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## **Conflict, Cash, and Controversy: Protecting Environmental Rights in Post-Conflict Settings**

Easterday, J.S.; Ivanhoe, H.; Stahn, C.; Iverson, J.M.

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## Conflict, Cash, and Controversy

### Protecting Environmental Rights in Post-Conflict Settings

*Jennifer S. Easterday and Hana Ivanhoe\**

#### 12.1 Introduction: Sustainable Development, Environmental Protection, and *Jus Post Bellum*

It is widely accepted that armed conflict can lead to a number of alarming environmental problems.<sup>1</sup> There is also a growing consensus that environmental degradation and mismanagement can lead to, or exacerbate, armed conflict.<sup>2</sup> This is especially true where a country relies on the extractive industry for a significant portion of its revenue, and where large parts of the population depend on land and renewable resources for their livelihoods.<sup>3</sup>

The focus of this chapter is on the risks that environmental degradation and mismanagement pose in the post-conflict phase, during the transition from conflict to peace. During this phase, a failure to adequately respond to environmental challenges can lead to a renewal of armed conflict and generally undercut important peacebuilding processes such as reconciliation, establishing strong political institutions, economic development, and creating trust in the government.<sup>4</sup> Severe environmental degradation also poses a threat to people's enjoyment of their basic human rights (e.g. right to life, water, and self-determination, among others). The deprivation of these human rights can then in turn serve as a destabilizing force to any new government, particularly those of post-conflict countries.

In addition to mitigating a risk of return to conflict, natural resource and environmental management can provide building blocks and opportunities for fostering

\* Jennifer S. Easterday is Co-founder and CEO of JustPeace Labs, a peacebuilding and technology NGO, and is a PhD Researcher in Law at Leiden University, Netherlands. Hana Ivanhoe is a Lecturer at UC Berkeley School of Law.

<sup>1</sup> See, for example, UNEP, *Sierra Leone: Environment, Conflict and Peacebuilding Assessment of Sierra Leone* (February 2010), 2 (finding that the conflict there had significantly damaged natural resources such as water and agricultural land).

<sup>2</sup> See, for example, UN Department of Economic and Social Affairs, Division for Sustainable Development (UNDESA SD), *Developing National Sustainable Development Strategies in Post-Conflict Countries* (June 2011), 20 (arguing that 'Violent conflict can be detrimental to the environment, which can, in turn, exacerbate poverty and have ripple effects on the livelihoods of local populations.').

<sup>3</sup> David Jensen and Steve Lonergan, 'Natural Resources and Post-Conflict Assessment, Remediation, Restoration, and Reconstruction: Lessons and Emerging Issues' in David Jensen and Steve Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (London: Earthscan, 2012), 416.

<sup>4</sup> Ken Conca and Jennifer Wallace, 'Environment and Peacebuilding in War-Torn Societies: Lessons from the UN Environment Programme's Experience with Post-Conflict Assessment' in Jensen and Lonergan (n 3) 63.

sustainable peace.<sup>5</sup> Natural resources provide opportunities to develop sustainable livelihoods and are critical for the return and integration of refugees and displaced persons. Moreover, high-value natural resources, such as mineral deposits, are used to generate quick income and restart the economy, providing a critical revenue stream for the government.<sup>6</sup> In many post-conflict situations, there is a severe lack of government institutions that can deal with environmental protection or natural resources management.<sup>7</sup> The institutions are often non-existent or significantly decimated. The strengthening or establishment of legitimate institutions involves capacity building, bureaucratic reform, and reforming legislative and policy frameworks.<sup>8</sup>

According to UNEP:

Managed well, natural resources can support economic development, create employment and revenues for the government thus supporting peacebuilding and sustainable development. Environmental management can be, for example, perceived as a low profile sector and create opportunities to foster multi-level and multi-group engagement, cooperation and reconciliation.<sup>9</sup>

The pursuit of sustainable development is key to ensuring a peaceful and prosperous transition from conflict. According to the World Commission on Environment and Development (the Brundtland Commission), sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'<sup>10</sup> It aims to achieve a balance between three pillars that are critical in peacebuilding contexts: the need for economic recovery, sources of livelihoods, and long-term environmental and social protections.

Sustainable development is a legal concept that has not achieved the status of binding hard law, but has been reflected in many sources of hard law. These sources include many treaties and conventions (such as the EU treaty, the Climate Change Convention, and the Biodiversity Convention) as well as the jurisprudence of international courts and tribunals. Sustainable development is also frequently invoked in soft law sources, including the Rio Declaration and policy papers of international organizations, such as the International Law Commission's 'Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts.'<sup>11</sup> Moreover, it is increasingly found in national constitutions and legislation.<sup>12</sup> Therefore, while it is still too vague and uncertain to be recognized as customary international law, it should be accepted as a

<sup>5</sup> UNDESA SD (n 2) 13 (Arguing that 'Integrating environment and peacebuilding into national strategies and planning processes fosters the creation of synergies and more effective policies to help prevent relapses into conflict. Especially in countries in which natural resources play a major role in conflict, sustainable development can help overcome legacies of conflict. In other post-conflict countries, sustainable development folds in key elements of building a stable state and helps to identify policies, actions, and strategies that combine economic, social, and environmental goals and at the same time build peace').

<sup>6</sup> UNEP, *Integrating Environment in Post-Conflict Needs Assessments* (UNEP, 2009), 14.

<sup>7</sup> Conca and Wallace (n 4) 70–1. <sup>8</sup> UNEP (n 6) 14.

<sup>9</sup> UNDESA SD (n 2) 35. Internal citations removed.

<sup>10</sup> World Commission on Environment and Development, *Our Common Future* (United Nations, 1987) 41, at <<http://www.un-documents.net/our-common-future.pdf>> accessed 7 May 2015.

<sup>11</sup> Marie G. Jacobsson, Special Rapporteur, UN Doc. A/CN.4/674, 30 May 2014, paras. 125–32.

<sup>12</sup> Christopher Jeffords, 'Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions' (2011) Working Paper 16, University of Connecticut Economic Rights Working

principle that can influence the development of international law and how it is interpreted and applied.

Sustainable development and environmental protection also provide opportunities to establish dialogue and create inclusive development processes. Effective management of natural resources and environmental protection depend on the participation and buy-in from local populations. Those communities that are directly affected by pollution or the degradation of arable land from extractive industries, for example, should be brought into the debate about how to effectively manage and share the benefits from the use of natural resources. This provides an opportunity to enhance dialogue between the general population and the government, build confidence and reconciliation between divided communities, and mitigate other underlying grievances that might have contributed to the conflict.<sup>13</sup>

Economic stabilization and the regeneration of income are often top priorities of post-conflict states. Peacebuilding is expensive, and donors cannot cover all of the costs for very long. Peace processes related to the economy often focus on structural adjustments and neoliberal reforms, and rely on natural resources—especially the extractive industry, where applicable—as a fast and easy revenue source.<sup>14</sup> However, these reforms are not necessarily undertaken sustainably, especially with regards to environmental quality. Environmental concerns are not a top priority, and as a result there may be inadequate environmental planning in aid and development schemes. In fact, it is often, at least in part, the lack of legislative and regulatory environmental protections in post-conflict countries that incentivizes the very rapid investment by multinational corporations ('MNCs'). This, some argue, is a critical flaw.<sup>15</sup>

This chapter argues that sustainable development should be a key element of the *jus post bellum* normative framework. *Jus post bellum* focuses on the laws, norms, and practices applied during the transition from conflict to peace. Its goal is to foster a just and sustainable peace, and the concept can take on several different functions to that end. *Jus post bellum* is comprised of various international norms and also includes principles of interpretation for how to adopt these norms to particular post-conflict contexts and peacebuilding practices.<sup>16</sup> The concept of sustainability links economic development with environmental protection, and requires that economic programmes be undertaken hand in hand with environmental governance in order to protect people's livelihoods and ensure long-term stability.<sup>17</sup>

Specifically, this chapter will examine issues of environmental protection as they relate to resource intensive economic development (e.g. via investment in the extractive

Paper Series 22 (noting that the key words 'future, generation, and sustainable development' occurred in thirty-five different constitutions). See also Canada's Federal Sustainable Development Act (S.C. 2008, c 33).

<sup>13</sup> UNEP (n 6) 14. <sup>14</sup> Conca and Wallace (n 4) 75. <sup>15</sup> *ibid.*

<sup>16</sup> For more on the concept of *jus post bellum*, see Carsten Stahn, 'Mapping the Discipline(s)' in Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (The Hague: TMC Asser, 2008), 93, 105; Inger Österdahl and Esther van Zadel, 'What Will Jus Post Bellum Mean? Of New Wine and Old Bottles' (2009) 14 *Journal of Conflict and Security Law* 175, 178; but see Kristen Boon, 'Obligations of the New Occupier: The Contours of *Jus Post Bellum*' (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 57, 76 (defining *jus post bellum* more narrowly to 'apply to the exercise of governmental and public powers by external entities such as IOs and foreign states').

<sup>17</sup> Conca and Wallace (n 4) 75; UNDESA SD (n 2) 97.

industry) post-conflict. It analyses the use of soft law norms in addressing the nexus between environmental challenges and economic development so as to include private actors, such as multinational investors and corporations, in the peacebuilding project. Section 12.2 discusses the connections between corporate social responsibility and environmental degradation. The following section examines the role of private corporations during the transition from conflict to peace. It outlines several normative frameworks governing extraterritorial corporate behaviour and non-judicial forms of enforcement. Section 12.4 discusses how the UN and international financial organizations can incorporate these voluntary frameworks into their peacebuilding projects and loans to organizations working in post-conflict situations. Section 12.5 discusses challenges and gaps in the existing normative frameworks. The chapter concludes by proposing that peacebuilders incorporate soft law norms and standards, in particular corporate social responsibility frameworks, as a part of a holistic *jus post bellum* to meet the challenges of post-conflict sustainable development and environmental protection.

## 12.2 Corporate Social Responsibility and Environmental Degradation

Given the potential for long-term damage resulting from environmental exploitation and poor natural resource management, it is vital that environmental management standards be part of any large-scale project involving natural resources, particularly those in post-conflict countries. Immediately post-conflict, resource-rich countries often rely on natural resource exploitation to rapidly restart the economy.<sup>18</sup> Effective natural resource management early in the post-conflict transition can help build confidence in the government and the peacebuilding project in general by providing revenues to support peace dividends and create strong, legitimate government institutions. However, it is usually private corporations that undertake large development projects that rely on natural resources. Therefore, it is important for governments to have strong regulations in place to ensure these corporations adhere to sustainable development policies and provide environmental and social safeguards. With weak state institutions, potentially out-of-date legislation, and competing post-conflict priorities, however, this is difficult to guarantee in practice.

There is a need for increased regulation that balances sustainability with development needs. According to UNEP:

The private sector can be a force for development, inject needed capital, and be less constrained than donors and governments. But an under-regulated, low-competition, post-conflict environment can give entrepreneurs significant power which they can misuse. It is important that corporate responsibility takes seriously the legacy of conflict and accompanying social divisions, inequities, and fears. A balance has to be

<sup>18</sup> Oli Brown, Morgan Hauptfleisch, Haddijatou Jallow, and Peter Tarr, 'Environmental Assessment as a Tool for Peacebuilding and Development: Initial Lessons from Capacity Building in Sierra Leone' in Jensen and Lonergan (n 3) 332.

achieved between private sector opportunities to maximize economic growth and ensure that regulation is equitable and sustainable.<sup>19</sup>

This regulation needs to be multipronged, coming from both international and domestic law and incorporating both soft and hard law norms. This chapter will focus on the importance of including soft law norms such as corporate social responsibility, in addition to hard law, in post-conflict normative frameworks such as *jus post bellum*.

Corporate social responsibility ('CSR') generally refers to the overall contribution of businesses to sustainable development through measures that ensure that business is operated as sustainably, equitably, and ethically as possible.<sup>20</sup> Some references to CSR focus on legal obligations or standards such as 'do no harm'. Others call for a more proactive role, asking businesses to positively contribute to sustainable development or to align their business goals with societal goals.<sup>21</sup> According to many definitions, CSR requires that companies do more than what is legally required of them by the laws of the countries in which they operate.<sup>22</sup>

CSR has a great deal to contribute to the *jus post bellum* framework. In particular, it captures the responsibilities of non-state actors (beyond armed groups) in the peace-building phase in these countries in a way that other *jus post bellum* principles and standards are unable to. As discussed above, MNCs are important players in the post-conflict context, and to be fully holistic, *jus post bellum* cannot be limited to states, armed groups, and international organizations.

CSR initiatives are usually driven by investors, companies, interest groups (including NGOs), and consumers in developed countries. CSR is often transferred to developing countries through trade, investment, or development assistance.<sup>23</sup> For example, in international trade, there are rising international environmental standards that must be met for export to OECD markets, such as the EU. In other cases, companies might require specific environmental certifications for their suppliers.<sup>24</sup> With direct investment, some countries (such as Nigeria) might have legislation requiring foreign companies to hire local workers or rely on local services. In addition, some companies initiate partnerships or capacity-building projects aiming to transfer knowledge and expertise to smaller, local companies.<sup>25</sup>

Many companies have shown great initiative in the area of CSR, but relying solely on private corporations to adopt sustainable procedures would likely be insufficient in the post-conflict context. There have been myriad efforts to promote CSR and develop

<sup>19</sup> UNDESA SD (n 2) 77.

<sup>20</sup> This is notably distinct from corporate philanthropy, which encompasses contributions in cash or kind by corporations to local charitable causes in the communities in which they operate. For a more comprehensive definition of CSR and description of the economic factors at play in its development, see John F. Kennedy School of Government, *Corporate Social Responsibility Initiative: Defining Social Responsibility*, at <[http://www.hks.harvard.edu/m-rcbg/CSRI/init\\_define.html](http://www.hks.harvard.edu/m-rcbg/CSRI/init_define.html)> accessed 21 November 2014.

<sup>21</sup> Halina Ward, Tom Fox, Emma Wilson, and Lyuba Zarsky, 'CSR and Developing Countries: What Scope for Government Action?' (February 2007) UN Sustainable Development Innovation Brief 1.

<sup>22</sup> See, for example, Abigail McWilliams, Donald S. Siegel, and Patrick M. Wright, 'Corporate Social Responsibility: International Perspectives' (March 2006), Working Papers in Economics, Rensselaer Polytechnic Institute, at <<http://www.economics.rpi.edu/workingpapers/rpi0604.pdf>> accessed 20 June 2017.

<sup>23</sup> Ward *et al.* (n 21) 1.

<sup>24</sup> *ibid.* 4.

<sup>25</sup> *ibid.* 3.

productive relationships with private corporations operating in post-conflict societies.<sup>26</sup> Other ways to engage with CSR include by incorporating CSR requirements into overarching policy frameworks related to trade, investment, the use of natural resources, and environmental protection. As this chapter will attempt to show, these roles and tools are important not just for the post-conflict government itself but also for international organizations, aid agencies, and donors. To be sure, there are significant implementation challenges, competing priorities, and risks to this approach. However, these are critical connections to foster under a truly holistic conception of *jus post bellum*.

### 12.3 Ensuring Corporate Social Responsibility and Respect for Human and Environmental Rights in Post-Conflict Countries

This chapter will now turn to an examination of the role of the private sector (primarily MNCs) in post-conflict countries in the peacebuilding and development stage. As the trend towards globalization continues, MNCs consider constant expansion into new and emerging markets as an increasingly necessary component of any successful business model. It is also seen as a necessary tool for development.<sup>27</sup> As discussed above, bringing MNCs into the post-conflict development plan has the potential to serve as a positive force for both investors and investees, provided any such investment is made responsibly. Those who deny the role of private sector investment in the development of post-conflict countries notably tend to fail to propose viable alternatives for providing the necessary capital for such investment and development.<sup>28</sup>

Unfortunately, private sector companies can also, through their actions, degrade the environments of the fragile post-conflict countries in which they operate in a manner that itself contributes to a resurgence of conflict. And while domestic and international stakeholders clamour for increased commercialization and heightened private-sector foreign direct investment (FDI) to support this commercialization, competing voices point to sometimes violent forced evictions, allegations of indigenous land rights violations, and environmental degradation resulting from the effects of mining, oil and gas extraction, and agro-industrialization.<sup>29</sup> Private FDI in post-conflict countries is now

<sup>26</sup> See, for example, Juliette Bennett, 'Multinational Corporations, Social Responsibility and Conflict' (2002) 55 *Journal of International Affairs* 393.

