Angola, Sierra Leone, and Liberia proved to be ineffective in breaking the connection between the sale of rough diamonds and the continuation of conflict in these countries.⁴¹

In 2000, corporate fears over the potential for consumer backlash against the entire industry, combined with the concerns of all diamond-producing countries, led to the decision to develop a multi-stakeholder process to address the issue of so-called 'conflict diamonds'. Industry and civil society participants were given full participation rights alongside state representatives in the negotiations, which were essentially aimed at developing a system for certifying the origin of rough diamonds from conflict-free sources and thereby preventing rebel groups from financing their efforts through the sale of diamonds. The initial 2000 event in South Africa launched a series of Kimberley Process meetings, which gained support from a large number of countries involved in the diamond trade. UN backing for the initiative, including a 2000 General Assembly resolution (55/56)⁴² and a 2003 Security Council resolution (1459),⁴³ and an exemption from the World Trade Organisation,⁴⁴ were seen as crucial in legitimising the Kimberley Process that officially launched in early 2003.

Over 70 countries are now involved in the Kimberley Process, which commits participating governments to passing national legislation and undergoing peer review. In addition to such requirements on states, the initiative also includes provisions for industry self-regulation based on a system of warranties and verification by independent auditors of individual companies as well as internal penalties set by industry, all with the aim of helping facilitate the full traceability of rough diamond transactions by government authorities.

40 For more information on the Kimberley Process initiative, see: www.kimberleyprocess.com.

41 See, for example, UNSC Res. S/RES/1173, 12 June 1998 (concerning Angola), and S/RES/1306, 5 July 2000 (concerning Sierra Leone and Liberia).

42 UNGA Res. A/RES/55/56, 29 January 2001, on 'The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts'.

43 UNSC Res. S/RES/1459, 28 January 2003.

44 World Trade Organisation, 'Waiver concerning Kimberley Process Certification Scheme for rough diamonds', Doc. G/C/W/432/Rev.1, 24 February 2003.

As Amy Lehr has noted:

The Kimberley Process is arguably an example of a co-dependent system . . . Its multi-layered system denotes the benefits of multi-stakeholder approaches and mutual learning when addressing supply chain challenges. The certification scheme . . . was developed with the participation and expertise of NGOs and companies as well as governments. Those stakeholders continue to have a seat at the table of Kimberley Process meetings, and to exert considerable pressure on the direction that the initiative takes. In addition, the industry's system of warranties acts as a backup to the government certification scheme. . . . Conflict minerals cannot be addressed unless governments draw upon their traditional national government functions, such as customs inspections. The certification scheme's quality would falter without industry's input and pressure from NGOs, but its implementation would not occur without governments acting in their traditional roles as well.⁴⁵

The Kimberley Process has been credited with helping to reduce the trade in conflict diamonds to less than 1% of the world's total rough diamond trade. Yet despite its successes, the initiative has faced strong criticism in recent years, including from civil society stakeholders who played critical roles in its creation. In December 2011, Global Witness announced⁴⁶ that it was withdrawing from the Kimberley Process over what it viewed as a series of failures on the part of the initiative concerning specific country situations, most notably in Zimbabwe. This followed a decision⁴⁷ by the Kimberley Process to authorise exports from two companies operating in the Marange diamond fields in Zimbabwe despite widespread violence and brutal repression of opponents of Zimbabwe's President Robert Mugabe. Global Witness called for

all existing contracts in the Marange fields to be cancelled and retendered with terms of reference which reflect international best practice on revenue sharing, transparency, oversight by and protection of the affected communities . . . The diamond industry must finally take responsibility for its supply chains and prove that the stones it sells are clean.⁴⁸

At the heart of these criticisms is a seemingly straightforward question: what is a conflict diamond? The current political situation in Zimbabwe failed to

45 Amy Lehr, 'Old and new governance approaches to conflict minerals: all are better than one', in *Harvard International Law Journal Online*, Vol. 52, Article Series: November 2010, p. 159, available at: www.harvardilj.org/2010/11/online_52_lehr/.

46 Global Witness, 'Why we are leaving the Kimberley Process – a message from Global Witness Founding Director Charmian Gooch', 5 December 2011, available at: www.globalwitness.org/library/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch.

47 Kimberley Process Administrative Decision on Marange (Zimbabwe), Doc. 001/2011, 1 November 2011, available at: www.kimberleyprocess.com/documents/10540/40001/2011%20-%20AD31%20Marange%20%28Zimbabwe%29.pdf?version=1.1&t=1327595170000.

48 Global Witness, 'Global Witness leaves Kimberley Process, calls for diamond trade to be held accountable', Press Release, 5 December 2011, available at: www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable.

rise to the current definition of the term used by the Kimberley Process – ‘rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’.⁴⁹ Restrictions in this case were therefore deemed to be unwarranted.

Media reports⁵⁰ from the June 2012 inter-sessional meeting of the Kimberley Process in Washington D.C. indicate that the US government in its role as chair of the initiative during 2012 is attempting to address the question of definitions. It has made a proposal that is said to remove from the current definition of conflict diamonds references such as ‘rebel movements’ and to add terms such as ‘situations of violence’.⁵¹ Such changes, if approved, could potentially cover country situations such as Zimbabwe.

As the 2012 Chair of the Kimberley Process, US Ambassador Gillian Milovanovic, put it in her remarks to the Washington DC meeting:

Fundamentally, we believe that carefully crafted, agreed updates to definitions, and to the procedures through which they will be invoked and applied, are central to addressing the concern of unfairness and inconsistency and also to keeping the [Kimberley Process] relevant and effective for decades to come.⁵²

These and other challenges facing the Kimberley Process will likely be the subject of further intensive discussions during the initiative’s tenth anniversary in 2013.

MSIs and the UN Guiding Principles on Business and Human Rights

The previous section highlighted the diverse approaches taken and the challenges faced by three leading MSIs involved in conflict or fragile governance-related situations. This section will examine the extent to which the 2011 adoption by the UN Human Rights Council of the Guiding Principles on Business and Human Rights,⁵³ the result of John Ruggie’s six-year mandate as UN Special Representative, may be of relevance to the future of these and other MSIs in the human rights domain.

This issue should be considered first from the perspective of the approach that Ruggie took in developing the Guiding Principles and how governments and

49 Kimberley Process Certification Scheme Core Document, Section I, ‘Definitions’, available at: www.kimberleyprocess.com/documents/10540/11192/KPCS%20Core%20Document?version=1.0&t=1331826363000.

50 See, for example, Naren Karunakaran and Ahona Ghosh, ‘Diamond trade versus human rights’, in *Economic Times*, 19 June 2012, available at: http://articles.economictimes.indiatimes.com/2012-06-19/news/32317729_1_conflict-diamonds-blood-diamonds-kimberley-process-certification-scheme.

51 *Ibid.*

52 Kimberley Process, p. 4, available at: www.kimberleyprocess.com/documents/10540/49668/Milovanovic.pdf.

53 UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc. A/HRC/17/31, 21 March 2011, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement>.

other stakeholders have reacted to his methodology. In the resolution endorsing the Guiding Principles and establishing the mandate of a follow-up expert working group to lead on the dissemination and implementation of the Guiding Principles, the UN Human Rights Council emphasised ‘the importance of multi-stakeholder dialogue and analysis to maintain and build on the results achieved to date and to inform further deliberations of the Human Rights Council on business and human rights’.⁵⁴ Indeed, as the Norwegian government, which led the cross-regional group of core sponsors of the Special Representative’s mandate, stated just prior to the adoption of the 2011 resolution:

It is the view of the main sponsors that the success of the outgoing mandate holder results to a large extent from the inclusiveness of his approach and his ability to develop open communications with all stakeholders. We believe it is time to institutionalize this multi-stakeholder involvement and create a forum for dialogue and cooperation to support and strengthen the Working Group.⁵⁵

The Human Rights Council resolution established a multi-stakeholder Forum on Business and Human Rights under the guidance of the Working Group for the purpose of promoting dialogue and cooperation on issues linked to business and human rights, notably ‘including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices’.⁵⁶

The Forum meets for the first time in December 2012. It is too soon to predict whether Ruggie’s emphasis on multi-stakeholder consultations in reaching broad consensus and the strong support of some governments for this approach will impact the way the Human Rights Council takes forward its own work in this area, or for that matter how companies will pursue their individual and collective efforts to implement the UN Guiding Principles. For its part, the new UN Working Group on Business and Human Rights has made clear its intentions to build on this approach:

The Working Group recognizes that the final measure of success of its mandate will be the extent to which the Guiding Principles are mainstreamed into ‘business-as-usual’ for all stakeholders in business activities – whether they influence, lead or participate in, or are affected by the same. This places the principle of multi-stakeholder consultation and input at the core of the philosophy of the Working Group, with the aim of garnering the widest degree of support by stakeholders for both the process and the outcomes of the mandate.⁵⁷

54 UN Human Rights Council Resolution on ‘Human rights and transnational corporations and other business enterprises’, UN Doc. A/HRC/RES/17/4, 6 July 2011, para. 5.

55 Norway’s statement is available at: www.business-humanrights.org/media/documents/ruggie/statements-norway-uk-business-human-rights-16-jun-2011.pdf.

56 See UN Human Rights Council, above note 54.

57 Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/20/29, 10 April 2012, para. 75.

But beyond the importance of broad consultation with all relevant actors, what do the Guiding Principles have to say about multi-stakeholder initiatives themselves? In fact, direct references to MSIs in the Guiding Principles are found only in the context of the so-called ‘Remedy’ pillar of the Protect, Respect and Remedy Framework on business and human rights, which the Guiding Principles are meant to operationalise. Guiding Principle 30 states: ‘Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available’.⁵⁸ The Commentary to this principle states, in part:

The legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms. The mechanisms could be at the level of individual members, of the collaborative initiative, or both. These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts.⁵⁹

These statements are important, as existing MSIs have generally not placed emphasis on grievance or alternative dispute resolution mechanisms. It should be noted, however, that initiatives such as the FLA have instituted third-party complaint processes as a last resort for individuals and groups alleging serious abuses that have not been adequately addressed through other channels.⁶⁰ Similarly, MSIs currently in development, such as the Code of Conduct for Private Security Service Providers, have included grievance mechanisms as part of their founding governance documents.⁶¹

Specific references to grievance mechanisms in the UN Guiding Principles are critical but may raise questions as to why other aspects of MSI governance are not included as well. However, a number of additional issues covered in the Guiding Principles are of direct relevance and should be considered in this context. One example concerns the issue of corporate public reporting. Guiding Principle 21 affirms that business enterprises should communicate externally how they address the human rights-related impacts of their operations, in particular when operating in contexts that pose risks of severe human rights impacts. Disclosure of performance continues to be a key challenge for many MSIs. The Guiding Principles provide clear statements in this area that should inform future practice.

Guiding Principle 16, concerning corporate policy commitments to respect human rights, and Principle 17, on the need for ongoing human rights due diligence processes to assess actual and potential human rights impacts and steps to integrate and act upon the findings of such assessments, are critical baseline expectations which should also be factored into MSI governance and efforts aimed at increasing legitimacy and effectiveness.

58 See UN Human Rights Council, above note 53, Principle 30, p. 26.

59 *Ibid.*, Principle 30, Commentary.

60 See FLA, ‘Third party complaint process’, available at: www.fairlabor.org/third-party-complaint-process.

61 See Charter for the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers, 2013, available at: http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf.

Recommendations in the Guiding Principles to state duties are also of relevance to MSIs, in particular with respect to conflict situations. Guiding Principle 7 states:

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:
 - a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
 - b) providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
 - c) denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
 - d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Clearly, these recommendations suggest that companies and governments involved in MSIs such as those discussed in the previous section should now be reviewing their own policies and actions in light of the UN Guiding Principles, which are widely viewed as the most authoritative global standard in the area of business and human rights.

Looking ahead: fulfilling the promise of multi-stakeholder governance

Despite competing views concerning their utility and effectiveness, the development of MSIs addressing private sector responsibilities in conflict and fragile governance areas has already significantly altered the playing field for many major corporations and marked an evolution in how some states view the need for more innovative strategies to address key human rights-related challenges. Though only a relatively small number of states and companies have involved themselves in such efforts to date, these experiments in governance have clearly made an impact on the global policy agenda.

Given their recent history, it is not surprising that each of the MSIs discussed in this article features different forms of interaction and power relations between participants, employs different governance arrangements, and has achieved different levels of implementation and evaluation of performance to date. Despite their still experimental forms, there is a growing sense of urgency regarding the legitimacy and impact of such efforts should be addressed; these include the still limited involvement by many corporations, governments, and civil society actors, as

well as the lack of uniform standards, monitoring, and penalties for non-compliance.

What practical steps can be taken in the short term to address the challenges and shortcomings facing existing MSIs? One clear area where more work is needed concerns greater attention to the roles of governments in such efforts. As John Ruggie stressed when addressing participants in the Voluntary Principles on Security and Human Rights in 2011:

When operating in difficult environments, companies need granular advice and assistance from home and host states alike. They need to be able to count on the in-country government-to-government interface that is a critical component of the Voluntary Principles... In my experience, most embassies are not well instructed or equipped for these tasks. In addition, home governments of companies need to be honest with them when their activities approach critical thresholds, and promote corrective measures if they are crossed.⁶²

Encouraging participating governments to exert proactive leadership within existing initiatives, consistent with the state duty to protect human rights as affirmed in the UN Guiding Principles, is a clear priority in the time ahead. Other governance-related challenges need greater attention and more consistent approaches by all stakeholders as well. Issues such as how MSI secretariats should be established and funded, what the implications are for participating companies in terms of their relationships with suppliers, distributors, and subsidiaries, and how effective complaints mechanisms should be established are all critical in bolstering the legitimacy of existing and planned initiatives.

A number of lessons on these and other governance questions facing MSIs addressing human rights related concerns could potentially be drawn from related examples such as the work of the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance.⁶³ This collaborative project was formed in the late 1990s by four certification organisations with the aim of establishing a global association of sustainability standards. ISEAL's work covers industry sectors such as agriculture, forestry, and fisheries, with plans for standards on additional sectors under way. Its codes of good practice on issues of impact and assurance may benefit the efforts of MSIs discussed in this article. An additional relevant effort can be seen in the developing activities of the Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity), which aims to examine the impact and value of voluntary business-related human rights initiatives.⁶⁴

Another resource that MSIs should seek to engage is the new UN Working Group on Business and Human Rights, through its mandate to disseminate and foster implementation of the UN Guiding Principles. The Working Group could, for

62 John G. Ruggie, 'Keynote Remarks at Extraordinary Plenary Voluntary Principles on Security & Human Rights Department of Foreign Affairs & International Trade, Ottawa, Canada, 15 September 2011', available at: http://voluntaryprinciples.org/files/Ruggie_Speech_VPs_September_2011.pdf.

63 See the ISEAL Alliance website at: www.isealliance.org.

64 See the MSI Integrity website at: <http://www.msi-integrity.org/>.

example, be asked to convene representatives of major MSIs in the field to share lessons learned and discuss how relevant provisions of the Guiding Principles should best be integrated into existing and planned initiatives. Equally important, it and other independent human rights bodies such as national human rights institutions could play vital roles by assisting MSIs in resolution of disputes, and potentially investigating and issuing authoritative opinions in cases where disputes could not be resolved through mediation.

Greater involvement by these UN expert bodies will undoubtedly point out the significant constraints facing MSIs and other organisations working in this area, a subject that John Ruggie addressed repeatedly as part of his mandate. Ruggie proposed the establishment of a voluntary fund for business and human rights, with the primary purpose of addressing capacity-related needs in implementing the UN Guiding Principles. His proposal envisioned a fund that could receive contributions by states and private sources and be overseen by a multi-stakeholder steering committee dedicated to supporting strategies at all levels for encouraging uptake of the Guiding Principles.⁶⁵ To date, the only UN follow-up to this proposal has been a request by the UN Human Rights Council for a 'feasibility study' on the possibility of establishing such a fund,⁶⁶ although the UN Working Group or the Office of the High Commissioner for Human Rights could conceivably pursue additional actions in this area as well.

Critics of multi-stakeholder approaches will likely continue to point to the danger of such efforts becoming little more than exercises in corporate public relations and a diversion from the real task of creating verifiable and legally enforceable regulatory frameworks. Defending against such criticisms will require that those involved in MSIs, in particular companies and governments, take further concerted steps to strengthen the legitimacy and effectiveness of these initiatives, including by ensuring real power-sharing and genuine involvement of stakeholder groups from civil society and from local communities impacted by corporate operations, as well as by involving other constituent groups in decision-making processes and evaluation of impact. MSIs will also need to demonstrate their ability to involve more corporate and state actors while continuing to foster greater ownership, expertise, and innovation, which can produce positive impacts over time.

As the examples in this article highlight, many questions remain about the viability of MSIs as a form of global governance that can contribute to preventing and ending situations of violence, armed conflict, and wide-scale abuse of human rights. Despite these uncertainties, what is clear is that MSIs, operating

65 Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 'Recommendations on follow-up to the mandate', 11 February 2011, available at: <http://business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>.

66 UN Human Rights Council, UN Doc. A/HRC/RES/21/5, 16 October 2012, para. 11 requests 'the Secretary-General to undertake a feasibility study to explore the establishment of a global fund to enhance the capacity of stakeholders to advance the implementation of the Guiding Principles . . . the conclusions should be presented to the Human Rights Council and included in the report of the Secretary-General in June 2014'.

outside formal institutional structures and processes, continue to be seen by a range of actors as a viable form of global governance based on a growing body of practice in select industry and operating contexts. This collective knowledge and experience will inevitably make them a key determinant of how any new international standards aimed at clarifying the responsibilities of multiple actors in the human rights domain will be developed both substantively and procedurally in the future.

The importance of stakeholder engagement in the corporate responsibility to respect human rights

Barbara Dubach and Maria Teresa Machado

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Maria Teresa Machado started her career with international humanitarian and human rights organisations worldwide, including the Inter-American Court of Human Rights, the International Committee of the Red Cross, and Human Rights Watch, before furthering her experience to the fields of corporate social responsibility and sustainability. She joined Engageability as a consultant in the beginning of 2012.

Abstract

Over the past forty years, there has been a steady rise in the expectation for companies to operate as responsible citizens. Today companies have at their disposal a variety of initiatives, and new levels of accountability have been reached with the advancement of international standards on, among others, corporate responsibility to respect human rights. Against this background, this article provides an overview of the

most important guiding tools available on this subject and on how to promote peace and stability when operating in conflict-affected or high-risk areas. The article argues that ongoing stakeholder engagement is a key success factor in meeting the responsibility to respect human rights and that it has to be an integral part of a company's strategy, especially when operating in conflict-affected countries.

Keywords: Stakeholder engagement, collaboration, corporate responsibility, human rights, due diligence, conflict management, multi-stakeholderism, partnerships.



The publication of the Club of Rome's study *The Limits to Growth*¹ in 1972 and the first OECD Guidelines for Multinational Enterprises in 1976 initiated a discussion on the human, ecological, and social footprint of businesses and their role in tackling these challenges. Since then, there has been a steady rise in the expectation for companies to operate as responsible citizens from a broad range of stakeholders. The way corporate governance, compliance, and business ethics are addressed is influenced by increasing performance demands, growing public scrutiny, and new levels of accountability derived from the development of international standards and guidelines on corporate responsibility and the respect of human rights.²

At the same time, companies have come to realise the opportunities that a sustainable and responsible business strategy can offer. It creates value for the company and its shareholders but also for society, namely by creating job opportunities, generating income for local communities, sustaining livelihoods, and fostering local development, as well as by promoting best practices in the areas of human rights, labour, the environment, and anti-corruption.³

However, sustainable business cannot thrive where poverty, corruption, and inequality reign, and where human rights are not respected and supported.⁴ Especially when operating in situations of conflict and violence, companies of all sizes should, beyond their primary duty to cause no harm to human rights, have an interest in and contribute to promoting peace and stability.

1 Donnella H. Meadows *et al.*, *The Limits to Growth*, Universe Books, New York, 1972.

2 See Figure 1, 'The Corporate Responsibility Timeline'. This timeline illustrates the evolution and development of some of the international standards, guidelines, and initiatives that resonate with corporate responsibility and respect for human rights, intensified since the inception of the new millennium. Instruments such as the OECD Guidelines for Multinational Enterprises, the Principles for Responsible Investment, the ISO 26000 Guidance Standard on Social Responsibility and the ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy complement the Guiding Principles in establishing authoritative guidance for the corporate responsibility to respect human rights.

3 Barbara Dubach, 'Companies: Conflict Sensitive Engagement', in Andrea Iff (ed.), *Money Makers as Peace Makers? The Role of Business in Conflict Zones*, Swisspeace Conference Paper 1/2012 (forthcoming, June 2013).

4 These challenges were explored at the Rio +20 Corporate Sustainability Forum sessions dedicated to the theme of social development, which focused on the role of the private sector in the social dimension of sustainable development – as the source of responsible investment, job creation, innovation, and inclusive growth. See the Rio +20 Corporate Sustainability Forum, available at: <http://csf.compact4rio.org/events/rio-20-corporate-sustainability-forum/custom-125-251b87a2deaa4e56a3e00ca1d66e5bfd.aspx>. All internet references were accessed in October 2012, unless otherwise stated.

The Corporate Responsibility Timeline

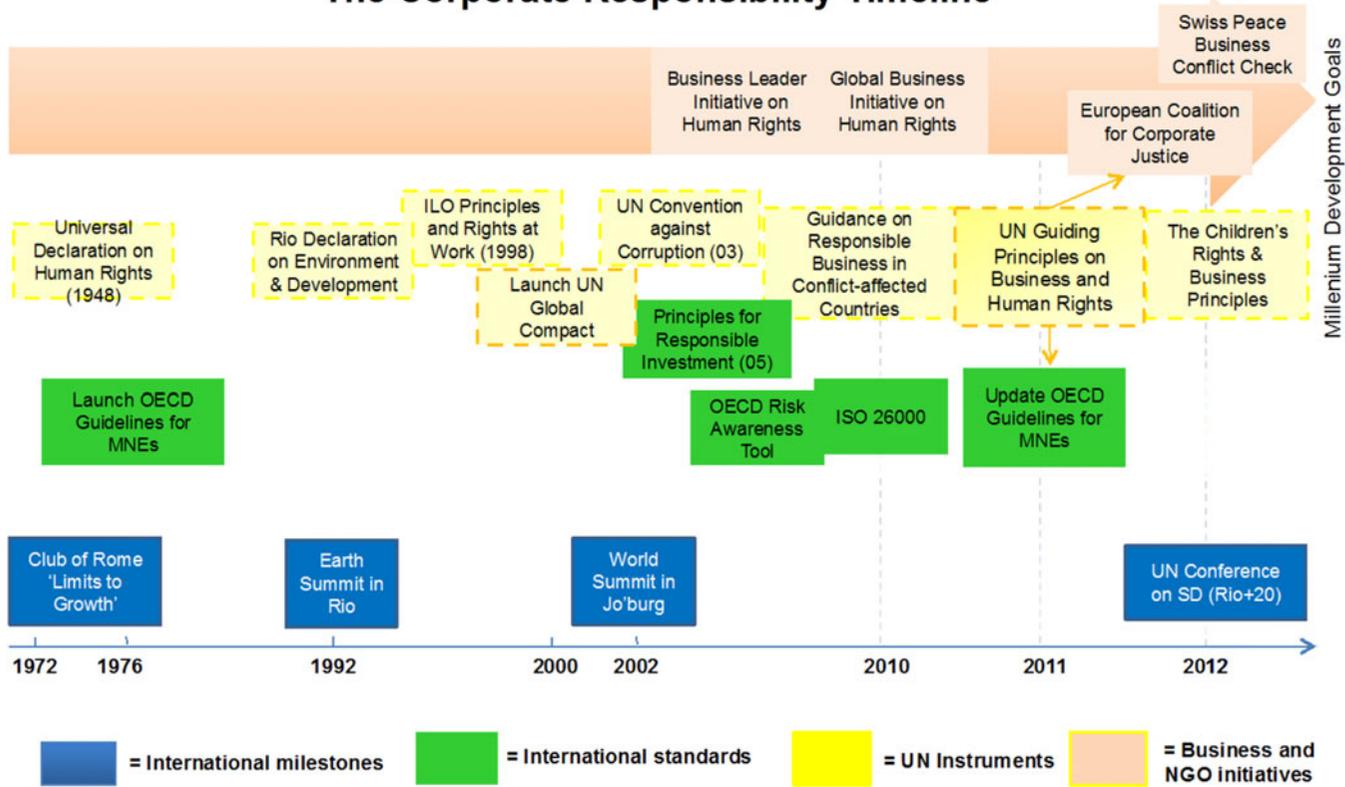


Figure 1. The Corporate Responsibility Timeline.

Many business leaders around the world recognise that respect for human rights is becoming an essential element of good risk management, enabling enterprises to navigate non-technical, non-financial risk in line with international norms, to secure the social license to operate, to enter new markets, and to avoid unnecessary litigation costs or legal liability. Many, therefore, endeavour to protect and respect human rights in their activities. However, there is still a long way to go until the private sector has fully embraced the opportunities to contribute to the development of more peaceful and sustainable societies.

This article provides an overview of existing guidance on the responsibility to respect human rights and its practical consequences for enterprises. It emphasises the importance of ongoing stakeholder engagement in successfully fulfilling the corporate responsibility to respect human rights with best practice examples of stakeholder engagement. The relevance of exercising stakeholder dialogues in conflict or high-risk contexts is also addressed. Finally, recent stakeholder campaigns on business and human rights are highlighted. The article concludes with recommendations on how best to integrate stakeholder engagement into a company's human rights strategy.

Corporate responsibility to respect human rights and its implications for companies

Whereas many multinational enterprises (MNEs) and small and medium-sized enterprises (SMEs) now see a long-term business case for respecting human rights,⁵ it remains one of the most challenging areas of corporate citizenship.⁶ As companies try to fulfil the legal, business, and moral obligations to address human rights within their operations and value chains, they are faced with major challenges. How to adopt a systemic management approach to human rights? How to avoid complicity in human rights abuses? Where to draw the boundaries of responsibility for human rights?

Guidance on the corporate responsibility to respect human rights

With a view on laying the foundations of a system for better managing business and human rights challenges, the Special Representative of the Secretary-General proposed in 2008 a conceptual policy framework known as the Protect, Respect and Remedy Framework. It chartered the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access to effective remedy.⁷

5 See the Global Business Initiative on Human Rights, available at: www.global-business-initiative.org.

6 See the UN Global Compact, available at: www.unglobalcompact.org/Issues/human_rights/.

7 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008, para. 9.

The Protect, Respect and Remedy Framework heightened the discussion around corporate responsibility and human rights, and generated momentum in 2011 for the endorsement of the Guiding Principles on Business and Human Rights.⁸ The Guiding Principles clarify the meaning of the corporate responsibility to respect human rights and provide a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. Together with the United Nations (UN) Global Compact Ten Principles,⁹ the Guiding Principles constitute the core framework for business and human rights, and have mainstreamed the corporate responsibility to uphold and respect internationally proclaimed human rights.

Key stakeholder groups have welcomed these standards. Numerous international organisations have drawn on the Guiding Principles in adapting their own business and human rights policies and standards.¹⁰ Governments such as those of Australia, Canada, and the United Kingdom, as well as the European Union,¹¹ have applied the Guiding Principles in their public policies, and it can be expected that others will also start encouraging or requiring corporate human rights disclosure. Several major global corporations have realigned their due diligence processes based on the Guiding Principles and, while these are not legally binding, stakeholder expectations and pressure on enterprises to respect human rights show a trend of increase.¹² Investors and advocacy organisations have progressively demanded that companies demonstrate and ensure respect for human rights through the measures outlined in the Guiding Principles.

- 8 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/17/31, 21 March 2011.
- 9 The UN Global Compact Ten Principles are ten universally accepted principles in the areas of human rights, labour, environment, and anti-corruption. See: www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.
- 10 For example, the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the Principles of Responsible Investment, the International Standardization Organization (ISO) 26000 Guidance Standard on Social Responsibility, and the International Labour Organization (ILO) Tripartite Declaration Concerning Multinational Enterprises and Social Policy refer to the corporate responsibility to respect human rights and were recently updated to ensure alignment with the Guiding Principles. In addition, new UN-supported principles covering specific human rights, such as the Children's Rights and Business Principles, were developed for the use and guidance of companies worldwide.
- 11 The European Commission's 2011 communication on corporate social responsibility calls on all European businesses to meet their responsibility to respect human rights, as set out in the UN Guiding Principles. The new policy on corporate social responsibility recommends that Member States establish a mix of self- and co-regulations that implement the corporate duty to respect human rights, and invites them to present or update their own plans for the promotion of corporate social responsibility by mid-2012. See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Renewed EU Strategy 2011–14 for Corporate Social Responsibility*, 25 October 2011, available at: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm.
- 12 Several business-led initiatives such as the Business Leaders Initiative on Human Rights and the Global Business Initiative on Human Rights have also contributed significantly to stimulating the discussion and understanding of the responsibility to respect human rights.

Practical consequences of the corporate responsibility to respect human rights

The responsibility to respect human rights refers to universal human rights principles, understood as those enshrined in the International Bill of Human Rights¹³ and the core conventions of the International Labour Organization (ILO).¹⁴ These principles present companies with a set of international norms against which to benchmark their own performance and remain accountable for their actions.¹⁵ Depending on the circumstances, enterprises may need to consider additional standards, such as those of international humanitarian law, when operating in situations of armed conflict.

For companies, in practical terms, respecting human rights means, at a minimum, not infringing on the rights of others, and causing no harm – a responsibility that is a baseline expectation for all companies in all situations.¹⁶ It is not a passive responsibility but requires action from companies. The Guiding Principles provide concrete and practical recommendations for companies on how to meet their responsibility to respect human rights, namely through determining their sphere of influence,¹⁷ expressing their commitment to a human rights policy,¹⁸ developing a human rights management framework,¹⁹ and exercising due diligence.²⁰

The corporate responsibility to respect human rights requires an ongoing and dynamic process (adapted to a company's operating context, sector, and size) that allows for enterprises to become aware of, prevent, and address adverse human rights impacts linked to their business activities and relationships (such as those with suppliers, customers, business partners, and other entities in the value chain).²¹ Companies are asked to identify and assess their actual and potential human rights impact, while integrating and acting upon their findings. They also have to monitor and track the effectiveness of responses so that they can communicate and report on their human rights impact. Finally, a framework for remediation must be established.

At each and every step of this process, it is essential to take stakeholder views into consideration and to engage with them at the local, national, and

13 The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

14 As set out in the ILO Declaration on Fundamental Principles and Rights at Work (adopted by the International Labour Conference at its Eighty-Sixth Session, Geneva, 18 June 1998).

15 John Morrison, "Eyes Wide Open": human rights and justifying business engagement. Reflections on the importance of the Khartoum meeting of 17 May 2006 hosted by UNDP and Ahfad University', p. 3, available at: www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Eyes_wide_open.pdf.

16 See Protect, Respect and Remedy Framework, above note 7, para. 24.

17 See Guiding Principles, above note 8, para. 11.

18 *Ibid.*, para. 16.

19 *Ibid.*, para. 19.

20 *Ibid.*, para. 17–22.

21 United Nations Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: an Interpretative Guide*, HR/PUB/12/02, OHCHR, New York and Geneva, 2012, p. 5, available at: www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

international levels. Human rights due diligence is a process that helps enterprises address their responsibilities towards the individuals and communities they impact, but also their responsibilities towards shareholders, investors, or business partners, being in the company's best interest. In order to manage human rights effectively, meaningful engagement and dialogue with concerned stakeholders based on transparency and accountability is needed.

Stakeholder engagement – key to the respect for human rights

Engaging stakeholders at every step of a human rights management framework is key in meeting the responsibility to respect human rights. It is not a one-off affair; rather, it is a learning process involving long-term commitments.²²

Stakeholder engagement – key concepts

Stakeholder engagement relates to mapping and being responsive to the needs of groups affected by, or dependent on, business activity and outcomes while accommodating and balancing their distinct interests. Typically, groups of stakeholders include employees (internal stakeholders); shareholders, investors, customers, business partners, suppliers, and regulators (known as 'external market stakeholders'); and civil society, community members, international organisations, and non-governmental organisations ('external non-market stakeholders').

Companies increasingly recognise the business and reputational risks that come from poor stakeholder relations and the opportunities offered by constructive ones. Actively developing and sustaining good stakeholder relations is a prerequisite for improved risk management and better results on the ground.²³ It allows companies to better anticipate and act upon the rapidly changing societal expectations within their operating context, as they understand and respect the communities in which they operate. At the same time, it allows them to adopt conflict-sensitive business practices as well as to establish consensus-building processes and trust between business and society in order to gain and maintain a social license to operate. However, for many enterprises finding the right approach to stakeholder engagement and tapping the wider benefits it offers to their business is still uncharted territory.²⁴

Realising the opportunities that stakeholder engagement offers requires systematic and proactive stakeholder engagement processes as an integral part of

22 Barbara Dubach, *Systematic Stakeholder Engagement: a Key for Assessing and Addressing Changes in the Global Societal Environment*, 2011, p. 7, available at: www.inter-disciplinary.net/wp-content/uploads/2011/06/dubachpaper.pdf.

23 International Finance Corporation, *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets*, May 2007, pp. 1–2, available at: www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_stakeholderengagement_wci_1319577185063.

24 B. Dubach, above note 22, p. 1.

| Guiding Principles | Stakeholder engagement recommendations |
|---|--|
| <ul style="list-style-type: none"> ● Human rights policy | <p>A human rights policy can be defined in consultation with stakeholders or at least reviewed by relevant external stakeholders.²⁵</p> |
| <ul style="list-style-type: none"> ● Human rights due diligence | <p>Effective consultation with affected communities or other stakeholders is key during human rights due diligence processes, and in particular in human rights impact assessment.²⁶ In conflict-affected or high-risk areas, an independent expert or advisory panel to review the human rights impact assessment should be considered.</p> |
| <ul style="list-style-type: none"> ● Human rights integration and action plan | <p>Local stakeholders should be consulted in dealing with implementation dilemmas and challenges,²⁷ and they should be invited to participate in reviewing performance and protecting ‘whistle-blowers’.²⁸ In conflict-affected or high-risk areas, particularly in the context of existing tensions amongst groups, an inclusive approach should be adopted.²⁹</p> |
| <ul style="list-style-type: none"> ● Human Rights Communication | <p>The processes and actions adopted to curtail possible impacts on and promote the enjoyment of human rights should be communicated to internal and external stakeholders on a regular basis, as should the company’s performance, for example on the company’s website or in its yearly reporting.³⁰ It is also important to publicly recognise responsibility for any impacts on human rights.³¹</p> |
| <ul style="list-style-type: none"> ● Remediation: <ul style="list-style-type: none"> – Complaint procedures – Dispute settlement mechanisms – Grievance mechanisms | <p>Effective non-judicial remediation includes multiple options for addressing complaints and involving multi-stakeholders in designing and raising awareness of dispute settlement and grievance mechanisms, verifying the operation of these mechanisms, and seeking solutions for open/ difficult complaints.³² In the case of open or difficult complaints, a multi-stakeholder grievance mechanism is recommended.</p> |

Table 1. Recommendations for stakeholder engagement based on the Guiding Principles.

a company's strategy. To implement good stakeholder engagement, some essential steps have to be followed. First of all, stakeholders affected by and dependent on business activities should be identified and prioritised, while their needs and concerns should be assessed and accounted for. Based on stakeholder analysis and needs assessment, a stakeholder engagement strategy should be defined, including engagement objectives and measurable targets as well as activities to be pursued. Implementation of the strategy and effectiveness monitoring should be done in consultation or collaboration with stakeholders. Last but not least, it is essential to report back to stakeholders on the company's performance and achievements.

