

**Submission of Anne Herzberg to the Working Group on Business and Human Rights
Project on Business in Conflict and Post-conflict Contexts:
Corporate Due Diligence in Situations of Armed Conflict**

Anne Herzberg,¹ Legal Advisor of NGO Monitor and UN Liaison for the Institute of NGO Research, brings this submission to the Working Group on Business and Human Rights to assist it in formulating recommendations regarding the implementation of the UN Guiding Principles in conflict and post-conflict situations to be presented to the UN General Assembly in October 2020.

Introduction

The UN Guiding Principles (UNGPs) state that when operating in areas of armed conflict, business should conduct enhanced due diligence resulting from potentially heightened risk and negative human rights impacts. Many non-governmental organizations and business and human rights (BHR) activists argue, however, that when there is a human rights impact identified, and this impact cannot be completely remedied, “enhanced due diligence” requires that businesses cease their operations or investments. Some also posit that conducting business should be completely barred in specific conflict areas where human rights impacts occur irrespective of whether those impacts are tied to the business activity. Still others seek to improperly establish ethnic, national, or religious criteria as a basis for conducting business. Yet, these conclusions

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are not mandated, nor recommended, by the UNGPs nor any of the other existing business and human rights guidelines. Moreover, adopting these activist demands would themselves lead to extremely harmful human rights impacts including the exacerbation and prolonging of conflict.

Importantly, when addressing business activities in conflict situations, the activist approach is often far too simplistic. This approach fails to take into account, beyond cursory citations, the requirements of international humanitarian law (IHL), the *lex specialis* of armed conflict situations. It confuses the legal obligations of governments versus private business, and presents aspirational objectives as binding norms. It also ignores competing human rights considerations and fails to appreciate the challenges faced by businesses needing to balance competing stakeholder interests, while also complying with multiple and overlapping regulatory environments.

This submission seeks to provide these missing dimensions. It surveys international and industry guidance, corporate practice, National Contact Point decisions and court cases in order to identify existing standards to help develop the emerging body of due diligence practices in armed conflict situations.² Identifying these practices can help concretize the “Respect” pillar of the UNGPs.

It is essential that the recommendations issued by the Working Group do not limit their analysis to for-profit companies but encompass state-owned enterprises, humanitarian organizations, and other non-governmental organizations. These entities regularly engage in business or quasi-business activities in situations of armed conflict, are regulated by corporate governance, and often have budgets and numbers of employees (salaried or otherwise) that far exceed that of many companies. Their operations can also have tremendous impacts on human rights for both good and bad.

It is also imperative, that in developing its recommendations, as a Special Procedure under the auspices of the Human Rights Council, the Working Group carry out its mandate in compliance with Resolution 5/1 that requires its work be “guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation.” (para. 54) Recommendations that single out one country or conflict zone would not meet these standards.

It is hoped that the research contained in the submission will aid the Working Group and others currently formulating norms and other regulatory frameworks.

Scope of Due Diligence Review

Due diligence in the context of business and human rights is the process by which companies take proactive steps to identify risks of human rights harm and if necessary, avoid and/or

² This submission is based on research from: Anne Herzberg, “Finding IHL: Corporate Due Diligence in Situations of Armed Conflict (publication forthcoming 2020, presented at the Interdisciplinary Research Workshop on Business and Human Rights at the University of Geneva, organized by Copenhagen Business School, the European Society of International Law, and the International Association for Business and Society, November 2019).

mitigate such risks.³ Prior to engaging in business operations, most companies undertake a due diligence review to identify potential risks and to expose any anticipated liabilities. Most guidelines advise such reviews to be on-going or renewed as changes occur in the operating environment. Business and human rights frameworks encourage (and mandate in some cases) corporations to take human rights concerns into account during the due diligence process. In situations of armed conflict, companies are advised to consult IHL. If concerns are identified, companies are advised, to the extent possible, to prevent foreseeable human rights impacts for which they are responsible. If this is not possible, guidelines recommend that businesses should do what they can to mitigate such impacts, including by exercising leverage over those who are positioned to implement change.

IHL Implications

According to the UNGPs, a core principle of the corporate responsibility to respect human rights is that “in situations of armed conflict enterprises should respect the standards of international humanitarian law”.⁴ Similarly, the OECD Guidelines for Multinational Enterprises echoes the wording in the UNGPs noting that such standards “can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments.”⁵ Nevertheless, to date, there has been little specific guidance as to how due diligence processes can incorporate IHL.

IHL consists of multiple treaties and customary legal obligations. The core instruments include the 1907 Hague Convention Concerning the Laws and Customs of War on Land, the Four 1949 Geneva Conventions, and the two Additional Protocols.⁶ The Convention Prohibiting Certain Conventional Weapons, the San Remo Manual on Armed Conflicts at Sea, the Hague Convention on the Protection of Cultural Property, and the Arms Trade Treaty, among many others, also form part of the IHL corpus.

IHL crafts a careful balance between the principles of military necessity and humanity.⁷ IHL does not prohibit war, nor the use of lethal military force. While it is difficult to accept, civilian casualties are permitted under IHL, provided combatants adhere to the rules of distinction and proportionality. Under these requirements, combatants must direct attacks at military objectives and must also ensure that civilian harm is not excessive to the anticipated military advantage. Occupation, prolonged detention, the use of military courts, and other situations seemingly at odds with human rights, are permitted (within specified constraints) under IHL.

Which specific rules of IHL apply in a given case depends upon whether the conflict at issue is an international armed conflict (IAC), a non-international armed conflict (NIAC), or a situation of belligerent occupation (a subset of rules contained within the laws of international armed conflict). Often, it is difficult to determine how to classify a conflict. Indeed, there may be

³ See ISO26000 at p. 24.

⁴ https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf at 13.

⁵ <https://www.oecd.org/daf/inv/mne/48004323.pdf>

⁶ <https://www.icrc.org/en/doc/resources/documents/misc/business-ihl-150806.htm>

⁷ Michael Schmitt, Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, 50 *Virginia J. Int'l L* 795 (2010).

aspects of IAC and NIAC occurring within the same conflict.⁸ In addition, combatant parties may not want to identify a given situation as one of armed conflict precisely in order to block the application of IHL.⁹ The location of the conflict is also important in determining the applicable rules. While almost all states have adopted the Hague and the four Geneva Conventions, not all have signed onto the Additional Protocols or other IHL treaties. States may also differ as to what provisions have been accorded customary legal status. Therefore, IHL obligations can not only differ across jurisdictions, but even within jurisdictions.¹⁰

In IHL, there is no explicit bar to business operations in armed conflict. Moreover, IHL is binding only upon states, though there is a developing trend that non-state armed groups (combatants) are also required to uphold the fundamental principles of IHL.¹¹ These principles include the protection of civilians and the environment, special protections for medical workers, and the treatment of those *hors de combat*. The ICRC takes the disputed position that, “although States and organized armed groups bear the greatest responsibility for implementing international humanitarian law, a business enterprise carrying out activities that are closely linked to an armed conflict must also respect applicable rules of international humanitarian law.”¹² The ICRC acknowledges, however, that “determining which activities are closely linked to an armed conflict” and that “the line between these various situations is at times difficult to draw precisely.”¹³

Another important implication of operating in a conflict zone, and how a company can evaluate potential risks and impacts, is the intersection of IHL and human rights law. Historically, IHL has been viewed as the *lex specialis*, meaning it takes primacy over other bodies of law.¹⁴ Yet, recent advisory opinions of the International Court of Justice suggest that some human rights law may be applicable in armed conflict.¹⁵ Considerable controversy exists in this area across states and amongst scholars and there are no clear rules as to how to weigh bodies of law if there is a conflict.

In addition, it is often difficult for businesses to identify or evaluate the occurrence of IHL violations. IHL violations are not measured simply based on effects. For example, a church is a civilian object that not be directly targeted under IHL. However, if armed groups take over that church and launch attacks on opposing forces from the church, it becomes a military objective and may be legally targeted under IHL. Simply observing that the church has been destroyed is

⁸ The conflicts in Syria and the DRC are two notable examples where this has taken place.

⁹ See e.g., ICRC Report on “General problems in implementing the Fourth Geneva Convention,” Meeting of Experts, Geneva, 27 - 29 October 1998.

¹⁰ For example, the Convention Cluster Munitions has been ratified by more than 100 countries, but not by major military powers including the US, Russia, India, China, Brazil, or Turkey. Therefore, a US company operating in Afghanistan (a party) might be bound by the convention, while it might not be bound in its operations in Egypt (not a party). http://i1.wp.com/www.clusterconvention.org/wp-content/uploads/2016/09/States-parties-to-CCM-map_Oct2019.jpg

¹¹ https://reliefweb.int/sites/reliefweb.int/files/resources/Business_IHL_Magazine_WEB.PDF

¹² <https://www.icrc.org/en/doc/resources/documents/misc/business-ihl-150806.htm>. Many courts and governments disagree with this analysis.

