

**Policy report:
Enhancing corporate
environmental responsibility in
conflict-affected settings**



**Conflict and
Environment
Observatory**

About this study

Corporations contribute to environmental harm in conflict-affected areas in numerous ways, including through the unsustainable exploitation of natural resources and the circulation of arms, enabling wildlife crime and poaching. The activities of corporations can also undermine the environmental security of communities, in turn posing threats to human security, and triggering local disputes that impede peace-building.

This report reconceptualises environmental protection during and after conflicts as a key component for the field of Security and Rule of Law. In doing so, it re-examines the roles and functions of key stakeholders, in order to improve conduct and so minimise and address harm to people and ecosystems. Through a comparative exercise, this report further enhances the understanding of the intersecting rules that should govern the environmental conduct of states and corporations in fragile and conflict-affected settings, as well as clarify the obligations of those actors during the phase of transition.

About the Conflict and Environment Observatory (CEOBS)

CEOBS is a UK charity that was launched in 2018 with the primary goal of increasing awareness and understanding of the environmental and derived humanitarian consequences of armed conflicts and military activities. In this, we seek to challenge the idea of the environment as a 'silent victim of armed conflict'.

We work with international organisations, civil society, academia and communities to: monitor and publicise data on the environmental dimensions of armed conflicts; develop tools to improve data collection and sharing; monitor and scrutinise developments in law and policy that could contribute towards the reduction of humanitarian and environmental harm; and promote environmental mainstreaming in humanitarian disarmament. CEOBS' overarching aim is to ensure that the environmental consequences of armed conflicts and military activities are properly documented and addressed, and that those affected are assisted.



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Introduction

Corporations contribute to environmental harm in conflict-affected areas in numerous ways, including through the unsustainable exploitation of natural resources and the circulation of arms, enabling wildlife crime and poaching. These activities negatively impact human health and ecosystems. The activities of corporations can also undermine the environmental security of communities, in turn posing threats to human security, and triggering local disputes that impede peace-building.

In many regions, climate change is already compromising the environmental security of communities, leaving them more vulnerable to environmental harm caused by corporate actors, and making measures to reduce corporate harm ever more urgent. In spite of this, access to justice for victims remains limited due to jurisdictional hurdles and the collapse of judicial institutions, whereas environmental harm is only marginally viewed as an issue of transitional justice.

These relationships remain largely unexplored. This is due to the scarcity of research that brings together traditionally separate fields of knowledge, such as environmental protection and justice during and after conflict, and usually distant, if not competing, actors, such as states, corporations and civil society. This fragmentation impedes knowledge production, and policy development and implementation. It also limits opportunities to engage with the stakeholders capable of effecting change on the ground including the corporations themselves.

Against this background, the project will target this fragmented landscape by reconceptualising environmental protection during and after conflicts as a key component for the field of Security and Rule of Law (SRoL). It will also actively promote environmental justice as an element of transitional justice. In parallel, it will re-examine the roles and functions of key stakeholders, and consider how they should be consulted and engaged with, in order to improve conduct and so minimise and address harm to people and ecosystems. The report aspires to enhance the understanding of the intersecting rules that should govern the environmental conduct of states and corporations in these areas, as well as clarify the obligations of those actors during the phase of transition.

Policy recommendations

Based on this analysis, we propose the following policy recommendations for states and corporations regarding corporate environmental conduct in fragile and conflict-affected (FCAS) settings:

1. States should:

Regulatory domain

1. