Corporate due diligence and liability for natural resources supply chains in/from conflict-affected regions: implementation guidance for principles 10 and 11 of the ILC Principles on protection of the environment in relation to armed conflict

Boon, S.P. van der; Dam-de Jong, D.A.; Hulme, K.; Lawry-White, M.; Tignino, M.

IUCN WCEL Specialist Group on Environmental Security and Conflict Law

CORPORATE DUE DILIGENCE AND LIABILITY FOR NATURAL RESOURCES SUPPLY CHAINS IN/FROM CONFLICT-AFFECTED REGIONS

Implementation Guidance for Principles 10 and 11 of the ILC Principles on Protection of the Environment in Relation to Armed Conflict

Publication by the IUCN-WCEL Specialist Group on Environmental Security and Conflict Law (August 2024)

Authors:
Simone van der Boon (Grotius Centre for International Legal Studies - Leiden University), Daniëlla Dam-de Jong (Grotius Centre for International Legal Studies - Leiden University), Karen Hulme (Essex University), Merryl Lawry-White (ILA British Branch) and Mara Tignino (Geneva Water Hub – Geneva University)

Cover image by Curioso Photography on Unsplash

1. Introduction

This policy guidance aims to set out recommendations for best practices for states and corporations regarding the implementation of the ILC Principles on the protection of the environment in relation to armed conflict, in particular principles 10 and 11 on corporate due diligence and liability.

> **Principle 10**
> **Due diligence by business enterprises**
>
> States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.
>
> **Principle 11**
> **Liability of business enterprises**
>
> States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict. Such measures should, as appropriate, include those aimed at ensuring that a business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its de facto control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.
>
> *Source: UN General Assembly Resolution 77/104 (2022) on Protection of the environment in relation to armed conflict, Annex*

This policy guidance is part of a broader project within the International Union for the Conservation of Nature's World Commission on Environmental Law (IUCN WCEL) Specialist Group on Environmental Security and Conflict Law focused on creating guidance for states on the implementation of the ILC Principles on the protection of the environment in relation to armed conflict. This guidance is produced on the request of the IUCN state members, as stated in IUCN resolution 052, adopted during the World Conservation Congress held in Marseille in 2020. The resolution calls on the Specialist Group 'to develop model legislation and/or principles in line with the work undertaken by the International Law Commission, and where appropriate to help State Members protect the environment in relation to armed conflict' (op. para. 3).

For this purpose, section 2 provides an introduction to the ILC Principles generally and to Principles 10 and 11 in particular. In addition, it discusses the legal foundations underlying Principles 10 and 11, including the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises on Responsible Business. Section 3 discusses potential issues in relation to the implementation of Principles 10 and 11, specifically the balancing of home state obligations with host state sovereignty and with respect to private military and security companies. Section 4 sets out existing guidance and remaining gaps with regard to the implementation of Principle 10, highlighting issues with resource extraction, heightened due diligence, participation and engagement. Section 5 covers implementation and guidance regarding Principle 11, including civil and criminal liability,

liability through subsidiaries, access to justice, and access to corporate-provided remedies. Finally, Section 6 provides an overview of recommendations for states and corporations.

This policy guidance was produced through an extensive consultation process, involving representatives from academia, legislators, civil society and the private sector (Annex I contains a list of consulted organisations and individuals). The consultation process started with a workshop on Corporate Due Diligence and Liability for Natural Resources Supply Chains in/from Conflict-Affected Regions on 21-22 June 2023 (see Annex II for more information). A first draft of the policy guidance was subsequently shared with the participants in the workshop and other stakeholders in May 2024. The input received from this process has further informed the issues and recommendations contained in this policy guidance, which was finalised in July 2024.

2. Overview of legal framework

(a) The Principles in context

The ILC Principles have been developed to enhance 'the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment'.[1] Some of the principles apply specifically to conflict or post-conflict situations, while others are 'of general application', implying that they are relevant for the whole conflict cycle (before, during and after). Principles 10 and 11 are part of the latter category. They formulate best practices for states in relation to environmental harm caused by corporations in conflict-affected areas. Principle 10 calls on states to take appropriate measures aimed at ensuring that corporations exercise due diligence with respect to the protection of the environment, when acting in an area affected by an armed conflict. It applies to three categories of states: conflict-affected states ("operating in … their territories"), home states of multilateral corporations ("operating … from their territories") and to occupying powers ("operating in or from … territories under their jurisdiction"). It furthermore applies to corporations that are active in conflict-affected and occupied areas or that (directly or indirectly) procure natural resources from such areas. Principle 11 complements Principle 10 by calling on states to take appropriate measures aimed at ensuring that corporations can be held liable for environmental damage caused by them, or their subsidiaries acting under their *de facto* control, in conflict-affected areas. Principle 11 applies likewise to territorial, occupying and home states, but it is limited to environmental harm *caused by* corporations and their subsidiaries. It therefore does not extend to business partners in the natural resources supply chain.

With regard to corporate responsibility for environmental harm, reference can further be made to Principle 16, applicable during armed conflict situations (including occupation). This Principle prohibits pillage of natural resources. As such, it is 'part of the broader context of illegal exploitation' in conflict-affected areas, which Principles 10 and 11 seek to prevent and redress.[2] Principles 10 and 11 should also be read in light of Principle 9, which stipulates that the Principles are without prejudice to the rules on State responsibility and specifies that "an internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State". Therefore, breaches of international legal obligations emanating from Principles 10 and 11 can entail the international legal responsibility of states, notwithstanding the soft

[1] *Report of the International Law Commission to the Seventy-Third Session,* UN Doc A/77/10, 12 August 2022, 100.
[2] Ibid., 151.

language contained in the principles themselves. This will notably be the case when corporations activities can be attributed to the state based on Articles 4 (the corporation is to be considered a *de facto* state organ), 5 (the corporation exercises elements of governmental authority) or 8 (the state exercises effective control over the activities of the corporation) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, or when states omit to prevent corporate abuses when they had an obligation to act, for instance under international humanitarian, human rights or environmental law.

(b) UN Guiding Principles on Business and Human Rights

The recommendations contained in Principles 10 and 11 are based on a range of international and domestic legal instruments. One of the most important legal foundations are the UN Guiding Principles on Business and Human Rights.[3] Although not legally binding as such, Pillar 1 of the UN Guiding Principles is based on states' existing obligations under international human rights law.[4] Pillar I prescribes that states have a duty to protect against human rights abuses within their territory or jurisdiction by corporations through, *inter alia*, effective legislation and adjudication.[5] Under Pillar II, corporations have a distinct responsibility to respect human rights.[6] This responsibility involves the implementation of due diligence requirements that aim to identify, prevent, mitigate and account for adverse human rights impacts resulting from the corporations' activities.[7] Thirdly, as part of the state's duty to protect, Pillar III of the Guiding Principles stipulates that states must take appropriate steps to provide victims of human rights abuses occurring under their jurisdiction with effective remedies. The three Pillars of the UN Guiding Principles correspond with the rationales of Principles 10 and 11. In line with Pillars I and II, Principle 10 recommends that states impose due diligence obligations on corporations to protect against environmental harm. Principle 10 thereby imposes a duty on states to protect, and indirectly a responsibility on corporations to respect. Furthermore, Principle 11 is connected to Pillar I where it recommends that states hold corporations liable for causing environmental harm and to Pillar III where it urges states to provide effective remedies to victims of environmental harm.

(c) OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct give effect to the UN Guiding Principles, by formulating a general expectation that corporations conduct risk-based due diligence in order to avoid contributing to adverse impacts through their activities.[8] The OECD Due Diligence Guidance for Responsible Business Conduct helps corporations implement these due diligence recommendations.[9] It introduces a five-step risk-based approach to due diligence in line with

---

[3] Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* UN Doc A/HRC/17/31, 21 March 2011 (Annex).

[4] Ibid., 1 ("Nothing 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 regard to human rights.").

[5] Ibid., 6, para. 1.

[6] Ibid., 13, para. 11.

[7] Ibid., 15-16, paras. 15, 17.

[8] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023), 10, available at < https://mneguidelines.oecd.org/mneguidelines/ > (last accessed 28 April 2024).

[9] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), 9, available at < https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm > (last accessed 28 April 2024).

the elements of the UN Guiding Principles, namely to prevent, mitigate, account for and address.[10] The OECD has furthermore developed guidance aimed specifically at responsible supply chain management by corporations in relation to minerals from conflict-affected areas.[11] Importantly, this guidance focuses on preventing conflict financing and is therefore only partly relevant to Principles 10 and 11.[12]

(d) Regional and domestic instruments

In addition to the UN Guiding Principles and the OECD Guidelines and Guidance, reference can also be made to domestic and regional legislative instruments laying down environmental due diligence obligations on corporations operating directly or indirectly in conflict-affected areas. Examples are the US Dodd-Frank Act (2015), the Lusaka Protocol of the International Conference on the Great Lakes Region (1994) and the EU Conflict Minerals Regulation (2017).[13] Furthermore, on April 24th, 2024 the European Parliament followed by the European Council on May 24th, 2024 formally adopted the Corporate Sustainability Due Diligence Directive (CSDD), setting into law obligations for large companies with significant activities in the European Union to conduct human rights and environmental due diligence in their own operations and across their chains of activities.[14] This Directive aligns with the OECD Guidelines for Multinational Enterprises.