These steps to establishing good stakeholder relations are all the more relevant in the realm of meeting the corporate responsibility to respect human rights and in successfully implementing the Guiding Principles.

Stakeholder engagement in the context of business and human rights

In the context of the corporate responsibility to respect human rights, stakeholder engagement should be a standard element of daily business, as it helps businesses to spot potential human rights impacts, opportunities, or challenges early in the process and at each step of developing and implementing a human rights framework in line with what is suggested in the Guiding Principles and explained in the following table.

From the moment a company maps its sphere of influence (its scope of opportunities to support the enjoyment of human rights and make the greatest positive impact),³³ outlines a human rights policy, and starts employing due diligence, proactive stakeholder engagement processes (such as needs assessment, partnerships, and multi-stakeholder forums) assume strategic significance.³⁴ When making use of these processes, a company can choose from a variety of activities: it can inform, communicate, consult, negotiate, involve, collaborate, or empower

25 See Guiding Principles, above note 8, para. 16.

26 *Ibid.*, para. 18.

27 *Ibid.*, para. 20(b).

28 UN Global Compact, *Blueprint for Corporate Sustainability Leadership*, p. 11, available at: http://unglobalcompact.org/docs/news_events/8.1/Blueprint.pdf.

29 UN Global Compact Office, *Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors*, UN Global Compact and PRI, June 2010, p. 22, available at: www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.

30 See Guiding Principles, above note 8, para. 21.

31 *Ibid.*

32 See Guiding Principles, above note 8, paras. 22, 28–29, 31.

33 Encouraged by the Guiding Principles (para. 11) and the UN Global Compact Ten Principles (Principle 1).

34 Various guidance tools and standards refer to or encourage exercising stakeholder engagement throughout the process of respecting and supporting human rights in business operations and activities, such as the UN Global Compact Ten Principles, the Guiding Principles, the ISO 26000 standard, the Global Reporting Initiative, and the *International Finance Corporation Good Practice Handbook for Companies Doing Business in Emerging Markets*. Particularly useful is the *Guide for Integrating Human Rights into Business Management*, produced by the Business Leaders Initiative on Human Rights, UN Global Compact, and the UN OHCHR, available at: www.integrating-humanrights.org.

stakeholders. How far or how deep these activities go depends on the enterprise's level of commitment to engaging with stakeholders.

In this view, stakeholder engagement is exercised so as to build relationships across a company and with external groups, which can directly or indirectly contribute to expanding the recognition of human rights values within the company's sphere of influence.³⁵ The purpose is to raise awareness of the human rights risks and opportunities the company faces, and to establish platforms for constructive dialogue and consensus-building processes to the advantage of all involved, the company's own workforce included. These relationships have to be based on transparency and accountability, so that trust among the concerned stakeholders is fostered.

In order to identify relevant external stakeholders and involve them in human rights management processes, it is essential to determine: who in the value chain might be positively or negatively affected by a company's business activities? Who was involved in the past when concerns needed to be addressed? Who can help the enterprise address specific impacts and who can affect its ability to meet its responsibilities? Who will be disadvantaged if excluded from the engagement?

Identifying stakeholder representatives (ensuring that all parties are well represented) and consulting with them can be an efficient way to understand their needs and concerns, to disseminate information to large numbers of stakeholders and to identify common solutions. Moreover, early engagement provides a valuable opportunity to influence public perception and set a positive tone with stakeholders from the outset.³⁶ In addition, it can serve as capital during challenging times, contributing to the prevention of conflicts and enhancing the stability and security of business operations.

It is therefore important, when engaging with stakeholders, to agree on the adequate level of information disclosure in ways that are meaningful, comprehensive, and accessible, not only communicating the company's achievements in relation to fulfilling the responsibility to respect human rights, but also being open to addressing challenging issues.³⁷ Enterprises should, thus, involve directly affected stakeholders in monitoring the impacts of business operations, and involve external monitors where they can enhance transparency and credibility.³⁸

For controversial and complex issues, enterprises should initially consult with stakeholders – consulting inclusively, documenting the process, and following up on results, including reporting back to stakeholders. At a later stage, companies should establish accessible and responsive means for stakeholders to raise concerns and grievances about business activities and enter into good-faith negotiations that satisfy the interests of all parties, especially through operating non-judicial independent remediation mechanisms (such as complaint procedures and dispute

35 See *Guide for Integrating Human Rights*, above note 34.

36 See International Finance Corporation, above note 23, p. 5.

37 See *Guide for Integrating Human Rights into Business Management*, above note 34.

38 *Ibid.*

settlement and multi-stakeholder grievance mechanisms). These mechanisms should be legitimate, accessible, predictable, rights-compatible, equitable, transparent, and based on dialogue and engagement.³⁹

Company-level remediation mechanisms may, for example, enable enterprises to address grievances at an early stage and before these escalate into legal suits or reputation-damaging public campaigns. Furthermore, by tracking complaints, companies can identify systemic problems and adapt practices to counter or mitigate adverse impacts on human rights as well as to prevent future controversies or disputes.⁴⁰ As such, remediation is complementary to any corporate due diligence framework.

Multi-stakeholderism

In particular, multi-stakeholder fora, where the different parties concerned actively participate in looking at controversial issues and finding consensual solutions to those issues, are extremely useful tools for businesses to successfully fulfil their corporate responsibility to respect human rights. This form of stakeholder engagement offers a way forward to prevent, mitigate, and redress conflicts and to spot opportunities for everyone involved or even set industry standards, as is so often the case with international multi-stakeholder initiatives such as the Global Reporting Initiative.⁴¹

At the local level, multi-stakeholder mechanisms are instrumental to convening with and listening to local stakeholders, thereby identifying their needs and concerns. They are excellent fora for soliciting substantive input from community members and addressing local issues, ultimately contributing to avoiding confrontation with local communities. Options available are community advisory panels, which bring local stakeholders together on a regular basis to discuss issues related to a company's activities. In the case of an open or difficult complaint, local remediation should preferentially be pursued through multi-stakeholder grievance mechanisms, where groups of stakeholders are given the chance to bring forth and resolve grievances.

Enterprises should also consider forming strategic partnerships and collaborating with selected stakeholders to address and overcome human rights challenges. Such collaborative efforts can take the form of public-private partnerships, networks and alliances (with other companies, business partners or suppliers, universities, or research institutions), or partnerships with civil society actors (such as non-governmental organisations).

The benefits enterprises and other stakeholders may reap from engaging in multi-stakeholderism are well illustrated by the success story of the Fair Labor

39 See Guiding Principles, above note 8, para. 31.

40 See International Finance Corporation, above note 23, p. 6.

41 The Global Reporting Initiative develops its largely adopted Sustainability Reporting Guidelines through a consensus-seeking, multi-stakeholder process involving participants drawn from global business, civil society, labour, academia, and professional institutions. See: www.globalreporting.org/Pages/default.aspx.

Association (FLA)'s Global Forum for Sustainable Supply Chains.⁴² The Global Forum provides a safe, non-judgemental space (without room for 'naming and shaming') where stakeholders can feel comfortable discussing contentious issues and sharing controversial views with industry partners, local and international NGOs, trade unions, leading experts, and people involved in the extended network of the supply chain.⁴³

According to Auret van Heerden,⁴⁴ the independent, integrated, and holistic approach of the Global Forum has generated and fostered connections for improved interaction between the different stakeholders. It has positively enabled these trusted stakeholders to discuss challenges in an open manner, to reach agreement on possible solutions and, most importantly, to share ownership and accountability for the results achieved.

However, exercising stakeholder engagement does not come without challenges, inherent to the nature of mapping, accommodating, and balancing different groups of interests. Enterprises are, more often than not, confronted with difficulties when deciding which contributions from stakeholders to take up; communicating and justifying to stakeholders why some suggestions are followed and others are not; tackling grievances; and properly following up on controversial issues raised. One key component in achieving good stakeholder engagement is to be open, transparent, and accountable for actions taken. This will also help to avoid stakeholder fatigue in the long run.

Operating in conflict-affected countries or high-risk areas and engaging stakeholders

When operating in conflict-affected countries or high-risk areas, companies are often confronted with severe operational, legal, and reputational risks.⁴⁵ Widespread violence, political instability, governance failure or even repression, social tension, poverty, and the collapse of civil infrastructure pose threats to employees and to the security of business operations, while poorly enforced legislation, institutional weakness, levels of corruption, human rights abuses, and

42 The Global Forum, established in 2011, is an institution intended to engage multiple stakeholders, independent from their affiliation with the Fair Labor Association (FLA), to address labour, human rights, and environmental issues that arise throughout the supply chains in various industrial sectors or product categories, and where there are identifiable regulatory gaps. See: www.fairlabor.org/global-forum-sustainable-supply-chains (last visited 25 March 2013).

43 FLA, *2011 Annual Report*, June 2012, p. 29, available at: www.fairlabor.org/sites/default/files/documents/reports/2011_annual_report.pdf (last visited 25 March 2013).

44 President and CEO of the FLA, at the First United Nations Forum on Business and Human Rights, which took place in Geneva in December 2012. UN Human Rights Council, 'Summary of discussions of the Forum on Business and Human Rights, prepared by the Chairperson, John Ruggie', UN Doc. A/HR/FBHR/2012/4, 23 January 2013, p. 7, para. 30, available at: www.ohchr.org/Documents/Issues/Business/ForumSession1/A_HRC_FBHR_2012_4_en.pdf (last visited 25 March 2013).

45 Institute for Business and Human Rights, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries*, London, 2011, p. 1.

violations of domestic or international law are powerful obstacles to developing responsible corporate activities.

The lack of a predictable political and economic framework and the risk of violence and conflict present a minefield of complex management issues,⁴⁶ as they impact production and supply lines, increase operating costs, delay business activities, and may have adverse effects on a company's reputation. Additionally, the likelihood that business activities might harm human rights in difficult operating settings is much higher than in stable environments. Indeed, 'the combination of foreign investment and high-risk countries has proved explosive: violent protests and fierce opposition locally, condemnation and campaigns internationally'.⁴⁷

In order to assess the overall conflict vulnerability, either prior to investing in a specific country or periodically, particularly in instances where political instability and violence escalate suddenly, enterprises may consider consulting one of the following tools, depending on the issues at stake or the circumstances they may face: the Failed States Index,⁴⁸ the Human Rights Risk Atlas,⁴⁹ the Basel Anti-Money Laundering (AML) Index 2012,⁵⁰ The Swisspeace Business Conflict Check,⁵¹ and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.⁵²

When facing high risks of conflict, companies may take one of two options: either to divest and leave the country, or to manage conflict risks effectively and try to contribute to a more stable environment. Enterprises wishing to stay and operate in conflict-affected and high-risk areas face difficult challenges. Some of the questions they need to answer for themselves include which steps to take in order to ensure that operations respect human rights, especially in contexts where others (notably states) do not fulfil their obligations; whether, in these circumstances, they

46 *Ibid.*, p. 1.

47 *Ibid.*

48 The Failed States Index 2011 – an annual ranking prepared by the Fund for Peace and published by *Foreign Policy* – analyses countries worldwide and rates them according to 12 indicators of pressure on the state, from refugee flows to poverty, public services to security threats. See: www.foreignpolicy.com/failedstates.

49 The stated goal of the Human Rights Risk Atlas is to 'to help business, investors and international organisations assess, compare and monitor human rights risk across all countries'. The Atlas uses 31 different human rights risk indices (e.g., human security, labour rights and protection, civil and political rights, and access to remedy) to map out the human rights risks for business involvement around the world. The Atlas also incorporates the Protect, Respect and Remedy Framework in evaluating the gravity of human rights violations. See: <http://maplecroft.com/themes/hr/>.

50 The Basel AML Index 2012 is a publicly available global ranking that assesses countries' risk levels regarding money laundering and terrorist financing developed by the Basel Institute on Governance. See: <http://index.baselgovernance.org/>.

51 The Swisspeace Business Conflict Check, a self-assessment and consultancy service offered to MNEs and SMEs active in politically unstable contexts, assists corporations in analysing their risk environment and defining strategies to cope with challenges arising from conflict. See: <http://businessconflictcheck.swisspeace.ch/en/>.

52 The OECD Risk Awareness Tool addresses risks and ethical dilemmas that companies are likely to face in weak governance zones. See www.oecd.org/daf/internationalinvestment/corporateresponsibility/36885821.pdf.

have additional responsibilities and, if so, what these might entail;⁵³ and how to avoid inter- and intra-community tensions and increasing the likelihood of violence directed against them.

The complexity of conflict situations requires common frameworks, common reference points for companies on what constitutes responsible business practices in these volatile environments, and awareness of context factors. In addition to the Guiding Principles and the UN Global Compact Ten Principles, further specific guidance is available. A short overview of such guidance tools is provided below.

Guidance on operating in conflict-affected countries and high-risk areas

The UN Global Compact, in collaboration with the Principles for Responsible Investment, has developed the *Guidance on Responsible Business in Conflict-affected and High-risk Areas*.⁵⁴ The *Guidance* aims at assisting companies in implementing responsible business practices in conflict-affected and high-risk areas consistent with the UN Global Compact Ten Principles, and seeks to provide a common reference point for constructive dialogue between companies and investors on what constitutes responsible business practices in difficult operating environments. The *Guidance* categorises responsible business practices in relation to four areas – core business, government relations, local stakeholder engagement, and strategic social investment – and highlights opportunities and challenges for each area.

The Voluntary Principles on Security and Human Rights⁵⁵ provide guidance to companies in the extractive and energy sectors in relation to ‘maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms’.⁵⁶ They can also be used by any company engaging with public and private security in high-risk areas. The OECD’s *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas*,⁵⁷ on the other hand, provides management recommendations for global responsible supply chains of minerals, so that companies respect human rights and avoid contributing to conflict through their sourcing decisions and practices, including their choice of suppliers.⁵⁸

In 2011, the Institute for Human Rights and Business launched a report entitled *From Red to Green Flags: The Corporate Responsibility to Respect Human*

53 See *From Red to Green Flags*, above note 45, p. 2.

54 See *Guidance on Responsible Business*, above note 29.

55 Voluntary Principles on Security and Human Rights, available at: www.voluntaryprinciples.org/files/voluntary_principles_english.pdf.

56 See ‘Voluntary Principles on Security and Human Rights, Fact Sheet Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State’, 20 December 2000, available at: www1.umn.edu/humanrts/links/volprinciples.html.

57 OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas*, OECD Publishing, 2011, available at: www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf.

58 *Ibid.*, Foreword.

*Rights in High-risk Countries.*⁵⁹ This report explores the specific human rights dilemmas and challenges facing companies operating in weak governance zones or dysfunctional states. It also provides detailed guidance for business leaders on meeting their human rights responsibilities, in particular in exercising enhanced due diligence based on the '3Rs' of understanding risk, building relationships, and providing remedy.⁶⁰

Stakeholder engagement in conflict-affected countries and high-risk areas

For enterprises, the inherent risks of operating in unstable regions are not simply externalities, but are 'factors that can be proactively managed in various ways'.⁶¹ To that end, companies develop strategies that allow them to minimise and manage these risks, among which stakeholder engagement plays a major role.⁶²

In violence- and conflict-stricken contexts, stakeholder engagement is a particularly relevant element in the risk management strategy, as engagement with local communities provides an invaluable source of intelligence about the local context. Working directly with the local population paves the way to understanding local concerns, needs, and tensions.⁶³ Moreover, stakeholder engagement can help develop good relations at the local level and make companies a relevant and integrated element in the local context, serving as capital for the security and stability of business operations. Proactive community consultation may serve as a means to bring conflicting groups together rather than exacerbate existing tensions and divisions. It can also 'help companies to gain political support among local communities for business activities (to gain and maintain a social license to operate)'.⁶⁴

When building relationships with local communities in conflict-affected or high-risk areas with a view to respecting human rights, it is essential to design stakeholder engagement processes that are inclusive (of all impacted groups, particularly in the context of existing tensions amongst groups), fair in terms of benefits for the groups, open (based on regular and transparent communication) and focused on winning trust.⁶⁵ Local stakeholders should be consulted in dealing with implementation dilemmas and challenges, and they should be invited to participate in reviewing performance and protecting 'whistle-blowers'.⁶⁶ The key is

59 See *From Red to Green Flags*, above note 45.

60 *Ibid.*, pp. 109 and 129.

61 Peter Davis, *Boardrooms & Bombs II: Strategies of Multinational Companies in Conflict Areas*, PeaceNexus Foundation, 10 December 2011, p. 16, available at: www.peacenexus.org/what-we-do/examples-of-projects.

62 As laid out in Guidance Point #4 in the *Guidance on Responsible Business*, above note 29, p. 23. Companies are encouraged to promote and take action towards constructive and peaceful company–community engagement.

63 P. Davis, above note 61, p. 19.

64 See *Guidance on Responsible Business*, above note 29, p. 24.

65 See *From Red to Green Flags*, above note 45, p. 119.

66 See *Blueprint for Corporate Sustainability Leadership*, above note 28.

to approach communities as partners in preventing and managing conflict, rather than viewing them as a risk factor.⁶⁷

In situations of violence or high risk, the level of expectation around corporate due diligence is significantly higher. Consequently, multi-stakeholder initiatives are of great importance to help establish where the thresholds of business responsibility for human rights might lie, as they provide a forum wherein governments, business, civil society, and local communities can discuss what should reasonably be expected from enterprises in such operating contexts.⁶⁸

One opportunity to engage with stakeholders in conflict-affected countries is to participate in an existing UN Global Compact local network,⁶⁹ or to contribute to setting up such a network in a specific country. The UN Global Compact networks provide a platform for identifying and collaborating with like-minded organisations. Together, companies and other organisations can contribute, within their sphere of influence, to improving the conditions of a country and acting as a force for economic and social progress in an area. For example, in Sudan, a number of international companies, together with Sudanese representatives, launched a forum to set up a business-led local network of the UN Global Compact in the country.⁷⁰

In addition to their core business activities and stakeholder engagement strategies, enterprises may try to shape their operating environments by focusing on social investment and community development initiatives. The primary responsibility for peace, security, and development rests with states, but the private sector can make a meaningful contribution to peace and stability in conflict-affected and high-risk areas.⁷¹ Companies should ideally maximise the benefits that flow directly from their core functions, such as job creation and broader economic development, while in turn receiving the benefits of increased support in the local communities in which they operate, a more positive public image, and the satisfaction of doing something good.⁷²

Responsible social investment is crucial and at the same time challenging in conflict-stricken countries. On the one hand, it is important to deliver long-lasting programmes that benefit local and regional communities as well as the company.

67 See *Guidance on Responsible Business*, above note 29, p. 23.

68 Institute for Human Rights and Business, keynote speech by Executive Director John Morrison, 'Business, human rights and peace: modern challenges in a historical context', FDFA Annual Conference, Human Security Division, 11 September 2012, available at: www.ihrb.org/pdf/Business-Human-Rights-and-Peace_Modern-Challenges-in-an-Historical-Context.pdf.

69 Local networks are clusters of participants who come together to advance the UN Global Compact and its principles within a particular geographic context. Their role is to facilitate the progress of companies (both local firms and subsidiaries of foreign corporations) with respect to implementation of the ten principles, while also creating opportunities for multi-stakeholder engagement and collective action. See: www.unglobalcompact.org/NetworksAroundTheWorld/index.html.

70 The launch of the UN Global Compact Network Sudan in 2008 was the culmination of two years of local efforts to establish a UN Global Compact Network, beginning in May 2006 with a forum in Khartoum on 'Public-Private Partnerships in Post-Conflict Societies', organised by the United Nations Development Programme and the Ahfad University for Women, outcome document available at: www.unglobalcompact.org/docs/news_events/9.1_news_archives/2006_05_17/sudan_outcome.pdf.

71 See Guiding Principles, above note 8, para. 7.

72 See *From Red to Green Flags*, above note 45, p. 117.

On the other hand, a company has the responsibility to do it well and needs to carefully select the beneficiaries in order to avoid further fuelling inter-community conflicts. It is helpful to adopt a regional approach for social investment programmes rather than having only the population in the immediate vicinity of corporate sites benefit from the company's presence. In view of this, social projects should be implemented in partnership with local or international non-governmental organisations and local institutions. Furthermore, a company should ensure that social projects are identified in consultation with affected communities and are strategically aligned with core business activities and impact mitigation responsibilities, such as respecting human rights.

There are often competing human rights-based arguments regarding the presence of enterprises in conflict-affected or high-risk areas, between the moral responsibility a company has in a specific country just by being there and the economic development and benefits that it brings to the local populations and the country in general. The balance between different human rights priorities is a hard one to strike and is unequivocally linked to a company's operating context, sector, and size.

Stakeholders' campaigns on business and human rights

The frustration of selected stakeholders in relation to existent guidance on business and human rights (partly due to the fact that the majority of the above-mentioned standards, guidelines, and initiatives are legally non-binding in character),⁷³ together with increased stakeholder expectations for companies to operate as corporate citizens, has led to stakeholder campaigns of many sorts, which will be addressed now.

Campaigns directed at the public image of enterprises

A famous case involving Nike, in 2001, showed consumers' power as active stakeholders. Deriving from a widely forwarded email thread known as the 'Nike Sweatshop Emails', which stated that Nike had relocated its production process in Asia and South America, and that workers in these firms were forced to work for long hours and paid low wages, there was a spontaneous, far-reaching temporary consumer boycott as a response. By engaging consumers or other stakeholders proactively, Nike would have had an opportunity to notice their concerns and take measures to avoid the campaigns.

The Sudan Divestment Campaign is another example that reveals how investors can play an influential role in determining companies' business decisions

73 With the exception of the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy, the remaining guidelines are voluntary. Consequently, enforcement mechanisms, independent monitoring, and penalties for non-compliance are non-existent. There are no established compulsory remedial actions for victims of human rights infringements and there are no instituted complaint procedures or grievance channels.

with respect to controversial issues. In 2005, the US government approved the Sudan Accountability and Divestment Act, which authorises and encourages state and local divestment from Sudan, prohibits federal contracts with problematic companies that operate in Sudan's oil, power, mineral, and military sectors, and provides legal protections to asset managers who choose to divest from Sudan.⁷⁴ As a result of the burgeoning pressure exhorted by the Sudan Divestment Campaign, US pension fund investment in foreign companies active in Sudan was largely withdrawn; this placed an additional financial burden on these companies, which were already in the spotlight. In order to respond to the Sudan Divestment Campaign, many international companies engaged in dialogue with the Sudan Divestment Task Force. By taking substantial action, such as significant humanitarian efforts in conjunction with respected partners to the benefit of one or more marginalised populations, they were able to avoid blacklisting.

Campaigns for corporate justice

From launching campaigns with the purpose of drawing attention to corporate behaviour, which invariably tarnish enterprises' reputation at the international level, non-governmental organisations and civil society at large have shifted their focus also to shaping legislation and setting industry standards, in a global trend calling for corporate justice. There has been an upswing in liability risks as stakeholder expectations for corporate compliance have increased and the web of liability has expanded.

In Europe, this is the case with the European Coalition for Corporate Justice (ECCJ),⁷⁵ which promotes holding European companies operating in Europe and abroad legally accountable for failures to comply with the corporate responsibility to respect human rights. In May 2012 the ECCJ launched recommendations for the implementation of the Guiding Principles,⁷⁶ urging the European Union and its Member States to:

- effectively assist companies in meeting their responsibility to respect human rights, by identifying appropriate ways of enforcing due diligence via regulatory measures;
- ensure policy coherence at both EU and Member State level . . . ;
- take effective measures to lift existing obstacles to justice and to ensure effective remedies for victims of corporate-related violations⁷⁷

74 See Sudan Divestment Task Force, available at: www.dosomething.org/project/sudan-divestment-task-force.

75 See European Coalition for Corporate Justice (ECCJ), available at: www.corporatejustice.org/-about-eccj,012-.html?lang=en.

76 The ECCJ's Recommendations on EU Priorities for the Implementation of the UN Guiding Principles on Business and Human Rights are available at: www.corporatejustice.org/IMG/pdf/eccj_recommendations_conference_eu_implementation_ungp_may2012.pdf.

77 *Ibid*, p. 1.

In line with the ECCJ, the Corporate Justice Campaign,⁷⁸ supported by some 50 organisations, was launched in Switzerland in early November 2011. The campaign is calling on the Swiss Federal Council and Parliament to ensure that corporations headquartered in Switzerland are compelled to take precautionary measures (duty of care) with respect to their activities and those of their subsidiaries, subcontractors, and suppliers, in order to prevent human rights violations in Switzerland and abroad, and that victims of human rights abuses committed by companies headquartered in Switzerland, but also by their subsidiaries, subcontractors, and suppliers, are given the opportunity to institute legal proceedings and seek redress in Switzerland. This campaign gathered significant public support,⁷⁹ and its petition was submitted to the Swiss Parliament in June 2012. It is scheduled to be discussed in one of the Parliament's commissions in 2013.

Bringing cases to justice

At present, there is no established international criminal mechanism for addressing human rights abuses perpetrated by companies. It remains unclear whether, and under which circumstances, corporate actors (including company directors, if relevant) can be prosecuted for violations of international human rights law or international humanitarian law, namely before the International Criminal Court. Hence, cases of corporate human rights abuses are generally subject to civil accountability within domestic jurisdictions. Civil liability is of an intrinsically national nature, but recent developments are introducing changes in domestic and international legal procedures.

The Alien Tort Claims Act

Two recent cases brought before American Courts, *Kiobel v. Royal Dutch Petroleum*⁸⁰ and *Doe v. Chiquita*,⁸¹ hold great potential to influence American and international law on the issue of corporate accountability for human rights violations. The cases were brought to court in the United States under the Alien Tort Claims Act, and at stake was the question of whether foreign corporations doing business in the United States can be held liable in the United States for gross human rights violations committed elsewhere (so called extra-territorial accountability).

78 See the Corporate Justice Campaign, available at: www.corporatejustice.ch/en/ (last visited 30 May 2012).

79 The campaign launched a petition, which was signed by 135,285 people in Switzerland. See Alliance Sud, available at: www.alliancesud.ch/en/policy/corporate-justice/135285-demand-clear-rules-for-swiss-corporations (last visited 25 March 2013).

80 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, Case No. 10-1491 (2012).

81 US District Court, Southern District of Florida, *In Re: Chiquita Brands International, Inc., Alien Tort Statute and Shareholders Derivative Litigation*, Case No. 08-1916 (3 June 2011).

This legislation is unique to the United States, but legal precedents in the United States have widened the definition of complicity in human rights violations and reverberated around the world, potentially exposing companies to legal sanction.⁸² There are now a small but growing number of claims being brought in different jurisdictions invoking domestic law of civil remedies against businesses' perpetration of gross human rights abuses, domestically and in third countries. These developments are creating a network of avenues to accountability.

The *Kiobel* case has come to illustrate how costly poor stakeholder management can become for enterprises. The lawsuit was the end result and a direct consequence of a steady process of deterioration in trust between a company, Shell, and local stakeholders, the Ogoni community, stemming from the company's failure to acknowledge the stakeholders' grievances.⁸³ The downward spiral of leaving stakeholder grievances unattended and refusing to engage in dialogue escalated into conflict, total loss of the company's social license to operate in the Ogoni territory, exposure to reputation-damaging global advocacy campaigns, and ultimately a lengthy court case.⁸⁴

Europe

In Europe, two recent cases may potentially set legal precedents to expand the scope of national law to regulate against overseas human rights harm committed by transnational corporations (extra-territorial accountability). In one of the cases, charges were filed against Nestlé and members of its senior management in Switzerland for the death of a trade union leader in Colombia.⁸⁵ In another case, Shell is due to face charges in court in the Netherlands for polluting Nigerian villages.⁸⁶

The European Commission's 2011 communication on corporate social responsibility⁸⁷ calls on all European businesses to meet their responsibility to respect human rights, as set out in the Guiding Principles. The renewed strategy for corporate social responsibility recommends that European Member States establish a mix of voluntary and binding regulations that implement the corporate duty to

82 William Rosenau *et al.*, *Corporations and Counterinsurgency*, National Security Research Division, RAND Corporation, 2009, p. 7.

83 John G. Ruggie, 'Keynote remarks at Association of International Petroleum Negotiators', Spring 2012 Conference, Washington DC, 20 April 2012, p. 1, available at: www.business-humanrights.org/media/documents/ruggie/ruggie-remarks-association-intl-petroleum-negotiators-20-apr-2012.pdf (last visited 25 March 2013).

84 John G. Ruggie, above note 83, p. 1.

85 See 'Complaint against Nestlé over Colombian death', in *Swissinfo.ch*, 6 March 2012, available at: www.swissinfo.ch/eng/business/Complaint_against_Nestle_over_Colombian_death_.html?cid=32242446.

86 See Ivana Sekularac and Anthony Deutsch, 'Nigerian villagers sue Shell in landmark pollution case', in *Reuters*, 11 October 2012, available at: www.reuters.com/article/2012/10/11/us-shell-nigeria-lawsuit-idUSBRE8991SE20121011.

87 See *A Renewed EU Strategy 2011–14*, above note 11.

respect human rights, and invites them to present or update their own plans for the promotion of corporate social responsibility by 2012.

As noted in the Protect, Respect and Remedy Framework: ‘There is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.’⁸⁸ In light of these campaigns and litigation cases, the importance of stakeholder engagement is increasing. Dialogue at all levels will be necessary to define a mix of voluntary and regulatory requirements to respect human rights. Options include encouragement of multi-stakeholder grievance mechanisms at the local level to solve local issues while at the same time ensuring that affected stakeholders have appropriate remedies. Concurrently, sustainability advisory boards should be formed at the board level or board members should, at least, have the required competences to encourage companies to address these issues proactively.

Concluding remarks and recommendations

Business should be part of the solution to create a more sustainable and just future. Stakeholder expectations often extend to the belief that enterprises can and should make a positive contribution to the enjoyment of human rights where they are in a position to do so. In order to tap into the potential that a sustainable and responsible business strategy offers and to realise the power of shared value, many business leaders have come to recognise that respect for human rights is an essential element of good risk management, including avoiding potential reputational risks or even costly court litigation.

Companies are now aware that what they do in remote or even closed-up areas is scrutinised internationally and has repercussions on their reputation and value. Bad reputation in one location may, hence, undermine the ability to do business elsewhere. Enterprises cannot compensate for human rights harm by ‘performing good deeds elsewhere’.⁸⁹

The Guiding Principles and the UN Global Compact Ten Principles represent the core framework for steering the corporate responsibility to respect human rights, as they provide recommendations to implement a human rights policy, to apply human rights due diligence, and to provide for remedies. Accordingly, companies should seek to carry out gap analyses against these frameworks, setting the responsibility to respect human rights, either by direct reference to the above-mentioned guidance or indirectly by reference to other additional standards, in line with the core framework (for instance, the OECD Guidelines for Multinational Enterprises, the Principles of Responsible Investment or the ISO 26000), so as to limit the uneven playing field with regard to human rights.

88 See Protect, Respect and Remedy Framework, above note 7, para. 19.

89 See Protect, Respect and Remedy Framework, above note 7, para. 55.

To implement a successful human rights management framework, it is essential to take inclusive and participatory stakeholder engagement into consideration at every step of the process as well as at the local, national, and international levels. Ongoing stakeholder engagement is a key success factor in meeting the responsibility to respect human rights, especially when operating in conflict-affected countries and high-risk areas.

Engaging with stakeholders should be done from the outset of a business operation. It should certainly not wait until ‘mechanisms fail to address abuses’. Identifying, convening with, and listening to local stakeholders is instrumental to promoting peace and stability in conflict-affected or high-risk areas, and can help to prevent the potential escalation of controversies and conflicts into lengthy court litigation. It should be in everyone’s interest to identify adequate solutions in multi-stakeholder processes and to use court litigation only as a last resort to settle disputes and conflicts.

To conclude, John Morrison rightfully argues that ‘multi-stakeholderism is not just about community consultation for a new business plan or operation. It is not . . . making a philanthropic gesture to the local community. Indeed, true multi-stakeholderism involves governments, business and civil society coming together as equal but distinct actors from the start’.⁹⁰ Stakeholders should actively and meaningfully participate in governance and accountability measures, from the beginning to the end; only then can real trust develop and sustainable solutions be found.⁹¹

90 See J. Morrison, above note 68.

91 *Ibid.*

Responsible risk-taking in conflict-affected countries: the need for due diligence and the importance of collective approaches

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Abstract

This article discusses some of the challenges that may be encountered by companies seeking to adhere to the Voluntary Principles on Security and Human Rights and the United Nations Guiding Principles on Business and Human Rights when operating in conflict-affected countries. The authors argue that corporate respect for human rights may not be sufficient to correct or compensate for state failure and also suggest that the leverage or influence enjoyed by individual companies in relation to the conduct of security forces and host governments may be limited, particularly in times of crisis. There is therefore a need for a collective approach to human rights risks in

conflict-affected countries, and this should focus on public security sector reform and good governance as well as on corporate due diligence.

Keywords: risk assessment, due diligence, private sector, conflict-affected areas, corporate responsibility, human rights, Voluntary Principles, Guiding Principles, case studies.



In this issue of the *International Review of the Red Cross*, Hugo Slim discusses the varied roles of business actors in conflict-affected countries as ‘victims, perpetrators, suppliers, humanitarians, peacebuilders, and preventers’.¹ For us, the most important role of business in conflict-affected settings is to drive economic recovery and growth. There is little prospect of lasting settlement to conflict without equitable economic development, and this will not happen without the private sector. On the other hand, careless or irresponsible private sector activity can contribute to ongoing cycles of violence in conflict-affected countries, or may undermine fragile political settlements. The central question is therefore not *whether* business can make a positive contribution, but *how* to ensure that this happens.² In this paper we discuss two key international standards relating to human rights which provide essential guidance for businesses operating in high-risk areas. We also review some of the challenges that may be encountered in implementing them.

The first standard discussed is the Voluntary Principles on Security and Human Rights (hereinafter ‘Voluntary Principles’). The Voluntary Principles were published in 2000 and provide guidance to companies on how to ensure the security of their assets and personnel in high-risk regions while also ensuring respect for human rights. The Voluntary Principles are the product of a multi-stakeholder initiative, originally sponsored by the United States (US) and United Kingdom (UK) governments and involving a select group of human rights NGOs and multinational companies operating in the extractive sectors.³ The relatively small number of participants lends greater focus to the initiative, but also limits its impact. That said, many non-participating companies and governments regard the Voluntary Principles as an important source of guidance.

The second standard we discuss is the United Nations (UN) Guiding Principles on Business and Human Rights, which were finalised in 2011.⁴ The Guiding Principles mark a major step forward because they are applicable to all

1 Hugo Slim, ‘Business actors in armed conflict: towards a new humanitarian agenda’, in this issue.

2 For an earlier discussion of related arguments, see John Bray, ‘The role of private sector actors in post-conflict recovery’, in *Conflict, Security and Development*, Vol. 9, No. 1, 2009, pp. 1–26.