¹³ *Id.*

¹⁴ <https://www.icrc.org/en/doc/assets/files/other/interplay-article-droege.pdf>

¹⁵ International Court of Justice, “Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,” I.C.J. Reports 1996, p. 226;

not sufficient to make a determination as to whether an IHL violation has occurred. Moreover, much of necessary information to make such assessments are within the exclusive domain of the military and may not be accessible to businesses or other stakeholders. For instance, whether a combatant has acted in accordance with distinction and proportionality hinges on the location and nature of the target, the presence and activity of combatants, what feasible precautions were taken, and what information was known to the commander prior to an attack.

Given that IHL binds states and not private entities, another difficult issue is that of corporate complicity. There is little consensus as to what constitutes complicity for IHL violations. This confusion applies not only as to what actors can held accountable, what level of conduct is required, and what violations are applicable. The available case law suggests that the bar to reach a threshold of complicity is relatively high.¹⁶ Simply conducting business operations in an area of conflict is not enough to establish complicity.

Inserting IHL into the due diligence calculus, therefore, creates many additional layers of complexity. But the analysis cannot consist, as carried out by many BHR activists, of simply picking an article from an IHL treaty and then facilely claiming, based on a cursory assessment of partial information, that there has been a violation of that article. It is even more problematic that this faulty methodology is then used to claim an obligation requiring the cessation of specific business activity or divestment from that activity.

Given these difficulties, the Working Group needs to better articulate the contours of the “Respect” pillar of the UNGPs and how the need for businesses to “respect” human rights or IHL is distinct from that of the legal obligations of States.

Existing Guidelines

This section briefly surveys the most prominent international and industry guidelines for conducting human rights due diligence and whether (and how) they address armed conflict and IHL. Most of these instruments identify armed conflict as a situation involving potentially higher risks. The issue of humanitarian law generally arises in the context of responsible sourcing, “conflict-free” principles,¹⁷ and the hiring of security personnel. Apart from the issue of conflict minerals, these instruments do not advocate the cessation of business activity in conflict zones.

International Organizations:

United Nations

UN Global Compact

¹⁶ See, e.g., Anne Herzberg, “Kiobel and Corporate Complicity - Running with the Pack,” *Kiobel Agora*, 107 *American Journal of International Law Unbound*, at 41.

¹⁷ These principles go beyond issues that arise solely in armed conflict such as forced labor, child labor, money laundering, and corruption. See e.g., LME policy paper.

Adopted in 2000, the UN Global Compact is a voluntary initiative open to any company willing to commit to ten sustainability principles and to implement them throughout its operations, and “sphere of influence.”¹⁸ The principles are derived from the international standards the Universal Declaration of Human Rights, the ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption. Nearly 10,000 companies have signed on.¹⁹

Principles 1 and 2 directly address human rights. Principle 1 states that “Businesses should support and respect the protection of internationally proclaimed human rights” while under Principle 2, companies must “make sure that they are not complicit in human rights abuses.”²⁰ To carry out the principles, companies are advised to “consider the country and local context in which it is operating for any human rights challenges that context might pose.” They are also cautioned to “pay particular attention to the context in countries where laws are widely known to fall short of international standards and where enforcement may be inadequate.”²¹ IHL violations are not specifically mentioned.

In 2010, however, the Compact and the Principles for Responsible Investment Initiative jointly issued the “Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors” providing specific advice for companies operating in conflict zones in alignment with the Compact’s ten principles.²²

The Guidance stresses that business operations in conflict zones should not always be considered as a negative. While business activities most certainly can result in adverse impacts, business can also bring substantial benefits to conflict-affected areas including “economic development and/or recovery”; “generating tax revenue,” “creating job opportunities,” “fostering coexistence and mutual beneficial development,” creating local value; and improving infrastructure.²³ To evaluate impact, both positive and negative, the guidance calls on companies to conduct complementary conflict risk and impact, human rights, environmental, and social impact assessments.

The document references IHL as one source to be used to “develop corporate policies and systems” along with “national law, the United Nations Framework for Business and Human Rights,” and “United Nations Security Council resolutions, typically on sanctions”.²⁴

The Guidance specifically advises against inaction in or withdrawal from conflict environments calling such decisions “wrongly assume[d]”. Instead, the Government Relations Guidance Point encourages companies “to explore all opportunities for constructive corporate engagement with government as well as set good examples in their dealings with governments in order to support peace.” Other activities companies might engage in are materially supporting peace negotiations,

¹⁸ <https://www.unglobalcompact.org/about/faq>

¹⁹ <https://www.unglobalcompact.org/>

²⁰ <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>

²¹ *Id.*

²² <https://www.unpri.org/download?ac=1724>

²³ <https://www.unpri.org/download?ac=1724> at 10

²⁴ *Id.*

“adopting hiring and workplace policies that cut across ethnic or racial divides,” and “mobilizing public opinion.”²⁵

UN Guiding Principles

The UN Guiding Principles “Protect, Respect, Remedy” framework has become a primary benchmark for business and human rights standards.²⁶ The Guiding Principles make clear however, that adherence is voluntary and not a legally binding instrument. Specifically, “[n]othing in these Guiding Principles should be read as creating new international law obligations or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regards to human rights.”²⁷

The UNGPs mention the issue of armed conflict and briefly reference IHL. Yet, the UNGPs offer very little in the way of practical guidance as to how IHL relates to human rights law, what potential impacts are specific to armed conflict, and how armed conflict may directly impact business operations. Principle 12 emphasizes that “the responsibility to respect human rights refers to internationally recognized human rights - understood, at a minimum as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at work.” IHL is not explicitly mentioned. The commentary notes that “in situations of armed conflict enterprises should respect the standards of international humanitarian law” though no specific instruments are identified. The interpretive guidance refers businesses to the ICRC’s guidelines (discussed below) for more information.²⁸

Principles 17-24 detail the need to conduct human rights due diligence. Principle 17 recommends that companies assess “actual and potential human rights impacts,” act on findings, and communicate how the business responds to those impacts. Principle 18(a) advises enterprises to “draw on internal and/or independent external human rights expertise”, while 18(b) calls for “meaningful consultation with potentially affected groups and other relevant stakeholders.” In the assessment, the UNGP commentary says that businesses “should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.”²⁹ No specific recommendations relating to IHL are included.

No guidance is provided as to how human rights can be identified in a defined and practical manner. Specifically, how is a company supposed to realistically engage in a due diligence process “including all internationally recognized human rights” (a phrase that could encompass thousands of potential rights) or how a company is supposed to carry on with operations that

²⁵ *Id.* at 17

²⁶ OHCHR states in its FAQs that “The Guiding Principles do not constitute an international instrument that can be ratified by States nor do they create new legal obligations.”

²⁷ OHCHR, Guiding Principles on Business and human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” at 1

²⁸ <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> at 12

²⁹ It should be noted that such an open-ended requirement does not provide meaningful guidance to companies as to how to conceptualize human rights.

“respect” human rights, since according to the UNGPs “enterprises may potentially impact virtually any” “internationally recognized human rights”.

In addition, the UNGP commentary recommendation to review “all internationally recognized human rights” may conflict with the framework of IHL. For instance, the “right to life” is conceptually very different in IHL rather than in human rights law.³⁰

The Commentary to Principle 19 recommends that if an adverse impact is identified, “a company should take the necessary steps to cease or prevent the impact.” The commentary also acknowledges though that if the business “has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations,” the company should determine its leverage over the entity concerned, the importance of the relationship, the severity of the abuse, and whether termination of the relationship would have adverse consequences from a human rights perspective. The phrase “directly linked” is not sufficiently explained. It is clear though that the UNGPs, like other BHR instruments, advise that companies should take multiple factors into account when determining how to remedy human rights impacts.

The UN Interpretive Guidance (Principle 23(a)) calls on companies in conflict zones to “comply with all applicable laws” while 23(b) advises to “seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements.” It advises, though, that business must be aware of the “human rights impact that could result from terminating its activities.”³¹

The Guidance also alerts companies that “heightened human rights due diligence should also be seen as essential if the enterprise has, or is considering entering into business activities in countries that are under sanctions by the United Nations or regional intergovernmental organizations.”³² This recommendation should be expanded to include operations by both for-profit companies and humanitarian organizations in areas controlled by designated terrorist groups, such as Hamas-controlled Gaza, areas controlled by Boko-Haram in Nigeria, or ISIS-controlled territory in Iraq and Syria.

It should be noted that some scholars have observed that the “legal compliance approach” of the UNGPs and its emphasis on risks and legal liability towards operations in conflict zones “may have the undesirable effect of discouraging responsible companies from investing in conflict-affected countries, leaving the door wide open for cowboy operators.”³³

UN Principles for Responsible Contracts

³⁰ Under IHL, combatants may be targeted with lethal force provided the rules of distinction and proportionality are observed. Under human rights law, lethal force may only be applied in narrow circumstances. See, e.g., <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law>.

