



Submission to the UN Working Group on Business and Human Rights¹

Introduction:

This is the EIRIS Foundation's response to the UN Working Group on Business and Human Rights ("the WG" in what follow) call for input on business related human rights abuses in conflict-affected areas. This submission focuses on the second question in the consultation which is "What specific measures should business take in conflict and post-conflict situations and what does "enhanced" human rights due diligence look like in practice? How does/should the process to identify, prevent, mitigate and account for actual and potential impacts in conflict and post-conflict situations differ from "non-conflictual" contexts?"

The EIRIS Foundation ("the Foundation" in what follows) is a charity with a 35-year history in the field of ethical and responsible investment which currently focusses on ways to maximize the impact of responsible investment and corporate responsibility.

The Foundation's project Business in Occupied Lands conducts research into corporate activity in Crimea and the Occupied Palestinian Territories. It identifies all companies, and their investors, that have a physical presence in those territories. In addition to the creation of a database listing companies and investors, the Foundation published a paper in 2018 on [Questions to Help Companies Respect Human Rights in Occupied Territories](#) which is intended to be a useful resource for the WG's examination of occupation as a phase of conflict.

The Foundation has also recently assumed responsibility for the EIRIS Conflict Risk Network which assists institutional investors in the USA with the research and analysis they need to implement state level Sudan Divestment legislation. This involves assessing whether companies in certain sectors in Sudan have taken "substantial action" in favour of disadvantaged communities and so become exempt from divestment requirements under the legislation.

About the submission:

As the WG specifically requested "case studies and good practice examples from past and current conflict situations", the Foundation decided to develop practical guidelines for companies human rights due diligence for businesses operating in conflict areas. It is intended to help companies incorporate International Humanitarian Law into their environmental, social and governance (ESG) policies. This is not intended to be a guide which explains exactly how to do a human rights due diligence².

In addition to the Guidelines, the Foundation [facilitated a discussion](#) between two experts in business and human rights which was used as background material for the Foundation's consultation. In the discussion, Dr Tara Van Ho of the Human Rights Centre in the University of

¹The EIRIS Foundation wishes to thank Dr Tara Van Ho and Richard Rogers as well as all the other people and organisations who contributed to this paper.

² For that, we highly recommend looking at International Alert's excellent guide on Human rights due diligence in conflict-affected settings

Essex, Richard Rogers of Global Diligence Law and Peter Webster from the EIRIS Foundation explain IHL, Crimes against Humanities and UNGPs for companies. This is another resource which is available for the WG to use as appropriate.

The consultation:

In order to ensure that the Foundation's proposal is useful and practical it reached out to over 30 companies, NGOs, human rights experts and other stakeholders to request feedback on the draft guidelines. It held one webinar with companies and another with NGOs. In addition, it also had individual calls with companies that could not participate in the webinar and will continue to collect input on the present draft.

Outcome of the consultations and recommendations for the WG:

Amongst the input received that we have tried to respond to in the recommended guidelines were the following points:

1. C-suite might be hesitant to address human rights proactively due to the threat of legal liability. We have stressed the collective responsibility of the Board for guiding the approach rather than focussing too much on individuals.
2. It is difficult for companies to have leverage down its supply chain (including distributors) and in Joint Ventures where they are not the operating partner and do not have a large share. We have recommended publication of details of the supply chain which in other contexts (for example labour standards) has helped companies and others to get a clearer picture of the issues. If the WG is able to add more generally to the understanding of best practice in managing supply chains in conflict that would also be helpful.
3. Companies think that acknowledging international and non-international armed conflict means taking a political stance and are reluctant to do so. We have stressed the importance of grounding the analysis in international law as a point of reference and recommended the use of UN and other international processes to reinforce this.
4. Companies are finding it difficult to find reliable, up to date sources of information on current conflicts. We have suggested several sources, but any wider recommendations that the WG wanted to make to improve on the general conflict analysis capacity in the business and human rights community would be helpful.
5. Companies and legal experts reinforced the importance of having a non-siloed, integrated internal approach to human rights and IHL. No company mentioned IHL in their policy and they all supported integration into its existing Human Rights Policies. NGOs identified that for a company to take human rights seriously and develop a good policy on it, it has to be raised by more than one department or business segment (i.e. CSR department and External Affairs or Communication department). This can have a big impact on the company's eventual response.
6. HRDD has to have a sector-based approach as each sector has different issues and has a different awareness of their human rights impacts. We have stressed the importance of internal analysis being specific to a company's products, client types and business partnerships but if the WG wanted to consider any sector specific recommendation (for example in relation to military equipment, construction, IT, finance or extractives) that might also be helpful to practitioners.
7. Concern from NGOs about companies using the development of a HRDD as an excuse for inaction or as a way to delay action: 'Doing HRDD in perpetuity'. We have tried to include

guidance on timescales and recommended the publication of conflict specific timelines to overcome this but it remains a risk to confidence in the due diligence process.

8. Companies identified the difficulty of having contact with all sides in the conflict – partly because it is hard to find representatives and partly because it might be seen outside the remit for a company to do so. We have highlighted the potential usefulness of contact in conflict analysis, and we think that it could be relevant to leverage as well. But any further guidance the WG can give on when direct contact may be helpful and how it can be approached would also give confidence to those involved.

There were several additional points that we have not been able to address directly in the present draft that may still be helpful to WG's conflict project:

1. Companies identify transparency as a risk, rather than an asset. On the other hand, our legal experts took the opposite view when it came to the prioritisation of legal cases and in terms of mitigation. They thought being ahead of the curve, transparent and “doing the best you can” would serve a company well.

Recommendation: anything the WG can do to reinforce the view that conducting thorough human rights due diligence in a transparent fashion (including effective action) reduces overall legal risk would facilitate uptake by companies.

2. Lack of clarity on what makes a company to be directly linked-to, or contribute/cause to human rights violations and how a company can move from linked-to category to contribute/cause category.

Recommendation: it would be helpful to practitioners and other parties if the WG were able to give guidance on the conflict-specific factors that companies can or should use to identify cause, contribution and particularly the boundary between those categories and “directly linked.”

3. What can companies that are already implicated in human rights breaches in a conflict for many years do?

Recommendation: because some conflicts are very long-standing (and indeed new conflicts can grow out of previous ones) it would be useful for the WG to test its final recommendations against the case of a company that has taken none of the recommended steps to date, but might be considering (or under pressure to adopt) the due diligence process for the first time in relation to a particular conflict. What additional implication or challenges would this have for them and other parties and how should they be addressed?



Guidelines on Human Rights Due Diligence for businesses operating in conflict areas

April 2020

These are guidelines for companies on incorporating International Humanitarian Law into their ESG policies. It was developed by the EIRIS Foundation. It focuses on operating in conflict areas such as international and non-international armed conflict, occupation or post conflict. It was drafted as a response to the UN Working Group on Business and Human Rights Call for input on conflict, business and human rights abuses in conflict affected areas.

It is divided into two sections: external and internal. We refer to external as the publicly available statements of publications which a company puts out. The internal aspect includes all the process and the steps which needs to be taken by a company.

This is not intended to be a guide which explains exactly how to do a human rights due diligence. For that, we highly recommend looking at International Alert's excellent paper on [Human Rights Due Diligence in Conflict-Affected Settings](#).

Companies wishing to use the EIRIS Foundation's guidelines need to adjust and modify this to their own contexts. This is not an off-the-shelf product to add to a company's existing ESG policies.

Corporate IHL Commitment Statement

EXTERNAL

1.1 Include reference to respecting the rights set out in IHL when operating in conflict areas in your published Human Rights Policy. Consider whether your circumstances merit a separate, more detailed published conflict policy.