3 The current participants in the Voluntary Principles process include eight governments (Canada, the Netherlands, Norway, Colombia, Switzerland, the United Kingdom, the United States, and Australia), twenty-two oil, gas, and mining companies, and eleven human rights non-governmental organisations. The text of the Voluntary Principles is available at: www.voluntaryprinciples.org/principles/introduction. All internet references were accessed on 29 May 2013 unless otherwise stated.

4 See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc. A/HRC/17/31, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011. Individual Guiding Principles in this article are referred to as GP 1, GP 2, etc.

companies across the entire range of human rights. Their endorsement by the UN Human Rights Council followed a six-year process of multi-stakeholder consultation led by Professor John Ruggie, who in 2005 was appointed as the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

Having enthusiastically welcomed the Guiding Principles, states have since been active in seeking to implement them. Meanwhile, other international instruments relating to corporate responsibility – including the Organization for Economic Co-operation and Development (OECD)'s Guidelines for Multinational Enterprises⁵ and the International Finance Corporation's Performance Standards on Social and Environmental Sustainability⁶ – have been revised to reflect the recommendations contained in the Guiding Principles. Many companies are also taking steps to align internal policies and risk management processes with the Guiding Principles.

The success of the Voluntary Principles and, more recently, the Guiding Principles is laudable, but it must be recognised that many challenges remain. In relation to conflict-affected countries and other high-risk areas, the scale of the problem should not be understated. The World Bank's *World Development Report 2011* estimates that more than 1.5 billion people live in fragile and conflict-affected countries or in countries with very high levels of criminal violence.⁷

In this paper we highlight some of the challenges that businesses may face when operating in these environments. In doing so, we aim to identify relevant lessons from past practice for companies seeking to implement the Guiding Principles and/or the Voluntary Principles. Our observations draw upon our experience advising private sector clients operating in these areas and are informed by our participation in international policy debates.

The first part of this paper very briefly discusses the reasons why business enterprises invest in conflict-affected countries notwithstanding the risks involved in doing so. The second part of the paper presents three case studies drawing on international companies' experience in relation to conflict-affected countries. The case studies underline the importance of identifying risks in advance, as well as the challenges of responding to human rights risks in a crisis situation. The third and concluding part emphasises some of the ways in which states and other actors can encourage responsible risk-taking and create an environment that enables the private sector to make a positive contribution to peacebuilding and post-conflict economic development.

5 Organization for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011.

6 International Finance Corporation (IFC), *IFC Performance Standards on Environmental and Social Sustainability*, 2011, available at: www.ifc.org/performancestandards.

7 World Bank, *World Development Report 2011: Conflict, Security and Development*, Washington D.C., 2011, p. 2 (and accompanying fn. 3).

Opportunities and risks

The ways in which individual companies perceive and assess the opportunities and risks associated with doing business in conflict-affected countries depend on numerous factors, including their size, sector, and risk appetite. Some companies perceive the economies of such countries as offering significant opportunities. In particular, countries recovering from conflict are often seen as zones of untapped potential and pent-up consumer demand for previously unavailable products or services. These countries may also be rich in natural resources. Obvious examples include Sierra Leone and the Democratic Republic of Congo in the early 2000s, and more recently, Myanmar (also known as Burma) and South Sudan.

Private sector investment in conflict-affected countries may contribute to the fulfilment of important social and policy objectives, including peacebuilding⁸ and post-conflict economic development.⁹ Because the private sector can play a positive role in these countries, governments and international organisations may offer incentives which aim to offset some of the risks that companies face. For example, companies prepared to risk capital in conflict-affected countries may be able to secure political risk guarantees (from national or multilateral agencies), finance on favourable terms, or access to preferential trade opportunities.

In many cases, companies see first-mover advantages in setting up operations in new markets ahead of their competitors. One of the most difficult calculations is when to make the first move. Companies that make the wrong call by investing too early may be exposed to extraordinary risks, including political risks, security risks, and risks to their reputation in cases where private sector activity is seen to cause or contribute to violence and conflict. Petroleum and mining companies are particularly exposed when investing in conflict-affected areas. The significant costs incurred at an early stage by investors in these sectors mean that walking away may not be an easy option if the political or security climate deteriorates.

Assessing risks: the evolving normative framework

Historically, companies considering investments in emerging markets were concerned with risks to their operations including, for example, the risk of expropriation, currency risk, and risks to company assets and employees resulting from conflict or violence. Since the late 1990s, leading companies have also begun to take greater account of the risk that their operations in such contexts may have

8 See the case studies in Jessie Banfield, Canan Gündüz, and Nick Killick (eds), *Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector*, International Alert, London, 2006. See also Safal Ghimire and Bishnu Raj Upreti, 'Corporate engagement for conflict transformation: conceptualising the business-peace interface', in *Journal of Conflict Transformation and Security*, Vol. 2, No. 1, 2012, pp. 77–100.

9 On this point, see United Nations Development Programme (UNDP), *Post-Conflict Economic Recovery: Engaging Local Ingenuity. Crisis Prevention and Recovery Report 2008*, UNDP Bureau for Crisis Prevention and Recovery, New York, 2008, especially pp. 53–57 and 117–120.

adverse impacts on the rights and interests of third parties. However, companies' awareness and sensitivity to these risks remains very uneven.

The Voluntary Principles provide an example of how attitudes to risk had begun to evolve in the early 2000s. They recognise that security 'is a fundamental need, shared by individuals, communities, businesses and governments'.¹⁰ The Voluntary Principles expressly acknowledge that companies can play a positive role in conflict-affected countries, in particular by supporting security sector reform and efforts to improve governance. It follows (although the Voluntary Principles do not make the point explicitly) that companies may play a negative role and that irresponsible private sector activities may contribute to human rights abuses, violence, and conflict.

The Voluntary Principles also recognise that the risks for companies in conflict-affected countries include the possibility that security forces assigned to protect their assets, employees, and operations may commit human rights abuses and/or use force inappropriately. In this regard, the Voluntary Principles recommend that companies should conduct thorough risk assessments and that such assessments should:

consider the available human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security. Awareness of past abuses and allegations can help Companies to avoid recurrences as well as to promote accountability. Also, identification of the capability of the above entities to respond to situations of violence in a lawful manner (i.e., consistent with applicable international standards) allows Companies to develop appropriate measures in operating environments.¹¹

The Guiding Principles incorporate many of the same principles as the Voluntary Principles but, as noted above, have a much wider scope in that they are applicable to all companies across the entire range of human rights, rather than focusing solely on security issues in the extractive sector.

Like the Voluntary Principles, the Guiding Principles state that operating in conflict-affected countries may 'increase the risks of enterprises being complicit in gross human rights abuses committed by other actors'.¹² In such contexts, the Guiding Principles recommend that companies should: (i) 'respect the standards of international humanitarian law' in areas where there is ongoing armed conflict;¹³ and (ii) 'treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue'.¹⁴

Of course, risks to human rights in conflict-affected countries do not arise solely in relation to armed conflict, security, and the use of force, and therefore the standards of international humanitarian law are not the only relevant standards. The Guiding Principles recognise that the activities of business enterprises can cause

10 Voluntary Principles, above note 3.

11 *Ibid.*

12 Guiding Principles, above note 4, p. 21.

13 *Ibid.*, p. 14.

14 *Ibid.*, p. 21.

or contribute to adverse impacts ‘on virtually the entire spectrum of internationally recognized human rights’.¹⁵ Moreover, the Guiding Principles describe the responsibility to respect human rights as a standard of conduct that companies should observe ‘wherever they operate’.¹⁶

The Guiding Principles introduce the concept of human rights due diligence as a process which allows business enterprises to ‘identify, prevent, mitigate and account for how they address their impacts on human rights’.¹⁷ In short, human rights due diligence allows business enterprises to ‘know and show’ that they respect human rights.¹⁸ Guiding Principle 7 explains that the human rights due diligence process includes assessment of ‘actual and potential human rights impacts, integrating and acting upon the findings of risk assessment, tracking responses, and communicating how impacts are addressed’.¹⁹ The Guiding Principles further state:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.²⁰

The commentary to GP 18 introduces risk assessment as ‘the initial step in conducting human rights due diligence’.²¹ Further, the commentary states:

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.²²

The commentary to GP 17 further notes that human rights due diligence can be included within ‘broader enterprise risk-management systems’ provided that it meets the basic requirement of identifying risks to rights holders, not just the company.²³ In relation to impact assessment, a recent report issued by the International Council on Mining and Metals points out that in many cases, it will be appropriate to integrate human rights impact assessments into wider social and environmental impact assessment processes.²⁴ It is left to companies to decide, on a case-by-case basis, whether to conduct stand-alone human rights impact assessments.

15 *Ibid.*, p. 13.

16 *Ibid.*

17 *Ibid.*, p. 15.

18 *Ibid.* The Guiding Principles also refer (at pp. 15–16) to the adoption of a human rights policy commitment by business enterprises as ‘the basis for embedding their responsibility to respect human rights’.

19 *Ibid.*, p. 16.

20 Guiding Principles, above note 4, p. 17.

21 *Ibid.*, p. 17.

22 *Ibid.*

23 Guiding Principles, above note 4, p. 16.

24 International Council on Mining and Metals, *Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes*, London, March 2012,

The case for conducting stand-alone human rights impact assessments is likely to be stronger in conflict-affected countries. In this regard, a document published by the UN Office of the High Commissioner for Human Rights (OHCHR), entitled *The Corporate Responsibility to Respect Human Rights: an Interpretive Guide*, points out that:

the risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection or where there are entrenched patterns of severe discrimination. Perhaps the greatest risks arise in conflict-affected areas, though they are not limited to such regions.²⁵

The limitations of a legal compliance approach

It is relevant to consider how the recommendation to treat the risk of causing or contributing to gross human rights abuses as a 'legal compliance' issue might inform companies' understanding of the nature of the risks which may be encountered when operating in conflict-affected countries. In relation to this recommendation, the OHCHR's *Interpretive Guide* states:

Where enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable. This is so both because of the severity of the human rights abuses at stake, and also because of the growing legal risks to companies as a result of involvement in such abuses.²⁶

There is some tension between the use of the word 'involvement' in this context, which might be interpreted very broadly, and the more narrowly defined circumstances in which a business enterprise may be held criminally complicit or otherwise legally liable for human rights abuses perpetrated by others.

It has been argued that exposure to civil liability under domestic law may justify a 'legal compliance' approach.²⁷ However, although examples of civil lawsuits

available at: www.icmm.com/page/75929/human-rights-in-the-mining-and-metals-industry-integrating-human-rights-due-diligence-into-corporate-risk-management-processes.

25 United Nations Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: an Interpretive Guide*, 2012, p. 80, available at: www.ohchr.org/Documents/Issues/Business/RtRInterpretiveGuide.pdf.

26 *Ibid.*, p. 79. The *Interpretive Guide* also explains (at p. 6) that '[t]here is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic in scope and nature, for example violations taking place at a large scale or targeted at particular population groups.'

27 See, for example, Jonathan C. Drimmer, 'Human rights and the extractive industries: litigation and compliance trends', in *Journal of World Energy Law and Business*, Vol. 3, No. 2, 2010, pp. 121–139. Arguments in favour of a 'legal compliance' approach often point to the risk of civil suits in the US or UK

in the US or, somewhat less frequently, in European courts may resonate with the few multinationals that have been sued in those countries, it should also be recognised that many of the business enterprises operating in conflict-affected countries include small and medium-sized enterprises, local companies, and sole traders who will not be familiar with these precedents and who are less likely to become targets for litigation.

It also bears emphasising that there have been very few cases in which it has been determined that a business enterprise is liable for complicity in human rights violations. This means that there is very little case law from which conclusions about the type of conduct which may expose a company to liability can be drawn. In contexts where legal liability for complicity is in theory a possibility,²⁸ a very high threshold applies. For example, in cases involving questions of whether an individual has aided or abetted violations of international humanitarian law, guilt depends on showing that the individual knowingly provided practical assistance, encouragement, or moral support which substantially contributed to the perpetration of a crime.²⁹

Because legal principles relating to complicity are highly technical, it is not clear that the recommendation to treat the risk of complicity in gross human rights abuses as a legal compliance issue is helpful to companies that do not have a sophisticated understanding of the risks involved.³⁰ Likewise, many corporate lawyers will not be expert in issues of complicity or corporate liability for human rights abuses and may fail to identify relevant risk factors. For example, in high-risk areas, complying with local law or other legal obligations (such as a contractual obligation to supply equipment or other resources to security forces) may immediately imply a risk of involvement in gross human rights abuses.

courts. It is less clear that corporations headquartered in other jurisdictions are exposed to liability. See, for example, Peter Muchlinski, 'The provision of private law remedies against multinational enterprises: a comparative law perspective', in *Journal of Comparative Law*, Vol. 4, No. 2, 2009, pp. 148–170.

- 28 For example, plaintiffs have sought to sue corporate defendants for 'aiding and abetting' human rights abuses perpetrated by foreign governments or other third parties under the US Alien Tort Claims Act, 28 USC § 1350 ("ATS") which provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. Courts in the United States have disagreed as to whether the ATS establishes jurisdiction over corporations, a question which the US Court of Appeals for the Second Circuit answered in the negative in 2010 in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel*"). On appeal, although the US Supreme Court appeared poised to answer this question, its long-awaited decision issued on 17 April 2013, addressed instead the broader issue of whether the ATS applies extraterritorially; that is, whether US courts have jurisdiction under the ATS over claims involving foreign plaintiffs, foreign defendants, and conduct occurring outside the US. A majority of the Court held that a presumption against extraterritoriality applies to the ATS and that the presumption is not displaced in circumstances where all the relevant conduct took place outside the United States (see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. (2013)). The Court did not reach the question for which permission to appeal was initially granted: i.e. whether corporations can be liable under the ATS at all.
- 29 See, Norman Farrell, 'Attributing criminal liability to corporate actors: some lessons from international tribunals', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 873, 877–878, 883, and 889–891.
- 30 Of course, part of the reason for the Guiding Principles advocating a legal compliance approach is the grave nature of abuses that may occur in conflict-affected countries. The message is that companies should take the risk of gross human rights abuses very seriously, even if there is no immediately obvious link with their operations or proposed operations.

The recommendation in the Guiding Principles that companies should adopt a 'legal compliance' approach to human rights risks in conflict-affected countries may create the danger that risk-averse companies, on advice from risk-averse lawyers, decide not to invest there. In saying this, it is assumed that responsible companies are likely to be more risk-averse (and vice versa). If this assumption is correct, overstating the risk of legal liability may have the undesirable effect of discouraging responsible companies from investing in conflict-affected countries, leaving the door wide open for cowboy operators.

The question of equipment transfers provides a useful illustration of the complex issues that may arise in the course of identifying and assessing risks. A businessperson reading the Guiding Principles and accepting that she would not wish her company to be involved in human rights abuse might decide it was not a good idea to provide equipment to security forces where there was a risk that those security forces might commit human rights abuses. In this regard, a lawyer might advise her that provision of equipment or any form of material support and assistance to security forces also exposed her company to the risk of legal liability if human rights abuses were committed by those forces.

Companies seeking to apply the Voluntary Principles have grappled with these kinds of problems since 2000. The Voluntary Principles acknowledge that companies may provide equipment to public security but go on to say that if they do so, they should 'take all appropriate and lawful measures to mitigate any foreseeable negative consequences, including human rights abuses and violations of international humanitarian law'.³¹ In practice, companies may have no realistic alternative but to provide equipment and other forms of support to security forces. In particular, companies may determine that risks to the security of their personnel and property would be increased if equipment or support were not provided.

It may also be the case that provision of equipment and material support can help to prevent human rights abuses. For example, companies may decide to provide food or shelter to under-resourced security forces on the basis that soldiers who are fed and housed properly are less likely to commit abuses than soldiers who are not. Host governments may also (and not infrequently do) request that companies provide vehicles, equipment, and other resources for security forces whose main role is to protect their operations. Such requests expose companies to risks, but they also open up the possibility of engaging the host government in dialogue regarding the conduct of security forces.

Consultation, influence, and leverage

The Voluntary Principles emphasise the importance of consultation between companies and governments regarding security and human rights issues. In relation to transfers of 'lethal and non-lethal equipment', the Voluntary Principles state that

31 Voluntary Principles, above note 3.

companies should consider the risks as well as ‘the feasibility of measures to mitigate foreseeable negative consequences, including adequate controls to prevent misappropriation or diversion of equipment which may lead to human rights abuses’.³²

The Voluntary Principles also recommend that companies should, ‘to the extent reasonable’, monitor the use of such equipment and investigate any cases in which it is used inappropriately. If companies receive credible reports of human rights abuses by government security forces in their areas of operation, they should ‘urge investigation and that action be taken to prevent any recurrence’.³³

More importantly, the Voluntary Principles envisage that companies should ‘use their influence’ to promote human rights principles, including the principle that ‘the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of Company employees’.³⁴ Similarly, the Guiding Principles refer to the concept of ‘leverage’ in explaining how companies can discharge the responsibility to respect human rights in cases where they have identified a risk that their activities may ‘contribute to’ human rights abuses committed by third parties.³⁵ However, the case studies in the next section suggest that individual companies acting alone, or in a crisis situation, may lack sufficient leverage to mitigate the risk of human rights abuses in conflict-affected countries.

Lessons from experience: three case studies

The first two case studies in this section involve examples of risk assessment and mitigation and seek to demonstrate the practical utility of the recommendations contained in the Voluntary Principles and the Guiding Principles, as well as some of their limitations, particularly with regard to the concept of leverage. These two case studies do not identify the companies or countries involved for reasons of client confidentiality. The third case study, which is based on public sources, concerns Anvil Mining in the Democratic Republic of Congo (DRC): Anvil’s experiences point to the difficulties that private sector actors can encounter if they fail to conduct effective human rights due diligence. The Anvil case study also shows that responsible corporate behaviour in conflict-affected countries is not sufficient in

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 Guiding Principles, above note 4, p. 18: ‘Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.’

itself; it must be complemented by security sector capacity-building and governance reform.

Case study 1: the importance of pre-entry risk assessment

In this case study, a multinational company found itself caught up in a violent but relatively short-lived internal conflict in a developing country. The company owned an important infrastructure asset and had operated it without incident for more than five years. It had entered the country during peacetime following the resolution of a long-running civil war. When the conflict flared up again, parties on both sides were accused of committing serious human rights abuses and war crimes.

The company depended on public security forces to protect its employees and property, and was party to an agreement to supply the security forces with equipment, including radios and petrol. In addition, the company would make small cash payments to individual members of the security forces to cover the cost of food and drink while they were deployed at the company's facilities. The contract did not include any provisions relating to the use of the equipment and resources provided by the company or, more broadly, relating to the conduct of the security forces.

When the conflict erupted, the company initiated a crisis management plan leading to the evacuation of most of its foreign staff. Concern was raised that the security forces might be involved in the commission of human rights abuses or violations of international humanitarian law. In this regard, it was suggested that the contract to provide the security forces with equipment and other resources created a risk that the company would be accused of complicity if human rights abuses occurred. Attention then turned to how this risk might be mitigated.

One of the options considered was whether it would be feasible for the company to suspend the provision of payments and equipment to the security forces. A risk identified with this approach was that if the payments were stopped, the security forces would be likely to abandon their duties. The company was also concerned that without transport supplied by the company, it was likely that security personnel would be unable to travel between their barracks and the company's facility.

Having concluded that suspending the provision of resources to the security forces would expose its personnel and property to unacceptable risks, the company considered whether there were alternative ways to mitigate the risk that the provision of resources would, to use the language of the Guiding Principles, 'contribute' to human rights abuses. In this regard, the company also took account of the recommendations regarding consultation with governments and state actors included in the Voluntary Principles.

The company sought to consult with its home government. Although it is a participant in the Voluntary Principles, the home government in question appeared ill-equipped and unprepared to provide meaningful advice or assistance to the company. In particular, the home government stated that it was unable to help the company make formal contact with international agencies, local government

officials, or representatives of other governments who had maintained a diplomatic presence in the country throughout the conflict.

The first lesson of this case study is, therefore, that home governments will not always be prepared or equipped to assist companies (even though both the Voluntary Principles and Guiding Principles recommend that companies may benefit from advice and assistance from their home governments). The second and more important lesson relates to the importance of early and thorough risk assessment. When the contract for provision of resources to the security forces was signed, it appears that no adequate risk assessment was undertaken.

The company had originally invested in the country during a peaceful period, but it was certainly not the case that the risk of violent internal conflict could have been discounted at that time (the fact that security was required itself was an indicator of conflict risk). Moreover, the human rights record of the public sector security forces was far from ideal. In that context, attempting to implement appropriate risk management mechanisms in the midst of a crisis was extremely difficult. If a risk assessment had been undertaken at an early stage (as is recommended in the Voluntary Principles and Guiding Principles), it might have been deemed appropriate, for example, to include provisions in the security contract expressly stating the company's expectations that the security forces should comply with international standards such as the UN Basic Principles on the Use of Force and Firearms.³⁶ In addition, the company could have sought to establish a dialogue with the host government regarding security, or a training programme for the security forces, to minimise the risk of human rights abuses or inappropriate use of force.³⁷

Case study 2: using government leverage to mitigate human rights risks

This case study concerns an extractive sector project in a conflict-affected country. The project was to be financed by a syndicate of international banks, and finance was subject to compliance with the IFC Performance Standards.³⁸ The project sponsors and lenders were advised by a number of international law firms and various risk consultants.

The project sponsors had commissioned a social and environmental impact assessment, which was provided to the prospective lenders. This assessment indicated that members of the host country's armed forces would be deployed to provide security at the project site or to protect project-related infrastructure. The assessment failed to observe that the host country's armed forces were composed

36 See United Nations Rule of Law, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*, available at: <http://fr.unrol.org/files/BASICP-3.PDF> (last visited 14 June 2012).

37 The events referred to in this case study took place prior to the publication of the Guiding Principles. A company seeking to implement the Guiding Principles in a similar context might also decide that establishing some form of grievance mechanism to allow stakeholders to raise issues regarding the conduct of security forces would also assist to mitigate risk.

38 IFC, *Performance Standards*, above note 6.

mainly of persons undertaking compulsory national service and that there were reports of national service personnel working on civilian projects. The assessment also failed to note that various foreign governments and international organisations, including the International Labour Organization (ILO), were concerned that the national service programme in the country contravened international law relating to forced labour.

These matters raised the concern that the project sponsor and lenders would be exposed to allegations of complicity in human rights abuses if national service personnel undertook any civilian work connected with the project. This concern arises, in particular, because the ILO Forced Labour Convention (No. 29) of 1930 prohibits a government or state agency from imposing or permitting the imposition of forced or compulsory labour 'for the benefit of private individuals, companies or associations'.³⁹ The OECD Guidelines for Multinational Enterprises also call on business enterprises to 'contribute to the elimination of all forms of forced or compulsory labour'.⁴⁰

A labour expert was engaged to visit the country in order to assess the risk, among others, that national service personnel would be forced to undertake work which benefited the project company, such as the construction of project-related infrastructure. This additional risk assessment established that there was no risk that national service personnel would work directly for the project, but some risk that they might be forced to work constructing or providing security for project-related infrastructure. In view of this risk assessment, the lenders determined that they could only support the project if the host government provided guarantees that no national service personnel would be forced to work in relation to such services.

Negotiating the relevant guarantees involved significant effort and required foreign governments and international financial institutions to assist the company in its negotiations with the host government. The host government ultimately agreed to give a written undertaking to the project sponsor addressing the concerns regarding national service personnel. The host government also agreed to participate in a monitoring mechanism involving regular inspections by an independent expert. It is unlikely that the host government would have agreed to these measures if foreign governments had not exercised their influence.

As with the first case study, one of the main lessons is that early and thorough risk assessment is crucial. This case study additionally demonstrates that consultation with host governments and appropriate use of influence and leverage can help mitigate the risk that private sector activities will cause or contribute to human rights abuse. However, the challenges and sensitivities associated with the use of leverage should not be underestimated. The case study also shows that risks of human rights abuses linked to the conduct of security forces are not the only risks that may arise in conflict-affected countries: the human rights of security personnel, for example, must also be taken into account.

39 International Labour Organization (ILO), Convention concerning Forced or Compulsory Labour, Art. 4, adopted on 28 June 1930.

40 OECD, *Guidelines for Multinational Enterprises*, above note 5, p. 35.

Case study 3: equipment transfers in a conflict zone

An incident in October 2004 involving Anvil Mining also illustrates the importance of thorough risk assessment and the need for companies to act with extreme caution in relation to equipment transfers in high-risk areas. Anvil acquired a copper and silver mine in Dikulushi in Katanga province, DRC, in 1998, and it came into production in 2002. Anvil subsequently applied for political risk insurance from the World Bank's Multilateral Investment Guarantee Agency (MIGA). After protracted negotiations, the company's application was approved in September 2004. A few weeks later, the DRC armed forces suppressed a minor rebellion in Kilwa, some 50 kilometres from Dikulushi, with widespread loss of life.⁴¹

Anvil was implicated in alleged abuses committed at Dikulushi because it had provided logistical support to the DRC armed forces. In particular, Anvil had permitted soldiers to travel on airplanes chartered by the company and in company vehicles.⁴² In June 2005 an Australian Broadcasting Corporation documentary drew international attention to the episode and implied that the company had been involved in human rights abuses. In response to the subsequent public outcry, then World Bank President Paul Wolfowitz asked the bank's Compliance and Advisory Ombudsman (CAO) to conduct an enquiry into MIGA's due diligence procedures concerning the Dikulushi project.⁴³

The CAO report is revealing for what it says about the approach to risk assessment on the part of both MIGA and the company. It is obvious that MIGA and the company were aware that the DRC was particularly unstable (hence the need for political risk insurance) and that the company was aware that it was exposed to risks associated with the conduct of the DRC armed forces. For example, the CAO report refers to an earlier episode in March 2004 when DRC armed forces had forcibly requisitioned three vehicles. A senior Anvil manager who initially refused the request was threatened, had an AK-47 rifle thrust into his stomach and was struck by a rifle butt.⁴⁴ According to information provided to the CAO by Anvil representatives, the company did not protest at the requisitioning of its vehicles in October 2004 but 'did express to the military its concerns that the soldiers should not engage in looting'.⁴⁵

MIGA's assessment of Anvil's application for political risk insurance took place at a time when the agency was reassessing its own role in light of the World Bank's Extractive Industries Review. An important outcome of the Extractive

41 An enquiry by the United Nations Peacekeeping Mission in the Democratic Republic of Congo and local human rights groups estimated the death toll at more than 100. See International Crisis Group (ICG), *Katanga: The Congo's Forgotten Crisis*, Africa Report No. 103, 9 January 2006, p. 10.

42 *Ibid.* See also World Bank Office of the Compliance Advisor/Ombudsman (CAO), *CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver Mining Project in The Democratic Republic of the Congo*, 2005, available at: www.cao-ombudsman.org/cases/case_detail.aspx?id=94. The CAO report (at p. 4) notes that 'the broad facts of Anvil Mining's involvement in the October 2004 Kilwa incident, in terms of the provision of logistical support to the Armed Forces of the DRC, are not in dispute'.

43 *Ibid.*

44 *Ibid.*, p. 5.

45 *Ibid.*, p. 6.

Industries Review was that MIGA undertook to ensure that its clients in the extractives sector complied with the Voluntary Principles. The CAO report notes that Anvil, in its application to MIGA, confirmed that there were no recommendations in the Voluntary Principles that were at odds with the company's existing *modus operandi*.⁴⁶ However, the CAO report concluded that MIGA itself lacked the capabilities to assess whether Anvil 'had the requisite skills in place to understand and operationalize' the Voluntary Principles, and that this was a crucial gap in MIGA's due diligence procedures.⁴⁷

The CAO report concludes that if the Voluntary Principles had been applied in a systematic manner:

they would have provided an essential bridge across the current disconnect between the treatment of conflict as an insurable risk, and the potential for a project to influence the dynamics of conflict in a way that might cause harm to local communities'.⁴⁸

However, the report does not claim that events in Kilwa would have taken a different course if the Voluntary Principles had been applied and notes that 'in volatile operating environments there is a residual risk that abuses may happen even where the [Voluntary Principles] have been followed'.⁴⁹

MIGA and Anvil accepted the CAO's critique on the need for more careful risk assessment and, as part of their response, jointly commissioned a report offering guidance on the implementation of the Voluntary Principles.⁵⁰ Not surprisingly, the report treads carefully with regard to the question of equipment transfers, noting that 'the ideal situation is to avoid direct transfer of equipment from the company to public security forces and government'.⁵¹ It would be preferable for the company to insist that the government provide whatever equipment is needed, thus avoiding the need to become involved in public security matters that in normal circumstances would be outside its mandate. If this is not feasible, an alternative approach is to deal with resource shortages through a public sector security reform programme supported by international donors.

The MIGA/Anvil Voluntary Principles implementation toolkit was written in general terms, but its reference to the need for internationally supported security sector reform was particularly apposite in the DRC. In early 2006, a report by the

46 CAO, above note 42, p. 20.

47 *Ibid.*, p. 20.

48 *Ibid.*, p. 21.

49 *Ibid.*, p. 51. In 2007 a Congolese military court acquitted three Anvil employees of complicity in war crimes. However, a group of NGOs who joined together to form the Canadian Association Against Impunity launched a class action suit against Anvil in the Canadian courts. On 1 November 2012 the Supreme Court of Canada turned down an appeal against an earlier judgment ruling that it was inappropriate to hear the case in Canada, see *Association canadienne contre l'impunité c. Anvil Mining Limited*, 2012 CanLII 66221 (SCC), available at: <http://canlii.ca/t/ftlpg>. See also 'Supreme Court won't hear appeal in Congo massacre case', in *CBC News*, 1 November 2012, available at: www.cbc.ca/news/canada/montreal/story/2012/11/01/quebec-anvil-mining-appeal-refused-supreme-court.html.

50 MIGA/Anvil Mining, *The Voluntary Principles on Security and Human Rights: an Implementation Toolkit for Major Project Sites*, July 2008, available at: www.miga.org/documents/VPSHR_Toolkit_v3.pdf.

51 *Ibid.*, p. II-17.

International Crisis Group (ICG) argued that no issue was ‘more important than security sector reform in determining the [DRC]’s prospects for peace and development’.⁵² The ICG called for coordinated action by the Congolese authorities as well as by international aid donors and the UN. The ICG report went on to argue that ‘[b]oth the army and police have enormous work to do to become modern and professional, but only if they do will the country’s economic and political life gain the breathing space needed to begin a return to normality’.⁵³ Companies have a clear interest in working with ‘modern and professional’ security forces but, other actors – mainly governments – need to be involved in achieving this professionalisation.

Conclusion: the importance of collective approaches

The three case studies above underline the need for effective pre-entry risk assessments that identify both the risks to companies and the potential impacts on local communities and other stakeholders resulting from private sector activities in conflict-affected countries. To the extent that risks exist, it is likely to be easier to address them effectively before a company has committed to an investment.⁵⁴ Particularly in the case of major projects, this is the period when foreign investors and their backers have the most leverage in relation to human rights issues, because they still have the option to walk away.⁵⁵ It is harder to exert the same degree of influence or leverage once companies have already invested significant amounts of capital in fixed assets, and are no longer in a position to pull out without incurring major costs.

At least among leading Western companies, some of the lessons of past experience are beginning to be absorbed, and more responsible approaches to risk are evident. Ten years ago, in an off-the-record interview, a company director reflected with rueful honesty on an investment made in a brief period of comparative peace in an African conflict zone: ‘Let’s be honest: we just jumped into it!’⁵⁶ Arguably, we would be less likely to hear such an observation today.

Nevertheless, pre-entry risk assessments are far from being a panacea. Circumstances change. They may change as a result of wider developments in the host country, as in the first case study above, or they may change because of local reactions to the activities of individual companies. Once companies have made their

52 ICG, *Security Sector Reform in the Congo*, February 2006, p. 1.

53 *Ibid.*, p. 2.

54 The importance of addressing concerns with respect to human rights when contracts with host governments are being negotiated is also emphasised in an Addendum to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. See John Ruggie, ‘Addendum – principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators’, UN Doc. A/HRC/17/31/Add.3, 2011.

55 A similar dynamic may exist with respect to the balance of bargaining power over purely commercial issues.

56 Interview with John Bray, November 2002.

investments, they have to use whatever influence and leverage they may possess in order to respond to changed circumstances implying risks to human rights. The first case study shows that this is far from straightforward, particularly in a crisis. The Guiding Principles refer to the need for responsible use of company leverage, but the leverage of an individual company acting on its own in a conflict zone may be very limited.

This consideration points to the need for a collective approach that involves host governments as well as home governments, companies, and international organisations or other multilateral agencies. In principle, this was the approach taken by the governments and other actors who came together to create the Voluntary Principles. As noted above, the Voluntary Principles were a tripartite initiative from the outset, involving the US and UK governments as well as a select group of companies and NGOs. However, the Institute for Human Rights and Business has pointed out that the limited involvement of governments from conflict-affected countries in the Voluntary Principles process may 'reinforce a perception that *companies* are the problem *and* the solution, while doing little to encourage governments of high-risk countries to eliminate abuse or impunity for abuse.'⁵⁷

Happily, there is one positive example to the contrary in that the government of Colombia is now a full participant in the Voluntary Principles process.⁵⁸ In this case, the key success factors included the active participation and commitment of the host government as well as an important industry group, the *Asociación Colombiana del Petróleo*. This example gives cause for cautious celebration but at the same time points to problems elsewhere: Colombia is still the only government from a developing country to be a full participant in the Voluntary Principles process.

In his 2008 report to the UN Human Rights Council, Professor John Ruggie noted that '[t]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences'.⁵⁹ Where governance gaps exist, it is critically important to emphasise the corporate responsibility to respect human rights, and this is rightly a key focus of the Voluntary Principles and the Guiding Principles. Arguably, it is

57 Institute for Human Rights and Business, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries*, 2011, p. 81, available at: www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf.

58 See Voluntary Principles on Security and Human Rights, *Voluntary Principles: Colombia Case Study*, available at: http://voluntaryprinciples.org/files/vp_columbia_case_study.pdf. Colombia's participation in the Voluntary Principles began with a meeting at the US embassy in Bogota in 2003. Following this meeting, the *Asociación Colombiana del Petróleo* established a working group whose activities included improving information-sharing, coordinating responses to human rights abuses, drafting performance indicators, and organising risk assessment guidelines and workshops. The outcomes of this process have included greatly improved coordination between companies and government officials and a general improvement in company standards.

59 See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/8/5, 7 April 2008, p. 3.

even more important to fill those gaps. In conflict-affected countries, security sector reform and good governance are essential, not just as a means of reducing the risks of human rights abuses but also to enable equitable and sustainable economic development.

Responsible companies will not invest in conflict-affected areas unless they see a commercial opportunity, but this is not the only factor. In 2003, the World Bank commissioned a series of papers on *Natural Resources and Violent Conflict: Options and Actions*.⁶⁰ John Bray's contribution discussed ways of attracting responsible companies to risky environments, on the understanding that they would be more likely to make a positive contribution than cowboy operators.⁶¹ A senior executive from an international oil company offered a succinct answer: 'It's governance, stupid'.⁶² Leading companies with high standards of accountability find it difficult to operate in countries with unpredictable governance, including, for example, countries where there is widespread corruption.