³¹ <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> at 72

³² P. 80

³³ Bray and Crockett, at1077

The UN has also issued a set of responsible contract principles for integrating human rights risk management into contract negotiations.³⁴ These principles are considered to be an addendum to the UNGPs.³⁵ This document discusses specific aspects of business operations that can be impacted by armed conflict. Principle 6, for example, addresses physical security facilities, installations, and personnel, notes that security “should be provided in a manner consistent with human rights principles and standards.” The commentary to Principle 6 invokes IHL, noting that physical security “requires clarity of roles, responsibilities and accountability and should in all cases be carried out in compliance with internationally recognized principles of human rights and humanitarian law.”³⁶

The principles discuss that agreements must address “how to involve local law enforcement or other relevant public officials;” “how to coordinate private and public security services;” and ensure they are “in line with internationally recognized human rights law and humanitarian law relevant to the management and implementation of security.”³⁷ The principles recognize that “it may not be possible to identify all security needs” and “security arrangements may have to be agreed with local officials, military personnel, or others who are not involved in the negotiation of the deal.”

It advises companies when identifying risks to consider among other things, the “security profile” of the location of the investment, “potential migrant flows”, “ethnic or religious conflict”, “conflict over resources,” terrorism, and “political insurgency”. Solutions for dealing with these issues should be “compatible with human rights and humanitarian law standards.” The contract parties should also consult with local stakeholders and implement grievance mechanisms to deal with issues that might arise.³⁸

OECD

The OECD’s Guidelines for Multinational Enterprises is the most influential guidance providing “non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”³⁹ Although non-binding, the OECD Guidelines notably is the only framework coupled with an oversight mechanism via the National Contact Points. The Guidelines are intended to serve as recommendations provided by governments to Multinational Enterprises (MNEs).⁴⁰ Originally issued in 1976, they were last revised in 2011 to specifically address human rights and incorporate the UNGP’s “Protect, Respect, Remedy” framework.⁴¹ The drafters consider the

³⁴ https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf

³⁵ Id. at 2.

³⁶ Id. at 22.

³⁷ Id.

³⁸ Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Addendum Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators* ** A/HRC/17/31/Add.3

³⁹ <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁴⁰ <http://www.oecd.org/daf/inv/mne/48004323.pdf> at 13

⁴¹ <http://www.oecd.org/daf/inv/mne/48004323.pdf> at 3

OECD Guidelines as an integral part of government obligation to promote “international peace and security.”⁴²

The OECD Guidelines promote a “risk-based” due diligence framework.⁴³ Specifically, companies are to “identify, prevent, and mitigate actual and potential adverse impacts” that are “either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship.” In other words, mere operation in a conflict zone is not enough to establish a “direct link”. “Contribution” also must be defined as being “substantial” and not “minor or trivial” activity. In cases of conflict between domestic law and international obligations, “enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.”⁴⁴

IHL is explicitly referenced, noting that “in situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments.”⁴⁵

To assist MNE’s in implementing the Guidelines, the OECD has issued a “Due Diligence Guidance For Responsible Business Conduct”.⁴⁶ At the outset, companies are advised to “catalogue the specific RBC standards” including “domestic laws and relevant international and industry-specific frameworks.” The guidance calls on companies to pay particular attention to situations that could lead to IHL violations such as gender-based violence and plunder of natural resources.⁴⁷ In “conflict affected” areas the guidance suggests companies may want to conduct stakeholder engagement via “bilateral aid agencies” rather than directly engaging with potentially impacted stakeholders and rightsholders in “safer” environments.⁴⁸

In general, the OECD does not define conflict areas as “no go zones” for businesses. The exception to this principle is in the area of conflict minerals.⁴⁹ The OECD has issued sector-specific due diligence guidance in the supplying of minerals from “conflict affected and high risk areas.”⁵⁰ Again while IHL is not specifically mentioned, the guidance acknowledges that “Armed conflict may take a variety of forms, such as a conflict of international or non-international character”. The model supply chain policy attached as Annex II explicitly addresses the issue of complicity. The policy calls for the suspension of engagement with suppliers where there is a “reasonable risk” that there is “direct or indirect” support to “non-state armed groups.”

ISO

⁴² <http://www.oecd.org/daf/inv/mne/48004323.pdf> at 8

⁴³ <http://www.oecd.org/daf/inv/mne/48004323.pdf> at 20

⁴⁴ <http://www.oecd.org/daf/inv/mne/48004323.pdf> 32

⁴⁵ 32

⁴⁶ <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁴⁷ Id. Annex Questions 2 and 3.

⁴⁸ Table 4.

⁴⁹ Discussion with senior OECD official, November 27, 2019.

⁵⁰ “Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas 2016, <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>

The International Standards Organization promulgated the ISO 26000 Social Responsibility guidance in 2010, providing best practices on how business and organizations can operate in an “ethical and transparent” manner in order to “contribute to the health and welfare of society.”⁵¹ Government, NGO, consumer, and labor representatives shaped the development of ISO 26000, which according to the ISO “means it represents an international consensus.”⁵² Importantly, and unlike the OECD rules which applies to “multinational enterprises,” ISO 26000 is geared for “all types of organizations regardless of their activity, size or location.”⁵³ This is because the ISO views “social responsibility” as applicable to all organizations, “not just those in the business world”. Consequently, ISO uses the terms “organizations” rather than “business”, “enterprises,” “corporations”, or “corporate social responsibility”.⁵⁴ The Working Group should adopt the expansive approach of the ISO.

The ISO acknowledges that while its guidance may represent a consensus position, it is “not intended to provide a basis for legal actions, complaints, defences, or other claims in any international domestic or other proceeding, nor is it intended to be cited as evidence of the evolution of customary international law.”⁵⁵

Human rights is “both a principle and a core subject” of the ISO. The ISO recognizes conflict as a situation where “organizations are more likely to face challenges and dilemmas relating to human rights and risk of human rights abuse may be exacerbated.” As such, it notes they might require enhanced human rights due diligence. The ISO, however, makes no reference to IHL. Instead, in addition to mentioning core human rights instruments, it advises respect for “international norms”.⁵⁶

ICRC

Unsurprisingly, as the organization tasked with preserving and promoting IHL, the ICRC issued the guidance, “Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law.”⁵⁷ This publication addresses specific risks and directly engages with IHL’s legal requirements and treaty provisions, as opposed to advising reliance on IHL generally.

⁵¹ <https://www.iso.org/iso-26000-social-responsibility.html>

⁵² This claim should be examined more closely to ensure that there was a plurality of civil society, sectors, and geographic participation represented.

⁵³ <https://www.iso.org/iso-26000-social-responsibility.html>; <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>; <https://ec.europa.eu/docsroom/documents/34482>

⁵⁴ At 5. This clarification is important given several international aid agencies have been plagued recently by scandals involving human rights abuses in conflict zones. For an example, see the Cameroon case study in the section on the National Contact Points, *infra*.

⁵⁵ At 1

⁵⁶ ISO v. OECD doc p. 32

⁵⁷ “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

The first two sections of the guidelines provide a brief overview introducing IHL and its central tenants. The third section then identifies potential risks that are likely to arise for businesses operating in armed conflict and particular ways in which those risks can be mitigated.

Referring to specific provisions in IHL, the guidance examines the hiring of military, armed groups or other security forces; the types of weapons businesses or their agents can employ or trade in; the acquisition of property and potential displacement of civilians; labor conditions; the protection of the natural environment; and the issue of complicity in abuses.

Importantly, the ICRC does not call for the cessation of business activities in conflict zones even when there are heightened risks. Rather, companies are informed as to what types of activities could expose the corporation and its officers to potential civil and criminal liability.⁵⁸

Industry Guidelines

According to Bray and Crockett, the role of responsible business in conflict zones “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.”⁵⁹ They explain further that “[d]irect and indirect jobs and the revenues they generate can actually be a source of stabilisation” provided there is strong “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).”⁶⁰

Recognizing the space for business opportunity in conflict zones, yet wanting to act responsibly, many industries have promulgated their own due diligence guidance. The following section highlights just a few of these initiatives and how they relate to IHL.

Voluntary Principles on Security and Human Rights

An industry association of companies in the extractives (oil, gas, mining) sector that often operate in conflict areas, have created the “Voluntary Principles on Security and Human Rights.” In contrast to other guidelines, the Voluntary Principles in its preamble explicitly recognizes IHL as a foundational benchmark.⁶¹ The Principles repeatedly reference IHL throughout.

The Voluntary Principles call on its adherents in their due diligence processes to survey a wide range of source material - military, economic, law enforcement, political, and consult with both community, civil society, and government officials. In operations, the Principles, echoing the IHL requirement of feasible precautions, advise companies to take “all appropriate and lawful

⁵⁸ See paras. 11-17. It should be noted that the issue of civil and criminal liability for complicity in IHL violations is highly unsettled.