(e) Treaty on business and human rights

In 2014, the Human Rights Council established an Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to human rights (OEIGWG) and mandated it to develop an international legally binding instrument on business and human rights.[15] The Working Group has since developed several text proposals, with the most recent one to be discussed during the OEIGWG's tenth session in October 2024.[16] However, progress has so far been slow and an agreement is not likely to be reached soon, due to the diverging positions of countries on the scope of the treaty.[17] If the negotiations succeed, this will be the first binding treaty containing

---

[10] The five steps are as follows: establish strong company management systems; identify and assess risks in the supply chain; design and implement a strategy to respond to identified risks; carry out independent third-party audit of smelter/refiner's due diligence practices; and report annually on supply chain due diligence. The guidelines further recommend providing for or cooperating in remediation when appropriate. Ibid. See also D. Dam-De Jong & S. Wolters, 'Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC', 10 *Goettingen Journal of International Law* (2020), 142-143.

[11] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition* (2016), 3, available at < https://www.oecd.org/corporate/mne/mining.htm > (last accessed 28 April 2024).

[12] Dam-De Jong & Wolters, *supra* note 10, 144.

[13] *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas*, OJ 2017 L130.

[14] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 5 July 2024.

[15] Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,* A/HRC/RES/26/9 (14 July 2014).

[16] For an overview of the treaty negotiations, see < https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc > (last accessed 11 July 2024).

[17] See eg Compilation of general statements from States and non-State stakeholders made during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, available at < https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc > (last accessed 19 July 2024).

obligations for states in relation to corporate due diligence and liability and set a global standard for the regulation of corporations.

3. Overarching issues and guidance

The following section will set out the overarching issues regarding the implementation of Principles 10 and 11 that were raised in the stakeholder consultation. Furthermore, an overview of existing guidance on these issues will be provided. Reference will be made to guidance presented by non-governmental organizations, as well as national and regional legislative instruments and case law.

(a) Balancing home state obligations with host state sovereignty

The first issue relates to the extraterritorial scope of Principles 10 and 11 in relation to multinational corporations. Principle 10 urges states to exercise extraterritorial jurisdiction in relation to environmental harm caused by their corporations and their subsidiaries abroad. Principle 11 recommends that states ensure that their corporations can be held liable for damage caused by them abroad. The extraterritorial scope of the Principles is based on the assumption that home states may be better placed to adopt measures preventing corporations from causing environmental harm and to provide access to remedies to victims, if conflict has led to the breakdown of institutions in the host state. This can be illustrated by case law, such as the *Katanga mining* case.[18]

It has been recognized that home states carry a responsibility to prevent their corporations from engaging in human rights violations abroad.[19] This is particularly relevant where remedies for victims before courts in the host state are 'unavailable or ineffective'.[20] In respect to practical guidance for corporations and states in this context, reference can firstly be made to General Comment No. 24 of the Committee on Economic, Social, and Cultural Rights.[21] The General Comment highlights, albeit in the context of social and economic rights, that home states ought not to exercise extraterritorial *enforcement* jurisdiction as a means of fulfilling their due diligence obligations.[22] Accordingly, home states should not enforce their obligations in the host state through the exercise of their executive powers, for example by arresting individuals. This would constitute an unjustifiable infringement upon the host state's jurisdiction and sovereignty.[23] Rather, states should ensure that their corporations fulfil their extraterritorial obligations by putting in place 'appropriate monitoring and accountability procedures'.[24] Stakeholder engagement also has an important role to play in this regard, as it can

---

[18] *Alberta Inc. v. Katanga Mining Ltd*. [2008] EWHC 2679 (Comm), 5 November 2008 (Tomlinson J.). See also *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, UN Doc A/CN.4/728, 27 March 2019, 44, para. 92

[19] CESCR, *General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,* UN Doc E/C.12/GC/24, 10 August 2017), 8, para. 26.

[20] *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra* note 18, 35, para. 72.

[21] CESCR, *General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, supra* note 19.

[22] Ibid., 11, para. 33. See also T. van Ho, 'General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)', 58(4) *International Legal Materials* (2019), 3.

[23] R. Chambers, 'An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional dilemma raised/created by the use of the extraterritorial techniques', 14(2) *Utrecht Law Review* (2018), 23.

[24] CESCR, *General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, supra* note 19, 10-11, para. 33.

reduce the 'democratic deficit of extraterritoriality'.[25] Guidance can furthermore be drawn from national legislation. The French *Loi de Vigilance* legislation accepts prescriptive and judicial jurisdiction for corporations and their subsidiaries.[26] It limits France's interference with the host state's sovereignty by only regulating French corporations.[27] Other states have followed this use of the active nationality principle for jurisdiction. Examples are the German Supply Chain Due Diligence Act (2023), the Norwegian Transparency Act (2022), and the Swiss Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (2023).

Recommendations

- States should put in place appropriate monitoring and accountability mechanisms to ensure that corporations headquartered in their state are held accountable for human rights abuses committed abroad, particularly when remedies for victims in the host state are unavailable or ineffective.
- States should respect the sovereignty of host states when regulating the conduct of corporations abroad, for example by only regulating the conduct of corporations that reside or are registered in its territory.

(b) Private military and security companies

Private military and security companies ('PMSCs') provide services that were previously provided by state authorities.[28] Such services may consist of training of troops, logistic support and intelligence services.[29] PMSCs may cause or contribute to environmental harm when they are involved in, for example, the disposal of military waste. Moreover, they may be in a proximate relationship with the contracting state and play a significant role in the conflict.[30] Due to the distinct nature of these actors, questions arise as to what is required of them in light of Principles 10 and 11, as well as from corporations that have contracted PMSCs.

According to UN Guiding Principle 14, all enterprises, including PMSCs, must respect human rights.[31] As such, the due diligence obligations flowing from Principles 10 and 11 apply to PMSCs. Nevertheless, due to their particular nature and activities, several guiding documents have been prepared for PMSCs. Reference can firstly be made to the Voluntary Principles on Security and Human Rights.[32] These Principles impose obligations on corporations or states contracting with PMSCs, in order to ensure the safety of their operations whilst simultaneously respecting human rights. The Principles also lay down rules for PMSCs themselves. The OECD has incorporated the

[2525] C. Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains', 81(2) *Heidelberg Journal of International Law* (2021), 520.
[25] Ibid., 521. Stakeholder engagement is further explored in section 4(c) of this Implementation Guidance.
[26] Prescriptive jurisdiction refers to the ability of a state to make laws, decisions or rules; judicial jurisdiction refers to the ability of a state to exercise its judicial powers. See also more generally J. Crawford, 'Part VII State Jurisdiction, 21 Jurisdictional competence' in: *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press, 2019).
[27] M. Monnheimer, 'A Case for Extraterritorial Due Diligence Obligations in the Human Rights Context' in: *Due Diligence Obligations in International Human Rights Law* (Cambridge University Press, 2021), 311.
[28] *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra* note 18, 44, para. 93.
[29] Ibid., 44, para. 93.
[30] Ibid., 46, para. 96.
[31] Ibid., 45, para. 94.
[32] Voluntary Principles Initiative, *Voluntary Principles on Security and Human Rights* (2000), available at < https://www.voluntaryprinciples.org/the-principles/ > (last accessed 27 May 2024).

Voluntary Principles in its guidance too.[33] Other relevant guidance for PMSCs can be found in the Montreux Document, which provides good practices for PMSCs in the context of armed conflict.[34] Building on the Montreux Document, an international code of conduct has also been developed for private security service providers.[35] Furthermore, an extensive overview of additional tools has been set out in the Second report on protection of the environment in relation to armed conflicts by Special Rapporteur Marja Lehto.[36] Although existing guidance focuses primarily on human rights, it is clear that other activities such as the disposal of toxic and other hazardous materials may have severe effects on human health,[37] are explicitly covered by Principles 10 and 11. Furthermore, as noted in the Commentary to Principle 10, states contracting PMSCs have international legal obligations in relation to the activities of PMSCs, especially when they are conducting activities that are traditionally carried out by states.[38] Pursuant to Principle 9, breaches of these obligations can entail the international responsibility of states. The ILC Articles on the Responsibility of States for Internationally Wrongful Acts apply in this context.