<sup>27</sup> For example, many academics and government officials within Africa are calling loudly for such private sector investment. At a 2013 meeting of the Economic and Monetary Community of Central Africa, the vice president of the Pan African parliament, honorable Roger Nkodo Dang of Cameroon, argued for foreign investment in the 'industrialization of agriculture' in Africa. Ruth Hall, 'Stop Selling off African land—Invest in Farmers Instead', *The Guardian* (23 January 2014), at <<http://www.theguardian.com/global-development-professionals-network/2014/jan/23/land-deals-africa-farming-investment>> accessed 20 June 2017.

<sup>28</sup> See, for example, Klaus Deininger and Derek Byerlee with Jonathan Lindsay, Andrew Norton, Harris Selod, and Mercedes Stickler, 'Rising Global Interest in Farmland—Can it Yield Sustainable and Equitable Benefits?' (Agriculture and Rural Development, The World Bank, 2011).

<sup>29</sup> For a more thorough analysis of this debate, see Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard, and James Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Land*

occurring at an increasing rate and as a result it is necessary to examine the environmental effects of that investment.

Post-conflict countries also tend to lack a well established rule of law and are often grappling with a somewhat tenuous government infrastructure—the legitimacy of which could even be in question at the time new FDI is initiated. Domestic legislation may be out of date or may not include CSR or relevant environmental regulations. This makes it necessary to look for other sources of regulation to help mitigate the risks of a return to conflict from MNC-caused environmental degradation, including international CSR soft law norms.

### 12.3.1 Normative frameworks governing adverse impacts of extraterritorial corporate behaviour

As discussed, post-conflict countries often lack an established rule of law and therefore fail to legislatively protect against corporate malfeasance or sufficiently enforce such legislation. This is due to a combination of factors, including but not limited to insufficient financial resources and endemic corruption.

It is the prevailing view that existing international legal standards and frameworks governing the protection of environmental and human rights, as well as the courts and tribunals that might ensure the enforcement of those rights, are fairly ineffectual at providing legal remedies in these areas because they impose legal obligations exclusively on states, not corporations.<sup>30</sup> These treaties and international courts and tribunals are generally not considered to bind corporations because corporations are not state actors.<sup>31</sup>

The last decade, however, has marked the emergence of a number of voluntary normative frameworks seeking to govern the behaviour of private sector actors in foreign jurisdictions. These normative frameworks share many of the same central tenants which are primarily derived from the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (the 'Ruggie Framework' or the 'Framework'), the first of the standards to be discussed below:

- Corporate duty to respect human rights extra-territorially
- Human rights due diligence
- Non-judicial grievance mechanisms

*Deals in Africa* (FAO, IIED and IFAD, 2009), 100–02, at <<http://www.fao.org/3/a-ak241e.pdf>> accessed 20 June 2017.

<sup>30</sup> David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 937.

<sup>31</sup> Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 *Northwestern Journal of International Human Rights* 222. It should be noted that instances in which corporations are complicit in violations of international criminal law as well as certain other occurrences may constitute exceptions to this general rule. The limited scope of this chapter does not allow for a thorough examination of whether corporations may be held liable for violations of international human rights laws in US courts under the Alien Tort Statute or for aiding and abetting human rights violations that amount to a violation of international criminal law. These discussions are beyond the scope of this piece. For a thorough evaluation of these questions, see,

Given their voluntary nature, all such frameworks proposed to date lack judicial enforcement mechanisms and (in many instances) any form of grievance body. As a result, they tend to serve primarily as suggested standards and perhaps lend themselves to efforts at the establishment of agreed upon principles, but do not fulfil the more traditional role of enforceable law. Moreover, none of these standards specifically address the matter of corporate intervention in *jus post bellum* contexts. As will be discussed at length later in this chapter, this represents a significant governance gap in the applicability and coverage of these standards.

The normative frameworks that are most effective and relevant to environmental degradation are discussed below.

### A. *UN Guiding Principles on Business and Human Rights Framework*

In the spring of 2008, John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (the ‘SRSG’) proposed a new approach to understanding and enforcing a corporation’s duty to respect human rights throughout its global supply chains. Three years later, the UN Human Rights Council endorsed the SRSG’s three-pronged Framework.<sup>32</sup>

The Framework is premised on three basic tenets: protect, respect, and remedy.<sup>33</sup> Specifically, states have a duty to protect human rights, corporations have a responsibility to respect human rights, and victims of human rights violations have a right to access remedies.<sup>34</sup>

The linchpin of the Framework, the corporate responsibility to respect human rights, originates from a solid and meaningful foundation.<sup>35</sup> It does not create new human rights obligations, but instead articulates existing duties within a cohesive template:

The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent

for example, Doug Cassel, ‘Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts’ (2008) 6 *Northwestern Journal of International Human Rights* 304.

<sup>32</sup> See UN Human Rights Council, Report of the SRSG: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework. A/HRC/17/31, 21 March 2011.

<sup>33</sup> UN Office Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: 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. A/HRC/8/5, 7 April 2008.

<sup>34</sup> *ibid.*

<sup>35</sup> See, for example, David Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 7 *Sur International Journal on Human Rights* 199; Robert C. Blitt, ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance’ (2013) 48 *Texas International Law Journal* 34, 52–6; UN Office Human Rights Council, Promotion of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: a Framework for Business and Human

and comprehensive template; and identifying where the current regime falls short and how it could be improved.<sup>36</sup>

The duty borne by all businesses to respect human rights means that they must (i) avoid infringing on human rights, and (ii) address adverse human rights impacts in which they are involved in any way.<sup>37</sup> These duties to respect and address human rights apply not only to the direct acts of the parent company, but also to the acts and actions of all of its subsidiaries, suppliers, and employees. This is the case even where the company has not directly contributed to the adverse impacts, thereby effectively requiring that a company take proactive and preventative responsibility for affirmatively respecting human rights throughout its supply chain.<sup>38</sup>

Although the corporate respect requirement codified in the Framework is often viewed as a ‘do no harm’ standard, it also gives rise to a number of active duties. Among these, the due diligence requirement by which companies must ‘manage human rights harm with a view to avoiding it’ is perhaps most noteworthy.<sup>39</sup> The due diligence duty requires that companies take tangible and measurable steps to ‘become aware of, address and prevent human rights impacts.’<sup>40</sup> It may also be deemed to mandate the adoption of grievance mechanisms by which affected parties can lodge complaints and seek redress for rights infringements.<sup>41</sup>

While there are still significant governance gaps in the protection of human rights *vis-à-vis* MNC behaviour, under the Framework corporations are complying with human rights standards in a way that they were not doing before the introduction of the Framework’s guidelines.<sup>42</sup> The Framework has also influenced the drafting of several similar normative guidelines, which are discussed below.

### *B. Guidelines on the Responsible Governance of Tenure*

In 2012, the United Nations Food and Agriculture Organization endorsed the Voluntary Guidelines on the Responsible Governance of Tenure (the ‘Tenure Guidelines’).<sup>43</sup> Similar to the Ruggie Framework, the Tenure Guidelines are not hard law and are entirely voluntary. Additionally, the Tenure Guidelines refer exclusively to matters of land tenure and therefore are limited in their application to protecting human and

Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/11/13, 22 April 2009, para. 46.

<sup>36</sup> John Ruggie, ‘Presentation of Report to United Nations Human Rights Council, Geneva’ 30 May 2011, at <http://business-humanrights.org/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf> accessed 7 March 2014.

<sup>37</sup> *ibid.* para. 11. <sup>38</sup> *ibid.* para. 13.

<sup>39</sup> UN Office Human Rights Council (n 35) para. 59; UN Office Human Rights Council (n 33) para. 25.

<sup>40</sup> UN Office Human Rights Council (n 35) para. 56.

<sup>41</sup> UN Office Human Rights Council (n 35) para. 59.