⁵⁹ J. Bray and A. Crockett, “Responsible risk-taking in conflict-affected countries: the need for due diligence and the importance of collective approaches, 94 *Int’l Review of the Red Cross*, Autumn 2012

⁶⁰ Speorri, <https://www.icrc.org/en/doc/assets/files/review/2012/irrc-887-spoerri.pdf>

⁶¹ https://docs.wixstatic.com/ugd/f623ce_808340b074b041e8b5ec7d441f768012.pdf

measures to mitigate any negative foreseeable consequences”. The Principles call on private security to “promote the observance of international humanitarian law.”⁶²

London Metal Exchange

In October 2018, the London Metal Exchange issued a position paper on responsible minerals sourcing in conflict zones. The LME proposed that all brands operating in this sector must conduct audits using a standard that has adopted the OECD conflict minerals guidance (discussed above).⁶³ The LME views the OECD guidance as “incorporating human and labour rights, health and safety, environmental concerns and best practice governance.”⁶⁴

International Petroleum Industry Environmental Conservation Association

The International Petroleum Industry Environmental and Conservation Association (IPIECA) issued guidance “Operating in Areas of Conflict for the Oil and Gas Industry” in 2008.⁶⁵ The guidance provides advice on how companies can develop conflict impact assessments and carry out conflict risk management in their operations.⁶⁶ While the guidance offers detailed practical advice and case studies, there is no overt reference to IHL.

Case Studies

As has been shown in the brief survey above, guidelines for human rights due diligence in conflict zones is relatively vague with regards to the application of IHL. In practice, however, many businesses, courts, and dispute mechanisms, do thoughtfully engage with the relevant IHL issues and apply them to a business and human rights framework. Importantly, these actors often reject the far-reaching and extreme activist approach. They seek to balance human rights concerns and potential conflicts amongst stakeholders. They will also not engage in situations that are seen to be inextricably linked to controversial political disputes. The following section discusses several examples.

Company Communications

Company publications and correspondence provide significant insight into how corporations conduct due diligence in situations of armed conflict. The following section highlights several examples.

⁶² Provides a detailed framework of how a company can use the Voluntary Principles to conduct a risk assessment and how IHL could be incorporated into that assessment such as engaging the ICRC to conduct IHL training for public security forces engaged by the company.

https://www.miga.org/sites/default/files/archive/Documents/VPSHR_Toolkit_v3.pdf

⁶³ <https://www.kriittisetmateriaalit.fi/wp-content/uploads/2018/12/Responsible-Sourcing-LME-position-paper-LME-2018-October.pdf> at 3

⁶⁴ Id

⁶⁵ <http://www.ipieca.org/resources/good-practice/guide-to-operating-in-areas-of-conflict-for-the-oil-and-gas-industry/>

⁶⁶ Id. at 6

For instance, in response to human rights concerns raised relating to company operations in Sudan and Myanmar, the New Delhi-based, Oil and Natural Gas Corporation Limited identifies what standards were relied upon and delineates what factors were prioritized by the company in evaluating its risks.⁶⁷ In addressing concerns of operating within the context of the Sudanese armed conflict, the company remarks that the development of the Sudanese oil industry “slowly led towards the end of civil war in Sudan and paved the way for the Comprehensive Peace Agreement (CPA) in 2005”. It also claims that “the oil industry not only generated wealth for its people but also provided numerous opportunities of employment and infrastructural development in that country.”

DRC-based Palm oil processing companies, DEG and PHC identified the creation of jobs and infrastructure and liaising with local communities as key ways in which they could mitigate risks and negative human rights impacts in conflict-affected DRC.⁶⁸ The companies also established a complaint mechanism managed by an independent and international team of experts.

Carrying out business activities in Western Sahara is the subject of significant controversy often raising questions about human rights due diligence and compliance with IHL. Western Sahara has abundant fisheries and phosphate reserves and is therefore an attractive location for foreign trade. As a result, there is extensive business activity by and with Moroccan and foreign companies in Western Sahara. The Polisario Front, recognized representative of the Saharawi people, considers such economic activities to be exploitative and fueling their oppression. Many international legal experts, human rights activists, and large blocs of the Saharawi people deem Western Sahara to be Moroccan-occupied territory and the Moroccan presence to be “illegal settlements”. The UN General Assembly designates Western Sahara as a “non-self governing territory”. Nevertheless, the General Assembly has stated that it considers IHL to apply to the territory.⁶⁹

The political and legal disputes surrounding Western Sahara have led some businesses to cease trade with and operations in the territory. Yet, many companies have continued economic relations. For example, two New Zealand corporations, Ravensdown and Ballance Agri-Nutrients remain substantial buyers of Western Saharan phosphate. Human rights groups questioned this on-going relationship and accusing the companies of propping up “blood phosphate”, by entrenching Moroccan occupation and exploiting the local population.⁷⁰ In response, the companies referred to UN guidelines and EU agreements with Morocco which do not bar trade in the area. Although the companies did not invoke specific IHL provisions, they instead laid out their calculus in deciding to continue trade and how they balanced the various human rights at issue.

⁶⁷ https://www.business-humanrights.org/sites/default/files/media/documents/company_responses/ongc-response-19-june-2014.pdf

⁶⁸ <https://www.business-humanrights.org/de/dem-rep-kongo-konflikt-um-landnutzung-f%C3%BCr-deg-palm%C3%B6lprojekt-versch%C3%A4rft-sich-enth%C3%A4lt-stellungnahme-des-unternehmens>

⁶⁹ See UNGA Resolution 69/10 “calls upon the parties to cooperate with the International Committee of the Red Cross and to abide by their obligations under international humanitarian law”; <https://undocs.org/A/AC.109/2015/2>

⁷⁰ <https://www.odt.co.nz/lifestyle/magazine/no-time-ignore-blood-phosphates>

Foremost, the location of a Moroccan state owned-company (OCP) plant in the disputed area of Western Sahara did not outweigh other considerations for the companies. Notably, they observed that 75% of world phosphate reserves are in Western Sahara and without phosphate, due to New Zealand's unique soil composition, rural agricultural production would decrease by 50%.⁷¹ The companies did not believe they were in a position to take a stance on the political dispute between Morocco and Western Sahara. Instead, they claimed they relied on the UNGPs and OECD guidance, they obtained "regular updates from OCP on employment practice, benefits to local people and investment in health, education and social programmes." They stressed that "it is unclear how closing the mine and jeopardising those local people's livelihoods will help the situation on the ground." In sum, the companies concluded that "there is currently no alternative that comes without significant environmental impacts, processing costs, miscellaneous supply risks and other human rights implications at the source."⁷²

Similarly, Atlas Copco, a Swedish-based company that supplies mining equipment to a phosphate mine in Western Sahara, responded to complaints filed by human rights groups alleging corporate complicity in violations of IHL and human rights, that:

Our view is that the extraction of phosphate made by our customer follows the rules of international law. The UN classifies the territory as non-self-governing, which means that certain rules apply but not that there is an absolute ban on sales. (2/2)⁷³

In another case involving Western Sahara, advocacy group Western Sahara Resource Watch asked Siemens Gamesa, owned in part by Siemens AG, about the renewal of a contract to operate a wind power plant in Western Sahara. In response, Siemens Gamesa responded that "We still believe that an improvement of energy infrastructure, especially based on renewable energies will bring real value to communities and people. In our projects we follow a 'hire-locals-first'-policy...Siemens Gamesa is currently investing in targeted community projects..." The company also stated that it did not want to weigh in on political issues or "make judgments on issues of international public law."⁷⁴ The company, therefore, in accordance with industry and international guidelines, determined that the environmental benefits, employment and investments in the local community, and a desire not to wade into a controversial political dispute, outweighed the fact the operations were occurring in "occupied" territory or "settlements".⁷⁵

As the most scrutinized global conflict, companies investing in or operating in projects in Israel and the West Bank are often accused of violating IHL or being complicit in IHL abuses, most notably, "settlement" activity.⁷⁶ In contrast to the UNGPs and OECD guidelines requiring case-

⁷¹ <https://www.business-humanrights.org/sites/default/files/documents/Ravensdown%20Response.pdf>

⁷² *Id.*

⁷³ <https://twitter.com/AtlasCopcoGroup/status/1115988313226264582>

⁷⁴ https://www.wsrw.org/files/dated/2018-12-04/2018.11.16_siemensgamesa-wsrw.pdf

⁷⁵ *Id.*

⁷⁶ It should be noted that the term "settlement" is often inconsistently and incoherently applied. In many cases, an overly broad definition is employed encompassing any territory or activity across the 1949 Armistice lines, including roads, border crossings, or military installations. These areas are called "settlements" even when there is no connection to a civilian settlement and even when such activity is legal under the disputed "occupation"

by-case examination and careful analysis, boycott activists single out selected companies demanding they withdrawal from territory they consider occupied by Israel, whether through the cessation of operations or through divestment in companies doing business there. These demands rarely demonstrate specific or direct harms caused by the business operations. Rather, the activists make generalized claims of abuse and broadly attribute such abuses to businesses, no matter how tenuous, simply because of their location. These activists also fail to consider competing human rights considerations, legal obligations, and human rights harms that might occur if the activist demands are adopted.⁷⁷