With regard to the responsibility of corporations that have contracted PMSCs, it is recommended that corporations apply best practices in the management of private security companies.[39] These practices include screening the track records of security companies, consulting with host governments and local communities, reporting on credible allegations of human rights abuses by the security companies, providing human rights training to the security companies and joining voluntary initiatives, such as the Voluntary Principles on Security and Human Rights.[40]

Recommendations

- States should require PMSCs to conduct due diligence with respect to the environment, especially when conducting activities that may have severe environmental effects, such as the disposal of toxic and other hazardous materials.
- States must respect their international legal obligations vis-à-vis the environment when contracting PMSCs. Breaches of these obligations can entail the international responsibility of states, pursuant to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts.
- States should require corporations that have contracted PMSCs to screen the track records of the PMSCs, consult with host governments and local communities, report on credible

[33] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, *supra* note 11, 22, 25, 26, 83, 92, 115, 117.
[34] International Committee of the Red Cross, *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (2008), available at < https://shop.icrc.org/the-montreux-document-on-private-military-and-security-companies-pdf-en.html > (last visited 29 April 2024).
[35] *International Code of Conduct for Private Security Providers* (2021), available at < https://icoca.ch/the-code/ > (last accessed 29 April 2024).
[36] *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra* note 18, 45-46, para. 95.
[37] See O. Das & A. Kellayv, 'Private Security Companies and Other Private Security Service Providers (PSCs) and Environmental Protection in *Jus Post Bellum*: Policy and Regulatory Challenges' in: C. Stahn, J. Iverson & J. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (OUP, 2017), 299, at 308-311.
[38] *Report of the International Law Commission to the Seventy-Third Session*, *supra* note 1, 129.
[39] United Nations Global Compact Office, *Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors* (2010), 13, available at < https://unglobalcompact.org/library/281 > (last accessed 8 May 2024).
[40] Ibid.

allegations of human rights abuses by PMSCs, provide human rights training to the PMSCs, and join voluntary initiatives, such as the Voluntary Principles on Security and Human Rights.

4. Principle 10: implementation issues and guidance

The following section sets out the issues that were raised in the stakeholder consultation regarding the implementation of Principle 10 and relevant guidance.

(a) Monitoring and tracing resource extraction in conflict-affected areas

A first issue concerns the practical difficulties of monitoring resource extraction in conflict-affected areas. Monitoring and tracing resource extraction contributes to the transparent and accountable trade in natural resources. This is particularly essential in conflict-affected areas, where natural resources extraction may finance conflict or contribute to human rights violations and environmental harm.[41] Consequently, monitoring and tracing resource extraction is essential for both corporations operating directly in the conflict-affected area and corporations that are exploiting natural resources via their supply chains.

The practical difficulties mentioned include the following. First, monitoring resource extraction typically requires the use of ground tests and remote observation to verify, for example, that a corporation is no longer sourcing from a particular mine. However, the access to these methodologies may be hampered due to the conflict. The presence of armed conflict may firstly preclude the possibility of field surveys.[42] Remote sensing is also impractical in many conflict-affected areas, due to potential cloud cover and the high financial costs attached to this method.[43] Moreover, satellite imagery cannot always be relied on in the absence of corroborative evidence, because these images are often misinterpreted and generally take a lot of time to create.[44] In response to these difficulties, scholars note an increasing reliance on open-source information.[45] There is, however, a risk of disinformation attached to this method.[46] It is furthermore suggested that corporations and/or states use multiple sources to verify data.[47] Artificial intelligence may also be used to create model predictions that give insight into the resource extraction.[48]

A second difficulty concerns the tracing of minerals. When minerals are smelted or refined, they undergo a change in composition. Consequently, the origins of these minerals can no longer be derived. Furthermore, for some minerals it is impossible to trace their origins without a tag, even before the smelting or refining phase. As regards this issue, reference can be made to the Mineral Certification Scheme of the International Conference on the Great Lakes Region, the Kimberley Process Certification Scheme and the general standards provided in the OECD Due Diligence

[41] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, *supra* note 11, 14.
[42] W. Zwijnenburg and O. Ballinger, 'Leveraging emerging technologies to enable environmental monitoring and accountability in conflict zones', 105(924) *International Review of the Red Cross* (2023), 1508.
[43] Ibid., 1516.
[44] Ibid., 1516.
[45] Ibid., 1500.
[46] Ibid., 1501.
[47] Ibid., 1517.
[48] Ibid., 1514-1515.

Guidance (in particular step 1). The EU Conflict Minerals Regulation also imposes requirements regarding the traceability of minerals.[49] An example of a specific tracing mechanism in practice is the International Tin Supply Chain Initiative's 'bagging-and-tagging' procedure.[50] Despite the existence of these instruments and mechanisms, additional guidance is welcome to clarify how corporations can exercise due diligence in relation to minerals that are no longer traceable.

Recommendations

- States should require corporations to prevent that they contribute to the financing of armed conflict through natural resources exploitation. A particular challenge is that monitoring resource extraction may be hampered in conflict-affected areas. Corporations should be required to use multiple sources to monitor resource extraction in conflict-affected areas, including open-source information.
- States should put in place mechanisms that allow tracking and tracing of minerals. They should prioritize the tracing of minerals, particularly before the smelting or refinement stage. Minerals that are untraceable by their nature should be subjected to a tagging procedure.

(b) Heightened due diligence

It is recognized in UN Guiding Principle 7 that the risk of gross human rights abuses is heightened in conflict-affected areas.[51] Accordingly, the due diligence obligations of corporations must also be heightened. In this regard, it may be difficult for corporations to recognize when heightened due diligence is required due to the potentially ongoing nature of conflicts. In response to this issue, a number of resources have been developed to help corporations identify conflict-affected and high-risk areas. By mapping such areas, these resources indicate where corporations should carry out heightened due diligence. The European Commission has provided a list of these resources, including those with a specific focus on mineral supply chains.[52] An example is the Environmental Justice Atlas, which maps conflicts related to environmental issues around the world.[53] Moreover, the UN Development Group has issued a toolkit on how corporations should conduct a conflict analysis themselves.[54] Additionally, various resources provide tools in relation to the implementation of heightened human rights due diligence in conflict-affected settings. These include guidance developed by the UN Development

[49] *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas*, *supra* note 13, Arts. 4(f) and 4(g).

[50] OECD, *Alignment Assessment of Industry Programmes with the OECD Minerals Guidance*, COM/DAF/DCD/DAC(2018)1/ADD1 (17 April 2018), 57, available at < https://one.oecd.org/document/COM/DAF/INV/DCD/DAC(2018)1/ADD1/En/pdf > (last accessed 4 April 2024).

[51] Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, *supra* note 3, 10-11, para. 7.

[52] Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council, 6-9,11-12, available at < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H1149&from=EN > (last accessed 8 May 2024).

[53] Available at < https://ejatlas.org/ > (last accessed 25 March 2024).

[54] United Nations Development Group, *Conducting a Conflict and Development Analysis* (2016), available at < https://www.undp.org/publications/conducting-conflict-and-development-analysis > (last accessed 8 May 2024).

Programme, Shift Project, Swisspeace and the Geneva Centre for Security Sector Governance.[55] International Alert has developed guidance specifically for extractives industries.[56]

These resources firstly set out under which circumstances corporations should conduct heightened human rights due diligence. The UN Development Programme, for example, lists 'red flags' pointing towards the necessity of heightened due diligence.[57] These include: 1) amassing of weapons, especially by non-state groups, 2) weak or absent state structures, 3) records of serious violations of international human rights and/or humanitarian law, 4) increased hate speech targeting specific groups or individuals, and 5) signs of militia or paramilitary group recruitment. [58] Secondly, these resources help corporations implement their heightened due diligence obligations. The UN Working Group on Business and Human Rights notes that corporations should essentially focus on three steps, namely conducting a conflict analysis, mapping the main actors of the conflict and conducting an impact assessment.[59]

An interrelated question is whether corporations should have a peacekeeping role during and post-conflict and, if so, how this role should be reflected in their due diligence obligations. This goes further than expecting corporations to apply a conflict-sensitive lens to their activities, which is merely aimed at reducing the intensity of the conflict and potentially supporting peace.[60] Instead, peacebuilding refers to advancing peace as the *primary* objective.[61] It has been observed in guidance that corporations are most willing to take on a peacebuilding role when the conflict significantly impairs their business activities.[62] This appears to be a high threshold.[63] Moreover, it has been observed that local peacebuilding efforts do not necessarily impact broader conflict dynamics.[64] Nevertheless, several toolkits have been developed to assist corporations in fulfilling a peacebuilding role. Firstly, the Collaborative for Development Action suggests networking with the 'key people' of the conflict, controlling economic sources, conferring legitimacy on other actors, and creating

---

[55] United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide* (2022), available at < https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide > (last accessed 18 April 2024); Shift Project, *Human Rights Due Diligence in High-Risk Circumstances* (2015), available at < https://shiftproject.org/wp-content/uploads/2015/03/Shift_HRDDinhighriskcircumstances_Mar2015.pdf > (last accessed 18 April 2024); Swisspeace, *Enhanced Human Rights Due Diligence in Conflict Affected and High-Risk Areas* (2016), available at < https://www.swisspeace.ch/articles/enhanced-human-rights-due-diligence-in-conflict-affected-and-high-risk-areas > (last accessed 18 April 2024); Geneva Centre for Security Sector Governance (DCAF and ICRC), *Addressing Security and Human Rights Challenges in Complex Environments Toolkit* (2017), available at < https://www.securityhumanrightshub.org/toolkit/ > (last accessed 18 April 2024).