1.2 Make public the list of countries and locations where the company and its subsidiaries operate. Identify whether the areas of operation are in conflict-affected areas according to independent assessments such as the International Crisis Group map. <https://www.crisisgroup.org/crisiswatch>. Make similar data available for your most significant suppliers; and where possible, extend this throughout the supply chain.

1.3 Make public the key elements of your contracts with armed forces providing security to your operations.

1.4 Make public the names of the independent sources consulted in developing your policy and classifying conflict-affected areas, as well as your working definition of conflict-affected areas.

1.5 Make public a summary of your documented decision-making process including a timeline of your involvement in any conflict areas showing major developments in the conflict and in your response.

1.6 Make public positive interactions and creative use of leverage where you can do so safely.

INTERNAL

Governance

2.1 Mandates and leadership on conflict needs to come from the C-suite and the Board. Day to day responsibility for the management of conflict risks needs to rest with an individual or committee that reports directly to the C-suite.

2.2 Ensure that your IHL approach is well integrated with other human rights functions rather than segregated, while still considering the compliance and legal risks involved. Judgements in this area need to take account of a combination of legal, human rights, community and geo-political expertise.

Conflict Analysis

3.1 Develop internal mechanisms, resourcing and expertise to identify armed conflict(s) and the company's risks with respect to international humanitarian law, with access to appropriate external expertise. Conduct staff training on IHL when it applies.

3.2 In relation to each conflict identified, ensure that you have the capacity to monitor all actors and developments in the conflict and assess the potential for new or continuing breaches of IHL. Make use of the [Universal Periodical Reviews](#) conducted by the UN Human Rights Council and other reports by [Special Rapporteurs](#) and [UN Treaty Bodies](#) (when applicable). Monitoring parties to the armed conflict can be done directly (i.e., through contact with them) or, more commonly, indirectly (through public and expert reports). You need perspectives from all sides. Utilise third party organisations when necessary to seek an objective understanding of the situation(s). Be willing to engage in direct dialogue with stakeholders and particularly those community members identified as protected persons under IHL in the areas in which the company operates.

3.3 Monitor any controversies facing other internal business lines or other external businesses in relation to the same or similar conflicts to learn from that experience.

3.4 Develop a company stance on the conflict area that is grounded in international law and one that you are ready to defend and explain. Be aware of the risks of being drawn into the politics of the conflict and taking sides or being perceived to have done so. You can regard International law as a set of authoritative legal standards and norms. Identify any discrepancies between domestic (local, national) laws and international humanitarian law in relation to the country/territory that will need to be managed. Understand the controversial aspects of the conflict. Provide country-specific training where appropriate.

Keep in Mind: The situation may be politicised within your company, as well as externally, which means the monitoring of potential business links may benefit from clear oversight from individuals or organisations outside the conflict zone.

Keep in Mind: Defining a territory or area as undergoing an armed conflict will likely be considered a political move by one or more parties to the conflict but you still need to reach an independent assessment of the situation and whether your conflict policy applies.

Risk Assessment

4.1 Risk assessment as part of enhanced due diligence needs to identify all actual or potential risks of causing, contributing or becoming linked directly to breaches of IHL as well as the heightened risk of other human rights breaches in situations of conflict.

4.2 Regular Human Rights Due Diligence risk assessments should include an audit of your current and planned operations to identify whether there are situations of armed conflict that may be relevant to planned or current business operations. Protected populations under IHL should be clearly identified as vulnerable groups needing special attention.

4.3 Conflicts are dynamic situations which require continuous attention. New conflicts or developments in the scale or nature of a conflict should trigger a fresh risk assessment and due diligence cycle. You should consider holding periodic 'crisis exercises' in which you simulate a situation of human rights emergencies to examine your preparedness to deal with such situations should they occur.