<sup>42</sup> For a more in depth discussion of the argument that voluntary private sector regulations of corporate conduct are not a sufficient substitute for state-based regulatory enforcement, see David Vogel, ‘The Private Regulation of Global Corporate Conduct: Achievement and Limitations’ (2010) 49 *Business & Society* 68.

<sup>43</sup> Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012).

environmental rights to instances in which such rights are threatened as a result of land misuse or management.

They are, however, significant in that they address ‘non-state actors’ generally and MNCs specifically.<sup>44</sup> While referencing ‘non-state’ actors eleven times, the Tenure Guidelines primarily focus on what states can and should do to ensure adherence to proper tenure practices in land acquisitions. ‘Business enterprises’ are explicitly addressed only once:

3.2 Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved.

As one author has observed, there is a tension inherent in the Tenure Guidelines’ provisions constraining corporate actors: the Guidelines have been drafted so as to both maximize foreign investment in developing countries as well as ensure the protection and valid use of the land and resources and safeguard against environmental damage.<sup>45</sup>

The provisions prescribed in the Tenure Guidelines and the application of the corporate duty to respect strongly echo the Ruggie Framework. The references to due diligence, risk management systems, and (non-judicial) grievance mechanisms are particularly noteworthy in this regard. In fact, in many ways the Tenure Guidelines excerpt and apply more specifically to matters of land use the corporate responsibilities already outlined in the Ruggie Framework.

### *C. Principles for Responsible Agricultural Investment in the Context of Food Security and Nutrition*

Much like the Tenure Guidelines, the Principles for Responsible Agricultural Investment in the Context of Food Security and Nutrition<sup>46</sup> (the ‘Principles for Responsible Ag’) include provisions prescribing the behaviour of business enterprises that clearly draw upon the concepts and principles of the Ruggie Framework. Again, like with the Tenure Guidelines, and as indicated by the highly specified name, the Principles for Responsible Ag are limited in scope to agricultural companies and sustainability. They too seem to take the language of business’ responsibility to respect introduced in the

<sup>44</sup> *ibid.*

<sup>45</sup> Jared Wigginton, ‘Large Scale Land Investment in Africa: an Issue of Self-Help and Self-Determination’ (2013) 20 UC Davis Journal of International Law and Policy 105.

<sup>46</sup> Committee on World Food Security, FAO, Principles for Responsible Agricultural Investment (RAI) in the context of food security and nutrition Zero Draft (2013).

Ruggie Framework and apply it in a more specified context. They also build on and supplement the Tenure Guidelines.<sup>47</sup>

The Principles for Responsible Ag outline the explicit role and responsibilities of business enterprises (as compared to other stakeholders) with respect to foreign agricultural investment advising that businesses ‘apply the Principles with a focus on mitigating and managing risks to maximize positive and avoid negative impacts on food security and nutrition’ which are threatened in the long-term by the propagation of unsustainable farming practices.<sup>48</sup>

The language, however, is not particularly strong. It requires MNCs to comply with the domestic laws of the countries in which they are doing business, which is of course already required as a matter of basic compliance and is additionally legally enforceable, and ‘any applicable international law’. It is entirely unclear what this would refer to since the question of whether and which international law(s) apply to business enterprises is highly debated and largely undecided.

Like the Tenure Guidelines, the Principles also restate companies’ responsibility to act with due diligence to avoid human rights violations first posited in the Ruggie Framework.<sup>49</sup> The Principles also ‘encourage’ companies to transact their operations equitably and transparently and ‘support efforts to track the supply chain.’<sup>50</sup>

Very little has been written to date regarding the effect or effectiveness of the Principles for Responsible Ag. This is primarily because the Principles were only very recently (15 October 2014) finalized and approved by the Committee on World Food Security of the FAO (CFS), demonstrative of the evolving nature of the field of business and human rights.<sup>51</sup>

#### D. OECD Guidelines

The Organisation for Economic Cooperation and Development’s Guidelines for Multinational Enterprises (the ‘OECD Guidelines’) again adopts much of the same language as the Ruggie Framework. In particular, the OECD Guidelines encourage MNCs to respect human rights throughout their supply chains regardless of the laws of the jurisdictions in which they operate, conduct risk-based due diligence, and prevent or mitigate an adverse impact where that impact is ‘directly linked to their operations, products or services by a business relationship’ even when they have not caused that impact.<sup>52</sup>

With respect to environmental responsibility, the OECD Guidelines state that MNCs should contribute to economic progress ‘with a view to achieving sustainable development.’<sup>53</sup> Even more rigorously, the OECD Guidelines encourage companies to establish

<sup>47</sup> Food and Agriculture Organization of the United Nations, Principles for responsible agriculture and food investments are approved (2014), at <<http://www.fao.org/news/story/en/item/260518/icode/>> accessed 20 June 2017.

<sup>48</sup> Committee on World Food Security, FAO, Principles (n 46) para. 50. <sup>49</sup> *ibid.*

<sup>50</sup> *ibid.* para. 51.

<sup>51</sup> Smita Narula, ‘The Global Land Rush: Markets, Rights and the Politics of Food’ (2013) 49 *Stanford Journal of International Law* 101.

<sup>52</sup> OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2013). <sup>53</sup> *ibid.*

and maintain systems of environmental management and formulate plans for the prevention, mitigation, and control of serious environmental damage resulting from their operations with the goal of avoiding adverse environmental impacts where possible.<sup>54</sup> The OECD Guidelines also encourage environmental impact assessments.<sup>55</sup>

The OECD Guidelines, as compared to the other normative frameworks discussed in this section, are particularly noteworthy for the manner in which they seek to establish an independent monitoring and implementation mechanism in the form of the OECD National Contact Points ('NCPs'). The NCPs provide a 'mediation and conciliation platform' for resolving disputes under the Guidelines as they arise.<sup>56</sup> Upon hearing complaints from interested parties, the NCP seeks advice from informed stakeholders and mediates the dispute. The NCP then produces a report with the terms of the agreement if the parties agree or with recommendations for resolution of the dispute if the parties do not agree.<sup>57</sup> Unfortunately, there is no mechanism for legal enforcement of the agreement or the NCP's recommendations, so it is up to the parties to voluntarily determine whether they will constrain themselves by the terms of the agreement or recommendations. The NCPs, however, still present a more robust mechanism for hearing human and environmental rights grievances than exists under any of the other frameworks to date.

There is, however, a good deal of uncertainty as to the NCPs' accountability and transparency. The NCPs are housed in the respective nations' party to the OECD Guidelines, but as international legal bodies, they are not governed by those nations' governments. In addition, the NCPs do not provide universal or comprehensive coverage; only parties to the OECD Guidelines have NCPs and many if not most of the developing countries effected by environmental degradation resulting from MNC investment are not parties to the OECD Guidelines. By way of example, only two African nations have NCPs: Egypt and Morocco.<sup>58</sup>

### 12.3.2 Non-judicial enforcement of these frameworks

Precisely because the various normative frameworks discussed above lack sufficient enforcement mechanisms, the CSR movement has emerged as a viable, if not ideal, alternative to traditional legal or judicial enforcement. CSR plays an important role here not only for the potential that it offers to improve the level of environmental sustainability of MNCs' operations in foreign jurisdictions, but because, for better or worse, it's all there is.

As discussed above, companies have many reasons (including profit motivation) for acting in a responsible manner.<sup>59</sup> In the absence of an enforceable, hard-law framework for preventing and, where necessary, adjudicating instances of corporate aggression or complicity in the perpetration of environmental degradation and related human rights abuses, therefore, CSR may be viewed as a potential tool or mechanism for non-judicial enforcement of the voluntary normative frameworks for protecting human and environmental rights in investee countries outlined above.

<sup>54</sup> *ibid.*      <sup>55</sup> *ibid.* Chapter VI, para. 3.      <sup>56</sup> *ibid.* Chapter I, para. 1.

<sup>57</sup> Wigginton (n 45).      <sup>58</sup> *ibid.*

<sup>59</sup> See, for example, Archie B. Carroll and Kareem M. Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) *International Journal of Management Reviews* 85.

In the four years since its endorsement, the Ruggie Framework has become widely known and subscribed to, in large part as a result of voluntary compliance by some of the world's largest and most powerful companies.<sup>60</sup> Companies are increasingly creating human rights policies that heavily draw on the recommendations in the Framework.<sup>61</sup>

Indeed, many feel that the UN consensus around the Framework, combined with the tacit agreement by certain (if not the majority of) major multinational firms to comply with and operationalize its principles, is giving rise to the emergence of recognized 'global standards on business and human rights' whereby companies have an affirmative duty to respect human rights through appropriate due diligence measures that include some sort of grievance mechanism.<sup>62</sup>

The same trend has been observed, albeit to a lesser degree, specifically in the realm of environmental impact. In 2014, the *New York Times* highlighted the 'greening' of major US companies' manufacturing facilities in Vietnam and throughout Asia.<sup>63</sup> Foreign corporations operating in the region have begun voluntarily adopting more stringent standards than required by domestic law for a range of environmental indicators, including water consumption, wastewater management, energy efficiency, and carbon dioxide emissions offsets.<sup>64</sup> The companies credit economic efficiencies, risk mitigation, and public relations considerations (i.e. consumer image) for the changing trend.<sup>65</sup> The article demonstrates the increased recognition and awareness of the Framework's duty to respect human rights (including the due diligence and grievance mechanism requirements) as applied to environmental matters and the different ways in which the duty has been operationalized at the corporate level.

As mentioned above, none of the existing voluntary frameworks governing corporate malfeasance in extraterritorial environmental degradation address instances of such degradation in specifically post-conflict contexts. Similarly, NGOs and activists monitoring and effectively regulating this space have to date failed to sufficiently draw attention to the special circumstances of corporate investment in post-conflict contexts. This topic will be further taken up in the next section.

### 12.3.3 Corporate social responsibility and normative frameworks governing corporate behaviour in recently post-conflict settings

Given that the focus of this chapter is primarily on duties when actors are intervening in post-conflict countries, it is important to examine the application of these normative frameworks

<sup>60</sup> For one prominent illustrative example of voluntary corporate compliance by a large multinational company, see the Coca-Cola example. Coca-Cola Company, Human and Workplace Rights, at <<http://www.coca-colacompany.com/our-company/human-workplace-rights>> accessed 7 March 2014.

<sup>61</sup> Ilse Griek, 'UN Forum on Human Rights: Assessing the Ruggie Framework' (February 2013) *Sustainalytics Reporter*, Issue No. 13.

<sup>62</sup> See, for example, Chris Jochnick and Nina Rabaeus, 'Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon' (2010) 33 *Suffolk University Law Review* 413.

<sup>63</sup> Mike Ives, 'Slowly, Asia's Factories Begin to Turn Green' (*New York Times*, 7 January 2014), at <http://www.nytimes.com/2014/01/08/business/international/asian-factories-see-sense-and-savings-in-environmental-certification.html> accessed 20 June 2017.

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*

to instances of environmental rights violations in recently post-conflict settings. As one author aptly surmised, ‘while governments have the primary concern in preventing violent conflict, businesses and financial institutions have an important role to play in avoiding or resolving conflicts that are associated with economic production.’<sup>66</sup> Unfortunately, as noted throughout the previous section, very few of the existing frameworks for business and human and environmental rights provide for conflict-specific measures.

The Ruggie Framework acknowledges the uniquely high-stakes circumstances presented by conflict and post-conflict settings for the protection of human rights, but considers the effects of conflict only in the context of state, not corporate duties.<sup>67</sup> The Framework states in pertinent part ‘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.’<sup>68</sup> Although this protection references the role of business in high-risk conflict-affected areas, it fails to establish a corporate duty to protect against such abuses in line with the other more explicit corporate duties outlined in the Framework, given that the language is directed exclusively towards state actors. In addition, the due diligence requirement could also come into play in operationalizing the respect duty in conflict settings. As explored above, companies should complete basic due diligence (e.g. complete environmental risk assessments) before they enter new markets to ensure that their investment and operations there will not adversely affect the environment. However, although not specified in the Framework, these assessments should explicitly address risks specific to the transition from conflict to peace.

At least in part because the framework fails to comprehensively address the issue of the corporate duty to respect in post-conflict settings, voluntary standards designed to address these issues have begun cropping up. These voluntary standards, however, more closely resemble public-private sector (or just private sector) multi-stakeholder initiatives than normative frameworks. Multi-stakeholder initiatives (‘MSIs’) can be any sort of collaborative initiative that brings together (often disparate) interests with a shared objective. Such initiatives may draft sets of standards/provisions that guide the actions of their members (i.e. a corporate code of conduct), but they are just as likely to be loose affiliations of stakeholders that meet on a regular basis to debate and deliberate about a chosen subject. The most successful MSIs generally include members of both the for- and not-for-profit communities. MSIs in the area of responsible supply chains and business operations abroad may or may not give rise to independent third-party certification schemes that serve as assurance mechanisms. But many do not, in which case their utility for constraining corporate malfeasance is highly questionable.<sup>69</sup> Two relevant MSIs are discussed below.

<sup>66</sup> Juliette Bennett, ‘Multinational Corporations, Social Responsibility and Conflict’ (2002) 55(2) *Journal of International Affairs* Columbia University 393–414.

<sup>67</sup> John Ruggie, ‘United Nations Guiding Principles on Business and Human Rights,’ 21 March 2011, para. 11, at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> accessed June 2017.

<sup>68</sup> *ibid.*

<sup>69</sup> See generally Justine Nolan, ‘With Power Comes Responsibility: Human Rights and Corporate Accountability’ (2010) University of New South Wales Faculty of Law Research Series 2010, Working Paper

### A. *The Equator Principles*

Drafted by a group of commercial banks engaged in project finance, the Equator Principles is a framework for 'determining, assessing and managing environmental and social risk in projects' with the objective of setting a minimum baseline for due diligence and responsible decision-making.<sup>70</sup>

The Equator Principles contain a number of sustainable development standards. For example, they require development project sponsors for high-risk (e.g. conflict-affected) projects to conduct and publically disclose, in a culturally appropriate manner, an environmental and social impact assessment ('ESIA'); demonstrate effective stakeholder engagement; establish a grievance mechanism for complaints by affected communities; and openly and transparently submit public reports on the ESIA and Equator Principle financial transactions.<sup>71</sup> These voluntary standards are applicable to projects in any sector and have gained significant traction since their creation.<sup>72</sup> Although the standards are voluntary, some commercial banks have made compliance a condition of project loans.<sup>73</sup>

The standards can ensure that predictable risks associated with natural resource use, including environmental damage and social harm, are identified and mitigated. Adopting and adhering to these types of soft law standards could help to improve the companies' reputations and bottom lines or trigger a cultural change within them.<sup>74</sup> Due to their voluntary nature, however, the extent to which they are able to promote meaningful environmental and social change is fully dependent on the discretion of the banks and is therefore suspect.

### B. *The Voluntary Principles on Security and Human Rights*

The Voluntary Principles on Security and Human Rights (the 'Voluntary Principles') are a voluntary set of standards and guidelines for extractives industry companies

11, 589–90. Some supplier codes of conduct are legally enforceable against the supplier parties (i.e. where those codes are incorporated into the contracts between company and supplier). See also, Muhammad Azizul Islam and Ken McPhail, 'Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards within the Global Garment Manufacturing and Retail Industry' (2011) 22 *Critical Perspectives on Accounting* 790, 806.

<sup>70</sup> Equator Principles Website, at <<http://www.equator-principles.com>> accessed 1 May 2015.

<sup>71</sup> The Equator Principles, June 2013, at <[http://www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf)> accessed 31 August 2014.

<sup>72</sup> For example, as of 2014 there were eighty Equator Principles Financial Institutions in thirty-four countries, covering an estimated 70 per cent of project finance debt in emerging markets. Equator Principles website, at <<http://www.equator-principles.com/index.php/about-ep/about-ep>> accessed 31 August 2014. See also Christopher Wright, 'Global Banks, the Environment, and Human Rights: The Impact of the Equator Principles on Lending Policies and Practices' (2012) 12 *Global Environmental Politics* 56, 62; Bank Track, 'Close the Gap: Benchmarking Credit Policies of International Banks (June 2010).