[56] International Alert, *Human Rights Due Diligence in Conflict-Affected Settings: Guidance for Extractives Industries* (2018), available at < https://www.international-alert.org/app/uploads/2021/08/Economy-Human-Rights-Due-Diligence-Guidance-EN-2018.pdf >(last accessed 18 April 2024).

[57] United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide*, *supra* note 55, 21.

[58] Ibid., 53.

[59] *Report of the Working Group on Business and Human Rights, Business, human rights and conflict-affected regions: towards heightened action*, UN Doc A/75/212, 21 July 2020, 10-11, paras. 46-48.

[60] B. Miller and others, *A Seat at the Table: Capacities and Limitations of Private Sector Peacebuilding* (CDA Collaborative Learning Projects, Africa Centre for Dispute Settlement and Peace Research Institute Oslo, 2018), 12, available at < https://www.cdacollaborative.org/wp-content/uploads/2019/01/A-Seat-at-the-Table_FINAL-010819-Web.pdf > (last accessed 18 April 2024).

[61] Ibid., 12.

[62] Ibid., 14.

[63] Ibid., 29.

[64] OECD, *Evaluating Peacebuilding Activities in Settings of Conflict and Fragility: Improving Learning for Results* (2012), 25, available at < https://www.oecd.org/dac/conflict-fragility-resilience/publications/4312151e.pdf > (last accessed 18 April 2024).

grievance mechanisms.[65] Guidance has also been developed by the UN Global Compact Office, which urges corporations to engage with governments in order to 'support both political will and government capacity to address, resolve and forestall conflict'. [66]

Recommendations

- States should develop guidance for corporations to help them to identify when heightened due diligence is necessary, either by consulting existing resources or by conducting a conflict analysis themselves. To determine how the heightened due diligence obligations should be implemented, corporations should map the main actors of the conflict and conduct an impact assessment.
- States should encourage corporations to assume a peacebuilding role during and/or post-conflict. Several toolkits have been developed to assist corporations in this role, in particular by the Collaborative for Development Action and the UN Global Compact Office.

(c) Public participation and stakeholder engagement

Public participation refers to the rights and opportunities for members of the general public to be involved in decision-making.[67] Public participation is an essential part of environmental due diligence obligations.[68] Stakeholder engagement refers to specific individuals or groups of individuals who are affected by the corporation's activities, either directly or indirectly. Public participation and stakeholder engagement is of particular relevance in conflict-affected areas, where local communities may have first-hand insight into the conflict and the measures that need to be taken by corporations.[69] Guidance is needed on two questions: 1) the issue of competing interests of stakeholders and 2) reporting obligations of corporations towards stakeholders.

With respect to competing interests of stakeholders, the OECD recommends that corporations be transparent in their decision-making and that 'dissatisfied groups should have an opportunity to have their concerns considered through strong objective remediation processes'.[70] It must be noted that stakeholder representatives may not always act on behalf of the best interests of their constituents, but rather in their own self-interests. When this appears to be the case, the corporation should 'consult more widely with stakeholder groups as to how to proceed'.[71] The OECD guidance also suggests seeking the assistance of a neutral mediator, to ensure that 'each side has a clear and objective understanding of their own best interests and to facilitate collaborative decision making between diverse stakeholders'.[72] Moreover, while accommodating as much as possible all views of

[65] Ibid., 21.
[66] United Nations Global Compact Office, *Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors* (2010), *supra* note 39, 16-17.
[67] J. Ebbesson, 'Public Participation' in: L. Rajamani & J. Peels (eds), *The Oxford Handbook of International Environmental Law'* (OUP, 2021), 352.
[68] *UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters*, 2161 UNTS 447, 25 June 1998.
[69] B. Dubach & M. Machado, 'The importance of stakeholder engagement in the corporate responsibility to respect human rights', 94(887) *International Review of the Red Cross* (2012), 1061.
[70] OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017), 73, available at < https://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm > (last accessed 18 May 2024).
[71] Ibid., 74.
[72] Ibid., 73.

stakeholders, priority should be given to stakeholders who are most impacted by the corporation's activities but have the least influence over it.[73]

In relation to guidance on how corporations can fulfil their reporting obligations towards stakeholders, the UN Guiding Principles and the OECD Guidelines emphasize that corporations should engage with affected stakeholders in all steps of their due diligence obligations.[74] This implies that corporations must report back to stakeholders.[75] The EU Corporate Sustainability Reporting Directive stipulates that corporations should 'report information necessary to understanding the undertaking's impacts on sustainability matters', including 'how the undertaking's business model and strategy take account of the interests of the undertaking's stakeholders'.[76] Corporations falling under this instrument must furthermore follow the recently adopted 'European Sustainability Reporting Standards', which include reporting standards in relation to stakeholders.[77] In addition to their legislative function, these standards may serve as guidance more broadly, including for corporations falling outside the EU framework.

On a more practical level, the OECD recommends that corporations report back to stakeholders 'in a timely fashion', whereby stakeholders 'are given an opportunity to express their satisfaction or lack therefore with commitment implementation'.[78] Furthermore, where corporations have departed from previously agreed action, stakeholders should be given an opportunity to react to this.[79] Importantly, there may be practical barriers to effective communication with stakeholders in conflict-affected areas. Corporations may have restricted access to certain areas and face confidential security information and poor communication systems.[80] It is recommended that corporations use various types of media to communicate. An example is the Resource Use and Management Plan (RUMP), developed by International Alert for the purposes of enabling collective decision-making by communities in the Philippines.[81] In general, corporations should ensure that their means of communication are accessible, taking into account levels of (digital) literacy.[82]

Recommendations

- States should adopt regulatory measures that require corporations to engage with stakeholders, based on the following principles:
- Corporations should prioritize stakeholder engagement, particularly where local communities have first-hand insight in the conflict.
- When there are competing interests between stakeholders, corporations should enable both

---

[73] Shift Project, *Bringing a Human Rights Lens to Stakeholder Engagement* (2013), 6, available at < https://shiftproject.org/resource/bringing-a-human-rights-lens-to-stakeholder-engagement-2/ > (last accessed 18 May 2024).
[74] UNGP's, Principle 21; OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, *supra* note 11, 52.
[75] Dubach & Machado, *supra* note 69, 1055.
[76] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022, OJ 2022 L322, Art. 19(2)(a)(iv).
[77] Commission Delegated Regulation (EU) 2023/2772 of 32 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards (adopted 22 December 2023), Disclosure Requirement SBM-2.
[78] OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive*, *supra* note 70, 80.
[79] Ibid.
[80] International Alert, *Human Rights Due Diligence in Conflict-Affected Settings: Guidance for Extractives Industries*, *supra* note 56, 68.
[81] Ibid., 69.
[82] Ibid.

groups of stakeholders to express their concerns, consider seeking the assistance of a neutral mediator, and prioritize those stakeholders who are most impacted by the corporation's activities but have the least influence over it.

- Corporations should regularly report back to stakeholders in an accessible manner.

(d) Engagement with armed groups

A further issue relates to the presence of non-state armed groups in the conflict-affected area that corporations operate in. Armed groups may become institutionalized to the point that they constitute a 'parallel' government. It is unclear to what extent corporations may lawfully engage, if at all, with such armed groups. This is a relevant issue as corporations may be practically forced to engage with non-state actors, particularly armed groups, but in doing so, risk facing criminal responsibility for complicity in the crimes of these actors. This topic is relatively underexplored in guidance.[83] Although the UNGPs and the Voluntary Principles on Security and Human Rights ('VPs') set standards for corporate responsibility in relation to armed groups, they do not provide practical operational insights on how corporations should deal with the presence of non-state armed actors.[84] The UN Working Group on Business and Human Rights nevertheless emphasizes that corporations should seek to understand armed groups.[85] In particular, corporations should gain understanding of armed groups' 'structure, […] control of territory and population, […] objectives, […] political agenda and the support from the local population'.[86] It also highlights that corporations should have a clear engagement strategy and strive to maintain impartiality.[87] Lastly, corporations should look to collaborate with other corporations, NGOs and the UN when analyzing the armed groups and conflict dynamics, to ensure cost-efficient coordination and information-sharing.[88]

A second issue concerns responsible exit strategies for corporations. Immediate disengagement by corporations in an area controlled by armed groups may have adverse effects on the environment. When there are armed groups present in the region where the corporation (previously) operated, a hasty exist, for example of a major local employer, may force individuals in the region to join the armed groups out of necessity on financial grounds. Exiting the area can also provide opportunities to armed groups to take over operations or benefit from infrastructure left behind by corporations, which may exacerbate the conflict and result in environmental harm. The Niger delta provides a relevant example of how a hasty exit of a corporation (in this case, Shell) may have severe environmental impacts.[89] To avoid such consequences, corporations should create a clear exit strategy.[90] The UN Office of the High Commissioner for Human Rights as well as the UN Development Programme have published guidance on this issue.[91] The primary consideration is whether a) exiting could exacerbate