This observation on the importance of good governance has wider application. Smaller local companies may not be able to choose where they operate, but their chances of success are affected by, for example, access to equitable dispute resolution and a functioning legal system.⁶³ In the context of the current discussion, the same principle applies also to human rights. There is no prospect of a lasting solution to endemic human rights problems or to conflict unless the country concerned can establish equitable and sustainable governance that protects the rights and interests of companies and individual citizens.

The World Bank's *World Development Report 2011: Conflict, Security and Development* makes a similar point on the need to strengthen government institutions, but at the same time offers a note of realism: 'Creating the legitimate institutions that can prevent repeated violence is, in plain language, slow. It takes a generation.'⁶⁴ While substantive change may take decades, neither companies nor individual citizens can afford to wait. This means that private sector actors will continue to find themselves operating in circumstances that are far from perfect, and where their business activities may have consequences that – even with the most thorough due diligence – are impossible to predict. In these circumstances, the easiest solution for responsible, risk-averse companies is to confine their activities to predictable if unexciting business environments in developed countries.

As noted in the first part of this article, companies may be more likely to decide not to invest in conflict-affected countries if human rights due diligence is seen primarily as a legal compliance issue. While staying at home may be the easy answer, it is not necessarily the ideal approach either from a commercial point

60 Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions*, World Bank, Washington D.C., 2003, available at: <http://go.worldbank.org/MSS8O5RVN0>.

61 John Bray, 'Attracting reputable companies to risky environments: petroleum and mining companies', in I. Bannon and P. Collier, above note 60, pp. 287–352.

62 *Ibid.*, p. 291.

63 For a discussion of this and related points, see World Bank, *World Development Report 2005: a Better Investment Climate for Everyone*, Washington DC, 2004.

64 World Bank, above note 7, p. 10.

of view or from a social development perspective. Responsible risk-taking should be encouraged, not suppressed. To say this is not to water down the business and human rights agenda, but rather to seek more effective ways of fulfilling it.

Responsible risk-taking undoubtedly requires due diligence by business enterprises on human rights as well as other issues. It also requires an ability to adapt to changing situations. The role of governments is to provide an enabling environment for local and international companies to operate responsibly and successfully, and this task requires a concerted effort on the part of both national and multilateral agencies. The primary responsibility for establishing the institutions and mechanisms required to protect human rights lies with host governments, but assistance from home states and other actors can be very helpful. Particularly in conflict-affected countries, it is critically important that governments, business, and civil society work together.

Pushing the humanitarian agenda through engagement with business actors: the ICRC's experience

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Abstract

Large companies can have both massively positive and massively negative impacts on communities, be it directly through their operations or indirectly through their influence on decision-makers. This is particularly true when business operations take place in conflict-affected or high-risk areas. Humanitarian organisations endeavouring to bring protection and/or assistance in these areas cannot, therefore, ignore these influential actors. Engagement with business actors – as well as with any other societal actor – should be framed within a clear rationale in order to deliver positive results. This article introduces the rationale that has been developed by the International Committee of the Red Cross (ICRC) and offers some examples of past engagement between the ICRC and business actors. It notes that occasions for humanitarian organisations to engage with business actors are likely to become more frequent in the coming years and argues that this trend, if properly managed, offers

* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

humanitarian organisations opportunities to leverage energies, know-how, and resources from the business sector for the benefit of the persons and communities that humanitarian organisations strive to protect and assist.

Keywords: business, corporate social responsibility, community engagement, partnership, multi-stakeholder initiatives, private military and security companies, extractive industry.



For most of their existence, humanitarian organisations led their operations without paying much attention to business actors. Relationships with companies were essentially limited to those providing goods and services that allowed humanitarian organisations to operate. There were few pressing reasons or incentives to expand the working relationship beyond this client–supplier dimension.

This situation changed in the course of the last decade of the twentieth century. The combination of globalisation and competition for finite natural resources resulted, among others, in two interesting developments. First, business consolidations through multiple mergers and acquisitions created companies enjoying far greater economic clout than many governments across the globe.¹ Second, it became increasingly common for humanitarian workers to cross paths with business operators while in the field, including in areas affected by armed conflict or other situations of violence.

These two developments matter for humanitarian organisations. Economic clout often results in influence on people and events. A company investing billions of dollars, paying tens of millions in taxes, and creating hundreds of jobs directly and thousands more through its chain of suppliers will obviously have a massive economic impact and will in most circumstances endeavour to use its influence to at least ensure that it can continue to run its activities smoothly. Humanitarian organisations – and, for that matter, development organisations – expect this influence to be used in a way that will at least ‘do no harm’ and at best ‘do good’ to the wider community.

As for the second development, the presence and operations of companies in places affected by armed conflict or other situations of violence constitutes, in theory, good news: companies more than any other societal actor are creating economic value, jobs, and opportunities for development – all elements that offer

1 Several organisations and academic institutions have tried to compare the relative economic sizes of countries and corporations, using various calculation methods. Working on different sources, Global Trends published a recent article establishing a new ranking. According to this ranking, in 2009 44 per cent of the largest 100 economies and 59 per cent of the largest 150 economies were corporations. This article is available at: www.globaltrends.com/knowledge-center/features/shapers-and-influencers/66-corporate-clout-the-influence-of-the-worlds-largest-100-economic-entities (all internet references were accessed in 2013).

hope and create alternatives to fighting or violence. Under this assumption companies can be a force for good, helping to counteract the dynamics fanning conflict or violence. Reality, however, does not always align with this theoretical view. Companies' operations have often been a trigger for events that have worsened conflict or violence. Some companies cut corners and make choices that are harmful to the environment, to neighbouring communities, or to the general welfare of the population of a country or region.² They generally do this to maximise profits (by cutting costs or saving time). They follow the assumption that their actions will not be noticed or that, if they are, they will be able to arrange a quiet, amicable settlement with the relevant authorities. Sometimes harmful decisions are the result of companies' policies; often they are the result of a few managers acting in a way that is not condoned by their hierarchical line but that the latter makes possible by its lack of concern or curiosity. On the darkest fringes of the palette, some entrepreneurs or small, 'fly-by-night' companies are willing to take advantage of conflict situations in order to make a quick profit. Their activities may be legally condoned (through a legal license to operate received from some official authorities) or plainly illegal (through participation in various types of trafficking, for instance). What these companies have in common is that they give no attention to their environmental and social impacts and thus operate outside any corporate responsibility framework. There are many companies performing poorly with regard to their corporate responsibility, especially in conflict-affected areas where most often the authorities are either unwilling or unable to regulate corporate behaviour. This creates further tensions or conflicts, further humanitarian consequences, and further suffering.

Many companies, however, do operate under a set of corporate responsibility policies. They endeavour to 'do no harm' and understand that operating in conflict-affected areas requires from them a heightened level of caution – or 'due diligence', in business parlance. Humanitarian organisations can, when relevant and without substituting the respective roles of governments and companies, leverage their own experience and know-how with a view to supporting these companies' endeavours to do no harm. They can share their analyses on the social and political situation in a given context. Benefiting from their proximity with local communities, they can help companies better understand the complex web of social or humanitarian impacts of their operations. They can guide companies through their rights and responsibilities under human rights law and, when relevant, international humanitarian law (IHL). They can provide advice when companies wish to make social investments within communities, and so on.

Moreover, through their field staff, humanitarian organisations have their feet on the ground in almost all places across the globe affected by armed conflict or other situations of violence. There, they do their utmost to bring assistance and sometimes protection to all those who suffer the consequences of these situations. In order to carry out their work efficiently and diligently, they have constantly to

2 The website of the Business and Human Rights Resource Centre offers a wealth of examples: www.business-humanrights.org.

make sure that they understand as precisely as possible their operating environment. What are the root causes of a situation of conflict or violence? What are the main drivers of abuses? Who are the main actors – locally, nationally, regionally, internationally – worsening or calming down dynamics of conflict or violence? What are the objectives of these various actors? As we consider these and other questions, business actors and economic interests often appear as distinct parts of the equation. Humanitarian organisations should thus take notice and include business actors in their network.

The ICRC has taken notice. While it is certainly neither the first nor the only organisation which has started to engage with business, its experience in this field should be of interest for persons involved in the ‘business and human rights’ and ‘business and conflict’ debates as well as for the wider humanitarian community. The reasons for this stem from the organisation’s operational focus on armed conflicts and other situations of violence, its broad mandate of protecting and assisting persons affected by such circumstances and disseminating IHL and humanitarian principles, its approach encompassing all persons affected by armed conflicts or other situations of violence rather than focusing on only a few categories (such as children, women, refugees, displaced, or the wounded and sick), its extensive presence in the field, and its constructive approach with all interlocutors. All this put together requires from the ICRC a carefully thought-through and balanced approach to business actors.

This article presents the ICRC’s experience in engaging with business actors. In the first section it explores the various circumstances under which the ICRC is interested in engaging with business actors. It then describes the ICRC’s engagement with business actors over the 2000–2012 period and provides some concrete examples of this engagement. It further provides some insights into future trends with regard to ICRC engagement with business actors, and makes a few concluding remarks.

ICRC engagement with business

In the late 1990s, with a view to organising its interactions with companies, the ICRC categorised the various circumstances under which it needed to engage or has an interest in engaging with companies. These circumstances, presented below, need not be cumulative for the ICRC to decide to engage.

1. *When companies or their representatives are directly or indirectly associated with adverse humanitarian consequences on communities or individuals.* Situations where companies are directly causing adverse humanitarian consequences are rather infrequent – companies generally take care to do no harm. Indeed, the political, reputational, and financial risks of operating in conflict-prone areas or war-torn societies have been integrated into companies’ decision-making, at least for large transnational companies. However, it is not uncommon for companies to be indirectly associated with adverse humanitarian consequences, most often resulting from acts carried out by public security forces, private

security forces, or other non-state armed groups in the process of defending companies' staff, assets, or operations. These adverse humanitarian consequences may originate from violations of IHL and may trigger legal proceedings under international or national jurisdictions against company managers or against companies themselves.³ Beyond these legal issues, the ICRC is keen to understand and, when relevant, act upon situations in which companies are directly or indirectly associated with adverse humanitarian consequences – not in a 'name-and-shame' perspective, but rather in a framework of constructive and privileged dialogue geared at improving the practices of companies in regard to their social or humanitarian impacts. Examples of engagement are offered in later sections of this article.

2. *When companies or their representatives bring influence to bear on a given situation.* Companies exert influence in many different ways. In certain circumstances, they are listened to carefully by the authorities in charge because their managers' decisions can have a massive impact on the authorities' budgets or on the economic life of the country or region. In other circumstances, the social or environmental impacts of companies' operations can decide the fate of large groups of populations. In yet other circumstances, their operations lead to a marked militarisation of a whole region. In its field operations, the ICRC needs to reach out to all actors wielding influence if it is to be able to carry out its mandate of protecting and assisting persons affected by armed conflicts and other situations of violence.
3. *When companies develop competences or skills that are of interest to the ICRC.* The corporate world is a source of learning with regard to general management practices, such as optimisation of human, financial, and logistical resources, innovation, and quality control systems. Some competences, skills, and good practices developed within companies are indeed of interest for humanitarian organisations. In its continuous efforts to best use the resources granted to it by its donors, the ICRC seeks to take up, when and where relevant, good practices that have been tried and tested by others, including companies.
4. *When companies sell goods or services required for humanitarian operations.* This is the classical client–supplier relationship and is the most regular and tested relationship between the ICRC and companies. Indeed, the ICRC has continuously needed goods and services sourced from businesses in order to smoothly run its operations. In this client–supplier relationship the ICRC has been endeavouring for the past few years to ensure that its suppliers behave properly in terms of their corporate responsibility and that they are not involved in activities running counter to the ICRC's humanitarian mission.
5. *When companies offer opportunities for partnership.* Faced with increasing levels of expectations from civil society and at times from governments, many

3 See the articles by Joanna Kyriakakis and Simon O'Connor, in this issue, for an overview of the various ways in which international and domestic criminal law can address business involvement in violations of international humanitarian law.

companies have sought recently to create positive social or environmental impacts beyond and above their pure business purpose as well as beyond and above their possible philanthropic activities. In this endeavour companies have been looking for partners in other sectors of society (such as government, academia, and non-governmental organisations) who can bring to a common project a different and complementary set of skills and competences as well as a degree of credibility. This provides an interesting field of exploration for the ICRC: indeed, the institution offers a very large palette of skills and competences, it faces regular flows of operational and organisational challenges, and it identifies projects that it cannot carry out by itself. Partnership with companies represents an option to develop state-of-the-art, comprehensive, and sustainable responses.

6. *When companies are interested in supporting humanitarian operations through cash or in-kind donations.* Companies have often proved generous when disasters strike. At times such generosity results from compassion – for instance, when a disaster affects a country or area where a given company operates or when a major disaster is heavily mediatised. At other times generosity is part and parcel of a well-calculated move aimed at gaining acceptance and polishing corporate reputation. The ICRC is seeking to diversify its donor base, and has determined that companies can be potential donors under certain conditions (these conditions are explained later in the article).

While not exhaustive, the above list covers the largest part of the spectrum of circumstances in which the ICRC will consider engaging with companies. Whatever the circumstances, though, the ICRC’s ultimate desired outcomes in engaging with companies can be compacted into two rough blocks.

The first block of desired outcomes – covering roughly the circumstances described in points 1 and 2 above – consists of ensuring that companies are sensitised to humanitarian issues or challenges. As companies can have a massive positive or negative impact in situations of armed conflict or other situations of violence, the ICRC considers that it can be worthwhile and legitimate to discuss humanitarian concerns with companies; it is a form of preventative action and as such is part and parcel of the ICRC’s mandate. This endeavour can take many forms, from bilateral discussion with a specific company on a specific humanitarian issue to production of generic guidance or participation in multi-stakeholder initiatives – that is, initiatives led jointly by several societal groups (such as governments, civil society organisations, and companies) with a view to responding to specific challenges. Under this first block of motivations, the ICRC simply seeks to bring about conditions that will diminish the chances of companies’ actions having negative impacts such as abuses against or deteriorating conditions for local communities. This is in line with the ICRC’s mission to protect and assist persons affected by armed conflicts or other situations of violence.

The second block of desired outcomes for the ICRC when it engages with companies – covering roughly the circumstances described in points 3 to 6 above – consists of ensuring that the organisation benefits from the right set of skills

and competences and from a solid and diversified donor base. Indeed, as mentioned earlier, companies regularly develop within their ranks very competitive and innovative sets of skills, competences, and good practices. Some of them are transferable to the not-for-profit world and should thus be given serious consideration. Furthermore, many companies are keen to leave a positive mark by supporting humanitarian activities or partnering in humanitarian projects. Under this block the ICRC simply seeks to strengthen its capacity to efficiently and economically deliver its humanitarian services.

As a conclusion to this first section exploring the circumstances and motivations that trigger ICRC engagement with companies, it is important to clarify one point. The ICRC engages with companies because it has observed in many theatres of operations that these entities play a role in conflict-related situations and that they often have the capacity and sometimes even the willingness to support humanitarian action. Based on its practice of constantly drawing lessons from its evolving operating environment and its pragmatic approach of developing working relationships with all actors that wield influence, the ICRC's engagement with companies represents one element among many others that help the institution to be relevant, knowledgeable, and effective in its mission to protect and assist persons affected by armed conflicts or other situations of violence.

2000–2012: the ICRC's first organised steps in engaging with business

The ICRC's current engagement with business actors began in late 1999. The present section describes briefly the strategy that was established to frame this engagement before exploring some concrete examples of engagement.

Strategy of engagement with the private sector

In late 1999 the ICRC adopted a specific strategy aimed at developing and organising its engagement with business (hereafter referred to as 'the strategy' or 'the 1999 strategy'). The novelty in the strategy was not so much that the ICRC had made a decision to engage with business: it had already done so episodically in the past. Rather, the novelty lied in the fact that the ICRC's governance and Directorate teams were supporting a comprehensive institutional policy signalling that business actors had become a stakeholder for the institution, and one that deserved closer attention and a more systematic approach. For internal purposes the implementation of this strategy of engagement with business was designed as a five-year project.

The 1999 strategy organised the ICRC's efforts of engagement with business around five distinct objectives that are briefly presented below.

The first objective consisted of *promoting humanitarian principles among business actors*. The focus was laid on companies operating or exerting influence in areas affected by armed conflict or other situations of violence. Under this objective, the ICRC essentially endeavoured to sensitise companies to their rights and

responsibilities under IHL and to draw their attention to the (potential) consequences of their decisions or operations on communities. Work on this objective was carried out both through direct bilateral dialogues with companies at headquarters or field levels and through participation in multi-stakeholder initiatives and normative processes.

The second objective concentrated on *developing within the ICRC an increased capacity of analysis and a more holistic understanding* of armed conflicts or other situations of violence through exchanges with business actors. In any place where it operates, as well as at the global level, the ICRC has always built its analyses on the basis of exchanges with a variety of stakeholders such as governmental authorities, non-state armed groups, religious clerics, and civil society organisations. Under this objective the rationale was to include, to the extent possible, business actors among the stakeholders consulted as a way to complement and enrich the ICRC's analysis. These societal actors indeed bring to the analytical exercise an economic dimension that had often been neglected by humanitarian actors.

The third objective was aimed at *developing competences through exchanges with companies*. The idea was that companies develop in the course of their operations and management practices a set of competences, know-how, and good practices that could be adopted or adapted by humanitarian organisations such as the ICRC. This objective set in place mechanisms and reflexes allowing the institution to create opportunities to take advantage of the capacities developed within companies.

The fourth objective focused on *refining the relationship between the ICRC and its suppliers*. Its aim was to improve some logistical procedures through increased cooperation with selected companies.

Finally, the fifth objective consisted of *developing fundraising from, and partnerships with, companies*. This objective fell in line with a broader institutional effort to diversify the ICRC's sources of funding. Indeed, the bulk of cash and in-kind donations to the ICRC comes from state contributions as well as from contributions from the Red Cross and Red Crescent Movement, with private donations covering only a very modest proportion of the institution's needs. This objective thus marked a determination on the part of the ICRC to be more assertive in seeking support from companies, while at the same time taking care not to encroach on the private fundraising efforts of other members of the Red Cross and Red Crescent Movement such as National Societies.

The 1999 strategy represented for the ICRC an evolution more than a revolution. The support for and interest in the implementation of the strategy displayed by the ICRC Directorate allowed the organisation to bypass some of the reluctance traditionally experienced among not-for-profit organisations toward engagement, cooperation, and association with business actors. The resources lined up for the implementation of the strategy facilitated progress on many of the set objectives. Proactive engagement with some industry sectors (such as the extractive sector and the private military and security sector) ensured a good positioning from which the ICRC could provide input on humanitarian concerns or IHL in various processes – in particular, in multi-stakeholder processes such as the

Voluntary Principles on Security and Human Rights and the United Nations (UN) Global Compact Expert Group on Responsible Business Practices in Conflict-Affected and High-Risk Areas. Business support in terms of competences, know-how, and funds helped the ICRC to better deliver its humanitarian services – the ICRC could, for instance, benefit from corporate expert support on issues such as quality control for drugs and internal auditing procedures. The network of contacts with business representatives built up over the years offered opportunities to promote humanitarian principles and created other opportunities of cooperation both at the field and headquarters levels. In short, by focusing the energies of the actors involved, the strategy of engagement with business accelerated a process of engagement with business actors. It is likely that this latter process would have taken place even without the 1999 strategy, but it certainly would have been more haphazard and much slower.

The ‘lessons learned’ exercise carried out after five years of implementing the 1999 strategy produced two main results. First, it determined that the ICRC should continue to engage with business and carry on with the main ambitions of the strategy. The efforts made during the first five years were deemed useful and conclusive for the ICRC in the sense that the implementation of the strategy benefited the ICRC in its capacity to deliver its humanitarian services. Second, the ICRC determined that, five years on, it was time to mainstream this work: engaging with business should no longer be considered as a separate issue tackled by a small group of specialists, but as an integral part of the ICRC’s functioning.

Some concrete examples of engagement with business actors

This section offers a glimpse into some of the work that has been carried out over the past twelve years as a result of the implementation of the 1999 strategy of engagement with business. The list that follows is not exhaustive; the selections were made on the basis of representativeness and exemplarity.

The Voluntary Principles on Security and Human Rights

Soon after the launch of its 1999 strategy, the ICRC determined that the extractive sector (oil, gas, and mining companies) was of particular relevance to its engagement with business. Extractive companies regularly operate in situations of armed conflict or other situations of violence; indeed, the very resources they exploit are often at the heart of grievances from communities and at the core of competition for access between opposing parties. As a consequence, operations carried out by the extractive sector often trigger increased levels of security deployments. The ICRC’s interest in this sector coincided with the early days of the Voluntary Principles on Security and Human Rights initiative.⁴

4 The website of the Voluntary Principles initiative contains the full text of the Voluntary Principles on Security and Human Rights, information on the various participants in or observers of the initiative, and

The Voluntary Principles were launched in December 2000 by the governments of the United States and of the United Kingdom, a number of major companies from the extractive sector, and a number of human rights non-governmental organisations. The Voluntary Principles are on the one hand a set of principles established to guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights, IHL, and fundamental freedoms. On the other hand, the Voluntary Principles also represent an initiative whereby participating companies, governments, and non-governmental organisations commit to promoting and implementing those principles. As a form of recognizance of the occasional overlaps between extractive activities and situations of armed conflict, the Voluntary Principles are a rare example of a multi-stakeholder initiative on the broad issue of business and human rights that specifically refers to IHL.

It made sense for the ICRC to take part in the proceedings of the Voluntary Principles, and for the initial members of the initiative to have the ICRC on board. The ICRC, however, did not wish to be a formal member of the Voluntary Principles: it considered that formal membership in an initiative that was constituted exclusively of Western governments, companies, and organisations was not suitable with regard to the institution’s principle of neutrality and would risk creating unwanted constraints in terms of its operational capacity in some circumstances. These limitations were understood and accepted, and in 2001 the ICRC was invited to participate in the Voluntary Principles as an observer.

This participation in the Voluntary Principles offers various interesting opportunities for the ICRC. First, the institution is able, at a stroke, to sensitise a large set of extractive companies on, for instance, the provisions of IHL that are of relevance to their operations, the differences between human rights law and IHL, and the fact that provisions of IHL are in no way ‘voluntary’, in the sense that companies have to comply with these provisions or their managers face the risk of being held accountable for any violations.

Second, the ICRC can participate in several working groups or task forces established under the Voluntary Principles initiative. These structures are aimed at advancing the work of the initiative in preparing decisions on governance or organisational issues or in exchanging and formalising good practices on specific questions or challenges. They therefore create valuable opportunities for the ICRC to inject some of its humanitarian concerns early on and to share some of its experience in, for instance, the development of working relations with specific groups such as affected communities, public security forces, private security forces, and non-state armed groups.

An interesting third avenue through which the ICRC has contributed to the progress of the Voluntary Principles involved launching and overseeing the production of a set of guidance tools seeking to help companies in their efforts to transform their commitments under the initiative into real changes in their

management and operational practices. In this exercise, the ICRC joined forces with three other organisations that all enjoy observer status in the Voluntary Principles: the International Finance Corporation, the International Council on Mining and Metals, and the International Petroleum Industry Environmental Conservation Association. Under their watch, a team of consultants produced what are now known as the Implementation Guidance Tools.⁵ These very practical tools are based on years of field experience and development of good practices by companies, consultants, and international organisations on issues of risk assessment, relations with public security forces and private security forces, and stakeholder engagement. The Implementation Guidance Tools have been an instant hit from the moment of their formal launch in 2011. Many companies that participate in the Voluntary Principles are reporting that they are using these guidance tools either as a benchmark for their own tools and procedures or as a replacement for or complement to them. Furthermore, it is very likely that extractive companies which are not participants in the Voluntary Principles have also been using the publicly available Implementation Guidance Tools.

Participation in the proceedings of the Voluntary Principles has also contributed to member companies becoming better acquainted with the ICRC, its constructive approach, and its areas of expertise. As a result, extractive companies have occasionally approached the ICRC both at the headquarters and field levels with a view to seeking expert advice on specific challenges they are facing, on guidance they are preparing, or on processes they are setting up. The ICRC endeavours to respond positively to these requests, provided they touch on issues where it really has competences to share and provided that its input is directly or indirectly beneficial to persons or communities affected by armed conflicts or other situations of violence.

Finally, there is yet another way for the ICRC to use the Voluntary Principles initiative as a conduit for its humanitarian mission – and this may be the most promising one. The Voluntary Principles as an initiative have so far delivered rather poorly in terms of having its members work together to tackle Voluntary Principles-related challenges at the level of the various countries where extractive operations are taking place. Indeed, after more than ten years of existence, there is only one country where oil and mining operations are taking place in which a group of stakeholders connected to these industries have worked together with a view to implementing the Voluntary Principles literally on the ground: Colombia. The Voluntary Principles initiative has been trying to establish national implementation processes in other countries with important oil and mining operations, but with only modest success so far. There are, however, two good reasons to be optimistic. First, in spring 2013 the Voluntary Principles initiative concluded a long process of work focusing on governance and organisational issues – a process that consumed a lot of its participants' energies for several years. Second, all participants in the Voluntary Principles – be they companies, governments, or non-governmental

5 The Implementation Guidance Tools are publicly available at: www.voluntaryprinciples.org/files/VPs_IGT_Final_13-09-11.pdf.

organisations – realise that the credibility of the initiative lies in the clear demonstration that the Voluntary Principles bring concrete improvements at the field level. As a consequence, there is at present a shared appetite among participants to enhance implementation efforts in the field. This development offers opportunities for a humanitarian organisation such as the ICRC to bring to bear its experience and competences and to use, where and when relevant, the leverage of Voluntary Principles-related efforts with a view to improving the protection of and assistance to persons or communities affected by armed conflicts or other situations of violence. The ICRC has been using these opportunities in places such as Colombia, Peru, and Madagascar, and it remains vigilant for future opportunities.

The private military and security industry

The private military and security industry has constituted an obvious point of concern for the ICRC. This industry has experienced a period of spectacular growth throughout the past two decades, a growth marked by serious incidents such as the presence of private security contractors during sessions of degrading and inhumane treatment inflicted on prisoners at Abu Ghraib prison in Iraq, and the Nisoor Square shooting by Blackwater contractors which cost 17 lives. Throughout this period companies in this industry have deployed more and more personnel in areas affected by armed conflict or other situations of violence and have developed a large palette of activities ranging from support to military forces to securitisation of sites or protection of persons, intelligence-gathering, training services, and provision of humanitarian assistance. Thus, they have naturally attracted the ICRC's attention.

The ICRC had previously had occasional chance encounters with the private military and security industry through its fieldwork, but it was only in 2003 that it started to organise its engagement with this industry, first by meeting a group of the most important and prominent companies based in the United Kingdom and United States. The main objective of this first round of engagement was to ensure that these large companies were fully aware of their rights and responsibilities under IHL. At the same time, the ICRC initiated representations with states – states contracting these private military and security companies, states on the territory of which these companies were operating, and states where these companies were incorporated. The main objective of this second part of the ICRC's involvement with the issues created by this industry was to underline that states have a responsibility to respect and ensure respect for IHL, and that this responsibility can be exercised, for instance, by properly regulating this sensitive industry.

Following several discussions with companies and states, two clear realisations emerged. On the one hand, it appeared that there was a need for an instrument or a mechanism that would facilitate the management by states of the challenges posed by the operations of private military and security companies in areas affected by armed conflict. On the other, it also appeared that there was a lack of consensus within the international community on the idea of developing a binding international legal instrument to tackle these challenges. On the basis of

these realisations, the ICRC then decided to join forces with the Swiss government (through its Federal Department of Foreign Affairs, the Swiss equivalent of a Ministry of Foreign Affairs) and to take an active part in what was referred to as the 'Swiss-ICRC initiative'. This initiative aimed at clarifying the applicable rules of international law and states' responsibilities vis-à-vis the operations of this industry. It also worked constructively with concerned states and the industry to develop practical and realistic guidance in order to enhance the protection of IHL and international human rights law in relation to the operations of private military and security companies in areas affected by armed conflict.

In autumn 2008, these efforts led to the adoption by 17 states⁶ of the Montreux Document on private military security companies (hereinafter 'Montreux Document').⁷ The Montreux Document serves two main purposes. First, it recalls the existing legally binding obligations of states, private military and security companies, and their personnel under international law whenever these companies are present in a context of armed conflict. So, while the Montreux Document itself is not legally binding, the rules contained in its first part are legally binding obligations under treaty or customary laws. Second, it offers a compilation of good practices designed to assist states in complying with their obligations under international law. The Montreux Document does not intend to legitimise the use of private military and security companies. Its objective is to recall and clarify rules of international law applicable to the activities of private military and security companies in situations of armed conflict and to offer good practices in this respect.

In late 2008, the Montreux Document was circulated as a document of the UN General Assembly and the UN Security Council. Under this status it was translated in all official UN languages⁸. Together with the Swiss Federal Department of Foreign Affairs, the ICRC has been active in promoting the Montreux Document across the world. At the time of writing, a total of 46 states and one international organisation (the European Union) support the Montreux Document.⁹

The Montreux Document is not the only conduit for ICRC engagement on private military and security issues. The ICRC has been engaged in trilateral dialogues with various states as well as private military and security companies both at the field and headquarters levels. It has had dialogues on IHL and humanitarian issues with industry associations, and it has offered on request specialised inputs focusing on IHL to processes such as the International Code of Conduct for Private Security Providers¹⁰ led by the Swiss Federal Department of Foreign Affairs and

6 These states were Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States.

7 The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, available at: www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm.

8 The Montreux Document can be viewed in the various official UN languages at: www.un.org/ga/search/view_doc.asp?symbol=A/63/467.

9 An updated list of states supporting the Montreux Document is available at: www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html.

10 The text of the Code of Conduct as well as other related information is available at: www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/coc.html.

work streams such as the Open-Ended Intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies¹¹ under the UN Human Rights Council.

The ICRC's Business and International Humanitarian Law booklet

ICRC staff involved in dialogues on humanitarian issues with business representatives began to realise that the latter had hardly any knowledge of IHL. Through their corporate responsibility managers, community relations officers, or legal and compliance advisers, companies had started in the late 1990s or early 2000s to grapple with human rights, but in most cases they had failed to recognise that a distinct body of law was applicable in situations of armed conflict.

This knowledge gap was problematic because, as mentioned earlier in the article, companies were increasingly operating in areas of armed conflict and were increasingly connected through their presence and operations with local or regional dynamics of conflict, in particular but not exclusively the extractive and private military and security sectors. Consequently, the ICRC considered that it was worth the effort to raise awareness and knowledge among business actors on the existence of IHL and on their rights and responsibilities under this body of law. It thus decided not only to disseminate IHL to business operatives when it was meeting them at the field or headquarters levels or as part of its involvement in various initiatives, but also to produce a booklet summarising the main elements of relevance, entitled *Business and International Humanitarian Law*.¹²

In acknowledgement of the fact that business managers are generally circumspect in front of lengthy reports, the booklet was built around a questions-and-answers structure. It was thus made expressly short and concise and was written in a way that is light on legal or humanitarian jargon. Furthermore, it was road-tested before publication to ensure that the final product addresses the main concerns and questions that business managers face when operating in areas of armed conflict.¹³

Field engagement

As an institution, the ICRC has faced no particular problem in engaging with companies at the corporate or headquarters levels on broad humanitarian issues. Both on the companies' and the ICRC's sides, the personnel involved have usually been open and keen to engage on humanitarian-related issues. Engagement at the field level has been more challenging so far. Several causes line up on the ICRC side

11 The mandate of this Working Group and other related information is available at: www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx.

12 ICRC, *Business and International Humanitarian Law: an Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, 30 November 2006, available at: www.icrc.org/eng/resources/documents/misc/business-ihl-150806.htm.

13 With time the booklet has been translated into French, Russian, and Chinese.

to explain the difficulties, including lack of familiarity, practice, or priority with regard to emergency response operations at the expense of relationship-building with new interlocutors; to these causes one could add occasional mutual suspicion experienced by personnel on both sides.

Nevertheless, there have been instances where engagement and cooperation have actually taken place. Below are presented three illustrative examples of cooperation in the field between companies and the ICRC.

Example 1: Improving law enforcement around industrial sites

The first example relates to the involvement of the ICRC in the training of security forces assigned to the protection of companies' staff, assets, and operations.¹⁴ For many years the ICRC has run programmes to support armed forces and law enforcement agencies in numerous countries.¹⁵ At one level, these programs aim to develop in these entities knowledge of the rules of IHL and of some relevant components of human rights law, in particular those related to the use of force in law enforcement operations. At another level, they aim to assist authorities in the integration of these rules into the doctrines, training, and operational practices of these entities. The ultimate objective of these programmes is to help the armed forces and the various law enforcement agencies perform their functions in a way that is compatible with IHL and with the provisions on the use of force.

In places where business operations are affected by significant security risks and are thus accompanied by deployment of armed forces or law enforcement agencies, companies need these public entities to perform well. Good performance means in particular that these entities are able on the one hand to securitise companies' staff, assets, and operations, and on the other to carry out their tasks in a way that does not encroach on communities' rights and well-being and that does not exacerbate tensions or provoke security incidents with these communities. Experience has indeed shown repeatedly that when communities are negatively affected by the security deployment associated with a company's operations, the company is also negatively affected, either because the operations have to be stopped or suspended due to the tensions or because the company's reputation takes a significant dent locally or internationally.

It is thus clear that in those situations, the ICRC's efforts to develop knowledge and application of the relevant provisions of IHL and human rights law in law enforcement are resonating well with companies' need to be able to benefit from good-quality law enforcement performance. As a result, there have been over the past years several instances in which companies and

14 Background information on the ICRC's engagement with weapon-bearers is available at: www.icrc.org/eng/what-we-do/building-respect-ihl/dialogue-weapon-bearers/index.jsp.

15 The following link to the ICRC's Annual Reports gives access to a country-by-country description of ICRC activities, including ICRC engagement with weapon-bearers: www.icrc.org/eng/resources/annual-report/index.jsp.

the ICRC have liaised and coordinated in the field to ensure that the work of the ICRC with armed forces and law enforcement agencies also benefits forces specifically engaged in the protection of business operations. This has happened, for instance, in Colombia, Indonesia, Azerbaijan, and Madagascar.

This type of cooperation offers a 'win-win-win-win' proposition. The authorities in charge benefit from the enhanced capacity of the armed forces or law enforcement agencies to perform their duties in a way that does not create a litany of tensions and incidents. Companies benefit from a more serene and less troubled working environment. Communities near the sites of business operations benefit from an improved and less risky interaction with the security set-up that supports those operations. The ICRC, meanwhile, benefits because communities are better protected, and less tensions and incidents create less humanitarian needs – and all this is made possible simply by the ICRC delivering its mission to protect and assist persons affected by armed conflicts or other situations of violence and to promote IHL and some segments of human rights law.

Example 2: Cooperating on the continuous delivery of privatised essential services in times of disruption caused by armed conflict

A second illustration of the possibilities of cooperation in the field with companies has as its background the Ivory Coast during the internal armed conflict that started in 2002. As a result of this conflict, the country found itself divided into two parts – one run by the central government, and the other run by the armed opposition. Such a situation traditionally creates a whole array of problems for the delivery of public services, and in this particular case one of them was related to the management of the water treatment and distribution system.

The running of the water treatment and distribution system had been privatised some years before the conflict erupted. The system was managed by the local subsidiary of a transnational company based outside the Ivory Coast. The *de facto* partition of the country created two particular problems for the water company. First, it was no longer able to ensure the proper maintenance of the water system in the areas under the control of the armed opposition, due in particular to the sudden departure of a large portion of its qualified staff. Second, it stopped receiving payments for the water delivered to private clients in those areas.

Had it followed pure business-motivated logic, the company might have considered suspending its services in the areas under control of the armed opposition, at least until practical solutions for maintenance and payments could be found. Fortunately, the massive humanitarian setback that such a business-motivated decision could have caused convinced all stakeholders – including the Ivorian ministry in charge and the company – to seek alternative solutions.

This is where the ICRC came in. In many places around the world, the organisation runs programs to ensure that populations affected by armed conflict or other situations of violence benefit from drinkable water. It had such a program running in the Ivory Coast at the time of the conflict. Through discussions with the ministry in charge and the company, pragmatic solutions could be found. The ICRC carried out itself or facilitated the temporary and secure transfer of qualified company staff to conduct some of the essential maintenance operations required in areas held by the armed opposition, with a view to ensuring that the water supply system would not break down or deliver water of insufficient quality. A quadri-partite agreement involving the ministry in charge, the company, a donor, and the ICRC and shared in full transparency with the armed opposition detailed the responsibilities of each party and organised the financial set-up in such a way that the company would not derive profits or sustain additional losses from the arrangement.¹⁶

This case is illustrative of the potential for huge beneficial humanitarian consequences when companies and a humanitarian and neutral organisation such as the ICRC manage to propose pragmatic solutions and persuade all parties concerned to set aside military and business considerations in order to preserve the well-being of hundreds of thousands of civilians.

Example 3: Acting as a neutral intermediary to help resolve hostage crises

A third example of engagement with companies directly in the field is related to the ICRC's traditional role as a neutral intermediary. This is a role that is granted to the ICRC through the Statutes of the International Red Cross and Red Crescent Movement¹⁷ and that follows on logically from the organisation's operational approach, which involves developing contacts and working relationships with all parties involved in an armed conflict or other situations of violence. On the back of this access to a wide range of interlocutors, the ICRC can offer its services as a neutral intermediary to help resolve a humanitarian issue. These services can take the form of providing good offices or, less commonly, mediation, and either way they are carried out with the full consent of all parties involved.

This operational practice occasionally places the ICRC in situations where it can facilitate some specific processes. The ICRC normally uses this working relationship with all parties to press its humanitarian messages, to inform of its humanitarian operations, and to get security clearances for those operations. At times, however, the ICRC's privileged access to all parties can be

16 Further information on this program can be found in the ICRC's *Annual Report 2004*, p. 112, available at: www.icrc.org/eng/resources/documents/annual-report/icrc-annual-report-2004.htm.

17 Statutes of the International Red Cross and Red Crescent Movement, Art. 5(3), adopted by the 25th International Conference of the Red Cross at Geneva in 1986, available at: www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf.

leveraged by others. This is the case, for instance, when the organisation helps with the exchange of information or the resolution of logistical issues in support of peace processes. It is also the case when parties to a conflict want to find ways to liberate prisoners or hostages. These are typical examples of the ICRC's capacity to act as a neutral intermediary.

Over the past few years there have been many instances of business actors being taken hostage in the course of their work in the field. In some of these instances – in Sudan,¹⁸ Ethiopia,¹⁹ and Niger²⁰ – the ICRC has been called in, in its capacity as neutral intermediary, to facilitate the release of the hostages. It is important to underline here that in all such situations the ICRC does not negotiate the terms of the releases, an option that would push the institution away from its humanitarian mission; it only facilitates such processes by relaying messages and managing the logistics when required.

In this type of situation, the ICRC provides a service that helps companies. It does so not because it helps companies *per se*, but because it helps to resolve a humanitarian problem that affects civilians. This nuance underlines the fact that this particular instance of engagement in the field with companies does not represent a deviation from the ICRC's mission – it is just a part of that mission.

As mentioned earlier in this section, the above selection of examples is purely illustrative and does not cover the full spectrum of the various situations in which the ICRC has engaged with business in the field. Further examples include occasional support provided by companies in specific circumstances on ICRC request – for instance, in situations of emergency where companies have swiftly offered in-kind assistance when the ICRC's logistical set-up was temporarily stretched – and ICRC participation in fieldwork carried out under some normative or multi-stakeholder initiatives, such as work related to the Voluntary Principles on Security and Human Rights.. As a conclusion to this section, it is important to underline one common thread in these various instances of cooperation in the field between companies and the ICRC: they were all directly or indirectly connected to the implementation of the ICRC's humanitarian mission. The condition for any decision by the ICRC to engage in the field with companies has always been, and will remain, that it plays a part in achieving a humanitarian objective. Absent this condition, the ICRC will not wish to engage as to do so would risk spreading its resources too thinly and ultimately eroding its capacity to deliver on its core mandate.

18 See Peter Shadbolt, 'Kidnapped Chinese workers released in Sudan', in *CNN*, 7 February 2012, available at: <http://edition.cnn.com/2012/02/07/world/africa/sudan-hostages>.

19 See 'Rebels release Chinese hostages', in *ChinaDaily*, 30 April 2007, available at: www.chinadaily.com.cn/china/2007-04/30/content_863863.htm.

20 See 'Niger rebels release French hostages', in *France 24*, 25 June 2008, available at: www.france24.com/en/20080625-niger-rebels-release-french-hostages-niger-rebels.

Partnerships

The strategy of engagement with business that the ICRC adopted in 1999 identified companies as a source of potential support. Support offered by companies can be financial, but it can just as valuably be of a more operational nature: companies and the ICRC can share their respective expertise, know-how, and good practices in a way that benefits both sides. This form of relationship not only provides the ICRC with extra means to deliver its humanitarian mission, but also offers extra capacities to deliver that mission more effectively.

In order to take advantage of the resources and capacities on offer from companies, the ICRC established in 2005 a group of corporate supporters under the name of the ICRC Corporate Support Group.²¹ All companies and foundations in the group are Swiss-based. Before being invited to join the group, they were vetted by the ICRC through an ethical screening process involving various specialised agencies. While the ICRC is ready to engage with all companies when it comes to discussing humanitarian issues and these companies' operations in the field, it has adopted strict criteria to guide its relationship with companies when this relationship involves an association of image.²² This caution is motivated by the necessary management of the institution's reputation – a reputation that is instrumental to the ICRC's capacity to deliver its humanitarian mission as well as, to some extent, to the security of its operations.

The establishment of a structured partnership with a group of companies has created new opportunities for the ICRC. The institution benefits from advice or direct support on issues such as human resources management, internal auditing, and financial management as well as on more technical fields such as logistics and quality control in medical procurement. Partner companies, meanwhile, have been able to benefit from yearly meetings with the ICRC's President, from yearly workshops where they can exchange experiences on specific issues (such as human resources, induction of new staff members, and corporate responsibility) with ICRC managers, and from occasional inputs by ICRC staff members sharing their field experiences. Partner companies have also been able to benefit from the positive effect in terms of reputation created by their partnership with the ICRC.

Looking ahead

This section will consider some of the main trends that can be observed on the issue of the connection between companies and armed conflicts or other situations

- 21 The initial seven corporate supporters to join the ICRC Corporate Support Group were ABB, Fondation Hans Wilsdorf, Lombard Odier Darier Hentsch, Roche, Swiss Re, Vontobel, and Zurich. Corporate supporters that joined the group after its 2005 launch include Holcim, Fondation Avina, Credit Suisse and Novartis. An updated list of the ICRC Corporate Support Group members is available at: www.icrc.org/eng/what-we-do/other-activities/private-sector/private-sector-csg-members.htm.
- 22 These criteria are listed in the document 'Ethical principles guiding ICRC's partnerships with the private sector', available at: www.icrc.org/eng/resources/documents/misc/ethical-principles-220502.htm.

of violence. It will then look at the way in which the ICRC intends to develop its engagement with business actors.

Major trends

Four major trends can be observed in relation to the connection between business actors and armed conflicts. The first two are closely related to what the former Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, identified in his report *Protect, Respect and Remedy* as ‘the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of society to manage their adverse consequences’.²³

The first trend is that there has been a movement, though as yet a rather modest one, to better regulate the interaction between business and society, including when it relates to situations of armed conflicts or other situations of violence. Developments in the past two years seem to indicate that some states, through their governments, their legislative bodies, or the multilateral organisations in which they participate, have started to take their responsibility to address these governance gaps seriously.²⁴

Second, many actors in society have shown a continuous interest in tackling concrete challenges through multi-stakeholder processes. These processes most often generate dialogue and develop better understanding among separate groups of stakeholders animated by diverging views and interests. This dialogue and increased understanding in turn facilitates pragmatic approaches and resolutions to specific challenges. And these pragmatic resolutions, even though of a voluntary and non-binding nature in most circumstances, often result in incremental improvements in the way business actors deal with some of the challenges they face with regard to their impacts on communities. These processes create a body of soft-law mechanisms and offer a vibrant alternative to the often slow and increasingly complicated process of producing legal obligations in the form of international instruments.²⁵

23 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, UN Doc. A/HRC/8/5, 7 April 2008, available at: www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

24 By way of illustration, the following document, produced in late 2012 by the International Corporate Accountability Roundtable, provides US-focused examples of domestic legislation and regulations as well as of multi-stakeholder processes in its sections titled ‘Discussion 2’ and ‘Discussion 3’ respectively. See ‘Second Annual Meeting of the International Corporate Accountability Roundtable: continuing our coordinated movement, Washington D.C., September 6–7, 2012’, available at: <http://accountability-roundtable.org/wp-content/uploads/2013/02/ICAR-Second-Annual-Meeting-Report1.pdf>.

25 The ‘Overview of selected initiatives and instruments relevant to corporate social responsibility’, in *Annual Report on the OECD Guidelines for Multinational Enterprises 2008*, OECD, 2009, provides an interesting oversight and classification of multi-stakeholder initiatives: see www.oecd.org/daf/inv/mne/40889288.pdf. The document *Investing the Rights Way: a Guide for Investors on Business and Human Rights*, Institute for Human Rights and Business, 2013, provides another interesting oversight and rough analysis of international frameworks and codes/principles/standards: see www.ihrb.org/publications/reports/investing-the-rights-way.html.

The third trend – and probably the most encouraging one – consists of a shift towards implementation. An increasing number of companies have indeed started in earnest to implement in their field operations the resolutions to which they have committed under various declarations of principles, codes of conduct, and multi-stakeholder processes. They have realised that rhetoric and positioning alone are no longer sufficient in the court of public opinion. They have also realised that while improving their human rights records is certainly not the easiest path to follow, it is likely to be the most sustainable one in the mid- to long term as it facilitates balanced and serene relationships with communities and polishes corporate reputation among civil society organisations, clients, and industry peers – all elements that ultimately bring down operational costs and create new business opportunities.²⁶

A fourth trend relates to companies' increasing keenness to connect their corporate responsibility or sustainability endeavours to the material issues created by their core business operations. This trend is strengthened by the fact that companies are growing less content merely to provide money, goods, or services to humanitarian organisations. In short, some companies have been demonstrating a new level of commitment and seriousness in addressing the challenges that their operations may create.²⁷ They increasingly want their social or humanitarian commitments to be more than simply feel-good operations meant to compensate adverse impacts created by their core business activities – they want their commitments to address directly some of these adverse impacts. The fact that food processing companies are addressing the adverse impacts of the increasing demand for palm oil, that telecommunications companies are addressing issues related to data management and privacy, that retail companies are addressing challenges emerging across their supply chains such as child labour or poor health and safety conditions on production sites, and that extractive companies are addressing the challenges related to the displacement of communities or the management of security around their operations are all testimony to this new level of commitment among companies – even though it is clear to everybody that there is still much progress to be made.

26 The operational and opportunity costs of conflict with communities have been shown in Rachel Davis and Daniel M. Franks, 'The costs of conflict with local communities in the extractive industry', conference paper, Proceedings of the First International Seminar on Social Responsibility in Mining, Santiago, Chile, 19–21 October 2011, SRMinning Publisher, available at: http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf. It is worth mentioning here two extremely valuable publications that provide guidance to companies in their endeavours to operate in a way that 'does no harm'. The first publication is generic: Luc Zandvliet and Mary B. Anderson, *Getting it Right: Making Corporate-Community Relations Work*, Greenleaf Publishing, April 2009 (at the time of publishing, the authors were part of the Corporate Engagement Program of CDA Collaborative Learning Projects). The second publication is specific to situations of conflict and to the extractive industry: *Conflict-Sensitive Business Practice: Guidance for Extractive Industries*, International Alert, March 2005.

27 By way of example, one could note how the Unilever Foundation connects its social investments and NGO partnerships with its corporate responsibility plan entitled 'Sustainable Living': see www.unilever.com/aboutus/foundation/. In the same industry sector, one could also note the same type of connection between Nestlé's social investments and NGO partnerships and its corporate responsibility plan entitled 'Creating Shared Value': see www.nestle.com/csv.

The above trends bear much promise for humanitarian organisations that are ready to engage with companies. They offer space for humanitarian organisations to get involved in the development of legal provisions seeking to better regulate companies in relation to their social or environmental impacts on societies, and to support the implementation of these legal provisions. They create opportunities for humanitarian organisations to foster pragmatic solutions to specific problems through their active involvement in multi-stakeholder initiatives. Finally, they open the way for humanitarian organisations to work alongside companies and craft joint projects that bring about positive impacts for vulnerable groups.

The ICRC has spotted these trends and will do its best to exploit them in such a way as to support its mission of protecting and assisting persons affected by armed conflict and other situations of violence and of disseminating IHL and humanitarian principles.

Continued engagement

A dozen years of structured and organised engagement with companies have allowed the ICRC to verify that such engagement is a strategic investment that yields great benefits with regard both to its humanitarian mission and its good functioning as an institution. The ICRC is resolved to pursue its strategy of engagement over the coming years and to further develop it.

So far, the bulk of the ICRC's engagement with companies has focused on the extractive and the private military and security industries. The institution has certainly remained open and ready to engage with companies from any sector should they approach it with requests or dilemmas that have a bearing on its mission and operational concerns. In the years to come, the ICRC will endeavour to reach out to new sectors such as the trading, telecommunications, and agribusiness industries. Activities in these sectors have great potential for both positive and negative humanitarian impacts and as such deserve to be explored in more depth. As in its engagement with other sectors, the idea is not for the institution to 'name and shame' but rather to refine its understanding of its operating environments and to determine whether there are, in these sectors, win-win opportunities for engagement that could trigger humanitarian improvements in specific contexts.

Another evolution in the ICRC's engagement strategy relates to the companies' home countries. An overwhelming majority of the ICRC's work has been carried out with companies originating from OECD countries. This was an opportunistic choice. These companies were indeed considered low-hanging fruit: they were most active and visible in multi-stakeholder processes or fora dealing with business and human rights; they were showing resolve in engaging with the humanitarian sector; they were closer culturally and more readily understandable for the headquarters-based ICRC staff that dealt with them; and they thus required less upfront investment from the thinly resourced ICRC team responsible for the strategy of engagement. Over the coming years the ICRC intends to reach out more determinedly to companies originating from non-OECD countries, in particular from so-called emerging economies. Once again, the main rationale for doing so is

to refine the ICRC's understanding of its operating environments by diversifying its network and to identify some potential win-win opportunities for engagement.

Furthermore, the ICRC has taken due note of the present trend toward implementation noted earlier in this article: many companies have over the past few years moved beyond declarative statements and have started grappling with actual implementation of their commitments in their operations. This move is of particular interest to the ICRC, firstly because it bears promise that certain humanitarian hardships directly or indirectly created by companies' activities could be lessened or avoided altogether, and secondly because while changing their operational practices to 'do no harm' or to 'do good', companies often seek specific sets of competences that are available from humanitarian organisations. The ICRC will carefully observe in certain contexts whether matches can be made between companies' needs and projects and its own humanitarian objectives and plans.

In its revisited strategy, the ICRC will also tackle its engagement with companies in a more holistic way. In previous years the ICRC has functioned with an organisational set-up that completely separates its endeavours to engage companies on humanitarian issues from its endeavours to seek support from companies (whether in the form of know-how, in-kind goods or services, financial assistance, or partnerships). The new approach will certainly keep a clear distinction between these two forms of engagement – there are indeed groups of companies with which the ICRC is willing to engage in relation to the humanitarian impact of their field operations but unwilling to enter into a donor or partnership relationship. The new strategy will however create more continuity between these two forms of engagement and will seek to favour synergies when and where it is relevant to do so. The rationale is that the level of shared experiences and trust created when the ICRC works alongside a company or group of companies on a specific humanitarian challenge can trigger opportunities for parallel engagement on exchange of competences, in-kind or financial support, or partnership. Furthermore, a company's willingness to provide support to the ICRC can serve as a stepping stone to engagement on humanitarian challenges associated with the company's operations.

Finally, in other aspects of its refreshed strategy the ICRC will simply continue some of the work it has been carrying out over the previous years. It will for instance pursue its involvement in selected processes creating norms, producing guidance, or collecting and disseminating good practices that directly or indirectly tackle companies' humanitarian impact in areas affected by armed conflicts or other situations of violence. As a co-initiator of the Montreux Document, the ICRC will ensure with its partners from the Swiss government that the Document is continuously disseminated and promoted. The ICRC will also continue to follow closely and when necessary provide input for the work of the Voluntary Principles on Security and Human Rights initiative, the work related to the International Code of Conduct for Private Security Service Providers, the proceedings of the UN Global Compact and in particular its Expert Group on Responsible Business Practices in Conflict-Affected and High-Risk Areas, the proceedings of the UN Working Group on the issue of human rights and transnational corporations and other business

enterprises, the various work streams related to conflict minerals, and so on. It will also consider proactively partnering with other organisations or individuals with a view to launching specific projects if and when it determines that it can add value and offer constructive involvement related to its competences.

Creating new opportunities

Sometimes opportunities just present themselves sometimes they need to be encouraged. In late 2011, the ICRC decided to join the International Institute for Management Development's (IMD) Corporate Learning Network precisely with the aim of generating new opportunities of engagement with companies.²⁸

The ICRC has integrated this membership in the IMD's Corporate Learning Network into its broad strategy of engagement with business. First of all, membership provides access to a wide network of business interlocutors – an interesting feature when one considers the increasing presence of business in areas affected by armed conflict or other situations of violence. Second, it offers learning opportunities as well as possibilities to exchange with business actors on good practices. Finally, it gives the ICRC the opportunity to reach out to new publics in its continuous efforts to communicate on its operations, to seek advice and support for its work, and to disseminate IHL and humanitarian principles.

Participation in the IMD's Corporate Learning Network is not the only conduit through which the ICRC creates opportunities to further its engagement with business, however. The ICRC Corporate Support Group (mentioned earlier in this article) represents another such conduit; it is currently in the process both of being expanded and of being more systematically utilised with a view to enhancing the ICRC's capacity to deliver its humanitarian mission. The ICRC's participation in selected multi-stakeholder initiatives and its occasional cooperation with industry associations provide yet another conduit for creating new opportunities to develop its engagement with business: constructive engagement in such set-ups nurtures interest and goodwill. Finally, the ICRC will increase its participation in various fora, processes, and groupings where business actors are heavily represented, such as the World Economic Forum.

Conclusion

As underlined in the introduction to this article, humanitarian organisations for most of their history have lived and worked without engaging much with companies, except in a client–supplier relationship. Indeed, for a long time they did not have many pressing reasons to engage: mainstream and legitimate business

28 The IMD is one of the world's most renowned business schools for executive education. The IMD's Corporate Learning Network is a platform that allows its members to learn and exchange information on strategy and management issues through roundtables and learning events. Furthermore, it offers its members access to a wealth of IMD-produced resources, from academic articles to book summaries and podcasts.

actors were rarely seen in conflict-prone areas and did not have the size and clout that some transnational corporations have today. This long period of mutual ignorance is over, and instances of cooperation and partnership between humanitarian organisations and companies will most likely continue to increase in the future.

At present both companies and humanitarian organisations find themselves in an uneasy phase of transition. Through societal expectations and sometimes initiatives by governments, companies are requested not only to 'do no harm' but also to go further by offering a positive contribution to society beyond the creation of jobs, the payment of taxes, and the sporadic deployment of philanthropic activities. Consequently, companies find themselves working in unfamiliar fields and liaising with unfamiliar partners, among which are humanitarian organisations. Generally speaking, managers and employees in both companies and humanitarian organisations are filled with representations of the other party that do not naturally generate mutual respect and confidence.

Efforts need to be made on both sides to overcome suspicion. Companies need the specific skill set and know-how that humanitarian organisations have developed over time in tackling humanitarian problems. Furthermore, companies need the access and good reputation that these humanitarian organisations enjoy in most circumstances, with a view to reaching out to local communities and developing a working environment where the latter will be able to benefit and have their say. For their part, humanitarian organisations can benefit from the specific skill sets and the financial, operational, and political clout that companies have developed.

Rapprochement will not be easy: there are certainly many differences between the business and humanitarian worlds, the most obvious one being the ultimate objectives underpinning their respective operations. But there are also similarities – there are entities with strong ethical frameworks and entities with loose ethical standards in both worlds; there are trustworthy and less trustworthy partners in both worlds; there is in both worlds a keen interest in the rule of law; and there is a pressing need in both worlds to build, develop, and consolidate one's reputation.

Nonetheless, rapprochement is inevitable: competition for resources and for markets pushes companies from all horizons to operate in all kinds of contexts, including in conflict-affected or conflict-prone areas. At the same time, the need for companies to develop their 'social license to operate' (that is, the acceptance of local communities in their areas of operations as a complement to the 'legal license to operate' granted through agreements with the governmental authorities) incites them to consider social investments and humanitarian or development activities. Both trends bring humanitarian and business actors in closer proximity to each other.

The differences and similarities between the business and humanitarian worlds require a very careful approach from both companies and humanitarian organisations when they want to engage. Humanitarian organisations should systematically analyse their potential engagement with business actors in terms of risks and opportunities. Risks regularly concern negative impacts on the

humanitarian organisation’s reputation or acceptance of being associated with business actors in specific contexts. Opportunities generally consist of extended possibilities – in quantitative or qualitative terms – to deliver humanitarian services or chances to influence soft-law mechanisms that will help companies operate in such a way as to do no harm.

Pressed to improve their corporate reputation and their practices in challenging operating environments, companies are increasingly seeking to engage with humanitarian actors. While doing so, they generally know quite well what they want to get from the engagement. Humanitarian organisations have at present an excellent opportunity to take the bull by the horns: they should determine what they need and what they want from business actors and engage, whenever possible, on that basis. This will offer the best opportunities to grasp the potential of synergies and closer cooperation for the benefit of the communities that humanitarian organisations strive to protect or assist. Some humanitarian organisations have already become proactive in their engagement with companies; others have remained reactive or downright reluctant.

In line with its operational practice of engaging with all actors of influence, the ICRC has begun engaging with business actors. This article has explored the motivations, practices, and perspectives of the ICRC’s engagement with business. Measuring the outcome of this engagement is a complicated task, but it is possible to pinpoint some indicators: as documented earlier in the article, the ICRC has provided some input in various multi-stakeholder initiatives promoting IHL and humanitarian principles; it has participated in the production of practical guidance assisting companies to operate in a way that ‘does no harm’; it has offered occasional advice and support to companies, both at the corporate and field levels, on challenges of a humanitarian nature that they were facing; it has sensitised public security forces carrying out law enforcement in areas where companies’ operations create social tensions to the proper management of the use of force; it has offered its services as a neutral intermediary to facilitate the release of hostages; it has benefited from companies’ expertise in addressing various management challenges; and it has benefited from new financial or in-kind resources. This list is illustrative and by no means exhaustive.

The ICRC has thus been exploring the potential of engaging with business actors for more than a decade. It has however not yet reached a point of consolidated practice. It will thus keep exploring until it is satisfied that it has maximised the potential benefits of its engagement with business actors while carefully managing the potential downside of this engagement. This exploration is worth the effort as it can yield greatly positive results for those the ICRC strives to protect and assist.

OPINION NOTE

The interaction between humanitarian non-governmental organisations and extractive industries: a perspective from Médecins Sans Frontières

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Abstract

This opinion note explores some aspects of the relationship between humanitarian non-governmental organisations (NGOs) and extractive industries. Médecins sans Frontières (Doctors without Borders, MSF) has endorsed a policy of non-engagement with the corporate sector of the extractive industries, particularly when it comes to financial donations. This is coherent with MSF being first and foremost a medical

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organisation, and one that adheres to the humanitarian principles of independence and neutrality. For humanitarian actors, the prospect of future environmental disasters and environmental conflicts calls for the anticipation of novel encounters, not only with environmental organisations but also with the extractive sector. Unlike environmental organisations, extractive industries are prone to generating or perpetuating different forms of violence, often putting extractive companies on a par with the parties to armed conflicts. In situations where a dialogue with extractive companies would be needed to optimise care and access to victims, humanitarian organisations should carefully weigh pragmatic considerations against the risk of being co-opted as medical providers of mitigation measures.

Keywords: MSF, extractive industries, armed conflict, corporate social responsibility, local communities, neutrality, conflicts of interest.

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Worldwide, the extraction of fossil and mineral resources has increased by factors of twelve and twenty-seven respectively over the last century, in order to meet the demands of global population growth, Western-style development, and accelerated industrialisation.¹ While this trend is to some extent inevitable, extractive activities expose more than other industries the clash between communal values and the profit motive. One obvious reason for this is that geological resources are geographically bound, and their exploitation inevitably impacts on neighbouring communities. For example, extractive industries often expand through remote territories, regardless of the land rights of the resident populations, the unique biodiversity of some areas,² or the presence of historical assets.³ The environmental, social, and health costs of fossil fuel extraction and industrial mining are therefore considerable and lead to frequent conflicts between local communities and extractive companies.⁴

Considering the developing world in particular, three aspects of extractive activities should be emphasised. Firstly, patterns of extraction vary in scale and intensity. They can include, for example, sporadic and purely artisanal activities,⁵

1 See Marina Fischer-Kowalski *et al.*, *Decoupling Natural Resource Use and Environmental Impacts from Economic Growth*, report of the Working Group on Decoupling to the International Resource Panel, Nairobi, United Nations Environment Programme, 2011, Figure 2.1 and pp. 10–11, available at: www.unep.org/resourcepanel/decoupling/files/pdf/decoupling_report_english.pdf. All internet references were accessed in 2013 unless otherwise stated.

2 See, for example, Michelle Faul, 'Africa's oldest park threatened by rebels, now oil', in *The Guardian*, 5 October 2012, available at: www.guardian.co.uk/world/feedarticle/10470121/print.

3 See, for example, Simon Romero, 'Brazil expands mines to drive future, but cost is a treasured link to its past', in *New York Times*, 15 December 2012, available at: www.nytimes.com/2012/12/16/world/americas/in-brazil-caves-would-be-lost-in-mining-project.html?pagewanted=all&_r=0.

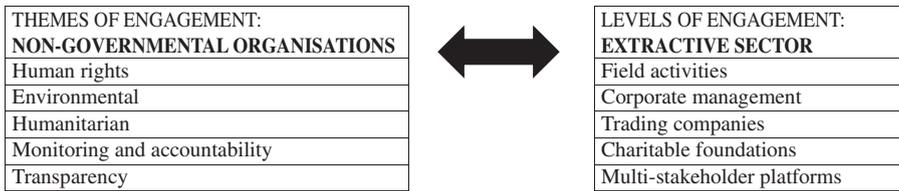
4 Philippe Sibaud, *Opening the Pandora Box: The New Wave of Land Grabbing by the Extractive industries and the Devastating Impact on Earth*, The Gaia Foundation, London, 2012, available at: www.gaiafoundation.org/sites/default/files/PandorasBoxReportFinal.pdf.

5 For example, artisanal gold mining has been the cause of an ongoing outbreak of lead poisoning in Zamfara State, Nigeria. See Médecins Sans Frontières (MSF), *Lead Poisoning Crisis in Zamfara State, Northern Nigeria*, MSF Briefing Paper, May 2012, available at: www.doctorswithoutborders.org

larger mining communities controlled by local or regional interests,⁶ or the industrial exploitation of large deposits by national or transnational companies. Secondly, a large portion of the resources extracted in developing countries is not locally processed and does not fulfil local development needs. Instead, these resources find their way through a complex network of export pathways feeding a profitable and largely unregulated market of globally traded commodities.⁷ Conceptually, it is thus rather misleading to distinguish artisanal mining from the activities of transnational corporations. Thirdly, in spite of a common developmental rhetoric that promises poverty alleviation, the rapid exploitation of natural resources is more likely to produce a ‘resource curse’, a situation typically seen in Sub-Saharan Africa.⁸ The resource curse was originally defined by a slowdown of economic growth resulting from the extraction of natural resources, and typically explained by poor governance, corruption, lack of democratic process, and violence.⁹ The econometric foundations of resource curse theories and their causal inferences have recently been challenged.¹⁰ More importantly, mainstream resource curse theories ignore community perspectives and conceal profound flaws in common development ideologies. For example, regardless of their economic effects, extractive activities often result in land seizures, destitution, imposed industrialisation and urbanisation, population displacements, gender disparities,¹¹ child labour,¹² and the unequal distribution of profits from geological wealth. This is to say that any kind of collaboration with the expansion of extractive industries, even for the sake of local needs, is an implicit endorsement of a dominant development paradigm based on rapid economic growth and market productivity. From such a global perspective, this paper looks specifically into the relationships between extractive industries and humanitarian organisations, examining the position of

[publications/reports/2012/Lead%20Poisoning%20Crisis%20in%20Zamfara%20State%20Northern%20Nigeria.pdf](#)

- 6 In the eastern provinces of the Democratic Republic of Congo, the army and militias control many sites of mineral extraction, including deposits of gold and metals of the tin group. See International Alert, *The Role of the Exploitation of Natural Resources in Fuelling and Prolonging Crises in the Eastern DRC*, International Alert, London, 2009, available at: www.international-alert.org/sites/default/files/publications/Natural_Resources_Jan_10.pdf.
- 7 Déclaration de Berne (ed.), *SwissTrading SA: la Suisse, le négoce et la malédiction des matières premières*, 1st edition, Editions d'en bas, Lausanne, 2011, ch. 13, pp. 215–222.
- 8 Philippe Calain, ‘Oil for health in sub-Saharan Africa: health systems in a “resource curse” environment’, in *Globalization and Health*, Vol. 4, No. 10, 2008 (online), available at: www.globalizationandhealth.com/content/4/1/10.
- 9 Philippe Calain, ‘What is the relationship of medical humanitarian organisations with mining and other extractive industries?’, in *PLoS Medicine*, Vol. 9, No. 8, 2012, available at: www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001302.
- 10 Jonathan Di John, ‘Is there really a resource curse? A critical survey of theory evidence’, in *Global Governance*, Vol. 17, 2011, pp. 167–184.
- 11 See, for example, Gender Action and Friends of the Earth International, *Broken Promises: Gender Impacts of the World Bank-Financed West-African and Chad-Cameroon Pipelines*, 2011, available at: www.gendirection.org/publications/11/chad-cam-wagp-pipelines.pdf.
- 12 See, for example, John Sweeney, ‘Glencore mine linked to child labour’, in *BBC Panorama*, 16 April 2012, available at: www.bbc.co.uk/news/17702487.



To illustrate the actual complexity of possible interactions, simple or multiple connections could be conceptually drawn between types of NGOs (left box) and each level of possible engagement with the extractive sector (right box).

Figure 1. Relationships between NGOs and extractive industries.

Médecins sans Frontières (Doctors without Borders, MSF) as a case in point. MSF as a movement has taken a clear stance, refusing funds linked to extractive industries. The reasons for this positioning will be further analysed in this paper, to demonstrate that similar reservations apply beyond the case of philanthropy.

NGOs and extractive companies: a complex range of relationships

In order to understand MSF’s specific position, it is apt to first examine the perspective of other NGOs in general, and of other humanitarian NGOs in particular. There is a wide spectrum of relationships between NGOs on the one hand and extractive industries or their allied trading companies dealing with primary commodities on the other (Figure 1). NGOs are diverse in terms of definition, aims, and outreach. Furthermore, they can interact with extractive industries at different levels: locally in the proximity of extraction sites; at the level of corporate management; through charitable foundations derived from extractive or trading companies; or through thematic platforms hosted by governments, academia, or NGO coalitions. Examples of relationships include philanthropic sponsoring, operational partnerships, conflict prevention, accountability and advocacy, and principled non-engagement (Figure 2).

Historically, some international human rights NGOs have triggered controversies by exposing the complicity of some international oil companies in human rights abuses perpetrated by governmental and local armed forces.¹³ Other NGOs have been active in promoting transparency initiatives to improve the accountability of mining companies and governments in their commercial transactions with regard to natural resources.¹⁴ Adding to this complexity, there is a frequent confusion between philanthropy, humanitarian action, and corporate social responsibility

13 For example, see Christian Aid, *The Scorched Earth: Oil and War in Sudan*, Christian Aid UK, London, 2001, part 2, chs. 2–4, pp. 12–29; European Coalition on Oil in Sudan, *Unpaid Debt: the Legacy of Lundin, Petronas and OMW in Block 5A, Sudan 1997–2003*, June 2010, available at: www.ecosonline.org/reports/2010/UNPAID_DEBT_fullreportweb.pdf.

14 See Déclaration de Berne, above note 7, p. 315.

| THEMATIC PLATFORMS | STAKEHOLDERS | MAIN THEME |
|---|--|-----------------------------------|
| Voluntary Principles on Security and Human Rights | Multi-stakeholder | Human rights |
| Extractive Industries Transparency Initiative | Multi-stakeholder | Transparency |
| Alliance for Responsible Mining | Multi-stakeholder | Social justice |
| Kimberley Process | Multi-country | Conflict-free certification |
| Devonshire Initiative | NGOs, mining industry (academia) | Knowledge exchange |
| PHILANTHROPY AND OPERATIONAL PARTNERSHIPS | | |
| ExxonMobil Malaria Initiative | NGOs, UN agencies, private–public partnerships | Malaria control |
| ACCOUNTABILITY AND ADVOCACY | | |
| Mines and Communities | NGOs coalition | Accountability, advocacy |
| Rights & Accountability in Development | Human rights NGO | Accountability, advocacy, justice |
| PRINCIPLED NON-ENGAGEMENT | | |
| Médecins Sans Frontières | Humanitarian NGO | |

Relationships can be seen as favourable (blue), critical (red), or non-existent (green) toward the corporate management of extractive industries.

Figure 2. Examples of relationships between NGOs and extractive industries.

(CSR). Transnational companies account for only part of all extractive activities carried out around the world, and they tend to become increasingly mindful of their adverse environmental and social effects, often under the pressure of environmental or human rights NGOs. In their attempts to exercise CSR, they seek at the same time to externalise remediation and mitigation measures, and naturally turn to humanitarian or developmental NGOs for expertise and operational partnerships. For example, transnational extractive companies are keen to display their corporate philanthropy by awarding local or international NGOs financial support for development programmes that benefit impacted populations. The engagement of the civil society into tri-sector partnerships with the corporate sector and development agencies is being encouraged by some governments¹⁵ and by global finance organisations, but such initiatives are clearly controversial.¹⁶ Indeed, by being seen as the CSR agents of companies seeking a ‘social licence to operate’, humanitarian NGOs could run the risk of compromising their independence and their credibility toward impacted communities. Interpretations of such a risk vary among humanitarian organisations themselves, as illustrated by their differing stances toward corporate extractive industries.

15 Catherine Coumans, ‘Whose development? Mining, local resistance and development agendas’, Mining Watch Canada, 29 November 2011, available at: www.miningwatch.ca/article/whose-development-mining-local-resistance-and-development-agendas.

16 See, for example, Rick Westerhead, ‘Donors closing wallets to Canadian charities who work with CIDA, mining companies’, in *Toronto Star*, 31 January 2013, available at: www.thestar.com/news/world/2013/01/31/donors_closing_wallets_to_canadian_charities_who_work_with_cida_mining_companies.html.

Humanitarian organisations and the Dunantist tradition

While others have opted for active engagement with the extractive sector, some among prominent international humanitarian NGOs like MSF¹⁷ and Médecins du Monde (Doctors of the World) have endorsed corporate fundraising policies that exclude financial partnerships with extractive industries.¹⁸ This could be put in the perspective of both MSF and Médecins du Monde being the champions of a strong ‘Dunantist’ or principled tradition of humanitarianism. In the following sections, I will refer mostly to the position of MSF, whose reservations toward extractive industries are broader than financial, and appear to be grounded in at least three types of considerations: (1) conflicts of interest and independence, (2) neutrality and perception, and (3) operational capacity and security.

Conflicts of interest and independence

An international Corporate Fundraising Statement issued by MSF in October 2010 excludes donations and collaborations ‘with companies with prime business activities in the following sectors: arms manufacturing and selling, tobacco manufacturing and selling, pharmaceutical industry, and extraction industry’. Leaving the pharmaceutical industry aside, the conflation of arms, tobacco, and extractive industries in the same exclusion category reflects a logic of preventing conflicts of interest. In other words, any money generated by activities that are harmful to health is incompatible with the medical and humanitarian endeavours of the organisation.

Extractive industries are a rather new topic of reflection for MSF.¹⁹ Environmental disasters, regardless of their origins, are being considered as a new field of intervention for the organisation, after its recent involvement in response to the major outbreak of lead poisoning in Zamfara State, Nigeria. Apart from environmental disasters, MSF as an international humanitarian organisation with a medical focus cannot ignore the many health hazards brought about by mining and oil extraction. For example, oil spills and gas flaring contribute to environmental illnesses, as seen in the Niger Delta.²⁰ The industrial mining of metal ores depletes and pollutes water resources, compromises agricultural livelihoods, and affects food security.²¹ In some contexts, mining and the resource curse contribute to the spread of sexually transmitted infections, HIV/AIDS,²²

17 MSF, ‘Corporate Fundraising Statement’, internal document, October 2010.

18 Jean Saslawsky, ‘Financing humanitarian aid’, XIV Humanitarian Congress Berlin, 12 October 2012, available at: http://humanitarian-congress-berlin.org/files/8013/5064/5592/Jean_Saslawsky_-_Financing_Humanitarian_Aid__12_Oct_2012.pdf.

19 See P. Calain, above note 9.

20 Global Health Watch, ‘Chapter C6: Oil extraction and health in the Niger Delta’, in *Global Health Watch 2: an alternative World Health Report*, Zed Books, London and New York, 2008, pp. 170–184.

21 Anthony J. Bebbington and Jeffrey T. Bury, ‘Institutional challenges for mining and sustainability in Peru’, in *PNAS*, Vol. 106, No. 41, pp. 17296–17301, available at: www.pnas.org/content/early/2009/09/23/0906057106.full.pdf+html.

22 Indra De Soysa and Ismene Gizelis, ‘The natural resource curse and the spread of HIV/AIDS, 1990–2008’, in *Social Science & Medicine*, Vol. 77, 2013, pp. 90–96.

and tuberculosis.²³ Extractive explorations and exploitations are reaching areas of exceptional biodiversity and can potentially enhance the risk of emerging infections.²⁴ Endemic violence frequently features as a component of the resource curse, with humanitarian consequences including population displacements, malnutrition, and an increased prevalence of mental health disorders. Transnational extractive companies and their trading partners are obviously not the only actors to blame for such dire health consequences, but their corporate philanthropy cannot be dissociated from the consequences of their mainstream activities and from business practices that may increase adverse social and health impacts. For example, the ongoing support of oil companies to some authoritarian governments in exchange for access to oil fields perpetuates poor governance and public health neglect. In a well-documented case, the funding of limited malaria control projects by ExxonMobil in Equatorial Guinea has been criticised as representing a conflict of interest with regard to the privileged connections between the company and the Guinean dictatorship.²⁵ Thus, both the direct and indirect health effects of extractive industries are a first justification for MSF to exclude extractive industries and their derived foundations as sources of funding. Corporate funding by the extractive sector would also affect the credibility of MSF as an independent organisation, particularly when MSF projects address the medical needs of populations affected by the activities of oil and mineral industries.

Neutrality and perception

Neutrality is a versatile concept, encompassing at least two meanings: (1) ideological neutrality and (2) not taking sides in a conflict, directly or indirectly.²⁶ The first meaning – ideological neutrality – matters to the extent that extractive industries are instruments of a dominant concept of development, akin to a religion²⁷ which is not necessarily accepted by communities offered humanitarian relief. To illustrate the latter point, not a single week passes without news of extractive projects being opposed by local communities.²⁸

The second meaning of neutrality is even relevant for MSF, as extractive industries can arguably be indirect participants in a variety of conflicts. Violence is a

23 David Stuckler, Sanjay Basu, Martin McKee, and Mark Lurie, 'Mining and risk of tuberculosis in sub-Saharan Africa', in *American Journal of Public Health*, Vol. 101, No. 3, 2011, pp. 524–530.

24 Chatham House, *The IDRAM Initiative: Extractive Industries Infectious Disease Risk Assessment and Management – Stakeholder Roundtable*, Meeting Summary, Centre on Global Health Security, November 2012, available at: www.chathamhouse.org/publications/papers/view/187975.

25 Naman K. Shah, 'Corporate philanthropy and conflicts of interest in public health: ExxonMobil, Equatorial Guinea, and malaria', in *Journal of Public Health Policy*, Vol. 34, No. 1, 2013, pp. 121–136.

26 Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, HPG Report 5, Humanitarian Policy Group, Overseas Development Institute, London, 2000, available at: www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf.

27 Gilbert Rist, *The History of Development*, 3rd edition, Zed Books, London, 2008, pp. 21–24.

28 See, for example, the headlines of Mines and Communities, available at: www.minesandcommunities.org.

hallmark of extractive activities,²⁹ particularly in the developing world. The range of conflict situations reflects different geopolitical contexts as well as variable balances of power between the extractive sector and local populations. Some of the most recent inter-state conflicts are obviously rooted in power struggles for access to natural resources. In parallel, armed conflicts and civil wars remain endemic in some of the most coveted or exploited areas of extractive resources. For oil extraction, for example, emblematic cases include the Niger Delta in Nigeria³⁰ and South Sudan.³¹ In the Kivu provinces, unprecedented levels of sexual violence are concentrated in areas that overlap with mining activities.³² Plausibly, this is a geographical illustration of the demonstrated link between mineral exploitation, a self-financing war economy, and human rights abuses in the region. In addition to protracted conflicts, more sporadic violence and human rights exactions can be committed by governmental forces or militias, sometimes with the logistical assistance of extractive companies.³³ A milder but even more common form of violence is the repression of protests against the environmental destruction brought about by mining and oil exploitation. These environmental conflicts often result in land seizures and the displacement of those whose lifestyles and agricultural livelihoods are compromised by extractive industries. When this happens on indigenous territories, the protection of ancestral land rights is weak and underground assets are typically seized as state property that can be sold or leased to private companies.³⁴ The International Labour Organization (ILO) Convention No. 169 is the most comprehensive legal instrument for protecting the rights of indigenous populations, but it has unfortunately been ratified by only twenty states.³⁵ Article 15 of Convention No. 169 deals with natural resources and guarantees to tribal peoples a due process of consultation, but it does not necessarily acknowledge their ownership

29 Stacy D. VanDeveer, *Still Digging: Extractive Industries, Resource Curses, and Transnational Governance in the Anthropocene*, Transatlantic Academy Paper Series, January 2013, available at: www.transatlanticacademy.org/sites/default/files/publications/VanDeveer_StillDigging_Jan13_web.pdf.

30 Chris Newsom, *Conflict in the Niger Delta*, Special Report 271, United States Institute of Peace, June 2011, available at: www.usip.org/sites/default/files/resources/Conflict_Niger_Delta.pdf.

31 Anne Hamilton, *Oil-Exploitation as a Factor of Violence in the Context of 2012 South Sudan–Sudan Border Conflict*, Social Science Research Network, 25 April 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046167.

32 Denis Mukengere Mukwege and Cathy Nangini, 'Rape with extreme violence: the new pathology in South Kivu, Democratic Republic of Congo', in *PLoS Medicine*, Vol. 6, No. 12, 2009, available at: www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000204.

33 United Nations Organization Mission in the Democratic Republic of Congo, *Report on the Conclusions of the Special Investigation into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004*, MONUC Kinshasa, September 2005, pp. 8–10, available at: http://raid-uk.org/docs/Kilwa_Trial/MONUC_report_oct05_eng_translated_by_RAID.pdf. See also Global Witness, *No Justice in Canada for Congolese Massacre Victims as Canada's Supreme Court Dismisses Leave to Appeal in Case against Anvil Mining*, 1 November 2012, available at: www.globalwitness.org/library/no-justice-canada-congolese-massacre-victims-canada%E2%80%99s-supreme-court-dismisses-leave-appeal.

34 Richard Witzig and Massiel Ascencios, 'The road to extinction: case study of resource exportation, disease importation, and human rights violations against the Urarina in the Peruvian Amazon', in *Health and Human Rights*, Vol. 4, No. 1, 1999, pp. 60–81.

35 ILO Convention No. 169, available at: www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm.

over mineral or sub-surface assets. When facing land seizures for the sake of resource extraction, their ultimate legal rights are thus considerably limited.

These considerations illustrate the key feature of most of the conflicts rooted in resource extraction: they are typically asymmetrical conflicts, where corporate interests prevail over local grievances. What counts for humanitarian organisations is the magnitude of local needs. In a distinctly asymmetrical conflict, there is thus no breach of neutrality in the fact of providing humanitarian relief to seditious communities while at the same time refusing to engage in partnerships with the corporate sector. In some instances of organised rebellion, it could be argued that environmental issues can be at the root of non-international armed conflicts as defined by international humanitarian law,³⁶ and that the conflict ceases to be asymmetrical. The Niger Delta would be a case in point – in the highly hypothetical case of a wealthy supporter of the rebellion offering philanthropic donations to MSF, there would indeed be a breach of neutrality akin to receiving donations from extractive companies. In any case, the application of the humanitarian principle of neutrality is not conditional upon any specification of the type of armed conflict taking place.³⁷ With extractive industries, the neutrality of MSF and similar organisations practically pertains to relationships with those companies having corporate interests or indirect participation in conflicts over natural resources. This encompassing interpretation of neutrality is reflected in the MSF Corporate Fundraising Statement when it says that all MSF sections will refuse funds and/or collaborations with extractive industries ‘to ensure that [MSF] is not perceived to contribute to conflicts and/or disasters that affect populations in danger or cause humanitarian suffering’.

Operational capacity and security

The next argument spelled out in the MSF Corporate Fundraising Statement is more pragmatic, but derives from the former considerations about independence and neutrality. The ultimate goal is to ‘never compromise MSF operational work and/or the security of volunteers and beneficiaries in the field’. Thus, beyond principles and values, strict adherence to neutrality and independence is also instrumental to guaranteeing operational space and security for humanitarian NGOs. In this sense, it would be pragmatically unwise for MSF to side in any manner with extractive industries when they generate local grievances and armed conflicts. Finally, the Corporate Fundraising Statement indicates that ‘Exceptions could be made with companies which are not active in areas of MSF operations.’ Such territorial exceptions would perhaps be compatible with the second understanding of neutrality (not taking side in hostilities, directly or indirectly), but not with the arguments over independence and conflicts of interest.

36 For a legal definition of non-international armed conflicts, see Sylvain Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’, in *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 69–94, available at: www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf.

37 Neutrality is not mentioned in the Geneva Conventions. See K. Mackintosh, above note 26, p. 8.

Beyond philanthropy

MSF thus sees in the receipt of financial sponsoring from extractive industries a breach of its independence and neutrality, and a risk of conflicts of interest and misperceptions. But would other types of interactions be more aligned with the values and principles of the organisation – for example, participation in CSR activities, conflict prevention, or disaster response? The exercise of CSR is instrumental to corporate achievements, and therefore foreign to the realm of humanitarian actions, even if those actions are devolved to humanitarian actors. Yet one could argue that a number of extractive companies are taking measures to prevent conflicts and health hazards (if only out of their own self-interest), and that humanitarian organisations can pragmatically help exposed communities by joining this endeavour. In fact, partnerships that could be interpreted as advisory would be no less damaging to independence and neutrality than sponsoring, particularly if there is a risk of NGOs being co-opted³⁸ or becoming a source of geopolitical intelligence. From the perspective of some industries, conflict prevention relies less on respecting the voice of dissenting communities than on gaining strategic information over their beliefs, social structure, and acceptance of environmental changes. Humanitarian organisations that would be in a position to receive such information should exercise restraint in sharing their analysis, even within thematic platforms bound by the ‘Chatham House Rule’.

Finally, it remains to be debated within MSF whether pragmatic dialogue with the corporate sector of the extractive industries could take place on an ad hoc basis, on the occasion of environmental disasters and environmental conflicts. In the former case, independent advocacy should make it clear that humanitarian NGOs are not mere providers of environmental public health or palliative measures. In the latter case, engagement should follow the same rules as those exercised with armed forces or their political allies. These rules are meant exclusively to secure access to victims and to optimise their relief.

Ironically, MSF was created in the aftermath of the Nigerian Civil War, a conflict whose escalation was rooted in a struggle for access to oil in the Niger Delta.³⁹ After forty years, the organisation is committed to a renewed reflection on the broad humanitarian consequences of extractive industries.

38 Dorothea Baur and Hans Peter Schmitz, ‘Corporations and NGOs: when accountability leads to co-optation’, in *Journal of Business Ethics*, Vol. 106, No. 1, 2012, pp. 9–21.

39 Chibuïke Uche, ‘Oil, British interests and the Nigerian Civil War’, in *Journal of African History*, Vol. 49, No. 1, 2008, pp. 111–135.

Q&A: INTERNATIONAL HUMANITARIAN LAW AND BUSINESS



Ten questions to Philip Spoerri, ICRC Director for International Law and Cooperation

With the globalisation of market economies, business has become an increasingly prominent actor in international relations. It is also increasingly present in situations of armed conflict. On the one hand, companies operating in volatile environments are exposed to violence and the consequences of armed conflicts. On the other hand, some of their conduct in armed conflict may lead to violations of the law.

The International Committee of the Red Cross (ICRC) engages with the private sector on humanitarian issues, with the aim of ensuring compliance or clarifying the obligations that business actors have under international humanitarian law (IHL) and encouraging them to comply with the commitments they have undertaken under various international initiatives to respect IHL and human rights law.

In times of conflict, IHL spells out certain responsibilities and rights for all parties involved. Knowledge of the relevant rules of IHL is therefore critical for local and international businesses operating in volatile contexts. In this Q&A section, Philip Spoerri, ICRC Director for International Law and Cooperation, gives an overview of the rules applicable to business actors in situations of conflict, and discusses some of the ICRC's engagement with business actors.

Philip Spoerri began his career with the ICRC in 1994. Following a first assignment in Israel and the occupied and autonomous territories, he went on to be based in Kuwait, Yemen, Afghanistan, and the Democratic Republic of the Congo. In Geneva, he headed the legal advisers to the Department of Operations. He returned to Afghanistan as head of the ICRC delegation there from 2004 to 2006, when he took up

his current position. Before joining the ICRC, he worked as a lawyer in a private firm in Munich. He holds a PhD in law from Bielefeld University and has also studied at the universities of Göttingen, Geneva, and Munich.

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1. Are business actors aware of the existence of international humanitarian law, and of their obligations under this body of law?

Over the years, companies have become increasingly familiar with human rights law. More and more business actors are making an effort to respect human rights and not to become involved in human rights abuses. This evolution can only be welcomed. However, business enterprises are in general less aware of IHL. They do not necessarily know that in times of armed conflict, this special body of law applies, and that it includes provisions that might be relevant to them.

International humanitarian law applies to both international armed conflicts (which oppose two or more states) and non-international armed conflicts (colloquially known as ‘civil wars’ – which oppose a state and an organised armed group or two or more such groups), but it does *not* apply to situations of internal disturbances and tensions. It is important to recognise the difference between international and non-international armed conflict because, whereas the first category is covered by an extensive range of IHL treaty rules, the second is governed by a more limited set of treaty rules. Internal disturbances and tensions, on the other hand, are regulated by human rights law and domestic law.

IHL and human rights law are two distinct but complementary bodies of law. In situations of armed conflict, human rights continue to apply and complement and reinforce the protection conferred by IHL. However, IHL remains the body of law specifically designed to apply in times of armed conflict. So in cases where *both* bodies of law regulate an issue and there is a conflict of norms, IHL will prevail and human rights law will be interpreted in accordance with IHL standards. For example, during hostilities, the right to life of a soldier must be interpreted in light of the IHL rules, which permit attacks on combatants. Furthermore, while certain human rights norms can be derogated from in certain situations, one cannot derogate from international humanitarian law. Most importantly, for business enterprises one of the main differences between human rights law and IHL is that IHL is binding on states, non-state actors, and individuals, whereas human rights law is explicitly binding on states.

This is what the ICRC wants business enterprises to be aware of, in terms of the applicable legal framework. In parallel, our institution engages in dialogue on humanitarian issues with business enterprises – a dimension of the ICRC’s work that is discussed in a separate article in this issue of the *Review*.¹

1 See Claude Voillat, ‘Pushing the humanitarian agenda through engagement with business actors: the ICRC experience’, in this issue.

2. How are business actors bound by IHL if they have not signed any commitment to respect those rules?

IHL consists of several treaties – such as the 1949 Geneva Conventions and their Additional Protocols of 1977 and 2005 – and customary international law. Those treaties are indeed signed by states, not by business enterprises. Nevertheless, they clearly contain obligations for non-state actors. This is not much different from other legal fields. Imagine, for example, at the domestic level, a national law on taxation. Business enterprises are bound by that law – they will need to pay taxes – but they did not sign the law. The same goes for the obligations under IHL. Once the business enterprise finds itself operating in an armed conflict and carries out activities related to the armed conflict, IHL applies. In this case, the business actors will be bound by the rules of IHL and have certain obligations, which if violated could lead to criminal or civil liability. Conversely, IHL also accords a certain protection to staff and property of enterprises in times of armed conflict.

3. What are the basic rules of IHL and how are they relevant to business actors?

IHL applies to acts related to the armed conflict, so if the activities of an enterprise are not linked to the hostilities, but are private economic ones, IHL will not be applicable to them. In that case, human rights law and domestic law will remain relevant.

This being said, it remains possible that, in the context of an armed conflict, business activities will become linked with the hostilities – for instance, if an enterprise provides support to a party to the conflict or if some staff of the enterprise are members of an armed group of a party to the conflict. It is thus important for a company manager to be aware of IHL rules and of their scope of application to avoid possible violations and/or complicity in violations by others.

The principle of distinction is one of the main principles of IHL of which business actors should be aware. This principle commands that parties to an armed conflict always distinguish between combatants and civilians. Only combatants may be attacked. Civilians, the civilian population as a whole, or civilian objects may never be deliberately attacked. Indiscriminate attacks are prohibited under IHL. In addition, if a combatant no longer takes part in hostilities, for example because he/she is wounded or because he/she surrenders, then he/she may no longer be attacked and must be treated with humanity.

IHL also contains rules on the means and methods of warfare. For example, weapons causing superfluous injury or unnecessary suffering, or widespread, long-term, and severe damage to the environment, are prohibited. Business enterprises that, because of their usual business activities, might sell components of biological or chemical weapons to parties in a conflict or provide services directly linked to the conduct of hostilities, such as intelligence, specific weapons engineering, or private

military contractors, must be very careful not to assist parties to the conflict in the commission of IHL violations.

Furthermore, certain IHL treaties also oblige states to control the production and trade of prohibited weapons – think of anti-personnel landmines, for instance. Often, there will be a provision in those treaties obliging states to criminally punish persons who do not respect the prohibition.

Some rules also prohibit attacks on specific objects, such as objects indispensable to the survival of the civilian population or works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations.

In addition, IHL contains rules on treatment and respect for the sick, wounded, and shipwrecked, as well as prisoners of war and other detained persons.

Due to the nature of the services they offer, some business enterprises are more at risk of being involved in activities ruled by IHL. This is especially the case for private military and security companies. For instance, private contractors involved in detention-related activities in the context of an armed conflict are bound by IHL.²

Finally, as I said earlier, business enterprises and their personnel are also protected by IHL as civilians and civilian objects. They must also be aware of this protection, its scope, and the circumstances under which they can lose it.

4. How does IHL offer protection to business enterprises during armed conflict?

First, where business actors are carrying out their usual activities (where such activities are not related to hostilities, and where the employees are not embedded in any armed forces), they are considered to be civilians under IHL. As civilians, they cannot be the object of direct attacks by the parties to the conflict.

However, IHL poses a condition for civilians to be protected against direct attack: they have to refrain from directly participating in hostilities. If they do not do so, they will lose their protection for as long as they directly participate in hostilities. This leads to the question of what constitutes ‘direct participation in hostilities’. The ICRC has developed a guidance document on this particular concept.³ It explains roughly that any act that is intended to support one party to the conflict by directly causing harm to another party (e.g. either by directly inflicting death, injury, or destruction, or by directly harming the enemy’s military operations or capacity) is considered a direct participation in hostilities. In the case of private military and security companies, for example, activities such as guarding captured military

2 See The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, ICRC and Federal Department of Foreign Affairs, government of Switzerland, 2008, (print release in August 2009), available at: www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (last visited November 2012).

3 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Nils Melzer (ed.), Geneva, May 2009, available at: www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/participation-hostilities/index.jsp (last visited November 2012).

personnel, providing to a party to the conflict tactical targeting information for an attack, operating weapons systems in combat operations, or delivering ammunitions to combatants in the battlefield are considered direct participation in hostilities.

The reasoning is similar regarding the equipment of an enterprise – cars, factories, buildings, and so on. Normally these are considered to be civilian objects (which should protect them from being directly attacked). However, if they make an effective contribution to the military action of a party to the conflict, they may lose their protection and become legitimate military objectives. For instance, if an enterprise let the armed forces of a party to the conflict use its vehicles or installations for military action, these vehicles and installations would become military objectives and IHL would allow the enemy to attack them.

Of course, despite the protective rules of IHL, business employees or assets, like any other civilians and civilian objects, may nevertheless lawfully become the victim of an attack. IHL prohibits parties to carry out an attack if the expected civilian loss would be excessive in relation to the anticipated military advantage. This means that there may be cases in which, although the civilians are not the direct object of an attack, the civilian loss will be deemed *not* excessive to the concrete military advantage, and as a result, the attack will be considered lawful.

Furthermore, besides the employees, as I have already explained, IHL also protects business property and goods. Goods, for example, could become the object of confiscation or seizure. IHL prohibits the confiscation of private property for personal or private use. Seizure of business property is allowed only under very strict circumstances. In those cases, the property has to be returned at the end of the conflict and compensation needs to be paid. The unlawful taking of private assets in such a context may amount to pillage, which is a war crime.

5. Are there other rules of IHL, besides the rules on the use of force, that business actors should be aware of when operating in situations of armed conflict?

IHL indeed covers more than the use of force alone. So even if an enterprise is not itself somehow involved in the ongoing violence, it will need to take into account rules of international humanitarian law. Of particular importance for business enterprises, for example, are the rules on the acquisition of property. The acquisition of property and the participation in the acquisition of property through the use of force, or even by threat or intimidation is considered pillage and prohibited under IHL. If the acquisition of the property also forces persons to relocate, this could amount, in certain situations, to prohibited forced displacement. On the other hand, as I mentioned before, IHL also protects the property of business enterprises. Finally, IHL also contains numerous rules on labour and labour conditions. In some instances states may compel persons to do certain types of work. Business enterprises do not have the same type of rights. They must ensure that no forced labour is associated with their activities.

6. *Despite those protective rules, as you've noted, business enterprises are often the victim of attacks, restrictions, or confiscations. Would it not be better for a business enterprise to evacuate from an area when a conflict begins?*

Well, in most conflict situations, reality shows that the space for business enterprises to operate or to continue to operate exists. Direct and indirect jobs and the revenues they generate can actually be a source of stabilisation if they are well managed. The challenge in this regard lies in the management of the impact that business enterprises are having on communities, on local and national authorities, and in particular on other armed actors (opposition forces, rebels, and others).

The key issue is what can be done to avoid business activities fuelling the armed conflict. Each situation will create different types of impact and will thus have to be assessed very carefully by the enterprises operating in such environments. Such assessments are complex or even sensitive undertakings since they have to take into account a number of factors and require a broad range of expertise. Ideally, therefore, such assessments connect with a wide range of perspectives and stakeholders. Host and home governments, local authorities, civil society organisations, and international organisations should be approached and should be able to provide input in such exercises. In the end, a company would not only assess whether the environment is secure enough for it to operate, but would also factor in the impact its activities will have on the conflict itself. Clearly, if they choose to stay, enterprises should not be involved in violations of IHL or human rights.

7. *Can business enterprises ensure their own security in times of armed conflict? If so, how?*

A business enterprise will feel the need to ensure its own security if, because of an armed conflict or a situation of lawlessness, it can no longer safely exercise its usual business functions. The enterprise's choice is sometimes limited by domestic law, which will determine whether security forces must be public (such as police, gendarmerie, and army) or may be private. It is actually not a rare phenomenon for business enterprises to find themselves in situations where they have to make pragmatic arrangements with organised armed groups (rebels, opposition, warlords) or with governmental police or armed forces to ensure their security. Whatever the nature of the security forces, under ordinary circumstances, they must act in accordance with domestic law and international standards of law enforcement. That is to say, they may only use force when it is strictly necessary and the force used must be proportionate to the threat. Business enterprises must take all necessary and feasible measures to ensure that the security forces they engage comply with these standards.

A point to bear in mind is also that, depending on how the security is managed and by whom it is provided, there is a risk of engaging directly in the

conflict. For instance, if the security forces hired by the company or provided by the authorities actually form part of the armed forces of either party to the conflict, the security forces personnel will be considered combatants or fighters. In other words, as far as IHL is concerned, they will be a legitimate target for the enemy. I will not expand further on this issue, but clearly the issue of trying not to organise one's own security in a way that will make one a direct participant in the conflict is a challenge.

I should also emphasise that when a company hires a security force, it may bear criminal or civil responsibility for violations of IHL and human rights law committed by security guards. So if the security personnel violate international humanitarian law, the business itself as well as its managers and directors might also risk being held legally accountable.

8. What does the risk of criminal liability in cases of non-compliance mean concretely for businesses?

First, under IHL, states have an obligation to investigate war crimes allegedly committed by their nationals or members of their armed forces or on their territory, or war crimes over which they have jurisdiction, and to prosecute if appropriate. Furthermore, states have the right to vest universal jurisdiction in their national courts over war crimes, i.e. to prosecute regardless of where the crime was committed or of the nationality of the alleged perpetrator.

Second, individual criminal responsibility for war crimes is now a well-established principle of international law. There is no doubt that anyone, including staff, managers, and directors of enterprises that commit such crimes, will engage his/her criminal responsibility.

The scope of criminal liability can be quite vast. Indeed, under international criminal law, besides the main perpetrators of the crime, accomplices can also be held criminally responsible if they aid and abet, or otherwise assist, order, or encourage the commission of that crime. For instance, a businessman selling chemical products that can be used to fabricate weapons to a party to a conflict, knowing or consciously disregarding the fact that the products will indeed be used to commit war crimes, could be held responsible as an accomplice.⁴

As for superiors, both civil and military, they can also be held individually responsible under international criminal law for crimes committed by their subordinates if they did not exercise proper control over the perpetrators where they knew (or should have known)⁵ that they were about to commit a crime, and if

4 See e.g. the *van Anraat* case, or the *Zyklon B* case (British Military Court, Hamburg, *Trial of Bruno Tesch and two others*, Case No. 9, 1–8 March 1946, published in *Law Reports of Trials of War Criminals*, Vol. 1, United Nations War Crimes Commission, Her Majesty's Stationery Office, 1947, pp. 93–104).

5 Note that the 'should have known' standard is unique to the International Criminal Court (ICC), the *ad hoc* tribunals having used a standard of 'had reason to know'. Furthermore, under the ICC Statute, the

they failed to take all necessary and reasonable measures within their power to prevent or repress the commission of war crimes or to submit the matter to the competent authorities for investigation and prosecution. For instance, the director of a company could be held responsible for war crimes committed by his/her employees in the course of any activities under the control of the director (while carrying out their tasks, ensuring the security of the company, working in the compound of the company, and so on).⁶

As I said, the criminal liability of individuals working for a company poses no legal or conceptual challenge, notwithstanding the task of identifying the individual(s) to be held accountable within the corporate structure. However, the question of the criminal liability of the corporation as such is less straightforward. For the time being, the International Criminal Court has jurisdiction solely over natural persons. However, in many countries, such as Switzerland and Canada, legal persons such as business enterprises can be held criminally liable for the commission of war crimes.

Furthermore, during the last decade, there have been developments in the field of civil litigation for international crimes, including war crimes, committed by corporations and their directors. It is thus possible for victims, in some countries, to lodge complaints against business actors for their implication in the commission of war crimes and to ask for reparation. So today, there is a real risk for business actors of facing criminal prosecutions or civil litigations for their alleged involvement in the commission of war crimes.

9. Can states also be held responsible for the involvement of business actors in armed conflict?

Indeed, the primary responsibility to ensure respect of IHL rests with states. This means that states have to take all reasonable measures to prevent violations of IHL. With respect to business actors, this can be done, for instance, by disseminating IHL amongst the business sector, by adopting appropriate legislation to regulate private security services, by requiring proper training for private security guards and public officers, or by establishing mechanisms of control in this respect.

As I mentioned, states also have an obligation to investigate and prosecute war crimes, including those committed by staff, managers or directors of business enterprises. A state can also be held responsible under international law if it fails to exercise due diligence to prevent, prosecute and/or punish human rights violations committed by business actors.

Furthermore, a state can be held responsible for violations of IHL committed by business actors when their conduct can be attributed to that state.

mens rea requirements for military and civilian superiors are different. See respectively Arts. 28(a)(i) and (b)(i) of the Rome Statute of the ICC.

⁶ See International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Trial Chamber I, 27 January 2000, para. 880.

This is the case, for instance, if business actors are incorporated into the state's organs, including its armed forces, if they act under the command or control of the state, or if they are empowered to exercise elements of governmental authority. This would be the case, for instance, activities related to law enforcement or to the guarding of detained persons.

Therefore, states have a crucial role to play in the establishment of an environment that allows business actors to operate in conflict areas in a way that respects IHL and human rights and to take action in case of violations.

10. How would you describe the engagement of the ICRC with business actors?

In the field, the ICRC's engagement with business actors still remains rather modest. However, we are presently witnessing two trends that are likely to have an impact on the ICRC's engagement with business actors in the field. First, the ICRC now clearly sees the importance of developing its capacity to analyse the impact of business on the conflict environment and to consider appropriate responses. Second, business actors operating in challenging contexts are increasingly seeking advice and guidance from humanitarian or development organisations.

These two trends have already created and will continue creating additional opportunities for humanitarian actors – and the ICRC in particular – to engage with business. In such situations the challenge consists in making sure that any engagement with business actors ultimately supports the ICRC's mission to protect and assist persons affected by armed conflict or other situations of violence. In his article in this issue of the *Review*, Claude Voillat provides a few examples of such ICRC engagement in the field.⁷

The ICRC's engagement with business actors at the corporate level has been more intensive. On the one side, the ICRC has been involved in a handful of initiatives seeking to mitigate the potential negative impacts of business operations. There are at present many such initiatives, some of them led by governments or multilateral organisations, others promoted by groups of companies or industry associations, and still others developed as multi-stakeholder initiatives. The ICRC focuses only on initiatives that are connected in one way or another with its mission and mandate. In these initiatives the ICRC seeks to ensure that IHL is appropriately referred to and that basic humanitarian principles are promoted. Our organisation also seeks, when relevant, to share its expertise in operating in conflict-affected areas.

The ICRC does not stop there, however. In its work alongside business actors, it has realised that the latter need practical guidance and tools in support of their endeavours to mitigate their potential negative impacts and to 'do no harm'. In this spirit, the ICRC has published an information brochure called *Business and*

7 See above note 1.

International Humanitarian Law,⁸ which is intended to inform businesses of their obligations and rights under IHL. The brochure explains when IHL is applicable, what the main purpose of this body of law is, and how businesses can conduct themselves in times of armed conflict so as to avoid violations of the law.

The ICRC has also taken part, jointly with other organisations, in the development of practical guidance. It has, for instance, worked with the International Finance Corporation, the International Council on Metals and Mining, and the International Petroleum Industry Environmental Conservation Association to develop the Implementation Guidance Tools for the Voluntary Principles on Security and Human Rights. Since their release, there has been repeated evidence that these guidance tools have been picked up and utilised in their operations by many companies – be they formal members of the Voluntary Principles initiative or not.

The ICRC has also remained very engaged on the question of private military and security companies (PMSCs). As you may be aware, the Montreux process was a joint ICRC and Swiss government initiative, which aimed at compiling the relevant legal obligations and good practices of states with respect to PMSCs. The Montreux Document has been signed by more than 45 states and the European Union, and has acted as a ‘vector’ for more recent initiatives, such as the International Code of Conduct for Private Security Service Providers. It has also permitted us to support legislative efforts in contexts like Afghanistan and Iraq.

Finally, the ICRC is aware of the fact that the above initiatives would remain futile if they were not translated into practice. The ICRC continues to actively promote the Montreux Document and to further encourage states to sign it and implement the good practices set forth in it. One effective way to promote the implementation of such standards is also through training. The ICRC will continue to explore with its delegations in the field options for meaningful contributions to such efforts, and will encourage initiatives in this regard.

8 ICRC, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, Geneva, December 2006, available at: www.icrc.org/eng/resources/documents/misc/business-ihl-150806.htm (last visited November 2012).

REPORTS AND DOCUMENTS

The International Committee of the Red Cross's (ICRC's) confidential approach

Specific means employed by the ICRC to ensure respect for the law by State and non-State authorities
Policy document. December 2012.

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Introduction

The ICRC defines its mission in the following terms:

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.¹

To conduct its mission, the ICRC's preferred mode of action is persuasion,² whereby it engages in confidential dialogue with the State and non-State authorities (hereafter 'the authorities') directly responsible³ for matters relating to respect for

1 See the policy document entitled *The ICRC: Its mission and work*, 2008, p. 4, available at: <http://www.icrc.org/eng/resources/documents/publication/p0963.htm>.

international humanitarian law and other fundamental rules protecting persons in situations of violence.⁴ The confidential approach has been part of the ICRC's identity for decades. In some cases, it is a key argument for obtaining access to the people the organization assists and protects. Bilateral and confidential dialogue has proven its effectiveness from the humanitarian point of view, in particular in contexts in which a neutral and independent player is needed.

The ICRC's confidential approach, which is at the core of its identity, is nevertheless subject to growing doubt in an international environment demanding greater transparency. The aim of this policy document is to clarify what the approach means, and to define its features and its limits. The document formalizes existing ICRC practice.

The expectations and general perception of the role of organizations when they are confronted by violations of the law have changed considerably in recent years. The appearance on the international scene of new sociopolitical, media and legal realities has increasingly laid open to question the relevance and effectiveness of the ICRC's traditional confidential approach in particular. These new realities include the following:

- **The crucial struggle against impunity** has been reinforced by the establishment of bodies competent to prosecute crimes that are not subject to a statute of limitations and of which the ICRC may have direct knowledge as a result of its field work. In this context, the ICRC's position may be perceived as contradictory: on the one hand, it supports and promotes such legal mechanisms as means not only of implementing international humanitarian law, but also of preventing future violations;⁵ on the other, in asserting its confidential approach, it refuses to participate in the establishment of indictments/defence briefs by testifying or divulging information relating to its activities.
- **The victims' demand that justice be done:** the ICRC's confidential approach and consequent refusal to testify can be perceived by the victims of violations as bolstering the perpetrators' impunity.
- **The demand for transparency and rapid results:** the ICRC, like other players, is increasingly subject to demands for transparency and rapid and measurable results. Its strategy, which is predicated on the gradual establishment over time of a confidential dialogue with the authorities, may appear not to meet expectations in this regard.

2 *Ibid.*, p. 11: 'Persuasion aims to convince someone to do something which falls within his area of responsibility or competence, through bilateral confidential dialogue. This is traditionally the ICRC's preferred mode of action'. The ICRC's modes of action are raising awareness of responsibility (persuasion, mobilization, denunciation), support, and substitution (direct provision of services).

3 The *ICRC protection policy* defines what is meant by 'authorities and other actors': 'all authorities and bearers of arms (...) who are able to launch hostile action against persons or a population and who are responsible for protecting those who fall under their control'; available in *International Review of the Red Cross* (hereafter *IRRC*), Vol. 90, No. 871, 2008, pp. 751–775, <http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm>.

4 For the reader's sake, the term 'authorities' is used here to designate both State and non-State authorities.

5 *The roots of behaviour in war: understanding and preventing IHL violations*, ICRC, Geneva, October 2004, available at: <http://www.icrc.org/eng/resources/documents/publication/p0853.htm>.

- **The rapid spread and diversification of increasingly sophisticated and hard-to-control information technologies:** it is becoming more and more difficult to guarantee that the confidential information handled by the ICRC in the context of bilateral dialogue with the authorities is not the subject of deliberate or accidental internal or third-party leaks, despite the technical and human measures taken to prevent such leaks.

1. Content of the ICRC's confidential approach

The confidential approach, which consists in persuading an authority to meet its obligations without resorting to public pressure, is a means to an end for the ICRC; it is never an end in itself or an inalienable principle. It is based on a tested method, but it has a point only if the ICRC is convinced that the authorities are willing to cooperate with it and that confidential bilateral dialogue can result in an objective benefit for the victims of violence. The approach is to be understood as a dynamic process implying that progress is made in terms of results and the commitment of the authorities concerned to put a stop to violations. It can never serve to justify, by silence, an unsatisfactory and static situation that is unlikely to change for the better in any significant way. This is why the ICRC must be in a position deliberately to breach its undertaking of confidentiality in exceptional cases in which the approach runs counter to the interests of the victims, in accordance with the Policy on ICRC action in the event of violations.⁶

1.1 Guaranteed results

The confidential approach allows the ICRC to create a space for dialogue between it and the authorities in which the two cooperate with a view to enhancing respect for humanitarian rules and to taking the required corrective action in the event those rules are violated. At the same time, the ICRC takes account of the efforts made and results accomplished, and of the constraints inherent in each situation, as it develops its dialogue with the authorities.

1.2 Protection of the victims of situations of violence

The confidential information collected, obtained or received by the ICRC in the course of its humanitarian mission is only ever communicated in order to alleviate the plight of the victims of situations of violence.

6 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence' (hereafter Policy on ICRC action in the event of violations), in *IRRC*, Vol. 87, No. 858, 2005, available at: <http://www.cicr.org/eng/resources/documents/article/review/review-858-p393.htm>.

The ICRC's work is broadly guided by an ethic of responsibility⁷ that subordinates the organization's decisions to consideration of the anticipated results for the persons it is its mission to protect in a given operational context. It is therefore prohibited to divulge information that could undermine the security of people (who are its source), including in the context of a confidential bilateral dialogue with the authorities concerned.

1.3 Transparency about the conditional nature of the confidential approach

In its dialogue with the authorities, the ICRC ensures that its confidential approach is not understood to be unconditional and definitive. It stipulates that the approach is contingent on progress being made and on the quality of the dialogue engaged. The agreements concluded between the authorities and the ICRC do not contain a clause binding the ICRC to absolute confidentiality. The Policy on ICRC action in the event of violations is a public document⁸, and the decision to derogate from bilateral confidential dialogue is subject to the specific conditions set out therein.

1.4 Concentric and creative representations

In the event of established or known violations of international humanitarian law and other fundamental rules protecting persons in situations of violence, the confidential approach must be broad, systemic and creative. The ICRC looks for any point of support within the power apparatus or structure able to correct the situation, using a variety of channels. It seeks as a priority to act on the direct perpetrators of the violations, but it also talks with those in a position to influence them. Its strategy can include other measures,⁹ which do not entail the ICRC departing from its policy of discretion in respect of the confidential information it holds.

2. The *raison d'être* of the ICRC's confidential approach

2.1 Access to the victims

In order to discharge its mission, the ICRC considers that it must have direct and sustained access to the people who are victims of situations of violence. The

7 In this regard, see Max Weber, *Politics as a vocation* (available at: <http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf>), for a discussion of the 'ethic of responsibility' (*verantwortungsethisch*) versus the 'ethic of ultimate ends' (*gesinnungsethisch*). The 'ethic of responsibility' presupposes that an organization must be held to account for the foreseeable consequences of its actions. The 'ethic of ultimate ends' posits, on the contrary, that the affirmation of a fundamental moral principle, even if the consequences are unfortunate, outweighs all other considerations.

8 See also section 4.1.1 below.

9 Such as suspending or stopping activities.

confidential approach is intended to make it easier to obtain access to those people from the authorities exercising control over them or over access to them. This proximity to the affected persons allows the ICRC to have on tap the most objective possible knowledge of the problems affecting them, to propose appropriate humanitarian action and to make representations based on established facts.

This approach also helps strengthen security conditions for ICRC staff in the field whose mission is to collect the facts needed to make credible representations.

The general requirement of access to people and security for ICRC staff, together with the individual protection of victims of violence, weighs in any decision to break with the confidential approach.

2.2 A corollary to the principle of neutrality

By refusing to favour one party over the other or, more generally, to be involved in any way that is not purely humanitarian, the ICRC seeks at all times to project an image fostering its acceptance and paving the way to concerted dialogue. This is why it is paramount to respect the Fundamental Principle of neutrality,¹⁰ which is key to ensuring that the ICRC can conduct its activities. The confidential approach helps reinforce the credibility of its commitment to political neutrality.

2.3 Recognition and legal protection of the ICRC's confidentiality by the international community

The international community has widely recognized that the confidential approach is a means enabling the ICRC to discharge its mandate. In its 1999 decision in the case of *Simic et al.*,¹¹ the International Criminal Tribunal for the former Yugoslavia (ICTY) recognized that international customary law gave the ICRC the absolute right not to divulge information relating to its activities. In reaching that conclusion, the ICTY took account of three of the Movement's seven Fundamental Principles – impartiality, neutrality and independence – and of the almost universal ratification of the 1949 Geneva Conventions. It considered that, in the context of legal proceedings, the ICRC retained the right not to divulge information if it considered that doing so would be detrimental to the discharge of its mandate. That decision has been confirmed by other international criminal tribunals.¹²

10 For a definition of the principle of neutrality, see *The Fundamental Principles of the Red Cross: commentary*, Jean Pictet, 1979, available at: <http://www.cicr.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>.

11 ICTY, *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Saric*, IT 95-9-PT, Trial Chamber III, Decision, 27 July 1999.

12 Specifically, the International Criminal Tribunal for Rwanda and, indirectly, the Special Tribunal for Sierra Leone. Rule 73 of the Rules of Procedure and Evidence of the International Criminal Court expressly recognizes that the information held by the ICRC is not subject to disclosure. The Rules of Procedure and Evidence of the Special Tribunal for Lebanon and those of the Mechanism for International Criminal Tribunals both contain a similar provision.

In addition, many of the headquarters agreements the ICRC has signed with States in which it conducts operations also contain a specific clause guaranteeing such immunity for ICRC staff in respect of the courts of the country concerned.

3. The ICRC's independence with regard to the use of confidential information

Subject to the applicable law, the ICRC reserves the right at any time to decide what type of information it wishes to share with the parties (State or non-State authorities, or third parties).¹³ Decisions to transmit confidential information are taken by the ICRC alone on the basis of agreed internal procedures. Such decisions must conform to the Fundamental Principles of independence, neutrality and impartiality, and take account of the interests of the beneficiaries of the ICRC's work. This holds true for bilateral confidential representations, public representations and acts of mobilization.¹⁴

The ICRC never transmits to the authorities concerned or to third parties information mentioning the names of those who have suffered abuse or violations unless it has their prior explicit consent to do so. Such information is only made available to duly authorized persons, after the periods of time set out in the Rules governing access to the archives.¹⁵

4. Breaking with the confidential approach

4.1 Deliberate breach of the confidential approach by the ICRC

4.1.1 Mobilization and public denunciation

The Policy on ICRC action in the event of violations¹⁶ governs the conditions in which the ICRC breaks with the confidential approach. Despite repeated representations made in a confidential and bilateral context, the authorities concerned may not follow up on the ICRC's recommendations and commit major and repeated violations of international humanitarian law and other fundamental rules protecting persons in situations of violence, or allow such violations to be committed. In that case, the ICRC may take other steps in the interests of the persons affected or threatened; these steps may take two forms:

- **mobilization** of third parties;
- **public denunciation** of the violations committed and/or the quality of the dialogue with the authorities concerned.

13 'Third parties' refers to any entity that is not already targeted by the confidential approach (other States, interest groups, civil society players, local and international media).

14 See point 4.1.1 below.

15 See point 4.1.2.a below.

16 See note 6 above.

The ICRC thus decides, in view of the gravity of the situation, unilaterally and deliberately to divulge information hitherto part of the confidential dialogue with the authorities. The decision is made by the ICRC's highest decision-making bodies, for strictly humanitarian purposes and as a last resort, when all other means have failed.

The information must contain only the elements strictly required and sufficing to demonstrate that a situation is unacceptable from the humanitarian point of view. The only purpose of divulging it is to support the ICRC's efforts to attain the desired outcome.¹⁷ It generally deals with:

- established observations that the law has been violated;
- the quality of the dialogue and the nature or results of the cooperation between the ICRC and the authorities concerned.

Confidential information transmitted to third parties never mentions by name the people presumed to have committed the violations.

It is prohibited to divulge confidential information unless under the provisions of the Policy on ICRC action in the event of violations.¹⁸

Mobilization. **Representations aimed at mobilization** represent a breach of confidentiality but do not go so far as to constitute a public denunciation. The ICRC may decide to share confidential information in a targeted fashion and on an exceptional basis with a limited number of authorities in a position to have a positive influence on a humanitarian situation. Should the ICRC decide to have recourse to a strategy of mobilization, it ensures that a number of parameters are met:

- the targets for the representations are chosen in the light of the context and chiefly for their ability to influence the authorities concerned;
- the capacity or willingness of the targets to respect the confidential nature of the information transmitted to them must be considered during the ICRC decision-making process. To the extent possible, an undertaking of confidentiality should be obtained from the third parties "mobilized", but not, of course, in respect of the authority "concerned" (since the mobilization is intended to influence its actions).

Public denunciation. The authorities concerned must in all cases be informed beforehand when the ICRC decides to breach its undertaking of confidentiality through a **public denunciation** that is part of a strategy of representations. Recourse

17 In exceptional cases, the ICRC can be prompted to denounce major violations even if there is no hope of a tangible outcome.

18 The ICRC is regularly confronted with violations of lesser severity that do not fall within the scope of the Policy on ICRC action in the event of violations. They are the subject of bilateral confidential representations until such time as they attain the degree of severity described in the Policy.

to public denunciation does not release the ICRC from its commitment to engage in dialogue with the authorities concerned.

Other forms of action not involving a breach of confidentiality. In cases in which the ICRC becomes convinced that a breach of confidentiality could seriously harm the people whose protection it is its mission to improve, or endanger its staff, it may use other forms of action, such as **suspending its activities** or **withdrawing**. It reserves the right to make its decision public in the light of its assessment of the pros and cons of doing so.

4.1.2 Other instances in which the ICRC deliberately breaks with the confidential approach

a) Access to the ICRC's archives. The ICRC's confidential approach, in addition to being conditional, is not unlimited in time. The policy governing access to the archives authorizes access to all documents produced or obtained by the ICRC after periods of time set out in the existing rules.¹⁹

b) Instances in which the ICRC waives its right not to divulge information. The ICRC benefits in international law²⁰ from the right not to divulge information relating to its activities. This right takes the form of testimonial immunity.

While it cannot be obliged to testify, the final decision whether or not to transmit items of information in its possession to a court or any other competent body remains with the ICRC.

The exceptional decision to assist a judicial body, inquiry, fact-finding commission or other similar body is taken on the basis of a detailed analysis of the situation and its potential consequences for the ICRC, its activities in the field and the people concerned by the judicial or other proceedings at hand.

4.2 Unintended breach of confidentiality by the ICRC

ICRC staff undertake contractually²¹ not to divulge confidential information except as authorized to do so by the competent ICRC bodies. Information may nevertheless

19 At present, after 40 years for general files and after 60 years for files containing personal information. See Article 7 of the Rules governing access to the archives of the International Committee of the Red Cross, in Jean-François Pitteloud, 'The International Committee of the Red Cross reduces the protective embargo on access to its archives', *IRRC*, Vol. 86, No. 856, 2004, p. 961, available at: http://www.icrc.org/eng/assets/files/other/irrc_856_pitteloup_eng.pdf.

20 See point 2.3 above.

21 The pledge of discretion signed by all ICRC staff stipulates that they must 'maintain the utmost discretion (...) with regard to matters that (they) are called upon to deal with or that come to (their) knowledge in the course of (their) activity at the ICRC, and consider (themselves) bound by an obligation analogous to that of professional secrecy'. Any information they obtain in the performance of their duties belongs to the ICRC. Persons under contract to the organization are therefore not free to use such information as they see fit. The ICTY decision in the *Simic* case (see above, note 11) implicitly recognizes that the information belongs to the ICRC and not to the individual working for it.

be divulged without authorization, as a result of a mistake, negligence or a deliberate, unilateral act. The ICRC has put in place measures to ensure that this does not happen and to take corrective action in the event that it does.

4.3 Breach of confidentiality by authorities engaged in confidential dialogue with the ICRC

An authority or its agents may unilaterally decide to make the confidential information transmitted to it by the ICRC public. The ICRC is not responsible for the breach and re-establishes the truth if the information is incomplete or tendentious. It may, for example, publish an entire document if excerpts have been divulged without its agreement, or explain why and in what context it came into possession of the information and for whom the information was intended.

The ICRC may also take such action if the breach of confidentiality is unintended or committed by a third party.

4.3.1 Divulgence for legal or political reasons

The transmission to the authorities of confidential information heightens the risk that the information will be divulged in certain circumstances.

The risk may be legal in origin: the timeframe for access to national archives, an order obliging the target of a representation to transmit the information to a judicial body, etc.

The risk may also stem from the political context: whenever the authorities in a given State change, the new authorities may decide unilaterally to publish or disseminate confidential information that the ICRC had transmitted to the previous authorities.

To the extent possible, the ICRC alerts the authorities to the potentially harmful effects that the divulgence of confidential information could have on the people concerned. On the basis of its right not to divulge information on its activities, recognized in international law, the ICRC also asserts that the judicial authorities should not consider the information concerned legally admissible.

4.3.2 Expanded dissemination of confidential information within the same State structure

On the basis of the nature of the humanitarian problems encountered, the ICRC draws up the list of authorities with whom it wishes to engage in confidential dialogue. It asks that the confidential information it transmits to them be used in accordance with the humanitarian goals established. The authorities are nevertheless free to disseminate internally the confidential information received from the ICRC.

Concluding remarks

This policy document governs the use of confidential information pertaining to the very essence of the ICRC's mission, i.e. to ensure respect for international humanitarian law and other fundamental rules. The confidential approach is never to be construed as a line of conduct allowing violations to be committed with impunity; rather, it serves to create a space for dialogue with the authorities about observations independently established by the ICRC, within which the ICRC endeavours to persuade them to fulfil their obligations.

REPORTS AND DOCUMENTS

What's new in law and case law across the world?*

Biannual update on national legislation implementing international humanitarian law and relevant case law January–June 2012

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The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL). The ICRC was entrusted with this task in a resolution adopted by the 26th International Conference of the Red Cross and Red Crescent in 1995.

The laws presented below were either adopted by states in the first half of 2012 (January–June) or collected during that period. They cover a variety of topics linked to IHL such as the legitimacy of the use of force, reparation for conflict victims, the missing, and the prevention and care of internally displaced persons. The full texts of these laws can be

ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, its three priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks; and (iii) to collect and facilitate the exchange of information on national implementation measures.

* This selection of national legislation and case law has been prepared by Audrey Purcell-O'Dwyer, Legal Attaché of the ICRC Advisory Service on International Humanitarian Law.

found in the ICRC's database on national implementation at: <http://www.icrc.org/ihl-nat>.

The included case law illustrates, among other things, the growing number of domestic prosecutions for violations of IHL and other international crimes, and shows the practical application of domestic implementing measures to punish these crimes. National Committees on IHL and other similar bodies are also increasing in number. More and more states consider them an important tool in facilitating national measures of implementation. The recent creation of committees in Sierra Leone and Qatar has brought the global total to 101 in June 2012.

To further its work on implementation of IHL, the ICRC organized a number of workshops and national and regional events in the period under review. Of particular interest was the Fourth Regional Conference of South Asia on International Humanitarian Law held in Bhutan in February 2012, which was organized by the Royal Government of Bhutan and the ICRC. This conference, which takes place every four years, brought together senior officials, lawyers, judges and members of National Committees on IHL from ten countries in the region with the aim of sharing experiences on the regional development, implementation and enforcement of international humanitarian law. Topics discussed at the conference included: the follow-up on the monitoring program for the strengthening of legal protection for victims of armed conflict¹ and access to health;² the protection of the environment in times of armed conflict; and the adoption of new legislation to implement the international obligations of these states under IHL in various fields (i.e. The Arms Trade Treaty).

Universal participation in international treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and is therefore a priority for the ICRC. In the period under review, fourteen of the twenty-eight IHL related international conventions and protocols³ were ratified or acceded to by various States. In particular there has been notable accession to the Protocols Additional to the 1949 Geneva Conventions and to the Convention on Cluster Munitions (CCM). It is worth noting that the CCM, which was only adopted at the end of 2008 and came into force on 1 August 2010, had already seventy-three States Party by the end of June 2012⁴ showing the true interest in regulating and prohibiting the use of such weapons in armed conflicts. There is still a long way before the CCM reaches universality, but the ICRC welcomes these ratifications.

1 For further information on this initiative, please see the ICRC Report on the strengthening of legal protection for victims of armed conflict (2011), available at: <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf> (last visited September 2012).

2 For further information on the Health Care in Danger (HCiD) initiative of the ICRC, please visit our website: <http://www.icrc.org/eng/what-we-do/safeguarding-health-care/about-health-care-danger-2012-02-06.htm> (last visited September 2012).

3 To view the full list of treaties the ICRC works on, please visit our website: http://www.icrc.org/eng/resources/documents/misc/party_main_treaties.htm (last visited September 2012).

4 The complete list of States Party can be found at: <http://www.icrc.org/ihl> (last visited September 2012).

Ratifications January–June 2012

| Conventions | States | Ratification date | Total number of ratifications (as of 30 June 2012) |
|---|------------------------|-------------------|---|
| 1954 Hague Convention on Cultural Property | Angola | 07.02.12 | 126 |
| | Benin | 17.04.12 | |
| | Palestine ⁵ | 22.03.12 | |
| 1954 Additional Protocol to the Hague Convention on Cultural Property | Benin | 17.04.12 | 102 |
| 1977 Additional Protocol I to the Geneva Conventions | Philippines | 30.03.12 | 172 |
| 1997 Anti-Personnel Mine Ban Convention | Finland | 09.01.12 | 160 |
| | Somalia | 16.04.12 | |
| 1998 Rome Statute of the International Criminal Court | Guatemala | 02.04.12 | 121 |
| 1999 Hague Protocol to the Hague Convention on Cultural Property | Benin | 17.04.12 | 63 |
| | Poland | 03.01.12 | |
| 2000 Optional Protocol to the Convention on the Rights of the Child | Côte d'Ivoire | 12.03.12 | 147 |
| | Malaysia | 12.04.12 | |
| | Grenada | 06.02.12 | |
| | Niger | 13.03.12 | |
| 2001 Amendment to the Convention on Conventional Weapons | South Africa | 24.01.12 | 75 |

(Cont.)

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|--|---------------------------------------|----------|-----------|
| 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | Hungary | 12.01.12 | 63 |
| | Philippines | 17.04.12 | |
| 2003 Protocol V of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 | Lao (People's Democratic Republic of) | 02.02.12 | 79 |
| | South Africa | 24.01.12 | |
| 2005 Additional Protocol III to the Geneva Conventions | Panama | 30.04.12 | 60 |
| 2006 Convention against Enforced Disappearances | Costa Rica | 16.02.12 | 33 |
| | Austria | 07.06.12 | |
| | Bosnia and Herzegovina | 30.03.12 | |
| 2008 Convention on Cluster Munitions | Honduras | 21.03.12 | 72 |
| | Côte d'Ivoire | 12.03.12 | |
| | Mauritania | 01.02.12 | |
| | Togo | 22.06.12 | |
| | Sweden | 23.04.12 | |

- 5 **Palestine.** On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council 'that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto'. On 13 September 1989, the Swiss Federal Council informed the State that it was not in a position to decide whether the letter constituted an instrument of accession, 'due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine'. On 31 October 2011, Palestine became a full member of UNESCO. On 22 March 2012, Palestine deposited with the UNESCO Director-General its instrument of accession to the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols.

National implementation of international humanitarian law

A. Legislation

Bolivia

Law No. 251 of 20 June 2012 on the protection of refugees.

On 20 June 2012, the Republic of Bolivia adopted a law on the protection of refugees, in accordance with their international obligations under the 1951 Convention relating to the Status of Refugees, its additional protocol of 1967 and other international human rights instruments ratified by the country (Article 1).

Law No. 251 provides jurisdictional protection to those people that have already entered the Bolivian territory and who either have obtained refugee status or who have applied for it (Article 2). The law gives an inclusive definition of 'refugee' in its Article 15 which states, in part, that 'any person persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . or that have fled their country of nationality or, of habitual residence because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order' can apply for the status of refugee.

The rights and protections granted to people included in the reach of Article 2 can be found in Title II of Chapter I, for example the right to family reunification. Article 4 deals specifically with the fundamental pillar of the status of refugees: the principle of *non-refoulement*. It affirms that no person who has invoked the status of refugee in Bolivia shall be 'returned to their country of origin or to another country where their life, safety or freedom are at stake'. The status of refugee is however subject to certain conditions listed in Title III of Chapter I and Titles I and II of Chapter II, which, if not respected can lead to exclusion, termination, cancellation or revocation of the status and even possible expulsion from the Bolivian territory.

The National Committee for Refugees (or CONARE) is the organ in charge of refugee applications and of promoting the defence and protection of the rights of every refugee in Bolivia (Title I of Chapter III). It is composed of the Ministry of Foreign Affairs (acting as the chair of the CONARE), the Ministry of Government, the Ministry of Justice and a technical secretariat (Title II of Chapter III).

Colombia

Regulatory Decrees No. 4800 and No. 4829 of 20 December 2011 on the regulation of Law No. 1448 of 10 June 2011 on the provision of assistance and integral reparation to the victims of the internal armed conflict and other provisions.

On 20 December 2011, the President of the Republic of Colombia signed two decrees (No. 4800 and No. 4829 which came into force after publication in the official gazette) regulating Law No. 1448 which outlines several different mechanisms for the benefit of victims of internal armed conflict, so that they may fully enjoy their rights to truth, justice and reparation.

The two decrees include mechanisms for the implementation of Law No. 1448, as well as mechanisms that outline the amount of compensation receivable through the administrative track, the land restitution process and rehabilitation measures. The decrees also establish the *System of Registration of Victims*, an algorithm to record victims' information and claim to land.

Decree No. 4829 regulates Title IV of Chapter III of Law No. 1448, which deals specifically with land restitution and contains provisions on the functioning of the Registry of Stripped and Forcibly Abandoned Land, along with provisions relating to compensation and the relief of debts for victims of armed conflict.⁶

Decree No. 4800 regulates the sections of Law No. 1448 concerning the provision of assistance and reparation for the victims of armed conflict. The decree identifies the organ in charge of delivering humanitarian aid to victims of forced displacement and the conditions under which one can apply for such aid. The decree prohibits any grave violations of human rights and international humanitarian law, and sets out a number of guarantees in health care (physical and psychological), education, as well as reparation for victims of such violations. It also provides details on the procedure that has to be followed with respect to the program of collective reparation established by Law No. 1448. The regulation provides that individual victims, as well as any person who has suffered a systematic violation of his collective or individual rights as a member of the community, will be entitled to reparations.⁷

6 For the complete text of the Law No. 1448 and the Regulatory Decrees, please see: <http://www.leydevictimas.gov.co/documents/10179/19132/completo.pdf> (last visited September 2012).

7 *Ibid.*

Law No. 1531 of 23 May 2012 on the declaration of absence of missing persons.

On 23 May 2012, the President of the Republic of Colombia signed Law No. 1531 on the declaration of absence of missing persons. The law was published the next day in the Official Gazette and entered into force immediately without need for further legislative action.

The purpose of Law No. 1531 is to create Declarations of Absence for victims of forced disappearances or other forms of involuntary disappearances and to take into account the civil implications these disappearances can have. The declaration is free and can be filled in by a spouse, a partner or same-sex partner, relatives within three degrees of consanguinity, or the Prosecutor. The declaration should be made to the civil court in the district of the last domicile of the victim, and contain information including marital status, age and work situation. The information will then be entered into the Information Network System on the Missing and Corpses (SIRDEC), in the civil registry, and finally will be published in a national newspaper.

This declaration aims at preserving the legal status of the disappeared person in regards to such things as their parental rights over minors and the protection of their estate. Finally, the law stresses that the declaration of absence should not in any way impede the search for the victim or to uncover the truth of what happened to them.

Haiti

Organic Law of the 3 May 2012 on the Organisation and Functioning of the Office of the Ombudsman.

On 3 May 2012, the Parliament of the Republic of Haiti adopted the Law on the Organisation and Functioning of the Office of the Ombudsman. The law was published in the Official Gazette (*Le Moniteur No. 119*) on 20 July 2012.

This law was adopted to consolidate the status of the Office of Ombudsman as an independent institution with the purpose of promoting, protecting and enforcing human rights, and with a view to ensuring that the Haitian government respects its national and international obligations in these matters. The law outlines the roles and responsibilities of the Ombudsman, the structure of the Office and its mode of functioning. Any individual or group of individuals may refer any violation or possible violation of their rights to this institution. On his/her own initiative, the Ombudsman may also intervene in or investigate any situation that it has reasonable grounds to believe is a violation or potential violation of an individual or group's rights pursuant to an act, omission or negligence on the part of the government. Further, the law empowers the Ombudsman to make recommendations for reform to the government and requires the government to consider and respond to any recommendations. The law also outlines sanctions for those who do not cooperate

with the Ombudsman and his/her Office. Finally, the Ombudsman is authorised by the law to report any violations of human rights to the judiciary.

Mexico

Decree No. 158 of 22 February 2012 issuing the law on the Prevention and Care of Internally Displaced Persons from the State of Chiapas.

On 22 February 2012, the Government of Mexico issued the Law on the Prevention and Care of Internally Displaced Persons (IDPs) from the State of Chiapas. This historical law recognizes for the first time the rights of IDPs established in the UN Guiding Principles on Internal Displacement but also integrates specific recommendations from various UN agencies, taking into consideration the specific conditions experienced by the State of Mexico.

This law establishes the basis for the prevention of internal displacement (Title IV), provides humanitarian assistance for the internally displaced (Title V), creates durable solutions for those affected (Title VI) and a framework that guarantees specific rights to IDPs (Title II).

The law provides measures for protection against the displacement of indigenous communities, farmers and other groups that have a special relationship with their land or territory. These measures are included in Title II of the law (Articles 4 to 17), which lists the specific rights recognized for internally displaced people (a right to a judicial status, a right to participate in any decision affecting their situation, a right to access justice, etc.) and instructs how such rights should be applied, i.e. in a non-discriminatory manner.

The Law is also very innovative in that it creates a registry of IDPs in order to track the phenomenon in the country and institutes a State Program for the Prevention of Internal Displacement. Its role is to implement the mechanisms necessary for the enforcement of the rights of displaced populations and allocate the resources necessary to achieve these objectives. The Law also creates the State Board of Comprehensive Care for Internal Displacement to act as the executing body of the said law.

Decree of 17 April 2012 issuing the law on the National Registry of Data on Lost or Missing Persons.

On 17 April 2012 the Government of Mexico issued the Law on the National Registry of Data on Lost or Missing Persons. The objective of the law is to create an electronic database as part of the Public Security System, which can be consulted by all authorities and that will facilitate the search for missing persons as well as those that are in a care, shelter, detention or internment facility (Article 2). The Law is also considered to be an instrument that can be used for the protection of human rights

with regard to the fight against human trafficking, pornography, exploitation, child prostitution and forced labour.⁸

The database will contain information such as their sex; age; nationality; city, county or state where they disappeared; their ethnicity; their disabilities (if they have any); and any other relevant information which can be used to identify the person (Article 4).

The Law creates an obligation for any administrative or judicial authority that has knowledge of a missing person or that has received a complaint about a disappearance, to immediately notify the National Register (Article 6), and penalises any illegal use of the information contained in the database (Article 12).

Directive of 23 April 2012, which governs the legitimate use of force by staff members of the Mexican Air Force, in the exercise of their functions in support of civil authorities and according to the Federal Firearms and Explosives law.

On 23 April 2012, the Government of Mexico issued the Directive on the legitimate use of force by members of the Mexican Air Force in the performance of their duties in support of civil authorities and pursuant to the Act Federal Firearms and Explosives.

The Directive is part of the Mexican National Development Plan 2007–2012, the objective of which is to reinforce the strength and security of the state by combatting illegal activities such as: human, weapon and drug trafficking at the national and international levels.

The Directive establishes that in their fight against human, weapon and drug trafficking, the use of force by Air Force personnel will only be appropriate when strictly unavoidable or absolutely necessary and should be used only in full respect of human rights; i.e. based on the principles of opportunity, proportionality, rationality and legality (Article 6). The directive then proceeds to list the general rules for the use of force (Title III), stating that any personnel that has exercised undue force or fails to comply with the obligations under this Directive shall be subject to punishment under the established laws of the country (Article 17).

Secretarial Agreement No. 27 of 23 April 2012 amending the Directive 003/09 of 30 September 2009 which regulates the legitimate use of force by naval personnel, in the performance of their duties and accordance with the rule of law.

On 23 April 2012, the Government of Mexico issued the Secretarial Agreement amending the Directive 003/09 of 30 September 2009 which regulates the legitimate use of force by naval personnel.

8 For more information, please visit: <http://ww2.noticiasmvs.com/noticias/capital/aprueba-senado-ley-del-registro-nacional-de-datos-de-personas-extraviadas-340.html> (last visited September 2012).

The Agreement is part of the Mexican National Development Plan 2007–2012, which establishes a clear and viable strategy to regain strength and security of the state of Mexico and establish the country on solid, realistic and, above all, responsible foundations.

The Agreement amends some articles of the Directive of 2009 on the use of force by naval personnel such as Article 2 on Aggression and adds a certain number of provisions such as Article 2 (*bis*) on the objectives of the legitimate use of force or Article 19 on the unlawful use of force. As an example, Article 2 (*bis*) states that objectives of the legitimate use of force are law enforcement, the prevention of the violation of human rights, the safeguarding and the restoration of the peace and public order.

Agreement of the Minister of Public Security No. 04/2012 of 23 April 2012, which issues general guidelines for regulating the use of public force by the police institutions of decentralized bodies in the Ministry of Public Security.

On the 23 April 2012, the ministry of Public Security issued agreement No. 04/2012 thereby creating a general normative framework to regulate the use of force by police institutions in Mexico (Article 1).

The Agreement stipulates that the use of force by a member of the police force (in the performance of their duties) shall only be deemed permissible if done in respect of the principle of legality, proportionality, necessity and rationality, according to the Mexican Constitution and to Mexico's international obligations (Article 4, Articles 9-12).

Article 24 of the agreement emphasises the need to give ethics and human rights training to members of the police force throughout their careers as well as the means for peaceful conflict resolution methods such as negotiation and mediation.

Finally, the agreement also establishes the criminal responsibility that members of the police force could incur if they do not respect the principle of legality, proportionality, necessity and rationality in their use of force (Article 28).

Rwanda

Organic Law N° 01/2012/OL of 2 May 2012 giving effect to the new Penal Code of Rwanda.

On the 2 May 2012, President Kagame assented to the new Penal Code of Rwanda, therefore replacing the old one of 1977 and, at the same time, repealing Law n° 33 bis/2003 of 6 September 2003 punishing the crime of genocide, crimes against humanity and war crimes (Article 654). The new Penal Code was published on the 14 June 2012 in the Official Gazette.

The main objective of this new Penal Code is to set out offences and provide for penalties applicable to offenders, co-offenders and accomplices.