<sup>73</sup> Jill Shankleman, 'Mitigating Risks and Realizing Opportunities: Environmental and Social Standards for Foreign Direct Investment in High-Value Natural Resources' in Päivi Lujala and Siri Aas Rustad, *High-Value Natural Resources and Peacebuilding* (Abingdon, UK: Earthscan, 2012), 49, 50.

<sup>74</sup> Cynthia A. Williams, 'Regulating the Impacts of International Project Financing: the Equator Principles' (2013) 107 *American Society of International Law Proceedings* 303, 306.

created by an industry MSI. Among other things, the Voluntary Principles require rigorous and comprehensive risk assessments for potential security risks, human rights violations, and violence.<sup>75</sup>

The Voluntary Principles are particularly noteworthy in that they refer explicitly to conflict scenarios and related security issues. However, the emphasis of the Voluntary Principles is on corporate use and employment of security forces to protect their investments and staff safety; human rights protections related to their operations are addressed only secondarily in the Voluntary Principles. For example, the Voluntary Principles provide that companies should support government transparency regarding their security forces and ‘communicate their policies regarding ethical conduct and human rights to public security providers.’<sup>76</sup>

Perhaps most relevantly, the Voluntary Principles encourage companies to promote the following principles:

- (a) individuals credibly implicated in human rights abuses should not provide security services for Companies; (b) force should be used only when strictly necessary and to an extent proportional to the threat; and (c) 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 as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>77</sup>

The Voluntary Principles are certainly notable in that they address the interaction between corporate investment on the one hand and conflict and security on the other, but they are severely limited in that they (i) apply exclusively to extractive companies, and (ii) are oriented around the protection and security of the MNCs’ interests as their primary objective.

### C. *The International Finance Corporation Social and Environmental Performance Standards*

The International Finance Corporation Social and Environmental Performance Standards (‘IFC-PS’) were established in 2006 by the IFC in consultation with MNCs, donor countries, donor agencies, and other entities. They create a comprehensive system for identifying social and environmental risks of IFC projects. The IFC-PS require a four-step process of assessment, defining actions, monitoring, and reassessment.<sup>78</sup> The assessment requires identification of the potential impacts of the project, risks to the environment and local communities, and risks that the environment and social situation pose to the project. The IFC-PS also incorporate elements of dialogue and consultation: recipients of IFC financing must engage with affected communities through consultation and disclosure, and must develop and implement a Stakeholder

<sup>75</sup> Voluntary Principles on Security and Human Rights Website, at <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> accessed 1 May 2015.

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

<sup>78</sup> Shankleman (n 73) 59.

Engagement Plan.<sup>79</sup> Further, companies must establish a monitoring and measurement programme and provide periodic progress reports to affected communities, and in some circumstances, compensate or offset risks and impacts to affected communities and the environment.<sup>80</sup> The IFC-PS place responsibility for some aspects of the assessment and management of environmental and social risks on the government or other third parties, where the recipient of the financing does not have control or influence.<sup>81</sup> Although the standards address several possible conflict triggers, such as acquiring land, pollution, natural resource access, and community safety, they do not require proactive steps to improve projects' benefits to local communities.<sup>82</sup>

## 12.4 UN and International Financial Organizations

Beyond international normative (but voluntary) frameworks and domestic legal reform incorporating CSR standards (but often lacking sufficient resources or will for enforcement), there are several methods to ensure sustainable development and environmental protection in the post-conflict phase. We propose that international actors—specifically the UN and international financial organizations (IFOs)—incorporate an expanded application of the CSR standards discussed above into their peacebuilding policies and loan agreements with MNCs and domestic governments.

Sometimes the UN can provide a critical entry point for CSR—for example, through a UN multi-donor trust fund or UN work plans. Sensitizing UN agencies working in a variety of sectors, including the extractive industries, agriculture, and livelihood recovery, about CSR can lead to positive results and future effects, although they also depend on the political will of the domestic government to carry them forward. In addition, increased environmental awareness can impact UN development assistance frameworks, priorities, and budgets.

According to one study, successfully incorporating CSR into the work of UN agencies requires:

1. Consistent categorization of environmental impacts from the outset, including a clear allocation of responsibility. The categorization of environmental issues should, whenever possible, be undertaken directly by project implementers as opposed to third parties.
2. Environmental screening applied to all projects, including humanitarian and development. This will help identify sectors that pose the biggest risks to the environment.
3. Project information records should include more data, including geographic locations, in order to facilitate review and analysis of environmental impacts and cumulative effects.

<sup>79</sup> IFC, 'Performance Standards on Environmental and Social Sustainability' (2012) 13 (Performance Standard 1).

<sup>80</sup> *ibid.* 3.

<sup>81</sup> *ibid.* 5.

<sup>82</sup> Shankleman (n 73) 60.

4. Capacity-building assistance should be provided as appropriate to domestic stakeholders in order to support the identification and mitigation of environmental threats in particularly risky sectors.<sup>83</sup>

Beyond the UN and other large donor and aid agencies, there are other opportunities to enforce standards of sustainable development and environmental protection. International pressure, including through UN Security Council sanctions, to meet minimum standards is one. International programmes that give privilege to export markets that comply with minimum standards is another option. Financial institutions provide another option for requiring minimum CSR standards, and will be the focus of this section.

One scholar has noted that:

While financial institutions have tended to oppose new financial regulations that restrict or impose costs on their own financial activities, many have issued public support for international environmental policies and regulations that aim to regulate the activities of the companies they are invested in. This suggests that long-term investors represent a nascent environmental policy constituency that could play an increasingly influential role in shaping global environmental governance through their financing activities and engagement with policy-makers and standard-setters.<sup>84</sup>

Indeed, many aid agencies and financing institutions have developed environmental and social standards as requirements for funding.<sup>85</sup> The World Bank, for example, required countries to develop National Environmental Action Plans in order to receive soft loans, although this policy was later relaxed. These helped identify and prioritize environmental problems and specified different solutions, whether institutional, policy, or investment-related.<sup>86</sup> Unfortunately, however, many environmental and human rights advocates have criticized the World Bank's policies as inconsistently applied and inadequate for the protection of environmental and human rights.<sup>87</sup>

Financial institutions can influence both the public and private sectors. For example, national debts can be cancelled or reduced to relieve pressure on post-conflict governments to hastily generate income through natural resource exploitation.<sup>88</sup> Financial institutions can also implement minimum standards in loan agreements both with states and with private companies. Through donor conditionality agreements, donors

<sup>83</sup> Jensen and Lonergan (n 3) 440–1.

<sup>84</sup> Christopher Wright, 'Global Finance and the Environment' in Robert Falkner (ed.), *The Handbook of Global Climate and Environmental Policy* (Hoboken: Wiley, 2013), 428, 442.

<sup>85</sup> Siri Aas Rustad, Päivi Lujala, and Philippe Le Billon, 'Building or Spoiling peace? Lessons from the Management of High-value Natural Resources' in Lujala and Rustad (n 73) 571, 604; Shankleman (n 73).

<sup>86</sup> UNDESA SD (n 2) 104–5.

<sup>87</sup> See, for example, 'OXFAM, World Bank Safeguards Review—Oxfam Submission to Phase 1,' at <[https://consultations.worldbank.org/Data/hub/files/oxfamsubmissiontoworldbanksafeguardsreview\\_phase1\\_final.pdf](https://consultations.worldbank.org/Data/hub/files/oxfamsubmissiontoworldbanksafeguardsreview_phase1_final.pdf)> accessed 3 May 2015; Peter Bosshard, Janneke Bruil, Korinna Horta, Shannon Lawrence, and Carol Welch, 'Gambling with People's Lives: What the World Bank's New "High-Risk/High-Reward" Strategy Means for the Poor and the Environment' (Report, Environmental Defense, Friends of the Earth and International Rivers Network, 2003), at <<http://siteresources.worldbank.org/CSO/Resources/EDhighrisk.pdf>> accessed 3 May 2015.