---

[83] B. Miller, D. Bardouille & S. Cechvala, 'Business and Armed Non-State Actors: Dilemmas, Challenges and a Way Forward' (CDA Collaborative Learning Projects, 2014), 9.
[84] Ibid.
[85] *Report of the Working Group on Business and Human Rights, Business, human rights and conflict-affected regions: towards heightened action, supra* note 59, 13-14, paras. 58-61.
[86] Ibid., 13, para. 58.
[87] Ibid., 13-14, paras. 59-60.
[88] Ibid., 14, para. 61.
[89] UN Environment Programme, *Environmental Assessment of Ogoniland* (2011), 99-100, available at < https://wedocs.unep.org/handle/20.500.11822/7947;jsessionid=E8F4C6CE7B87D3C07C717005FFC274C0 > (last accessed 28 April 2024).
[90] *Report of the Working Group on Business and Human Rights, Business, human rights and conflict-affected regions: towards heightened action, supra* note 59, 14, para. 65.
[91] United Nations Office of the High Commissioner for Human Rights, *Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting* (2023), 9, available at < https://www.ohchr.org/sites/default/files/documents/issues/business/bhr-in-challenging-contexts.pdf > (last

tensions and b) whether harms to people outweigh the benefits.[92] The Responsible Investment Association Australasia has furthermore developed a toolkit which introduces the following elements of a responsible exit: 'planning', 'identifying consequences of leaving', 'being sensitive to rights', 'meaningful stakeholder consultation', 'preventing or lessening negative impacts on human rights', 'monitoring and following up the situation of human rights in the region', and 'public communication of decisions'.[93] It also lists a number of considerations that corporations should take into account when deciding whether and how to exit.[94]

A third issue is whether corporations should pay taxes to the host state's government when by doing so, they risk indirectly financing the conflict. Corporations often do not have a choice when asked to pay taxes, since they have to abide by domestic legislation. The question then arises of how to mitigate risks or whether due diligence requires corporations to disengage in these circumstances. This issue appears to be underexplored in the available guidance. Although it is clear that corporations should avoid financing conflict, this does not include 'legally required forms of support, including legal taxes, fees, and/or royalties that corporations pay to the government of a country in which they operate'.[95] Thus, when there is a parallel government present in the area where the corporation operates, it is unclear to what extent corporations should accept financial obligations imposed on them by these institutions. International law does not contain directly relevant rules to guide corporations in these circumstances. Due to inconsistent state practice, states should consider developing guidance on the matter.

Recommendations

- Conflict-affected states should engage with corporations active in areas under the control of armed groups and clarify their expectations in relation to the continuation of corporate activities in these areas.
- Corporations should not engage with armed groups, unless required by the situation.
- When engaging with armed groups present in an area, corporations should seek to gain a better understanding of the structure of armed groups, their control of territory and population, their objectives, their political agenda and the support that they enjoy from the local population. They should also have a clear engagement strategy, maintain impartiality and collaborate with other corporations, NGOs and United Nations agencies.
- Before exiting an area in response to the presence of armed groups, corporations should establish a responsible exit strategy. They must consider whether exiting will exacerbate tensions and whether the benefits of exiting outweigh the harms to people involved.
- States should develop guidance for corporations on mitigating the risk of indirectly financing conflicts, particularly in host states with parallel governments.

accessed 18 May 2024). See also United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide*, *supra* note 54, 35.

[92] United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide, supra* note 54, 35-36.

[93] Responsible Investment Association Australasia, *Investor Toolkit on Human Rights and Armed Conflict* (2023), 31, available at < https://www.ausbil.com.au/Ausbil/media/Documents/Research%20and%20Insights/Investor-Toolkit-on-Human-Rights-and-Armed-Conflict.pdf > (last accessed 28 April 2024).

[94] Ibid., 36-37.

[95] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, *supra* note 11, 22.

(e) Situations of occupation

Situations of occupation may impose specific requirements on corporations with respect to due diligence. Principle 20 of the ILC Principles on sustainable use of natural resources states as follows: "To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the protected population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes harm to the environment". This Principle reflects the rules contained in Article 55 of the 1907 Hague Regulations in relation to the administration and usufruct of the occupied territory's natural resources. According to these rules and their interpretation by judicial institutions, the occupying power has a right to exploit the natural resources in occupied territory, subject to the following conditions: 1) the revenues may only be used for maintaining a civilian administration and for satisfying the needs of the population of the occupied territories; 2) the capital of the properties should be safeguarded.[96] There is a long-standing discussion in scholarship and practice on whether the right of usufruct applies to non-renewable natural resources, since the capital of these resources is automatically diminished through their exploitation. However, to the extent that non-renewable natural resources are covered by the right to usufruct, there is widespread agreement that their exploitation may continue at existing levels only; concessions for new projects may not be granted and existing projects must satisfy the requirement of sustainable use.

A first challenge for corporations is to identify whether a territory is occupied. This requires corporations to determine that the territory "is actually placed under the authority of the hostile army" (Article 42 of the 1907 Hague Regulations). Other challenges relate to ensuring that the conditions for usufruct are satisfied. There is currently no guidance for corporations on how to make such a determination. A suggestion put forward by Human Rights Watch in relation to the first condition is to require corporations to disburse revenues to a fund that is transparent and independently audited.[97] In relation to the second requirement, corporations should first verify whether the concession relates to a new project or whether it is for the continuation of an existing project. Second, they should verify whether measures have been taken to minimize harm to the environment and whether the quantities taken are in proportion to what is needed for satisfying the needs of the population of the occupied territory.

[96] *Report of the International Law Commission to the Seventy-Third Session*, UN Doc A/77/10, 12 August 2022, 166-169. See also D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (CUP 2015), 226-233

[97] S. Saadoun (2016) Responsible Business in Occupied Territories, available at < https://www.hrw.org/news/2016/06/21/responsible-business-occupied-territories > (last accessed 19 July 2024).

Recommendations

- States that assume effective control over territory as occupying power should establish funds for the revenues of natural resources exploitation. These funds should be transparent, managed by an independent party and subject to third-party independent audit.
- Corporations doing business in or with occupied territories should ensure that the revenues of their activities are used for the population of the occupied territory. For this purpose, they should make appropriate arrangements (with the occupying power) in relation to the management of the revenues.
- Corporations doing business in or with occupied territories should verify that the levels of natural resources exploitation do not exceed pre-occupation levels.
- Corporations purchasing natural resources from occupied territories must verify whether measures have been taken to minimize harm to the environment.

5. Principle 11: implementation issues and guidance

The following section sets out the issues that were raised in the stakeholder consultation regarding the implementation of Principle 11 and relevant guidance. It should be noted beforehand that Principle 11 focuses exclusively on liability. This implies that this section will not discuss alternative mechanisms set up by states for the purpose of addressing human rights and environmental concerns raised by the activities of corporations, such as OECD National Contact Points.

(a) Civil liability

The first sentence of Principle 11 recommends that states take ‘appropriate measures to ensure that business enterprises operating in or from their territories, or territories under their jurisdiction, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict’. From the perspective of civil liability, a first issue is that the relevant test of causation under Principle 11 is unclear. The scope of Principle 11 is more limited than the UNGP’s. The UNGP’s do not only prescribe liability for harm ‘caused by’ the corporation, but also for harm to which the corporation has ‘contributed’ and harm that is ‘directly linked’ to the corporation’s business activities.[98] By confining liability to harm that a corporation has caused, Principle 11 excludes liability for harm resulting from a corporation’s failure to conduct proper due diligence with respect to its business partners, as such harm would rather be ‘directly linked’ to the corporation’s activities.[99] Yet, there is still unclarity about the exact meaning of ‘caused by’ in Principle 11, as the commentary states that ‘[t]he notions of “harm” and “caused by them” are to be interpreted in accordance with the applicable law, which may be the law of the home state of the business enterprise, or the law of the state in which the harm has been caused’. It is recommended that states interpret ‘caused by’ as ‘caused by and contributed to’ in line with the UNGP’s.

Furthermore, Principle 11 does not clarify what burden of proof victims must satisfy. Consequently, states may place a disproportionate burden of proof on victims, making it more difficult to receive remedies in court.[100] Several NGOs have suggested to shift the burden of proof onto the defendant,

[98] Human Rights Council, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, supra* note 3, 14, para. 13.
[99] Dam-De Jong & Wolters, *supra* note 10, 114.
[100] *Report of the Working Group on Business and Human Rights, Extractive sector, just transition and human rights*, UN Doc A/78/155, 11 July 2023, 10, paras. 27-29.

particularly because the relevant information is typically in the hands of the corporate defendant. Amnesty International suggests that claimants should make a *prima facie* case that they have suffered harm as a result of the corporate defendant's activities, after which the burden of proof is shifted to the defendant.[101] The CESCR notes that this approach is justified 'where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant'.[102]

Recommendations

- States should clarify the relevant test of causation for civil liability to arise on corporations that have caused environmental harm in conflict-affected areas. The UNGPs provide a relevant global standard.
- When the evidence of harm to claimants as a result of the corporation's activities lies within the exclusive knowledge of the corporation, states should adjust the burden of proof that claimants need to satisfy accordingly.