As opposed to other conflicts where less attention is devoted to the actual substance of IHL,⁷⁸ the accused companies operating in Arab-Israeli conflict, provide detailed responses addressing IHL issues. These communications also discuss the interplay with human rights issues as well as the legal structure created by the governing Oslo Accords and how these factors impact corporate due diligence analysis. These substantive analyses stand in stark contrast to the simplistic accusations, false claims, and demands made by boycott activists.⁷⁹

NGO correspondence with the Heidelberg Cement company provides a representative example.⁸⁰ The company was asked about quarrying activities in the West Bank and whether such operations accorded with human rights and humanitarian law. The company provided a detailed response:

The Nahal Raba quarry is located on public land in Area C, directly at the border to Israel. Before the Australian company Pioneer started quarry operations in 1986, the ownership of the land was checked thoroughly according to the statutes of article 43 of the Hague Conventions (IV) of 1907 on the basis of the Jordanian planning law No. 79 from 1966 and an extensive planning approval process was conducted that offered extensive veto rights to potentially affected local residents. No private ownership could be determined. Therefore no expropriation has taken place; consequently, any potential allegation of violations against article 47 of the Hague Convention (IV) from 1907 must be firmly rejected, too. In addition, neither Hanson Israel/HeidelbergCement, nor Pioneer has been confronted with complaints by Palestinian local residents with respect to

paradigm. This moniker is also used even though the activity at issue, and even the specific business, is directly mandated by internationally guaranteed agreements, such as the Oslo Accords, between the Israeli government and the PLO. See, e.g. NGO Monitor, “Who Profits: Foundation for the UN BDS Blacklist,” January 2019, <https://www.ngo-monitor.org/reports/who-profits-foundation-for-the-un-bds-blacklist/>.

⁷⁷ A 2019 publication, “[Investor Obligations](#),” commissioned by Norwegian People’s Aid and the Fagforbundet trade union and authored by the Essex business and human rights project is a prime example of such activist claims.

⁷⁸ See, e.g., Eugene Kontorovich, “Unsettled: A Global Study of Settlements in Occupied Territory,” Northwestern Public Law Research Paper 16-20, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835908

⁷⁹ It should also be noted that the so-called OHCHR settlement “database” is similarly non-substantive. It is based on outdated claims, and provides no analysis, transparency, or differentiation, in singling out and defaming companies, accusing them of being involved in alleged human rights abuses. For in depth analysis of the multiple problems in the database, see: NGO Monitor, “[Analysis of the UN’s Discriminatory BDS Blacklist](#),” February 13, 2020; [Letter to High Commissioner Bachelet](#), January 1, 2020; [January 1, 2017 Submission to OHCHR](#).

⁸⁰ <https://www.business-humanrights.org/sites/default/files/documents/Heidelberg%20Cement%20response.pdf>

any violations of property rights since the beginning of the quarrying activity 29 years ago.⁸¹

This answer demonstrates that the company engaged directly with IHL and reviewed provisions of the Hague Convention applicable to occupied territory. It not only reviewed requirements of the Hague Convention, but also the domestic law in place prior to Israeli control. In addition, the company consulted the requirements of the Oslo Peace Accords which currently govern the status of the territory.

In addition to in-depth review of the applicable law, the company examined the human rights impacts of its operations. It noted that it served both Israeli and Palestinian customers and that Palestinians comprised 60% of employees and contractors working in the quarry. The company also noted that the interactions between Israeli and Palestinian workers fostered co-existence in an atmosphere of “increasing anti-normalization campaigns”.

Airbnb provides another interesting case study. In November 2018, the company announced it would de-list properties located in Israeli settlements in the West Bank.⁸² The company issued a policy statement recognizing though that its actions were not legally required and that “[t]here are conflicting views regarding whether companies should be doing business in the occupied territories that are the subject of historical disputes between Israelis and Palestinians.”⁸³ The policy did not apply to East Jerusalem or the Golan Heights.

The Airbnb decision immediately drew considerable backlash. Although the company claimed it was not acting in a discriminatory fashion or endorsing the anti-Israel boycott movement, its explanation did not match the public perception. For instance, BDS activists, who had campaigned for the policy, hailed the decision as a significant victory.⁸⁴ On the other hand, Jewish and Israeli groups, among many others, believed the act was motivated by discrimination. The groups demonstrated the discriminatory effect, if not intent, of the company’s decision by showing that in enacting the new policy, the company had failed to consult with necessary stakeholders, failed to examine each situation on a case-by-case basis, and relied on a one-sided analysis of the Israeli-Palestinian dispute. Each of these actions were in violation of the new policy the company had claimed to have adopted. In addition, the company appeared to single out Israel alone, while failing to apply the same policy in other conflict areas.

⁸¹ *Id.*

⁸² <https://press.airbnb.com/listings-in-disputed-regions/>

⁸³ The company announced going forward how it would approach listings in disputed areas:

“Recognize that each situation is unique and requires a case-by-case approach.

1. Consult with a range of experts and our community of stakeholders.
2. Assess any potential safety risks for our hosts and guests.
3. Evaluate whether the existence of listings is contributing to existing human suffering.
4. Determine whether the existence of listings in the occupied territory has a direct connection to the larger dispute in the region.”

<https://press.airbnb.com/listings-in-disputed-regions/>

⁸⁴ <https://www.adl.org/news/letters/adl-letter-to-airbnb-on-its-decision-to-delist-rentals-in-israeli-settlements;>
<https://electronicintifada.net/blogs/nora-barrows-friedman/airbnb-drops-israeli-settlements-listings>

As a result of its actions, the company faced several discrimination lawsuits in both Israel and the US, as well as government sanctions in several US states.⁸⁵ In April 2019, the company settled multiple discrimination lawsuits and reversed its policy, deciding to maintain the listings on its site.⁸⁶

In contrast, after being targeted in a BDS campaign by Amnesty International to cease Jewish listings in the West Bank and East Jerusalem, Trip Advisor, Booking.com, and Expedia, acknowledged the potential IHL issues, but instead prioritized human rights issues, including preventing discrimination and promotion of consumer rights and access to information.⁸⁷ The companies rejected the NGO claims that posting information about the region was illegal or contributed to the maintenance of human rights abuses. The issue of politics was also important to the companies, that withdrawal or selectively posting information, could further increase tensions and cause greater harm.⁸⁸

National Contact Points

The OECD Guidelines obligates OECD and adhering governments to establish a dispute resolution mechanism known as National Contact Points (NCP). Under this framework, complaints can be filed with the NCP against corporations believed to be in breach of the guidelines, initiating a review process. While the NCP process is generally non-binding,

⁸⁵ <https://www.miamiherald.com/news/politics-government/state-politics/article224556770.html>;
<https://www.jpost.com/American-Politics/Illinois-governor-calls-for-inquiry-of-Airbnb-over-settlements-policy-573230>; <https://www.haaretz.com/israel-news/texas-blacklists-airbnb-over-israeli-settlement-boycott-1.6983940>

⁸⁶ <https://press.airbnb.com/update-listings-disputed-regions/>;
<https://www.nytimes.com/2019/04/09/world/middleeast/airbnb-israel-west-bank.html>;
<https://www.france24.com/en/20190410-airbnb-will-leave-west-bank-homes-listed-settle-suits>

⁸⁷ https://www.business-humanrights.org/sites/default/files/documents/TripAdvisor_response_12%20Feb%202019.pdf

⁸⁸ “TripAdvisor believes that travelers coming to our site or app should have access to all relevant information available about a destination, including businesses currently open in those locations. To this end, we aim to provide travelers with an apolitical, accurate and useful picture of all accommodations, restaurants and attractions that are currently open for business around the world. We understand that this issue is a sensitive matter with cultural and political implications. The listing of a property or business on TripAdvisor does not represent our endorsement of that establishment. We provide the listing as a platform for guests to share their genuine experiences with other travelers. As such, we do not remove listings of properties or businesses that remain active and open for business. With respect to where a location is listed on a map, TripAdvisor’s practices aim to be consistent with the travel industry and Internet search standards.