<sup>88</sup> Rustad *et al.* (n 85) 593.

can exert significant policy influence on post-conflict states that are dependent on aid. This might include pressure to review existing extractive industry contracts; take steps to increase transparency, accountability, and public participation; or may include direct assistance to government institutions. As the government starts to earn greater revenues by natural resource exploitation, however, the leverage these donors possess might start to decline.<sup>89</sup> It is therefore important for donor conditionality to focus on long-term goals and provide assistance for the government to undertake legal reforms and institution building.<sup>90</sup> The conditionality must also be neutral, and not favour private corporations from the donor state. This last issue is complicated by the differing approaches of various donor states, which might compete among each other depending on their commercial interests or have distinct approaches to local governance issues, such as China's non-interference policy.<sup>91</sup>

Because of the high cost of natural resource extraction in particular, private companies often require external financing (equity investors and/or loans) to begin operations. The loans often come from a mix of multilateral or bilateral development banks and commercial banks. These banks undertake extensive due diligence to ensure the viability of the proposed project. The due diligence often includes assessment of environmental and social risks, based on the recognition that environmental damage and social conflict can pose risks to projects and the banks. This puts banks in a key position to promote higher environmental and social standards for natural resource extraction projects in post-conflict situations.<sup>92</sup>

Financers of the private sector have implemented various voluntary standards in loan condition agreements, including the IFC-PS and the Equator Principles, both discussed above. Although these standards are voluntary as such, they can become enforceable when compliance is a condition of project loans.<sup>93</sup>

The good practices developed by the implementation of these standards can have positive influence on developing standards in other sectors, amongst small- and medium-sized businesses, and on developing government policies.<sup>94</sup> The standards could also ensure that predictable risks associated with natural resource extraction, including environmental damage and social harm, are identified and mitigated. But in actuality the standards are seldom sufficiently robust to result in meaningful changes in corporate behaviour.<sup>95</sup>

One author notes that:

On the one hand, the standards are a useful tool for helping to make foreign direct investment in the natural resource sector a stronger contributor to post-conflict peace-building: they provide a framework that enables firms to be more aware of the complexities of post-conflict environments and to behave more responsibly than might otherwise be the case. On the other hand, because of their voluntary nature and the absence of requirements for systematic follow up on implementation, the standards

<sup>89</sup> *ibid.* 599.

<sup>90</sup> *ibid.* 600 (noting that 'Although bilateral agencies have large budgets, little of that money is directed toward strengthening government: in Sierra Leone, for example, less than 10 percent of the US\$13 million spent by US and UK aid agencies on diamond reform was used to directly improve government capacity').

<sup>91</sup> *ibid.* 600.

<sup>92</sup> Shankleman (n 73) 55.

<sup>93</sup> *ibid.* 50.

<sup>94</sup> *ibid.* 64–5.

<sup>95</sup> *ibid.* 64.

have not been as effective as they might otherwise have been. In order to have greater impact, the standards should be revised to require companies to publish regular and detailed progress reports. Further, environmental regulations in most developing countries, especially those emerging from conflict, need to be revised and updated to incorporate the social, labor, health, and security requirements included in the voluntary standards.<sup>96</sup>

The standards are limited to the extent that they are voluntary and not all banks or financiers require their application. Given that environmental and social conditions are generally viewed as secondary to the bottom line (i.e. likelihood of the loan recipient to pay back in full), they are often not allocated sufficient financial and human resources by the banks to ensure robust compliance. They are also not created specifically for post-conflict situations, and therefore do not directly address important post-conflict issues such as reintegration of soldiers, sensitive conflict triggers, or community-specific development needs.<sup>97</sup> This suggests a need to broaden the standards for post-conflict situations and/or to apply them in a way that is consistent with the goal of achieving sustainable peace. This would require cooperation between governments, financiers, and other donors and aid agencies working across sectors during the transition to peace. These stakeholders will need to understand, apply, and enforce these and other post-conflict standards for private companies.

## 12.5 Challenges and Gaps in Existing Frameworks Addressing Environmental Degradation Resulting from External Involvement in Post-Conflict Settings

There are many important challenges to consider with an approach to sustainable development and environmental protection that relies on external actors, in particular MNCs and the financial industry. This section will discuss some general practical challenges to relying on voluntary standards as well as gaps in the current normative framework. Practical challenges include limited resources and time; working in unstable environments; corruption; political considerations; deciding on a normative framework; and ensuring local ownership while also supporting fair negotiations between governments and MNCs. Gaps in current normative frameworks include a lack of enforcement and a failure to explicitly or acutely address environmental harms or post-conflict contexts.

### 12.5.1 Practical challenges

Practical challenges to addressing sustainable development and environmental protection during the transition to peace include tight deadlines and limited resources for conducting due diligence and ESIA. Adequately understanding the conflict context as well as the environmental and social dynamics of development projects requires in-depth consultation with a wide range of stakeholders. It also requires understanding

<sup>96</sup> *ibid.* 50.

<sup>97</sup> *ibid.* 65.

current good practices and new or developing standards, as well as a consensus among stakeholders for the best approach in a given situation. This is time and labour intensive, and a disincentive for adhering to voluntary standards or other good practices for external actors working in post-conflict situations.

Soft law norms for corporations rely on a level of trust and good faith on the part of the corporation. However, immediately post-conflict, the instability of the state and the chaotic environment may even attract companies that generally have lower standards for corporate responsibility.<sup>98</sup> Combined with low pay rates, complicated bureaucracy for businesses, and high levels of corruption, accountability and transparency are at risk.<sup>99</sup> Indeed, according to UNEP, it is easy for corruption to become the norm in these situations. As a result, this attracts companies that ‘thrive under conditions of poor transparency, corruption, non-competitive bidding, and so on.’<sup>100</sup> Other, more socially responsible and above-the-board companies are driven out, sometimes through threats and intimidation. This creates a systemic lack of transparency and accountability, which can then allow natural resource revenues to feed into other illicit activities, such as drugs or smuggling.<sup>101</sup>

Political considerations are also a significant challenge. Often, contracts with large corporations working in the extractive industry will include certain social provisions, such as provision of education and health services. However, if corporations take over the provision of these services, this can undermine the legitimacy of the government and trust in its ability to provide necessary services.<sup>102</sup> The UN and other international agencies depend on government support and buy-in, which raises its own set of challenges. Implementing programmes and policies that will ultimately be later overturned due to a future lack of government support is a waste of time and resources. Therefore, in drafting assistance agreements or creating country assistance plans, such organizations might be torn between using discreet language—which might pacify government stakeholders and ensure their buy-in—and stronger language that will ensure more attention and support from the donor community.<sup>103</sup> The result might be a balance between the two that does not adequately capture the attention or support of either.

Striking the right balance can be exacerbated in situations where there is little trust between domestic entities. In such environments, suspicion and exclusion are common, leading to challenges in developing agreements and collecting the necessary information to monitor implementation.<sup>104</sup> International organizations must be strategic in order to avoid increasing these tensions and distrust. This can lead to such organizations taking neutral or technical approaches and avoiding contentious policy issues. This, for example, has often been the approach taken by UNEP.<sup>105</sup> Providing neutral, reliable, scientific information about the environment can fill an important knowledge gap. But it can also mean missing an opportunity to strengthen institutions and policies

<sup>98</sup> Note that this is not a general rule and in fact is not always the case. See, for example, Coca-Cola’s entry into Myanmar and the anticipatory, preventative measures they were required to take in order to do so. The Coca-Cola Company, ‘Responsible Investment in Myanmar Report’ (2013).

<sup>99</sup> Brown *et al.* (n 18) 332–3.

<sup>100</sup> UNEP (n 1) 60.

<sup>101</sup> *ibid.*

<sup>102</sup> Brown *et al.* (n 18) 332.

<sup>103</sup> UNDESA SD (n 2) 94.

<sup>104</sup> Conca and Wallace (n 4) 73.

<sup>105</sup> *ibid.* 74.

when it is necessary to decide what to do about environmental risks. In addition, as one study has noted:

In divided societies ravaged by violent conflict, actors will bring to the table many different ways of knowing and historical reference points; the technical-rational discourse of modern science will be inaccessible to a wide swath of the population; and 'facts' will be widely understood to be political things. Under these circumstances, efforts to depoliticize knowledge entail a clear trade-off: they make it more feasible to work under very difficult circumstances but at the risk of reducing the scope of potential ownership in the results.<sup>106</sup>

Given the need for coordination between the large body of domestic and international stakeholders involved in peacebuilding, these trade-offs and politics will become increasingly complicated and burdensome. It could risk stagnating efforts for positive change.