(b) Criminal liability

Although not specifically stated, Principle 11 leaves open the possibility of criminal responsibility of corporations. This can be derived from the commentary to Principle 11, which refers to states' obligations under international humanitarian law, including in relation to the war crime of pillage. Holding corporations criminally liable for environmental harm comes with a set of challenges, including in relation to the modes of liability. In practice, a corporation may not always be the only or direct contributor to the harm. Rather, corporations may contribute through various modes, such as by aiding and abetting, instigating, or facilitating. It is not clear which of these modes of liability satisfy the standard of causation set by Principle 11.

The International Commission of Jurists has published guidance with respect to criminal liability of corporations in the context of human rights abuses.[103] The guidance sets out the legal framework for accomplice liability, liability for aiding and abetting and superior liability. With regard to standards of causation, it notes that '[t]here will usually be a sufficiently close link in law between a company's conduct and gross human rights abuses if the company's conduct has 'enabled', 'exacerbated', or 'facilitated' the abuses'.[104] In this regard, reference can be made to the French *Lafarge* case. There, the French Supreme Court held that a French corporation was found to have been complicit in crimes against humanity committed by armed groups in Syria, due to its financial support to the armed groups.[105]

[101] Amnesty International & Business and Human Rights Resource Centre, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse* (2017), 7, available at < https://www.amnesty.org/en/documents/pol30/7037/2017/en/ > (last accessed 18 May 2024).
[102] CESCR, *General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, *supra* note 19, 13-14, para. 45.
[103] International Commission of Jurists, *Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability. Volume 1: Facing the Facts and Charting a Legal Path* (2008), 17, available at < https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf > (last accessed 18 May 2024).
[104] Ibid., 10.
[105] Business and Human Rights Resource Centre, 'Corporate complicity in crimes against humanity: the Lafarge case' (10 March 2022), available at < https://www.business-humanrights.org/en/blog/corporate-complicity-in-crimes-against-humanity-the-lafarge-case/ > (last accessed 29 April).

The guidance from the International Commission of Jurists also focuses specifically on accomplice liability for human rights abuses in a corporation's supply chain.[106] It notes that proximity is a determining factor for establishing criminal liability.[107] However, even where the human rights abuses take place far into the supply chain, corporations may still be held criminally liable if they know or are expected to know that the human rights abuses may be taking place.[108] Additionally, the UN Global Compact Office recommends that corporations adhere to international best practices of human rights due diligence, even when national law sets lower standards, in order to avoid allegations of complicity in human rights abuses.[109]

With regard to legislative instruments, reference can furthermore be made to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol'). Article 46C of the Malabo Protocol opens the possibility of corporate criminal liability. The modes of liability are laid down in Article 28N of the Malabo Protocol. These modes include instigating and facilitating, aiding or abetting, conspiring and attempting to commit any of the offences laid down in the Statute of the African Court of Justice and Human Rights. As they apply to 'any person', this provision also covers corporations.

Recommendations

- States should clarify the potential modes of criminal liability for corporations that have caused harm in conflict-affected areas, including the standard of causation.
- Corporate criminal liability should encompass liability for human rights abuses that have taken place in a corporation's supply chain, if the corporation knew or was expected to know that human rights abuses may have been taking place.

(c) Liability through subsidiaries

The second sentence of Principle 11 recommends measures aimed at ensuring that a corporation can be held liable to the extent that the harm 'is caused by its subsidiary acting under its *de facto* control'. It is unclear how '*de facto* control' should be construed in practice, as there are different ways in which liability may arise with respect to the parent corporation and the subsidiary. For example, the parent corporation may be found to be responsible through agent liability. Alternatively, both the parent corporation and the subsidiary may be held responsible on the basis of joint and/or several liability. Lastly, parent liability may arise through intervention. Since the types of liabilities arising on the parent corporation and the subsidiary directly impact the accessibility of remedies for victims, it is crucial to provide guidance on the interpretation and application of the control test. Amnesty International holds that a corporation controls a subsidiary whenever 1) it holds at least a majority of the shares in the subsidiary or 2) it exercises effective control over the subsidiary.[110] Conversely, in the case of *Vedanta*, the Supreme Court of the United Kingdom held that the ownership of a majority of the shares of the subsidiary may enable the parent corporation to control the subsidiary, but that there

[106] International Commission of Jurists, *Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability. Volume 1: Facing the Facts and Charting a Legal Path, supra* note 101, 29-30.
[107] Ibid., 30.
[108] Ibid.
[109] United Nations Global Compact Office, *Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors* (2010), *supra* note 39, 13.
[110] Amnesty International & Business and Human Rights Resource Centre, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse, supra* note 99, 2.

was no duty upon the parent to do so.[111] The parent corporation only incurs liability for the conduct of its subsidiary where the corporation 'availed itself of the opportunity to takeover, intervene in, control, supervise or advise the management of the relevant operations of the subsidiary'.[112] Thus, the interpretation of '*de facto* control' is not clear-cut and will vary according to the domestic legal system. Importantly, whenever control over the subsidiary cannot be established, a corporation may still be held liable in the form of accessory liability, depending on the domestic legal system.[113]

An additional challenge with establishing liability is that the claimant may not be able to determine the level of control of a parent corporation over its subsidiary without access to internal documents of the corporation. Consequently, it will be difficult to establish *de facto* control when the parent corporation refuses to disclose information on this matter. It is suggested that, in determining the relevant burden of proof, the inequality between parties in terms of access to information and resources is taken into account.[114]

Recommendations

- States should clarify when a corporation has *de facto* control over its subsidiary in order for liability to arise on the part of the corporation.
- States should clarify how liability may arise when a corporation's subsidiary has caused harm depending on the level of control, for example through joint liability, joint and several liability or agent liability
- In determining the standard and burden of proof of whether a corporate defendant had *de facto* control over its subsidiary, the inequality of parties in terms of access to information must be taken into account.

(d) Access to justice

The third sentence of Principle 11 recommends that states provide 'adequate and effective procedures and remedies' for victims of environmental and health-related harm that has been caused by the corporation or its subsidiaries in a conflict-affected area. Access to justice may be compromised by several potential barriers.

A first barrier concerns judicial doctrines that affect the jurisdiction of a court in cases brought in the corporation's home state for harm that occurred abroad. In practice, the doctrine of *forum non conveniens* is one of the most important barriers to access to justice in such cases. According to this doctrine, a court may decline to exercise jurisdiction if another forum is available to victims that is considered more appropriate. Amnesty International suggests eliminating the doctrine in relation to

---

[111] *Vedanta Resources PLC and another (Appellants) v Lungow and others (Respondents)* [2019] UKSC 20, para. 49.
[112] Ibid.
[113] J. Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies' (2014), 37, available at < https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf > (last accessed 29 April 2024).
[114] Human Rights Council, *Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, A/HRC/55/59/Add.1, 13 February 2024, 11, Article 8.5, available at < https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf > (last accessed 29 April 2024).

corporate human rights abuses altogether, in order to strengthen the right to remedy of victims.[115] Similarly, in the 2016 Council of Europe Recommendation on Human Rights and Business, it is recommended that the doctrine be dismissed in transnational tort claims for alleged corporate-related human rights abuses.[116] In this regard, reference can be made to the EU, where the doctrine has been considered incompatible with the Brussels I Bis Regulation.[117] Amnesty International notes that the elimination of the doctrine in this context has not led to any significant legal difficulties in practice. If the doctrine is upheld, however, guidance emphasizes that courts should take into account whether victims still have effective access to justice in the host state. Support for this suggestion can be found in case law of US courts, such as the *Presbyterian Church of Sudan v. Talisman Energy* and *Wiwa v. Royal Dutch Petroleum Co.*[118] This determination includes considering all potential issues that claimants may face in the courts of the host state.[119] Only in 'exceptional circumstances' should the court dismiss claims on the basis of *forum non conveniens*.[120]

A second potential barrier to effective access to justice is the political question doctrine. In US courts, a limited number of cases brought under the Alien Tort Statute have been dismissed on this basis.[121] The political question doctrine is typically raised where the corporation has assisted the government in their conduct.[122] This doctrine has been extended to the conduct of PMSCs, in relation to their handling of waste.[123] In these cases, the contracting state is also the contractor's home state.[124] It therefore appears that the doctrine is generally only raised in specific circumstances where the corporation has a link with the home state. This suggests that the doctrine does not form a significant barrier to access to justice, in comparison to the doctrine of *forum non conveniens*.

A third barrier to effective access to justice is the double criminality rule. In some jurisdictions, it is required that the conduct is unlawful in both the home and host state of the corporation. Cases that have been dismissed on the basis of the double criminality rule are rare. It is suggested that in most cases involving corporate human rights abuses and environmental harm, the relevant conduct is unlawful in both the host state and the home state.