Chapter 1 of Title 1 (Articles 114 to 134) on offences and their penalties is of particular interest as it deals with the crimes of genocide, crimes against humanity and war crimes. For example, according to Article 116, ‘any person who publicly shows, by their words, writings, images, or by any other means, that they negate genocide committed, rudely minimizes it or attempts to justify or approve its grounds, or any person who hides or destroys its evidence shall be liable to a term of imprisonment of 10 to 15 years’. The new code provides punishment for international and cross-border crimes, offences against children’s rights, offences related to information and communications technology (ICT), commercial and tax offences, human trafficking, illegal sale of body parts and misuse of public property.

South Sudan

The South Sudan Red Cross Society Act, 2012.

On 9 March 2012, the President of South Sudan, Salva Kiir, signed The South Sudan Red Cross Society Act setting up the autonomous and independent body of the South Sudan Red Cross Society (SSRC) (Article 7).

The SSRC will be recognisable through the use of the Red Cross Emblem on a white flag established by the Geneva Conventions and their additional protocols (Article 17). The SSRC is a component of the Movement and the Federation of the Red Cross and will act as an auxiliary to the government on humanitarian matters (Article 7).

The purpose of the SSRC is to ‘prevent and alleviate human suffering, provide humanitarian aid to civil and military victims in times of armed conflicts, violent and natural disasters, and in peace time, and to provide community services to the general population of South Sudan’ (Articles 3 and 6).

Uganda

The Amnesty Act (Declaration of Lapse of the Operation of part II) Instrument 2012, Statutory Instrument No. 34 of 23 May 2012.

On 23 May 2012, the Republic of Uganda published in its official gazette the Amnesty Act (Declaration of Lapse of the Operation of part II) Instrument 2012, Statutory Instrument No. 34 of 2012 which officially revokes amnesty for rebellion against the government and for all acts committed during the course of the rebellion including war crimes. The Statutory instrument does not, however, have retrospective application.

Venezuela

Joint Inter-ministerial decree of the Ministry of Foreign Affairs, of Justice and of Defense of 29 February 2012, which reinforces the registration of conventional weapons, including small arms, and regulates the disposal of these weapons in order to regularize the situation.

On 29 February 2012, the Republic of Venezuela published in its Official Gazette, a Joint Inter-ministerial decree which reinforces the registration of conventional weapons, including small arms, and regulates the disposal of these weapons in order to regularize the situation.

The decree creates an operating record of weapons aimed at all those who possess a firearm in an irregular situation. The registration process began on 1 March 2012 for an initial period of 90 days which was to be extended if necessary in order to optimise the nationwide results (Article 1).⁹ The objective of this exercise is to suspend the processing of applications for new permits to carry weapons, the marketing of firearms and ammunition, and suspend any donation of weapons throughout the territory for a period of one year (Articles 2 to 6). The decree then proceeds to list who is exempt from these modalities. Such persons include the state security forces and athletes who have to use weapons in the exercise of their functions (Articles 7 to 16).

B. National Committees on International Humanitarian Law

Sierra Leone

On 30 April 2012, Sierra Leone's National Committee for the Implementation of International Humanitarian Law was inaugurated. It was created through a joint action plan between the ICRC and ECOWAS. Its mandate includes the promotion, development and support of the dissemination of IHL in state institutions, (a function as advisory body to the Government), and to promote cooperation between the Government and international organisations in strengthening respect for IHL.

It will also promote the inclusion of further IHL instruments, such as the Rome Statute and the Ottawa Treaty, in national law and raise awareness of IHL among the authorities. The National Committee has already worked on two bills which will soon be presented to parliament: the Review Act of the Sierra Leone Red Cross Society and a draft legislation on the implementation of the Geneva Conventions and their Additional Protocols.

The National Committee is composed of 20 members, one member of the Ministry of Foreign Affairs and International Cooperation, one from the Ministry of Defence, one from the Ministry of Education, one from the Ministry

⁹ At the time of writing no such extension had happened.

of Justice, one from the Ministry of Health and Sanitation, two representatives of the Civil Society Movement, two representatives from the International Organization for Migration, three from the Sierra Leone Red Cross, one from the Special Court for Sierra Leone, one from Women's Forum of Sierra Leone, two from the Sierra Leone Institute of International Law, two from prisons, one from the Human Right Commission and a member of the Sierra Leone National Commission on Small Arms. The Chairperson is the Solicitor-General, Mrs Martina Kroma.

Qatar

On 8 May 2012, the Emir Sheikh Hamad bin Khalifa Al Thani endorsed the cabinet decision No. 27 of 2012 establishing a Qatari National Committee for International Humanitarian Law. The aim of this committee is to support principles of international humanitarian law, by ensuring that objectives set in international conventions and instruments are respected, by promoting international cooperation in this field and by raising awareness regarding IHL principles at the national level and ensuring their respect (Article 3).

The Committee, which will run for a renewable term of 3 years (Article 2), will be established within the Ministry of Justice, under the presidency of the Deputy Minister of Justice, and include a representative of the Ministry of Defence, the Ministry of Interior, Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Labour, the Higher Council for Education, the Higher Council for Health, a member from the Shura (Consultative) Council, the University of Qatar, the Qatari Institution for Combating Trafficking in Persons and a member of the Qatari Red Crescent Society. The National Commission shall select a Vice-President from among its members.

C. Case law

Bosnia and Herzegovina

Case v. Šaban and Elvir Đelilbašić, before the Section I for War Crimes of the Court of Bosnia and Herzegovina of 22 June 2012.

On 22 June 2012, the Trial Panel of the Criminal Division of Section I for War Crimes of the Court of Bosnia and Herzegovina charged the two Defendants in the *Šaban Đelilbašić et al.* case with the criminal offence of War Crimes against Civilians pursuant to Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 180(1) (individual criminal responsibility) of the same Code and sentenced them to six-year imprisonment each.¹⁰

¹⁰ For a summary of the case in English, see the Court of Bosnia and Herzegovina's website: <http://www.sudbih.gov.ba/?id=2514&jezik=e> (last visited September 2012).

The two defendants, who were former members of the Army of Bosnia and Herzegovina during the armed conflict between 1992 and 1995 and of Muslim ethnicity, pleaded guilty of intentionally killing with an automatic rifle Nedeljko Kosca and Bozo Katana, of Serb ethnicity, in Turbe (Bosnia and Herzegovina), to avenge the death of their brother on 9 December 1992.¹¹

Case v. Franc Kos et al., before the Section I for War Crimes of the Court of Bosnia and Herzegovina of 18 June 2012.

On 18 June 2012, the Trial Panel of the Section I for War Crimes of the Court of Bosnia and Herzegovina charged the defendants Franc Kos, Stanko Kojic, Vlastimir Golijan and Zoran Goronja with the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) (Persecution) read in conjunction with Paragraph 1 (a) and Article 29 (Accomplices) of the Criminal Code of Bosnia and Herzegovina. The accused were sentenced to 43 years imprisonment for Kojic, 40 years for Kos and Goronja and 19 years for Golijan.¹²

The defendants, who were former members of a unit (the 10th Sabotage Detachment) of the Army of Republika Srpska (VRS) created by Ratko Mladic, were found guilty of having participated in the 'widespread and systematic attack against the Bosniak civilian population of the UN Safe Area of Srebrenica' during the armed conflict in the Republic of Bosnia and Herzegovina in June and July 1995. These widespread and systematic attacks included forcible transfers and summary executions of more than eight hundred captured Bosnian men 'on national, ethnic and religious grounds'.

Denmark

Prosecution v. T, Case 2/2012, 26 April 2012 on the application of the Danish act on genocide.

On 26 October 2011, the 6th Division of the Eastern High Court dismissed the primary charge of Genocide allegedly committed by the accused in Rwanda, thus upholding the first instance ruling of the Court of Roskilde. In the present case, the Prosecution requested that the Supreme Court of Denmark reverse the order of the Eastern High Court. The Prosecution used national and international humanitarian law, (namely the Genocide Convention), to argue that the Denmark's Genocide Act has extraterritorial effect and thus applies to acts of Genocide committed outside of Denmark. T. contested this argument, claiming that there was no authority under Danish law allowing for the prosecution of the crime of genocide perpetrated outside of Denmark in 1994.

The issue before the Supreme Court was therefore whether the scope of Denmark's Genocide Act is geographically limited to Denmark, or universal.

¹¹ For more information, please visit: <http://www.bim.ba/en/324/10/35241/> (last visited September 2012).

¹² Available at: <http://www.sudbih.gov.ba/index.php?id=2507&jezik=e> (last visited September 2012).

On 26 April 2012, the Court found that ‘the legislative history of the Genocide Act, including the comments on the obligation to prosecute genocide under Article VI of the Convention, does not provide any basis for finding that the intention of the Act was to limit the scope of the criminality of genocide to the territory of Denmark’. The Court therefore reversed the order of the Eastern High Court, having concluded that the Danish Genocide Act has universal scope.

Spain

Case *Manos Limpias y Asociación Libertad e Identidad v. Baltasar Garzón*, *Supreme Court Decision n°101/2012, of 27 February 2012 on the breach of judicial duty of Justice Garzón*.

On 27 February 2012, by six votes against one, the collegial panel of judges of the Supreme Court ruled that Judge Garzón had not committed a breach of judicial duty in starting a criminal process in 2006 to investigate the fate of missing persons and crimes committed during the Spanish Civil War, which took place from 1936 to 1952.¹³

In 2009, *Manos Limpias & Co.* had intended a procedure against Judge Garzón for instructing crimes of the Franco dictatorship despite the existence of the Amnesty Law of 1977 and contrary to the statute of limitations set in the Spanish Constitution.

In this judgment, the Supreme Court found that even though the application and interpretation of legal norms by Judge Garzón were excessive and erroneous, they did not reach the threshold necessary to amount to a breach of judicial duty.

The court stated that the Amnesty Law of 1977 was indeed applicable in the circumstances and that the characterisation of the crimes under the Franco dictatorship as crimes against humanity was incorrect, as international criminal law was not applicable at the time.¹⁴ Moreover, the court stated that a criminal process can only be initiated in order to investigate crimes committed by an accused who is still alive; as General Franco is dead, so is his criminal liability. Finally the court recalled that ‘the search for historical truth is neither the function of the criminal process nor of the Judge’.¹⁵

The Supreme Court, however, noted that similar procedures on similar legal bases and grounds as the one used by Garzón had already been brought before

13 For more information, please visit: http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Tribunal_Supremo/Sala_de_prensa/Documentos_de_Interes/Tribunal_Supremo__Sentencia_del_caso__Manos_Limpias_y_Asoociacion_Libertad_e_Identidad_vs_Baltasar_Garzon__por_prevaricacion_judicial__STS_101_2012 (last visited September 2012).

14 For more information, please visit: <http://www.lefigaro.fr/international/2012/02/27/01003-20120227ARTFIG00506-espagne-le-juge-garzon-est-acquitte.php> (last visited September 2012).

15 See: http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Tribunal_Supremo/Sala_de_prensa/Documentos_de_Interes/Tribunal_Supremo__Sentencia_del_caso__Manos_Limpias_y_Asoociacion_Libertad_e_Identidad_vs_Baltasar_Garzon__por_prevaricacion_judicial__STS_101_2012 (last visited September 2012).

Spanish national courts but also at an international level (citing a *European Court of Human Rights*' decision in the case of *Kolk and Kislyiy v. Estonia*, 17 January 2006, Dec., Nos. 23052/04 and 24018/04, ECHR 2006-I). The court finished its argumentation by stating that Garzón, even though wrong in their interpretation and application of the law, had aimed to improve the situation of victims whose right to know the facts and recover their dead to honour them is recognized by the Law of Recovery of Historical Memory of 2007.

South Africa

South African Litigation Centre and Another v. The National Director of Public Prosecutions and Others (*Case No.77150/09*) [2012] ZAGPPHC 61; 2012 (10) BCLR 1089 (GNP); [2012] 3 All SA 198 (GNP) (8 May 2012).

On 8 May 2012, the North Gauteng High Court of South Africa issued its decision in the case of *South African Litigation Centre and Others v The National Director of Public Prosecutions and Others*. The case involved an application for judicial review of the decision of the South African National Prosecuting Authority and Police not to institute an investigation into alleged crimes against humanity of torture committed on 27 March 2007 in Zimbabwe, in accordance with South Africa's international obligations, including the Rome Statute and the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act).

In the ruling, the Court addressed the issue of whether the Applicants had the requisite legal standing to bring the application. This was of particular note because the Court recognized that the ICC Act, read in the context of its purpose and in light of the Rome Statute, requires a broad approach to traditional principles of standing, particularly given the public interest in the proper administration and enforcement of justice and the rights of the victims to see justice done. The Court also dealt with the issue of jurisdiction over the alleged crimes. The Respondents had argued that South African Authorities did not have the requisite jurisdiction to investigate the crimes, asserting that the accused persons had to be present on South African territory. The Court rejected this argument, stating that according to the ICC Act, the South African authorities have a duty, irrespective of the location of the accused, to investigate international crimes.

The Court decided that the decision of the Respondents to refuse the Applicant's request that an investigation be initiated into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe under the (the ICC Act), was unlawful, inconsistent with the Constitution as well as South Africa's international obligations, and was therefore invalid. The Court ruled that the Respondents had a duty to investigate the allegations, to act independently, and not take into account irrelevant political and policy considerations at the investigation stage. Further, the Court found that the Respondents had relied on an incorrect evidential threshold in deciding not to initiate an investigation, stating the Rome Statute's thresholds should be applied *mutatis mutandis* to the domestic decision, thus requiring an examination of whether a *reasonable basis* existed for

carrying out an investigation. The Court stated that ‘the First, Second and Fourth Respondents, in failing to initiate an investigation, thereafter attempting to justify their decision on the basis of material errors of fact and law, and through taking into account irrelevant factors and failing to consider relevant ones, have flouted both their domestic and international obligations’. Thus the Court recognized that there was an obligation incumbent on the Respondents to investigate and prosecute international crimes under both international and domestic law, and that the ‘prosecution be enabled as far as possible’.

Consequently, the Court set aside the Respondent’s decision and ordered the Police’s Priority Crimes Investigation Unit (in cooperation with the National Prosecuting Authority) to carry out the investigation of the crimes allegedly committed. The Court further ordered that the Prosecuting Authority based on the results of the investigation, decide whether or not to then institute a prosecution.

United States

Haditha Trial, case v. Staff Sgt. Frank G. Wuterich, 24 January 2012, on the massacre of 24 Iraqi civilians in Haditha.

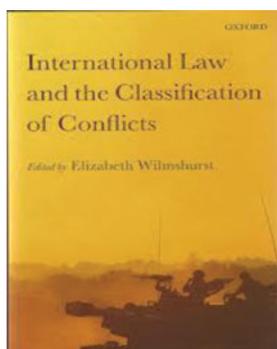
On the 24 January 2012, after a six-year prosecution, a U.S. military judge sentenced Staff Sergeant Frank G. Wuterich, who was originally charged with alleged war crimes in Iraq for the 2005 attack on two dozen unarmed Iraqi civilians in Haditha, to 90 days imprisonment.¹⁶ Sergeant Wuterich was however only subjected to a reduction in pay and rank (from Sergeant to Private), after having pleaded guilty to dereliction of duty when he admitted telling his subordinates to ‘shoot first and ask questions later.’¹⁷ Eight Marines were initially charged with manslaughter in this case but one was acquitted, and six others had their cases dropped.¹⁸

16 For more information, please visit: <http://edition.cnn.com/2012/01/24/justice/california-iraq-trial/index.html> (last visited September 2012).

17 For more information, please visit: <http://www.reuters.com/article/2012/01/23/us-marine-haditha-idUSTRE80M1U620120123> (last visited September 2012).

18 For more information, please visit: http://www.huffingtonpost.com/2012/01/25/haditha-killings-frank-wuterich-iraq_n_1230889.html (last visited September 2012).

BOOKS AND ARTICLES



International Law and the Classification of Conflicts

Edited by Elizabeth Wilmshurst*

Book review by Dr Roberta Arnold, Fellow, Royal Institute of International Affairs, Chatham House, and Professor of International Law, University College London

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Edited by Elizabeth Wilmshurst, who has also authored the introductory and final chapters, this book deals with one of the most complex contemporary issues of the laws of war: the classification of (armed) conflicts. Depending on the outcome, different legal regimes may apply: the situation may be subject to international humanitarian law (IHL) as opposed to international human rights law and domestic law. The book does not discuss the problems related to the lowest threshold of application of IHL, which excludes situations of international disturbances and sporadic acts of violence.

The book is divided into three parts and fifteen chapters. Part I introduces the subject: in chapter 1 ('Introduction'), the editor explains the aims and objectives of the publication. She highlights the fact that each of the authors was asked to adopt the same format – that is, to outline the views of the various actors in the armed violence and of outside parties as to the classification of the situation, and then to undertake his or her own analysis of the classification. In chapter 2 ('The nature of war and the character of contemporary armed conflict'), Steven Haines illustrates the evolution undergone by armed conflicts, while in chapter 3 ('Classification of

* Published by Oxford University Press, 2012. The views expressed here are those of the book reviewer alone and not of the International Committee of the Red Cross.

armed conflicts: relevant legal concepts), Dapo Akande discusses the legal concepts that are relevant for classification. Part II, which is divided into ten chapters, is dedicated to different case studies: Northern Ireland (chapter 5, by Steven Haines); the Democratic Republic of the Congo (DRC) (chapter 6, by Louise Arimatsu); Colombia and Ecuador (chapter 7, by Felicity Szenat and Annie Bird); Afghanistan from 2001 onwards (chapter 8, by Françoise Hampson); Gaza (chapter 9, by Iain Scobbie); South Ossetia (chapter 10, by Philip Leach); Iraq from 2003 onwards (chapter 11, by Mike Schmitt); Southern Lebanon from 2006 (chapter 12, by Iain Scobbie); and ‘The war (?) against Al-Qaeda’ (chapter 13, by Noam Lubell). In chapter 14, Mike Schmitt addresses the challenges raised by classification in future conflicts. In Part III, the editor sets out the volume’s conclusions.

In the nine case studies, the contributors consider modern methods of warfare (including cyber warfare¹) and give the historical background and context of armed violence over different periods of time. They examine how contemporary forms of armed violence are classified in practice and assess the consequences of such classification. The main outcome of their analysis is that, notwithstanding the tendency to expand IHL rules applicable to international armed conflicts (IACs) to non-international ones (NIACs), the distinction between the two still remains relevant (and troublesome).

The case studies² show that in practice, classification may not always matter for different reasons: (a) because the parties to the conflict do not observe the law applicable to *any* kind of conflict; (b) because the parties, for policy or clarity reasons, may decide to apply IHL rules governing IACs to their operations; (c) because states may opt for solutions on the ground, allowing them to avoid theoretical difficulties;³ and (d) because with regard to the legitimate use of force,⁴ the applicable rules are similar in both cases.

On the other hand, the case studies demonstrate that classification still matters greatly with regard to the issues of detention and transfer of detainees, as well as for the trial of persons charged with war crimes, particularly in relation to NIACs or mixed conflicts.⁵ Akande discusses⁶ the difficulties of setting out the proper test for classification under such circumstances, by examining the decisions rendered by the International Court of Justice in the *Nicaragua* and *Bosnian Genocide Convention* cases,⁷ and by the International Tribunal for the Former Yugoslavia in the *Tadić* case.⁸ He provides a very interesting analysis of the ‘overall’

1 See ch. 14 (2), ‘Classification in future conflict’, by Michael N. Schmitt.

2 In particular, the case studies on the DRC and South Ossetia; see p. 491.

3 E. Wilmshurst, pp. 491–493.

4 In particular on the DRC, Iraq, Lebanon, Gaza, and South Ossetia, see pp. 494–495.

5 See p. 495, and the case studies on Lebanon, the DRC, and South Ossetia.

6 See ch. 3, ‘Classification of armed conflicts: relevant legal concepts’, by Dapo Akande, pp. 58–62.

7 International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgement, ICJ Reports 1986, p. 14, para. 219; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Reports 2007, p. 43, paras. 385–395.

8 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgement (Trial Chamber), 7 May 1997; *Prosecutor v. Tadić*, IT-94-1-A, Judgement (Appeals Chamber),

and ‘effective control’ tests for purposes of attribution of conduct of non-state parties to a state and for the classification of a conflict, questioning *inter alia* their applicability to United Nations (UN) forces.⁹ This reflection is to be welcomed, since the status of the UN Blue Helmets and the rules to which they may be subject is becoming increasingly relevant, in particular for neutral troop-contributing nations, which may be forbidden by their constitutions to get involved in armed conflicts (e.g. Switzerland).

The book further acknowledges that most difficulties related to classification are due to the fact that modern conflicts are no longer restricted to inter-state confrontations. Some of the discussed scenarios highlight the emergence, in recent years, of new forms of ‘irregular war’. These may be labelled, accordingly, as insurrection, insurgency, (urban) guerrilla, complex, advanced, compound, hybrid or criminal warfare. Steven Haines, in chapter 2, explains these concepts and the elements that characterise them. Of particular interest is his analysis of the emerging integration between criminal gangs and political or military leaders in armed conflict and its impact on classification. The details are then discussed in the case studies on Colombia and Afghanistan (chapters 7 and 8), where significant criminal activity continues alongside other forms of violence; the study shows that classification may, thus, also be important in terms of operational law, since depending on the outcome, violence may be legitimately counteracted with the use of armed force rather than law enforcement mechanisms.

The book also makes for an interesting read in that it provides factual details on conflicts, which facilitate their classification. In fact, often classification is hindered by a lack of access to the relevant information. In many instances, the only organisations having access to such information, such as the International Committee of the Red Cross, will not make the information or its internal classification assessments available to the public; moreover, the parties to the conflict, which have witnessed the facts, may not be a reliable source. As observed by Wilmshurst: ‘it is the facts rather than a subjective act of recognition alone [i.e. by a State] which determines the category of armed violence’.¹⁰

The case studies of Colombia (chapter 7), the DRC (chapter 6) and Northern Ireland (chapter 5) illustrate that the participants to a conflict may also fail to classify it clearly, and that political factors may be the cause of this.¹¹ States may be reluctant to acknowledge that internal violence has reached the level of armed conflict, in order not to have to regard the opposition as an ‘equal’ party to a conflict rather than as a group of common criminals. On the other hand, in scenarios such as Afghanistan (chapter 13), there might be the opposite tendency of classifying as an armed conflict a situation that could more appropriately be considered a law enforcement matter.¹² This is well demonstrated in the case study

15 July 1999; *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995.

9 E. Wilmshurst, pp. 486–488.

10 *Ibid.*, p. 483.

11 *Ibid.*, p. 479.

12 *Ibid.*, p. 479.

on Afghanistan¹³ and the chapter on ‘The war (?) against Al-Qaeda’, which deal with the controversies raised by the ‘war on terror’, particularly with regard to the status of ‘terrorists’ upon capture (prisoners of war or ordinary detainees?) and the legitimate use of force.¹⁴ Thus, beyond the legal difficulties associated with the classification of a conflict, there may be also more practical difficulties related to a lack of knowledge of the relevant facts. The book, by illustrating the background of the armed conflicts it examines, proves to be helpful in this regard.

What the book (intentionally) does *not* do is deal with the impact of classification on the subsequent attempts to bring to justice individual violators of the law. As suggested by Wilmshurst, ‘classification in international criminal law is a subject in itself.’¹⁵ This statement is accurate, though worrying, since international criminal law is ultimately an offspring of the laws of war,¹⁶ so that in interpreting it, the nexus to IHL should not be severed. To do otherwise may lead to contradictory or counterproductive results. For instance, in Switzerland, with the introduction on 1 July 2011¹⁷ of the new war crimes provisions in the Criminal Code (Articles 264b–264j), aimed at implementing the Statute of the International Criminal Court, the legislation intentionally distances itself from the traditional IHL dichotomy between IACs and NIACs, with the provisions applicable to all types of armed conflict. In following this trend, much appreciated by international criminal lawyers but not necessarily by conservative humanitarian lawyers, the legislation may have nonetheless gone a little too far. For instance, in Article 264c (2) it is provided that acts proscribed by Article 264c (1) (that is, grave breaches of the Geneva Conventions of 1949), when committed in connection with an NIAC, are to be considered *equivalent* to grave breaches of IHL, as long as they were directed against a person or property protected by IHL.¹⁸ In doing so, the legislation has clearly and intentionally distanced itself from the classical IHL position that grave breaches can only be committed within the framework of an IAC.¹⁹ The question then arises as to how the judicial authorities will proceed when called to assess the conduct of a foreign national suspected of having committed ‘grave breaches’ within

13 See chs 8 and 13.

14 See ch. 13, ‘The war (?) against Al-Qaeda’, by Noam Lubell; see also ch. 4, ‘Conflict classification and the law applicable to detention and the use of force’, by Jelena Pejic; ch. 5, ‘Northern Ireland 1968–1998’, by Steven Haines; and ch. 8, ‘Afghanistan 2001–2010’, by Françoise Hampson.

15 E. Wilmshurst, p. 8.

16 One may consider the Charter of the International Military Tribunal of Nuremberg of 8 August 1945 as the first international attempt to define war crimes and crimes against humanity. The text is available in ‘The Charter and Judgement of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General’, UN Doc. A/CN.4/5, International Law Commission, Lake Success, New York, 1949.

17 Swiss Criminal Code of 21 December 1937, SR 311.0, available in English at: http://www.admin.ch/ch/e/rs/311_0/index.html (last visited March 2013).

18 E.g. a combatant *hors de combat*. See the message of the Federal Council of 23 April 2008 on the modification of the federal legislation for the implementation of the Rome Statute for an International Criminal Court (‘Botschaft über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs’), Bbl 2008, 3863, 3938, available at: <http://www.admin.ch/ch/d/ff/2008/3863.pdf> (last visited July 2013).

19 Art. 50, GC I (sick and wounded in the field); Art. 51, GC II (sick and wounded at sea); Art. 130, GC III (prisoners of war); Art. 147, GC IV (civilians); Art. 85, AP I (protected persons).

the framework of an NIAC under Article 264c (2), when this position has yet to be recognised as amounting to customary international law.

Another aspect of the legislation that may lead to difficulties is the interpretation of the concept of 'protected status' and the applicability to NIACs of the 'protected persons' definition under the rules applicable to IACs.²⁰ Conduct amounting to a grave breach of the Third Geneva Convention, for instance, may not necessarily be equated to a war crime carried out in an NIAC, considering that there is no recognised prisoner of war status under Common Article 3 or Additional Protocol II. A translation of IAC war crimes to NIACs can only be made upon interpretation of the underlying IHL provisions. Therefore, classification for purposes of international criminal law shall consider also classification methods for IHL purposes, since these may have a severe impact on issues such as detention²¹ and the use of force.²²

In conclusion, the book gives a comprehensive and very detailed analysis of how classification is undertaken in practice, assessing its impact on the applicable legal regime and proposing in particular three solutions: (a) first, due to 'legal complexities about the distinctions between categories of hostilities'²³ and the fact that qualification may vary over time and sometimes will only be assessed in the aftermath of a conflict, an independent authority should be established to give guidance as to which law is applicable; (b) where controversies as to classification remain, unilateral commitments with regard to the applicable law by states participating in the hostilities may be encouraged; and (c) given the frequent problems of classification due to the gaps in the law applicable to NIACs and the interplay between IHL and human rights law, it is suggested that supplementing the insufficient substantive law may be a solution.

In sum, the book seems to suggest that classification has to be taken more seriously not only by states engaged in conflict, but also by courts and other authorities enforcing international law²⁴ – a position fully shared by this reviewer.

20 For instance, Art. 4, GC IV provides that only civilians who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals can invoke the safeguards of GC IV. This proved to be a major problem for the prosecution of war crimes committed by the Nazi regime against German nationals. For more details, see Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, Ardsley, 2004, p. 207.

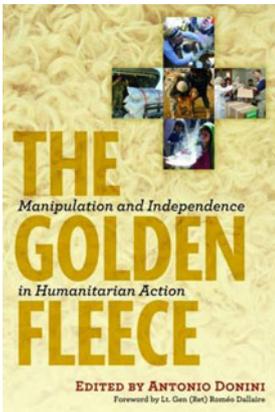
21 In this regard, another important aspect is the border line between IHL and international human rights law. On detention, see D. Akande, pp. 495–496, with reference to the case studies of Lebanon in 2008, the Second Congo War in the DRC, and the South Ossetian conflict; and ch. 4.

22 Depending on classification and the question of whether IHL applies at all, different rules may apply to the use of force. This holds particularly true with regard to the use of force in law enforcement operations. On this, see D. Akande, p. 495, who refers to the case studies of Iraq and Afghanistan; and chs 4 and 13.

23 E. Wilmschurst, p. 500.

24 *Ibid.*, pp. 501–503.

BOOK REVIEW



The Golden Fleece: Manipulation and Independence in Humanitarian Action

Antonio Donini (ed.)*

Reviewed by Michael Barnett**

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A product of scholars, researchers, and friends of the Feinstein International Center at Tufts University, *The Golden Fleece* makes two very important points and makes them very well. The first is that instrumentalization is all around humanitarianism. Everyone instrumentalizes everyone else. Donors instrumentalize aid agencies, using them to advance their political and strategic interests. Aid agencies instrumentalize victims, using them to raise money by circulating their moments of hardship and suffering. Individuals can play the role of victim in order to gain access to resources, and victims themselves might try to prolong their status in order to maintain access to basic goods. And then there are the aid profiteers, including militias and warlords, whose own interests are often premised on increasing the suffering of local populations and then skimming off the aid that is sent by outsiders to help the victims. As Cole Porter might have hummed, 'Birds do it, bees do it, even educated fleas do it'.

The second point is that instrumentalization is as old as humanitarianism. We might think that it is new, but it is not. We might think that it is increasing, but there are good reasons to think that it is as bad as it ever was. *The Golden Fleece*

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is a wonderful work that combines scholarship and commitment, fine-grained observations and almost timeless reflections, and the past and the present.

In the introduction, Antonio Donini writes that instrumentalization is 'a shorthand for the use of humanitarian action or rhetoric as a tool to pursue political, security, military, development, economic and other non-humanitarian goals'.¹ This definition creates a wide expanse of action to count as instrumentalization, and the chapters of the volume amply demonstrate the myriad and creative ways in which actors have instrumentalized humanitarianism and the effects of such instrumentalization. In Part One, Ian Smillie and Larry Minear quickly bury any notions that instrumentalization is a recent discovery of the opportunistically minded. The International Committee of the Red Cross (ICRC) owes its existence to the fact that European powers believed that humanitarianism was a useful way of saving war from itself. Great Powers involved themselves in nineteenth-century humanitarian action to the extent that they could serve their broader imperial ambitions. Humanitarian actors have used the suffering of others to advance their various agendas, including their desire to increase their budgets and advance their visibility. Instrumentalization is a constant presence throughout the history of humanitarianism.

Part Two consists of a series of very detailed and well-written cases of post-Cold War episodes of instrumentalization. In his chapter on Afghanistan, Antonio Donini highlights the relationship between the growing presence of instrumentalizing Great Powers and the difficulty of delivering assistance to those in need. Helen Young's fascinating chapter on Darfur contains various insights, including an argument regarding the relationship between ways of labelling a conflict and the degree of instrumentalization: it was a lot harder to instrumentalize Darfur when it was an emergency than when it was a post-conflict situation. Pakistan could have been the site for the adage 'no good disaster should go without being instrumentalized'. Indeed, a chart outlining the disasters and the culprits of instrumentalization takes two full pages (and it looks like it could easily have gone on for several more pages). By the time I got to the chapter on Somalia, I concluded that there cannot be a book on cases of non-instrumentalization because they do not exist. A conversation with the former Commissioner-General of the United Nations Relief and Works Agency (UNWRA) provides an opportunity for someone who was a constant victim of instrumentalization to let his frustrations fly. Mark Schuller's chapter on Haiti is organized around the different actors who have instrumentalized aid at different points in Haiti's tragic history. The tone of the book becomes more passionate in Part Three, as Dan Maxwell outlines how the instrumentalization of food aid, quite literally, takes food from the mouths of the dying, and Norah Niland shows how difficult protection becomes once actors decide to instrumentalize humanitarianism. The only people who do not benefit from the instrumentalization of humanitarian action are the victims themselves. In the conclusion, Antonio Donini and Peter Walker reflect on whether those in the aid community will try to do what they can to minimize their instrumentalization (probably not) and whether

1 *The Golden Fleece*, p. 2.

the changing patterns of disasters might make instrumentalization less likely (probably not).

Let me try to offer a cheery counterpoint to the volume's depressing observations. Instrumentalization is probably not as omnipresent as the volume suggests. The definition of instrumentalization is so loose that almost no actions can be excluded. In fact, it could include the very act of humanitarianism itself – many people give not because they want to help people in need but rather because they want to sleep better at night, get closer to God, and impress their friends. In other words, if we assume that givers have mixed motives, then included in those motives are other goals that do not include the relief of suffering. Consequently, this definition probably overcounts most of what we would think as instrumentalization. A less encompassing definition might restrict the definition to the intended use of humanitarian action in ways that knowingly harm the goal of the alleviation of suffering. The volume's definition of instrumentalization is too encompassing, distracting from what many care about: those who intentionally use humanitarianism even though they have reason to believe that doing so might come at the cost of lives. For instance, while the volume includes examples of how aid agencies tell stories that portray the situation as worse than it is, I am not sure that this really counts as an instance of instrumentalization. It might be deceitful, and it might have all kinds of unintended consequences for disaster response down the road, but is this an instance of instrumentalization? I don't think so.

Instrumentalization might appear to be more ubiquitous and harmful than it really is because of the volume's working definition of humanitarianism: the impartial, neutral, and independent delivery of relief to victims of conflict and natural disasters. The underlying assumption of the book is that humanitarian action works best when it is most pure, and it is most pure when it is limited to these principles and this particular goal; conversely, the moment that it departs from these principles and becomes more ambitious is the very moment that instrumentalization becomes more pronounced and the fundamental goal of saving lives is compromised. But such a stance precludes the possibility that a relaxation of these goals might, at times, advance the goal of saving lives. It is an empirical question whether these principles best serve this function. And, raising this as an empirical matter suggests that these principles of humanitarianism are, themselves, instruments.

Lastly, is instrumentalization so bad? Part of this depends on what the alternatives are. I might agree with the proposition that 'pure' humanitarianism is more likely to serve the objective of saving lives, but what if no one wants to give to pure humanitarianism? In other words, what is the alternative to instrumentalization? It might be, to paraphrase Marx's views on exploitation, the only thing worse than being instrumentalized is not being instrumentalized at all. Marx, of course, was a huge critic of exploitation. He saw exploitation all around him and he was keenly sensitive to even the barest of indicators. For him exploitation, though, was part of all past and present economic systems, and there would be no escape until socialism removed the conditions for exploitation. Yet astute readers of Marx also recognized that exploitation might be a necessary evil. Most individuals needed to be

exploited if they were going to survive. If individuals were not exploited through the labour process, then they became part of underemployment and condemned to a life of abject poverty and misery. Exploitation is bad, but there are lots of worse things in life. In general, while the volume makes the case that some kinds of instrumentalization are harmful to the goal of saving lives, it might very well be that other kinds of instrumentalization at other times actually further this goal. After all, Marx thought that exploitation was not only an endemic feature of most economic systems, but that it was better than not being exploited at all, and probably necessary for making life a little better in the immediate term and for creating the conditions for more radical change. Long live instrumentalization? Perhaps not, but we know it will live as long as humanitarianism does.

BOOKS AND ARTICLES

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