There are other important trade-offs as well. International organizations will have to decide between relying on national legal frameworks or following international best practices. While the national legal framework might in some ways be inadequate to effectively deal with sustainable development and environmental protection, relying on it could ensure greater domestic buy-in and increase the legitimacy of the international intervention. On the other hand, this approach could slow progress as capacity is built.<sup>107</sup>

As with any international intervention, it is important to have the approval and support of domestic authorities. Such interventions depend on local input and ownership, and should not be viewed as imposed or self-serving. This is important to ensuring the effectiveness of programmes in the long term as well as promoting better handover when, as inevitably happens, donors and aid organizations leave the country.<sup>108</sup>

In addition to including the views and positions of the domestic government in approaching environmental integrity in post-conflict situations, the approaches of international organizations need to include MNCs. As a country transitions to peace, donors will often promote foreign investment to help restart the economy so that MNCs can become active players in post-conflict economies.<sup>109</sup> It is therefore necessary to include such actors in discussions about natural resource management. In addition, there should be measures put in place to ensure that negotiations between MNCs and post-conflict governments are fair and transparent. In the aftermath of conflict, states are typically weak and therefore at a disadvantage when negotiating with MNCs. If the resulting agreements are unfair or do not require adequate environmental and social safeguards, there could be longstanding negative repercussions.

### 12.5.2 Gaps in existing frameworks

The most significant gap in the existing frameworks for ensuring that corporations protect the environments in which they are operating is the enforcement gap. As discussed

<sup>106</sup> *ibid.* 75.

<sup>107</sup> *ibid.* 78.

<sup>108</sup> Rustad *et al.* (n 85) 592.

<sup>109</sup> *ibid.* 601.

at length above, even where domestic legislation exists for these purposes, it is frequently insufficiently enforced. In addition, the non-binding international frameworks in place fail to specifically proscribe corporate acts that damage the environment and distinguish such acts from violations of human rights. The private sector MSIs designed for these purposes also lack mechanisms for independent enforcement. Assuming that one normatively believes that corporations should have the same or similar duties and responsibilities when operating in a foreign jurisdiction as they would when operating in their home country, therefore, it is necessary to envisage an approach for ensuring such duty or responsibility is met that is both effective at providing harmed individuals some sort of (even indirect) recourse and practically feasible. This is necessary to ensure not only justice for those harmed, but also to encourage compliance such that those harms might be avoided in the first place. We argue that the extent to which companies feel the threat of recourse in the form of some sort of enforcement mechanism effectively determines whether normative guidelines will have any preventative influence.

The greatest potential source of enforcement therefore seems to be in the form of media and NGO naming and shaming. Taking advantage of the momentum behind the global CSR movement in recent years, human rights and environmental NGOs and activists have begun treating the principles codified in the Ruggie Framework and other normative frameworks as concrete standards by which to hold companies and governments accountable, thereby creating a unified baseline. This allows concerned stakeholders to be more cohesive and directed in their efforts at naming and shaming companies that fail to abide by recognized standards for business and environmental and human rights, making them more effective watchdogs.<sup>110</sup> As a result, the media and the activist/advocacy NGO community now effectively constitute an enforcement mechanism for the normative frameworks that lack a judicial court or tribunal.<sup>111</sup>

In addition, the voluntary frameworks discussed here fail to explicitly or acutely address environmental wrongs and adverse environmental impacts of corporate malfeasance on local populations—this is a second gap in the existing frameworks in this area. The majority of the language used is instead focused on human rights abuses. Although there is now arguably consensus around the concept of environmental rights which must be protected by the international community at the same level as human rights, and that certain environmental harms in fact effectively constitute deprivations of human rights (i.e. the right to health and a healthy environment, the right to food and water, among many others), it would likely be advantageous to efforts at increasing corporate environmental responsibility to expand existing soft law frameworks for the enforcement of international norms via corporations such that those norms come to explicitly and acutely incorporate environmental issues.

Third and finally, with the exception of the Voluntary Principles on Security and Human Rights, the frameworks and initiatives explored here seldom mention the need

<sup>110</sup> Jochnick and Rabaeus (n 62) 438.

<sup>111</sup> For more on this, see Hana Ivanhoe, 'The Next Generation of "Fair Trade": A Human Rights Framework for Combating Corporate Corruption in Global Supply Chains' in Bård A. Andreassen and Võ Khánh Vinh (eds.), *Duties Across Borders. Advancing Human Rights in Transnational Business* (Intersentia, forthcoming 2017).

for heightened scrutiny regarding human rights violations and protections in post-conflict countries. The Ruggie Framework references the need for such heightened scrutiny, but only in the context of the state duty to protect such human rights; it fails to couch this requirement explicitly in terms of additional obligations for human (and/or environmental) rights protections to be borne by companies when entering newly post-conflict markets.

We therefore propose a more robust application of the principles enshrined in the Ruggie Framework and related normative frameworks and private sector guidelines, in a manner that explicitly and acutely addresses issues of environmental degradation in post-conflict settings. NGOs and activists could then use such an expanded application of the Framework and its standards, in concert with the growing CSR movement, to provide some sort of means of enforcement. This would pull MNCs into the *jus post bellum* framework and offer an accountability mechanism for currently un- or under-regulated MNCs operating in fragile post-conflict states.

Requiring MNCs to adhere to these norms and good practices in their operations in post-conflict states could also have a spillover effect as they incorporate them into their business practices more generally. As part of the *jus post bellum* framework, these norms could also contribute to a more holistic approach to peacebuilding and sustainable peace. Moreover, incorporating soft law standards into peacebuilding plans and priorities could strengthen their normative value and enforceability and establish good practices following the Frameworks. If they are incorporated into the domestic legislation of post-conflict states, they could eventually become part of customary international law.

MNCs should also be encouraged to see the business gain from complying with voluntary standards and government legal frameworks. Voluntary standards that include environmental and social safeguards can assist the MNCs and their financiers to play a constructive post-conflict role and ensure the success of their venture. MNCs have been motivated to comply with such standards when there are (1) requirements imposed by financial institutions or their home-country legislation and (2) an impetus to ensure long-term profitability by developing a reputation as a 'reputable' company.<sup>112</sup>

## 12.6 Conclusions

Addressing environmental concerns in a post-conflict setting is a difficult undertaking; yet addressing these concerns is vital to ensuring that post-conflict countries develop sustainably. Given the inadequacy of existing post-conflict country domestic and international hard law governing environmental protections, voluntary and soft law norms and the corporate social responsibility movement are critical to ensuring that multinational investment in post-conflict countries is in line with sustainable development principles and the long-term economic and environmental prosperity of those countries. Thus, they constitute an important source of norms for a holistic *jus post bellum* framework.

<sup>112</sup> Rustad *et al.* (n 85) 602.

Peacebuilders must take the opportunity to work with private corporations to secure environmental and social safeguards in development projects that could otherwise lead to resurgence of conflict. This should be done through both domestic and international regulation. One part of this is an expansion and imposition of soft law norms for the protection of human and environmental rights by MNCs, specifically in post-conflict countries. This will require the expansion of the Ruggie Framework so as to explicitly refer to peacebuilding environments—or at the very least—its expanded application as well as effective enforcement (by monitoring NGOs and media). CSR standards as codified in international soft law should also be more comprehensively included in international loan and financing agreements where the recipient is or is operating in a recently post-conflict country. Such initiatives and standards also need to be adapted to be context and conflict specific.<sup>113</sup> Any agreements related to land acquisition or use must also be made with the consensus of the affected community.

At a minimum, these norms must include the following fundamental tenants of corporate responsibility, as articulated in the Ruggie Framework and subsequent guidelines:

- Corporate duty to respect human rights extra-territorially;
- Human rights due diligence; and
- Non-judicial grievance mechanisms.

The study of environmental protection and sustainable development shows important challenges *for jus post bellum*. In particular, it shows the need to incorporate soft law norms and standards as a part of a holistic *jus post bellum*. These standards provide a critical opportunity to harness the power of private corporations and direct investments to ensure sustainable development in post-conflict states, resulting in a smoother and more durable transition to peace.

<sup>113</sup> Additional research will evaluate existing standards and propose areas for potential improvement with respect to post-conflict situations.