4.4. Enhanced due diligence will also require adequate and dynamic review of your actual or potential business in the region (including new operations, new business streams, new and existing customers, new and existing suppliers, business relationships, subsidiaries, joint ventures, mergers and acquisitions) to identify all potential business links with any of the parties involved in the conflict. You cannot and should not rely solely on the due diligence carried out by governments (e.g. export licensure, customs) or other international bodies (i.e. EU) to ensure that your obligations have been met.

4.5 Identifying the IHL violations that you may face means reviewing the violations IHL identifies as serious and working through how these might involve your business, your workers, your supply chain, and your customers. This analysis will need to be specific to the nature and uses of your products and services, your particular customer base (consumers, business or public sector) and the types of business partnerships you have (suppliers, agents, joint ventures etc). See "[Questions to help companies respect human rights in occupied territories](#)" as an example of such an exercise in one particular context.

4.6 In relation to any potential violation of IHL, a you should have a clear and documented process to decide which (if any) of the three forms of involvement - causing, contributing to, or being directly linked with – applies to any identified violations or potential violations.

Action plans

5.1 If you are causing or contributing to **actual** IHL violations you should implement immediate action plans to cease the causing of or contribution to the violation, and to provide remedy to those affected. Where the impact is diffused or it is difficult to access rights-holders, international and local non-governmental organisations may be able to assist in designing and dispersing appropriate remedies.

5.2 If you are causing or contributing to **potential** IHL violations you need to identify action plans and leverage that can prevent the violations. If you judge that this is not possible, you will need to stop the cause or contribution to those potential violations and plan for remedy to victims (if the violations then occur).

5.3 In the case of both actual or potential contribution to IHL violations, you should also test your action plans against international, host and third state criminal and civil legal liability.

5.4 Where you have any direct business links to parties to the conflict who are involved in IHL violations but without causing or contributing to the violations yourself, you need to use or develop leverage on those parties to avoid, mitigate or reduce any such violations, especially if you are to maintain business links with them. Given that conflict will often be a matter of international concern, you should explore the leverage available through working with or supporting action by your home state, and UN or regional conflict resolution mechanisms and initiatives.

5.5 To avoid being caught unawares, you should prepare in advance for different possible scenarios that could arise from your dynamic monitoring of the parties to the conflict and actual or potential business links with these parties. Additionally, you should seek to learn from monitoring the challenges facing other businesses in similar circumstances.

5.6 Action planning needs to keep under review whether some (or all) of your operations in a country or region should cease due to an ongoing or new conflict and which parties or agencies you should avoid business links with, or require additional due diligence. Any general withdrawal from a conflict zone should be a last resort and the impact of withdrawal on the local population (including any protection you have been able to provide them) needs to be assessed and considered. You should carefully plan any withdrawal to avoid or minimise any further human rights risks.

5.7 There is a direct correlation between the risk/severity of the IHL breaches and the speed of an action required to stop such breaches. Your leverage must be more effective and immediate the worst the breaches are. Though it is impossible to specify timescales to suit every situation, when you are dealing with serious violations of IHL, your action plan should be calibrated in terms of months rather than years. However, there could be situations demanding action in hours rather than days. In any case, the development of action plans should be in the shortest possible time and cannot be used as an excuse for inaction.

Tracking

6.1 The purpose of tracking is to make sure that your efforts bear fruit and are results focused.

6.2 Plans to cease any cause or contribution to IHL breaches should be subject to review on relatively short timescales to ensure that they are effective.

6.3 In the case of business links with IHL violations where you are seeking to use leverage to prevent or mitigate those violations, your mitigation actions must be targeted at protecting the population from harm. If your leverage is repeatedly unsuccessful, there is a risk that your involvement with the IHL breaches could change from being 'linked to' to 'contributing to'. You should therefore make clear, reasonably frequent and documented assessments of whether your attempts at leverage are effective or whether you need to try a new approach.

6.4 All cases where you cause, contribute to or are linked with IHL violations need to be reviewed regularly against the latest understanding of international, host and third state criminal and civil legal liability.