A fourth barrier links back to the parent-subsidiary relationship and relates to piercing the corporate veil. Parent corporations should not be able to escape responsibility by creating separate legal

---

[115] Amnesty International, *Injustice Incorporated. Corporate Abuses and the Human Right to Remedy* (2014), 151, available at < https://www.amnesty.org/en/documents/pol30/001/2014/en/ > (last accessed 18 May 2024).
[116] Amnesty International & Business and Human Rights Resource Centre, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse*, *supra* note 99, 11.
[117] Amnesty International, *Injustice Incorporated. Corporate Abuses and the Human Right to Remedy*, *supra* note 113, 128; CJEU, Case C-281/02, *Andrew Owusu v. N.B. Jackson* [2005].
[118] Amnesty International, *Injustice Incorporated. Corporate Abuses and the Human Right to Remedy*, *supra* note 113, 152.
[119] Ibid.
[120] Amnesty International & Business and Human Rights Resource Centre, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse*, *supra* note 99, 13.
[121] *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, *supra* note 18, 40, para. 84 (e.g. the *Saldana* case).
[122] The International Corporate Accountability Roundtable & The European Coalition for Corporate Justice, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013), 42, available at < https://corporatejustice.org/publications/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/ > (last accessed 28 April 2024).
[123] *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto*, *supra* note 18, 48, para. 101.
[124] Ibid., 49, para. 103.

personalities for their subsidiaries abroad.[125] Amnesty International suggests that states explicitly clarify when the corporate veil can be pierced.[126] In the United States, for example, courts have established criteria that justify piercing the corporate veil in exceptional circumstances.[127] Alternatively, it suggests that states recognize a corporation and its subsidiaries as 'one enterprise' for the purposes of litigation concerning corporate human rights abuses. This approach would take away the need to pierce the corporate veil. Other suggestions made by Amnesty International include adopting a direct duty of care approach to corporations for acts of their subsidiaries or recognizing a 'rebuttable presumption' regarding the liability of corporations for human rights violations of their subsidiaries.

Recommendations

- The doctrine of *forum non conveniens* may affect the access to justice for victims of environmental harm caused by corporations abroad, where the host state does not provide adequate remedies. States should consider dismissing the doctrine in cases of extraterritorial corporate human rights abuses. Where the doctrine of *forum non conveniens* is upheld, national courts should consider whether victims still have sufficient access to justice in the host state.
- States should ensure that corporations cannot evade responsibility by creating separate legal personalities for their subsidiaries abroad. States should clarify the circumstances under which the corporate veil can be pierced or, alternatively, ensure that corporations can be held directly liable for human rights violations of their subsidiaries abroad.

(e) Access to remedies provided by corporations

Although the third sentence of Principle 11 is addressed to states, corporations can also play a role in providing remedies themselves. This is reflected in Pillar 3 of the UNGPs. The use of the wording 'as appropriate' furthermore indicates that states do not have to provide remedies when the corporation has already done so in an adequate manner. One way in which corporations can provide remedies is through operational-level grievance mechanisms.[128] These are 'formalized means for affected stakeholders to raise concerns about any impact they believe a corporation had on them, in order to seek remedy'.[129] The grievance mechanisms should provide solutions, including remedies, for affected stakeholders. Several issues may arise in relation to the implementation of operational-level grievance mechanisms, particularly in conflict-affected areas. Firstly, operational-level grievance mechanisms may be of limited impact in situations of widespread human rights abuses, since they are designed to handle small disputes only. Moreover, affected stakeholders may be distrustful of the corporation, which can limit the effectiveness of the grievance mechanisms. Furthermore, operational-level grievance mechanisms may not adequately take into account conflict and gender sensitivities.

---

[125] Ibid., 35, para. 73.

[126] Amnesty International & Business and Human Rights Resource Centre, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse, supra* note 99, 24-25.

[127] *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, supra* note 18, 42, para. 88.

[128] International Commission of Jurists, *Effective Operational-Level Grievance Mechanisms* (2019), 30, para. 26, available at < https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf > (last accessed 18 May 2024).

[129] Institute for Human Rights and Business & Shift, *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (2011), 71, available at < https://op.europa.eu/en/publication-detail/-/publication/e05fc065-f35c-4c0d-91e9-7e500374ee0f > (last accessed 18 May 2024).

Guidance in relation to operational-level grievance mechanisms has been developed by the International Commission of Jurists and the UN Development Programme, amongst others.[130] The UN High Commissioner for Human Rights has also published a report on operational-level grievance mechanisms, which includes recommendations for improving the effectiveness of these mechanisms.[131] UN Guiding Principle 31 furthermore sets out several characteristics of effective operational-level grievance mechanisms. These include: legitimacy, accessibility, predictability, equitability, transparency, compatibility with rights, continuous learning and engagement and dialogue. The factor of legitimacy is particularly relevant in cases of distrustful stakeholders. Legitimacy must be understood as 'enabling trust from stakeholder groups for whose use they are intended and being accountable for the fair conduct of grievance processes'.[132] This may be achieved through meaningful stakeholder participation.[133] It is also acknowledged in guidance that grievance mechanisms may not be fit for purpose in all situations, for example in cases of alleged gross human rights violations.[134] The need for a gender sensitive approach in relation to grievance mechanisms has also been recognized in guidance.[135]

Recommendations

- States should require corporations to establish operational-level grievance mechanisms that are legitimate, accessible, predictable, equitable, transparent, compatible with rights, and facilitate continuous learning, engagement and dialogue.
- Operational-level grievance mechanisms should incorporate a conflict and gender sensitive approach and prioritize stakeholder engagement.

6. Recommendations

The following section provides an overview of recommendations in relation to Principles 10 and 11, based on the challenges identified in sections 3 to 5. It should be noted that the rules on the responsibility of states for internationally wrongful acts apply without prejudice to Principles 10 and 11. Breaches of international legal obligations by states regarding environmental damage in relation to armed conflict can give rise to the international responsibility of states.

[130] International Commission of Jurists, *Effective Operational-Level Grievance Mechanisms*, *supra* note 126; United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide*, *supra* note 55.

[131] Human Rights Council, *Report of the United Nations High Commissioner for Human Rights, Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms*, A/HRC/44/32, 19 May 2020, available at < https://www.ohchr.org/en/documents/reports/improving-accountability-and-access-remedy-victims-business-related-human-rights > (last accessed 29 April 2024).

[132] United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide*, *supra* note 55, 46.

[133] International Commission of Jurists, *Effective Operational-Level Grievance Mechanisms*, *supra* note 126, 11; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights, Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms*, *supra* note 129, 17.

[134] United Nations Development Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide*, *supra* note 55, 46.

[135] International Commission of Jurists, *Effective Operational-Level Grievance Mechanisms*, *supra* note 126, 40, 99.

General recommendations

Overarching

- States should put in place appropriate monitoring and accountability mechanisms to ensure that corporations headquartered in their state are held accountable for human rights abuses committed abroad, particularly when remedies for victims in the host state are unavailable or ineffective.
- States should respect the sovereignty of host states when regulating the conduct of corporations abroad, for example by only regulating the conduct of corporations that reside or are registered in its territory.

Recommendations in relation to Private military and security companies

- States should require PMSCs to conduct due diligence with respect to the environment, especially when conducting activities that may have severe environmental effects, such as the disposal of toxic and other hazardous materials.
- States must respect their international legal obligations vis-à-vis the environment when contracting PMSCs. Breaches of these obligations can entail the international responsibility of states, pursuant to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts.
- States should require corporations that have contracted PMSCs to screen the track records of the PMSCs, consult with host governments and local communities, report on credible allegations of human rights abuses by PMSCs, provide human rights training to the PMSCs, and join voluntary initiatives, such as the Voluntary Principles on Security and Human Rights.

Recommendations in relation to Principle 10

Monitoring and tracing resource extraction in conflict-affected areas

- States should require corporations to prevent that they contribute to the financing of armed conflict through natural resources exploitation. A particular challenge is that monitoring resource extraction may be hampered in conflict-affected areas. Corporations should be required to use multiple sources to monitor resource extraction in conflict-affected areas, including open-source information.
- States should put in place mechanisms that allow tracking and tracing of minerals. They should prioritize the tracing of minerals, particularly before the smelting or refinement stage. Minerals that are untraceable by their nature should be subjected to a tagging procedure.

Heightened due diligence

- States should develop guidance for corporations to help them to identify when heightened due diligence is necessary, either by consulting existing resources or by conducting a conflict analysis themselves. To determine how the heightened due diligence obligations should be implemented, corporations should map the main actors of the conflict and conduct an impact assessment.
- States should encourage corporations to assume a peacebuilding role during and/or post-conflict. Several toolkits have been developed to assist corporations in this role, in particular by the Collaborative for Development Action and the UN Global Compact Office.

Public participation and stakeholder engagement

- States should adopt regulatory measures that require corporations to engage with stakeholders, based on the following principles:
    - Corporations should prioritize stakeholder engagement, particularly where local communities have first-hand insight in the conflict.
    - When there are competing interests between stakeholders, corporations should enable both groups of stakeholders to express their concerns, consider seeking the assistance of a neutral mediator, and prioritize those stakeholders who are most impacted by the corporation's activities but have the least influence over it.
    - Corporations should regularly report back to stakeholders in an accessible manner.