Our mission at Booking.com is to empower people to experience the world. The Booking.com website and mobile apps are available in over 40 languages, offer more than 28 million total reported listings, and cover more than 130,000 destinations in 228 countries and territories worldwide. Booking.com permits all accommodations worldwide to register themselves on Booking.com’s website and to offer their accommodations to travelers, where this is in compliance with legislation applicable to Booking.com and its operations. Where clearly defined and applicable laws or sanctions prohibit us from offering our services, we fully comply with such restrictions. Booking.com is of the view that it does not provide “services and utilities supporting the maintenance and existence of settlements, including transport”, as referenced in paragraph 96 of the Report of the International Fact-Finding

nevertheless, the NCP mechanism represents the only “government-backed corporate accountability instrument that includes a complaint mechanism.”⁸⁹

Many of the complaints filed with the National Contact Points relating to armed conflict involve the DRC. In fact, according to OECD Watch, there have been nearly three times as many cases overall filed involving the DRC as any other country (Brazil is next at 13).⁹⁰

For instance, the UK’s NCP reviewed a case where companies operating cobalt and copper mining concessions in the DRC conflict zone. The NGOs responsible for filing the case with the NCP argued that the company was depriving residents of clean water and health care.⁹¹ Despite the presence in a conflict zone [Lualaba Province], the NCP related to human rights law standards rather than IHL.⁹²

In another case relating to the DRC, in 2015, former employees filed complaint at the Netherlands NCP against Heineken and its Congolese Subsidiary Bralima. The employees alleged multiple violations of labor laws between 1999 and 2003 as well as cooperating with the RDC-Goma rebel movement including seeking authorization from the rebels for mass dismissals.⁹³ The employees argued that cooperation with the Rebels constituted violations of IHL including complicity: “Recours par la BRALIMA à un mouvement d’insurrection rebelle pour exécuter ces licenciements massifs et abusifs. Le droit international humanitaire interdit aux multinationales (ou leurs filiales), dans l’exercice de leurs activités, toute coopération avec une rébellion. Ce qui constitue une grave violation des droits de l’homme et dans ce cas d’espèce il s’agit d’un crime...C’est une complicité dans la commission des crimes.” They also presented evidence of IHL violations by the rebels.⁹⁴

Mission on Israeli Settlements in the Occupied Palestinian Territory. Everything we do in terms of how we display information on Booking.com is focused on the customer and always in accordance with applicable law. Our geographic labeling of properties gives full transparency to customers about where an accommodation is located and we continuously update and optimise this information. By marking properties concerned as being in 'Israeli settlements' we provide transparency to anybody looking (or not looking) for accommodations in these territories. “Expedia Group is an online travel company, empowering leisure and business travelers around the world with the tools and information they need to research, plan, book and experience travel. Expedia Group operates more than 200 travel websites across 75 countries. Travel suppliers distribute and market their products and services via our desktop and mobile offerings, Expedia Group does not operate hotels, vacation rentals or travel products itself. We allow any accommodation provider to sign up to our platform in accordance with laws applicable to Expedia Group. Expedia Group is committed to providing transparency to our customers when travelling to disputed territories globally and we appreciate Amnesty International bringing its concerns on this complex issue to our attention. In the Occupied Palestinian Territories, we identify these accommodations as "Israeli Settlement" located in Palestinian Territory. We are currently reviewing the transparency of our display not only in the Occupied Palestinian Territories, but as well as other disputed territories globally to ensure that travelers have the information necessary to make the travel decisions that best suit their needs. The issues raised in your letter are an important input as we continue to assess the type of information we provide to our travelers.”

⁸⁹ ISO vs OECD doc p. 24

⁹⁰ https://complaints.oecdwatch.org/cases/advanced-search/countries/casesearchview?type=Country&b_start:int=0

⁹¹ <http://www.raid-uk.org/blog/mining-giant-erg-ignored-uk-government-human-rights-dr-congo>

⁹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/506285/BIS-16-156-raid-and-enrc-final-statement-after-complaint.pdf

⁹³ Dutch NCP Decision, https://complaints.oecdwatch.org/cases/Case_446/1661/at_download/file

⁹⁴ https://complaints.oecdwatch.org/cases/Case_446/1539/at_download/file

The NCP's Final Statement did not specifically address the issue of complicity for IHL violations but rather emphasized the complex balancing of rights and "very difficult choices" by choosing to remain in conflict zones. In particular, the NCP, citing the UN, OECD, and the World Bank, noted that withdrawal "reduces economic opportunities and contributes to a 'poverty-conflict trap'. Companies must take into account employee safety, protection of assets, and local social impact. To resolve the complaint, Heineken agreed to a €1 million settlement and to draft a new policy "on how to conduct business and operate in volatile and conflict-affected countries." In 2018 Heineken issued a new human rights policy.⁹⁵

A 2014 NCP case filed in the UK alleged that British company G4S was in violation of the Guidelines due to relations with an Israeli company that provided services to prisons which were alleged to violate the rights of Palestinian prisoners, in particular the use of administrative detention and housing inmates under the age of 18. In its Final Statement, the UK NCP found that there had been adverse human rights impacts, but said that G4S had not violated human rights generally. The NCP did not identify specific provisions of human rights law or IHL that it said were violated.

The NCP found that the company had engaged in technical violations of the OECD Guidelines by failing to communicate how it evaluated human rights impacts and what steps it would take to address those impacts.⁹⁶ The NCP acknowledged, though, that the narrow focus of the company's review was a result of the NGO complainant solely seeking G4S to cancel its contracts. The NCP repeatedly stressed that neither the OECD Guidelines, nor UK policy view termination as the "first or only option". Instead, a company should seek to use engagement and leverage, and that under the guidelines "withdrawing from a business relationship is a last resort."⁹⁷

The Swiss NCP considered an interesting case regarding the rights of the indigenous Baka people of Southern Cameroon filed against the World Wildlife Fund by Survival International. The complaint centered around an agreement entered into between the WWF and the Cameroonian government.⁹⁸

Under the agreement, Cameroon's Ministry of Forests and Wildlife established wildlife preserve areas and appointed WWF as the "joint manager" of each of these parks. The agreement also established "ecoguards" to prevent poaching activity within the preserves. Part of this "ecoguard" involved the deployment of an armed military unit called the Bataillon d'Intervention Rapide. Survival International claimed that this agreement violated the OECD

⁹⁵ <https://www.theheinekencompany.com/Sustainability/Values-and-Behaviours/Respecting-human-rightshttps://www.theheinekencompany.com/-/media/Websites/TheHEINEKENCompany/Downloads/PDF/Sustainability/HEINEKEN-Human-Rights-Policy-Effective-as-per-1-September-2018.ashx?la=en>.

⁹⁶ At 18

⁹⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431972/bis-15-306-lawyers-for-palestinian-human-rights-final-statement-after-examination-of-complaint-uk-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises-r1.pdf at 13

⁹⁸

https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_F%C3%A4lle/Abschlusserk%C3%A4rungen/WWF_2016_Final_Statement.pdf.download.pdf/10%20Final%20Statement%20WWF%20International%20Cameroon.pdf

Guidelines because WWF failed to conduct due diligence on how this agreement would impact the indigenous Baka people. They further alleged that the agreement curtailed access to “traditional territories and natural resources” on which the Baka depend. They also claimed that the ecoguard patrol used threats and violence against the Baka, treating them as poachers. While the parties focused primarily on the international law pertaining to indigenous rights, the violations alleged against the security and military forces, and charges of complicity against WWF, suggest the existence of a NIAC.

In response to the charges, WWF noted that it often works where “there is limited official recognition and respect for indigenous rights, where extreme marginalization and difficult demographics or politics present particular challenges.” The WWF added that Survival International did not “take account of the complexity of the zoning process which also brought new areas under community control and imposed limits as well as community focused obligations on existing concessionaires.” WWF explained that it had undergone extensive consultations with the Baka prior to entering the agreement and that several amendments had been made. Regarding claims against the ecoguards, WWF claimed that it “facilitated the provision of human rights training to ecoguards and the employment of Baka ecoguards.” It also noted that it “attempt[s] to verify credible allegations of instances of abuse coming to its attention and has taken up instances of verified abuse with the Cameroonian authorities.” WWF further noted that its ability to influence the ecoguards was particularly difficult because deployment was determined by the government and “the majority of incidents raised in the specific instance occurred in the period 2009–2013 of turmoil characterized by security concerns, increased availability of military grade weaponry, related insurgency in the Central African Republic and subsequent refugee emergency, and the withdrawal of other international agencies from the area.”⁹⁹

The Swiss NCP found the case merited further consideration. During the NCP process, the parties agreed among other things that it would engage on enhanced training for the ecoguards and to “improve the consultation of the Baka in view of reducing the risk of abuse.” Survival International, however, dropped out of the mediation process.

Several NCPs are hesitant to examine cases where government compliance with IHL is integrally involved with the company operations. When reviewing a complaint against two US defense companies (Lockheed Martin and Boeing) alleged to have breached the OECD guidelines for supplying Saudi Arabia with products later used in the armed conflict in Yemen, the US NCP stated that the complaint “concerns the conduct of particular States, and would entail an examination of state conduct, which would not serve to advance the Guidelines.” Moreover, the NCP noted that the case “concerns various state practices, which NCPs are not designed to assess.” And according to the OECD, “[p]erceptions that the Specific Instance procedure is a channel for intervening inappropriately in the domestic affairs of another country would be highly detrimental to the effectiveness of the Guidelines.”¹⁰⁰

⁹⁹https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Statements_konkrete_F%C3%A4lle/WWF_2016/WWF_Initial_Assessment.pdf.download.pdf/Initial%20Assessment%20WWF%20International.pdf

¹⁰⁰ <https://2009-2017.state.gov/e/eb/oeed/usncp/specificinstance/finalstatements/264328.htm>

A 2013 UK NCP case also dealt with Yemen following a complaint filed by a prisoners' rights NGO. The group claimed that a British Telecom company provided communication services to a US military base located in the UK who then communicated to a base in Djibouti that operated drones in the armed conflict in Yemen. The NCP rejected the claim because a direct link could not be established between the provision of a general communications line to the US military in the UK to adverse impacts from drones in Yemen.¹⁰¹

Although the NCP did not proceed further in this case, it did trigger a policy note by the NCP Steering Board regarding how the issue of corporate complicity under the OECD Guidelines should be addressed in the due diligence process. Specifically, the Board questioned "once a heightened risk of human rights abuse has been identified by a complainant, is it for the complainant to prove a 'specific link' before any heightened due diligence requirements are engaged?" The Review Committee found that "an obligation to conduct due diligence cannot be an open-ended commitment to ensure that no harm ensues from whatever product or services it may provide to its customers. This would give rise to a responsibility for whatever a customer (or its further customers) might do." Further, "save for narrowly defined circumstances of strict liability, no legal system would provide for such wide-ranging liability."¹⁰² In other words, short of an inherent risk in the goods or services, "no more than general responsibility for risk-based due diligence can be expected."¹⁰³

Domestic Court Cases

Domestic courts in Europe and North America have also played a role in delineating corporate requirements in situations of armed conflict. These cases rarely proceed far. Many courts dismiss such cases at the preliminary stages on jurisdictional grounds or for failure to state a claim.¹⁰⁴ The US Supreme Court in *Jesner v. Arab Bank*, following up on the 2013 *Kiobel* decision, for instance, severely restricts the ability to bring complicity cases in US courts against foreign corporations committing human rights violations abroad. Nevertheless, important principles can be derived from existing court decisions, how they view allegations of IHL, and the implications for business operations in conflict zones.

For example, in the case of *Talisman Energy*, residents of Sudan brought suit in New York Federal Court against an oil company for complicity in government abuses including genocide, torture, and rape against the population located in the region of its operations. However, the US Second Circuit Court of Appeals found that the "activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally

¹⁰¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/282428/bis-14-608-initial-assessment-by-the-uk-national-contact-point-complaint-from-reprieve-against-british-telecommunications-plc.pdf

¹⁰² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/282467/bis-14-609-review-of-the-uk-national-contact-points-procedure-in-its-initial-assessment-of-the-complaint-from-reprieve-against-british-telecommunications-plc.pdf

¹⁰³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/282467/bis-14-609-review-of-the-uk-national-contact-points-procedure-in-its-initial-assessment-of-the-complaint-from-reprieve-against-british-telecommunications-plc.pdf

¹⁰⁴ n.1 *supra*, Herzberg, "Running with the Pack".

accompany any natural resource development business or the creation of any industry . . . None of the acts was inherently criminal or wrongful.”¹⁰⁵

The court also rejected a rule requiring companies to cease operations in this conflict zone, short of international sanctions, because if “liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargoes or international sanctions through civil actions in United States courts.”

The court continued that, “[s]uch measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations.” In other words, the court found that the “theories of substantial assistance serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan . . . they wish to argue that Talisman’s knowledge of the Government’s record of human rights violations, and its understanding of how the Government would abuse the presence of Talisman, is a sufficient basis from which to infer Talisman’s illicit intent.”¹⁰⁶

French Courts have also looked at the issue of corporate complicity for alleged violations of IHL.

In March 2013, a French appellate court dismissed a lawsuit brought by the Palestine Liberation Organization (PLO) and the Palestinian activist group Association France-Palestine Solidarité (AFPS) against three French companies: Alstom, Alstom Transport, and Veolia Transport.¹⁰⁷ The PLO and AFPS accused the companies of violating international law, in particular complicity in “war crimes” due to violations of Article 49(6) of the Fourth Geneva Convention, by participating in contracts to build the Jerusalem light rail, which the claimants alleged was settlement activity in occupied territory. In addition, they claimed that these contracts violated Israel’s obligations under the Hague Convention and the UN Global Compact. The plaintiffs sought the cancellation of the contracts.

The French appellate court rejected these claims. The court looked to whether the legal norms relied upon provided non-state entities with a private right of action and decided that the obligations of the Geneva and Hague Conventions only apply between state parties. In addition, the court considered whether an unlawful act had even been claimed. The court noted that building the Jerusalem light rail was not illegal because military occupation itself is not illegal, and Article 43 of the Hague Convention allows for the governance of occupied territory, including the building of transportation infrastructure.

¹⁰⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, (2d Cir., October 2, 2009), available at http://www.ca2.uscourts.gov/decisions/isysquery/c16d78c9-7adc-400d-ab5f-32c8ac0eb260/7/doc/07-0016-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/c16d78c9-7adc-400d-ab5f-32c8ac0eb260/7/hilite/

¹⁰⁶ *Id.* See also, Anne Herzberg Submission to OHCHR, Remedies Project, 2014 https://www.ngo-monitor.org/submissions/submission_of_the_amuta_for_ngo_responsibility_to_the_office_of_the_high_commissioner_for_human_rights_for_the_study_of_domestic_law_remedies_for_corporate_involvement_in_gross_human_rights_abuses/#easy-footnote-bottom-30

¹⁰⁷ Cour d’appel [CA] [regional court of appeal] Versailles, 3 ch., March 22, 2013, 11/05331 (Fr.), available at <http://fr.slideshare.net/yohanntaieb3/decision-de-lacourdappel> [hereinafter Cour d’appel], translated at <http://blog.eur.nl/iss/hr/files/2012/02/Decision-Versailles-Appeal-Court-22-March-2013.pdf>.

The court also discounted the claims that use of the light rail was illegal because it would entrench “illegal settlements”. Importantly, and similar to the ruling in *Talisman*, the court emphasized that the determination of the purpose of a contract and its legality cannot hinge on “the individual assessment of a social or political situation by a third party.” Moreover, the alleged “political motive attributed to the State of Israel” in the court’s opinion, could not “be applied by ‘contamination’ to the purpose of the contracts.”

Finally, the court addressed corporate complicity. The court stated that corporations were not bound by humanitarian and human rights conventions, with the possible exception of instruments addressing environmental and labor standards. Nor was there such a rule in customary law. It also ruled that the UN Global Compact did not provide a right of action upon which a suit could be based.

In contrast, in 2016, NGOs and groups of former employees filed a criminal complaint in Paris against cement giant Lafarge for terror financing, complicity in war crimes and crimes against humanity, and violations of labor law under the French criminal code.¹⁰⁸ Lafarge was operating a cement factory in North East Syria, and while most companies pulled out after the civil war began due to the extremely dangerous conditions, Lafarge stayed. In 2012, it recalled foreign employees, while it kept local workers in place. In 2013, ISIS took control of the area where the factory was located and the town where most of the employees lived. It is alleged the company paid ISIS intermediaries to obtain raw materials as well as “taxes” to ISIS in order to enable employees to cross ISIS checkpoints. The employees allege the company failed to implement security protocols or protect the employees; one was kidnapped and ISIS took over the factory in 2014.

In June 2018, prosecutors indicted the company, following 2017 indictments of 8 employees, opened an investigation relating to suspected terror financing and complicity in crimes against humanity.¹⁰⁹ Such financing includes payments to ISIS and other terror groups via third parties as well as purchasing raw materials from terror affiliated intermediaries.¹¹⁰ A panel of three judges is supervising the investigation and the company was forced to provide a €30 million security while the case is pending.¹¹¹ A group of Yazidi rape survivors sought to join the suit in December 2018.¹¹² In May 2019, preliminary charges were dropped against Lafarge’s former CEO by the French court citing lack of involvement in the alleged acts.¹¹³ In November 2019, the court dismissed the crimes against humanity charges, though the terror financing claims remain.¹¹⁴ The reason the suit was not dismissed entirely, as opposed to the Alstom suit, was likely motivated by the involvement of ISIS, the nature and severity of the violations, and the

¹⁰⁸ https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf

¹⁰⁹ https://www.swissinfo.ch/eng/blowback_-cement-firm-lafarge-indicted-over-complicity-in-syria-crimes-/44223672

¹¹⁰ <https://www.reuters.com/article/us-lafarge-syria/french-judges-drop-preliminary-charges-against-lafargeholcims-former-ceo-idUSKCN1QM21K>; https://www.swissinfo.ch/eng/syria_terror-finance-charges-against-lafargeholcims-ex-ceo-dropped/44802800

¹¹¹ <https://www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity>

¹¹² <https://www.thelocal.fr/20181201/yazidi-women-want-to-join-court-case-against-french-cement-giant>