Engagement with armed groups

- Conflict-affected states should engage with corporations active in areas under the control of armed groups and clarify their expectations in relation to the continuation of corporate activities in these areas.
- Corporations should not engage with armed groups, unless required by the situation.
- When engaging with armed groups present in an area, corporations should seek to gain a better understanding of the structure of armed groups, their control of territory and population, their objectives, their political agenda and the support that they enjoy from the local population. They should also have a clear engagement strategy, maintain impartiality and collaborate with other corporations, NGOs and United Nations agencies.
- Before exiting an area in response to the presence of armed groups, corporations should establish a responsible exit strategy. They must consider whether exiting will exacerbate tensions and whether the benefits of exiting outweigh the harms to people involved.
- States should develop guidance for corporations on mitigating the risk of indirectly financing conflicts, particularly in host states with parallel governments.

Situations of occupation

- States that assume effective control over territory as occupying power should establish funds for the revenues of natural resources exploitation. These funds should be transparent, managed by an independent party and subject to third-party independent audit.
- Corporations doing business in or with occupied territories should ensure that the revenues of their activities are used for the population of the occupied territory. For this purpose, they should make appropriate arrangements (with the occupying power) in relation to the management of the revenues.
- Corporations doing business in or with occupied territories should verify that the levels of natural resources exploitation do not exceed pre-occupation levels.
- Corporations purchasing natural resources from occupied territories must verify whether measures have been taken to minimize harm to the environment.

Recommendations in relation to Principle 11

Civil liability

- States should clarify the relevant test of causation for civil liability to arise on corporations that have caused environmental harm in conflict-affected areas. The UNGPs provide a relevant global standard.

- When the evidence of harm to claimants as a result of the corporation's activities lies within the exclusive knowledge of the corporation, states should adjust the burden of proof that claimants need to satisfy accordingly.

Criminal liability

- States should clarify the potential modes of criminal liability for corporations that have caused harm in conflict-affected areas, including the standard of causation.
- Corporate criminal liability should encompass liability for human rights abuses that have taken place in a corporation's supply chain, if the corporation knew or was expected to know that human rights abuses may have been taking place.

Liability through subsidiaries

- States should clarify when a corporation has *de facto* control over its subsidiary in order for liability to arise on the part of the corporation.
- States should clarify how liability may arise when a corporation's subsidiary has caused harm depending on the level of control, for example through joint liability, joint and several liability or agent liability
- In determining the standard and burden of proof of whether a corporate defendant had *de facto* control over its subsidiary, the inequality of parties in terms of access to information must be taken into account.

Access to justice

- The doctrine of *forum non conveniens* may affect the access to justice for victims of environmental harm caused by corporations abroad, where the host state does not provide adequate remedies. States should consider dismissing the doctrine in cases of extraterritorial corporate human rights abuses. Where the doctrine of *forum non conveniens* is upheld, national courts should consider whether victims still have sufficient access to justice in the host state.
- States should ensure that corporations cannot evade responsibility by creating separate legal personalities for their subsidiaries abroad. States should clarify the circumstances under which the corporate veil can be pierced or, alternatively, ensure that corporations can be held directly liable for human rights violations of their subsidiaries abroad.

Access to remedies provided by corporations

- States should require corporations to establish operational-level grievance mechanisms that are legitimate, accessible, predictable, equitable, transparent, compatible with rights, and facilitate continuous learning, engagement and dialogue.
- Operational-level grievance mechanisms should incorporate a conflict and gender sensitive approach and prioritize stakeholder engagement.

Annex I Overview of consulted organisations and individuals

Name	Organisation
Barnes, Mihaela	Nomos Strategy
Brabant, Stéphane	Trinity International Paris
Brown, Oli	Chatham House
Citeroni, Nicole	University of Luxembourg
Cooke-Hurle, Tim	Doughty Street
Cronjé, Erin	De Brauw Blackstone (law firm)
De Brabandere, Eric	Grotius Centre - Leiden University
Douvartzidis, Lara	IBA
Gerritse, Eva	PAX
Grant Goodey, Elodie	International Conflict and Security Consulting (INCAS)
Hofmeister, Edie	Osisko Gold Royalties
Hulme, Karen	Essex University and IUCN-WCEL
Iverson, Jens	Grotius Centre - Leiden University
Kebebew, Tadesse	Geneva Water Hub
Kim, Soh-Won	Principles for Responsible Investment
Koster, Harold	Leiden University - Institute of Private Law (company law)
Kron, Amanda	Lund University
Lawry-White, Merryl	ILA British branch
Lehto, Marja	SR Perac
Lopez Hurtado, Carlos	International Commission of Jurists
Ngangjoh Hodu, Yenkong	Manchester University
Nyheim, David	International Conflict and Security Consulting (INCAS)
Olawuyi, Damilola	UN Working Group on Business and Human Rights
Pantazopoulos, Stavros	T.M.C. Asser Institute
Pearshouse, Richard	Human Rights Watch
Pertile, Marco	University of Trento
Pietropaoli, Irene	BIICL
Plas, van der, Cathalijne	Leiden University - Institute of Private Law (Private international law)
Reid, Alex	Global Witness
Robinson, Abigail	Continua
Rouas, Virginie	T.M.C. Asser Institute
Rovinescu, Lee	Freshfields Bruckhaus Deringer
Sjöstedt, Britta	Lund University
Spears, Suzanne	Paxus LLP
Stewart, Daniel	Independent International Legal Advocates
Tignino, Mara	Geneva Water Hub
Tyler, Katherine	Kingsley Napley
Van Ho, Tara	Essex University
Wesselink, Egbert	PAX

Annex II Program workshop on Corporate Due Diligence and Liability for Natural Resources Supply Chains in/from Conflict-Affected Regions, 21-22 June 2023, The Hague, the Netherlands

This workshop was organized by (in alphabetical order) the European Society on International Law's Interest Group on Business and Human Rights; Essex University, Geneva Water Hub - Geneva University; the Grotius Centre for International Legal Studies – Leiden University; the International Law Association's British branch; and the International Union for the Conservation of Nature - World Commission on Environmental Law's Specialist Group on Environmental Security and Conflict Law.

It brought together academics, practitioners and legislators to share experiences and compare perspectives on the current landscape of corporate responsibility in natural resources supply chains, with an emphasis on conflict regions. The workshop consisted of three sessions, in the form of roundtable discussions with brief presentations by selected participants to introduce the key questions to be discussed by the participants.

Programme Wednesday 21 June 2023

4.30 – 4.35 pm	Welcome by Eric De Brabandere (director of the Grotius Centre for International Legal Studies
4.35 – 4.50 pm	Introduction, setting out the objective and format of the workshop
4.50 – 5.10 pm	Keynote to introduce the principles and their ramifications for corporations – Ambassador Marja Lehto (ILC Special Rapporteur on the ILC Perac principles)
5.15 – 6.45 pm	*Roundtable 1 Coverage of the regulatory initiatives*

Moderator: Mara Tignino (Geneva Water Hub - Geneva University and ESIL Interest Group on Business and Human Rights)

Opening statements (15 minutes):

- Damilola Olawuyi (UN Working Group on Business and Human Rights)
- Stéphane Brabant (Trinity International)

Discussion: *This roundtable seeks to engage with the following questions:*

- *Which contexts and mechanisms of compliance are covered by existing and emerging regulatory initiatives cover and where are the gaps? For instance, to what extent do these take into consideration the specific context of armed conflict or post-conflict situations?*
- *Which human rights and environmental risks do these initiatives address (and which are left out)?*
- *Is the design of these initiatives tailored to the objectives that they aim to achieve?*
- *How do the ILC Principles map onto and/or enhance existing regulation?*

Programme Thursday 22 June 2023

9.00-10.30 am *Roundtable 2 Implementation: challenges and opportunities*

Moderator: Karen Hulme (IUCN-WCEL and Essex University)

Opening statements:

- Yenkong Ngangjoh Hodu (Manchester University)
- Mihaela Barnes (Nomos Strategy)

Discussion: *This roundtable seeks to engage with the following questions:*

- *What are the perceived challenges in the implementation of the regulatory initiatives (and the principles more directly) discussed in Roundtable 1 and how can these challenges be addressed?*
- *More specifically, is there a need for more guidance on implementation? If so, how is that guidance most effectively delivered?*
- *Are there practical impediments (such as difficulties in tracing supply chains)? If so, how can those impediments be addressed?*
- *How and to what extent could "heightened" corporate due diligence inform/guide the implementation of the ILC Draft Principle 10?*
- *How best to engage the business community in heightened corporate due diligence to prevent environmental harm in conflict affected regions?*

11.00 am-12.30 pm *Roundtable 3: Remedies and accountability*

Moderator: Daniëlla Dam-de Jong (IUCN-WCEL and Leiden University)

Opening statements:

- Carlos Lopez Hurtado (International Commission of Jurists)
- Tara Van Ho (Essex University)

Discussion: *This roundtable seeks to engage with the following questions:*

- *How to ensure access to remedies for victims of environmental harm committed directly by corporations or as accomplices in conflict affected regions (both through civil liability mechanisms and criminal prosecution)?*
- *What are participants' experiences with respect to liability (including piercing the corporate veil) and the availability of remedies for victims?*
- *What function can operational-level grievance mechanisms at the company level perform in providing remedies?*
- *How can operational-level grievance mechanisms incorporate a conflict-sensitive (and gender) approach?*

12.30 pm Closure