¹¹³ *Id.*

¹¹⁴ <https://www.france24.com/en/20191107-lafarge-charges-of-crime-against-humanity-dropped-on-appeal-but-others-remain>

direct involvement of the company officials in the allegations. Should the case continue to move forward against the company and remaining employees, it will provide useful insights as to what types of IHL violations may serve as the basis of a complicity finding.¹¹⁵

Unsurprisingly, cases involving IHL frequently appear on the docket of the Israeli Supreme Court. In a notable 2009 case, an NGO active on Palestinian rights issues, filed suit against the Israeli government and ten Israeli owned-quarries operating in Area C¹¹⁶ of the West Bank.¹¹⁷ The NGO was seeking a court order terminating the quarry operations and blocking the Israeli government from issuing any new quarry licenses on the basis that the Israeli-owned quarry operations were in violation of IHL, specifically Articles 43 and 55 of the 1907 Hague Convention which establishes the duties of an occupying power.¹¹⁸ According to the NGO, quarrying operations in occupied territory must exclusively benefit the occupied population.¹¹⁹

The court first described the business reality. The court noted there were 10 Israeli owned (8 active) and 9 Palestinian-owned quarries all operating in Area C since the 1970s. While each company was slightly different, the companies sold product to both Palestinians and Israelis. The quarries employed several hundred Palestinians.¹²⁰

The Court next referred the Oslo Accords and noted that Article 31 of the interim agreement between Israel and the PLO explicitly addressed the issue of quarries, placing the Israeli civil administration in charge of their regulation and licensing with control to be gradually transferred to the PA and matters to be determined by a joint Israeli-Palestinian Committee¹²¹. It said that the NGO's petition would require the court to nullify this agreement and doing so was a political matter to be jointly decided by both governments and not by the court or a private request.

Next the court, looked at Article 55 of the Hague Convention. Article 55 addresses the principle of usufruct and whether and how an occupying power can utilize natural resources located in the occupied territory.¹²² The court examined existing legal theory and practice and determined that the use of such resources was in accordance with IHL provided that it did not impair or exhaust such resources.¹²³ In the specific case at issue, the amount of existing and projected quarried material constituted half of one percent of existing reserves.

¹¹⁵ <https://www.capital.fr/entreprises-marches/lafarge-en-syrie-un-des-intermediaires-entre-le-cimentier-et-les-jihadistes-mis-en-examen-1350299>; <https://www.globalcement.com/news/item/9439-french-court-of-appeal-to-rule-on-lafargeholcim-terrorism-charges-in-october-2019>

¹¹⁶ Per the Oslo Agreements between Israel and the PLO, Area C refers to the part of the West Bank designated to fall under full Israeli civilian and security administration.

¹¹⁷ *Yesh Din – Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank, et. al.*, HCJ 2164/09, 26 December 2011,

<https://casebook.icrc.org/case-study/israel-high-court-justice-quarrying-occupied-territory>

¹¹⁸ *Id.* at section 3

¹¹⁹ *Id.*

¹²⁰ *Id.* at section 1

¹²¹ *Id.* at section 6

¹²² *Id.* at section 7-8

¹²³ The court reviewed legal treatises, law review articles, expert opinions, and army manuals.

Third, the court examined Article 43 (also at issue in the French Alstom case) and did not find the NGO arguments compelling.¹²⁴ The court noted that Article 43 provides a “quasi-constitutional framework” for belligerent occupation setting the “manner by which the military commander exercises its duties and powers in the occupied territory.” Part of that duty requires balancing security needs with that of the national, economic, and social interests of the local population. The NGO argued that the fact the quarried material went in large part to the Israeli market and enriched Israeli companies provided no benefit to the Palestinian population. The court rejected this “narrow interpretation” and noted that the course advocated by the NGO (cancellation of contracts and complete cessation of activity) could endanger hundreds of Palestinian jobs, stagnate the local economy, and damage economic development.¹²⁵ The court also focused on proposed recommendations by the Israeli government to restrict the issuance of any new quarry licenses while the territory was under dispute, rehabilitate any environmental damage, and to separate out royalties and duties collected from these companies for the sole use of the Palestinian population.¹²⁶

As a result of these factors, the court rejected the petition.¹²⁷

Western Sahara Phosphate cases

Two cases, in South Africa and Panama respectively, relate to the export of phosphate mined in Western Sahara and the issue of corporate complicity.

In 2017, a ship carrying 55,000 tons of phosphate mined by Moroccan state-owned company OCP to New Zealand-based purchasers was interdicted in Port Elizabeth, South Africa while it was docked for provisioning.¹²⁸ During the stay, the Polisario Front challenged ownership of the phosphate as belonging to the Polisario and the Saharawi Arab Democratic Republic.¹²⁹ The High Court of South Africa examined the legal status of and international law applicable to Western Sahara.¹³⁰ Although it found Western Sahara to be occupied by Morocco, it did not rely on or analyze IHL in its decision. In a subsequent proceeding, the court was to determine ownership of the phosphate, but issued a short default judgment in favor of the Polisario after OCP refused to contest the issue in court. Nevertheless, OCP reclaimed ownership of the phosphate following an auction where other companies refused to bid. The cargo eventually arrived in New Zealand.¹³¹

¹²⁴ Id. at section 8-9

¹²⁵ Id. 12 and 13

¹²⁶ Id.

¹²⁷ While the court rejected the “strict interpretive stance” and extreme remedy requested by the NGO to ban all Israeli-owned quarries from operating and closing existing businesses, it should be noted that the Israeli government did enact new policies substantially reducing the level of harm to local residents.

¹²⁸ <https://www.wsrw.org/a249x4098>

¹²⁹ <https://af.reuters.com/article/westernSaharaNews/idAFL8N1SF7CE>

¹³⁰ <http://www.saflii.org/za/cases/ZAECPEHC/2017/31.html>

¹³¹ <https://www.ocpgroup.ma/en/south-africa-nm-cherry-blossom-ocp-group-recovers-its-phosphate-cargo>

At the same time the South African proceedings were pending, the Polisario filed a claim in a Panamanian court to detain a Danish charter vessel carrying a similar quantity of OCP-mined phosphate through Panama to Vancouver for the Canadian company Agrium.¹³²

In contrast to the South African case, however, the Panamanian courts rejected the Polisario's claims regarding ownership outright and dismissed the suit. According to OCP, "The court ruled that a domestic court is not the appropriate venue to consider purely political matters. It also ruled there is indeed no evidence demonstrating that the cargo on board belongs to the plaintiffs."¹³³

Conclusion

In order to be effective, the Working Group must issue conflict recommendations that not only prioritize human rights concerns, but that are **practical, relevant, and realistic** for the business community. These recommendations should align with existing business and human rights standards and practices. They should not advance the narrow political agendas of the activist sector promoting boycotts and divestment. Importantly, the recommendations must guard against discrimination, and adhere to the principles enumerated in Resolution 5/1 including cooperation, universality, and non-selectivity.

The research contained in this submission provides a summary as to how various international standards, industry guidelines, and judicial and quasi-judicial frameworks evaluate the issues related to business activity in situations of armed conflict and how they are in keeping with the above goals.

The following standards for corporate due diligence in situations in armed conflict emerge as a result of this review:

- There is a need to conduct on-going due diligence in situations of armed conflict.
- There is a need to consult a variety of stakeholders.
- Increased IHL education is necessary.
- IHL instruments must be incorporated into the due diligence process and companies must screen for potential IHL violations.
- While companies should use IHL screening, this process is not only to be used "one way" to simply to identify violations. IHL and human rights law are also to be used as a source to determine appropriate activity. (e.g. in situations of occupation, the rules of IHL lay out the obligations of the occupying power; such obligations will necessitate specific business activity).
- The due diligence process often requires the balancing of various rights and interests. Potential violations must be weighed against other human rights considerations. (e.g. freedom of movement vs. right to employment; right to life vs. violation of privacy, etc...). Given that there is an infinite potential for human rights impacts of any business activity, it might not be possible to eliminate those impacts in all cases.

¹³² <https://www.reuters.com/article/us-westernsahara-morocco-idUSKCN18E2YA>

¹³³ <https://www.reuters.com/article/us-westernsahara-morocco-panama-idUSKBN18Z2SC>

- Business activity can bring significant benefits to regions facing armed conflict.
- Terror financing or other support to non-state armed groups is an area of on-going and heightened concern.
- Engagement with governments is important and should be encouraged.
- Withdrawal from and termination of activity is not favored and should only be exercised as a last resort.

With these standards in mind, the Working Group's conflict recommendations should center on constructive and non-punitive mitigation strategies, improving pluralistic stakeholder engagement, and developing "win-win" initiatives that serve businesses, employees, and the wider community.

It is hoped that the research presented in this submission will aid the Working Group in issuing recommendations that will achieve these goals.

Respectfully submitted,

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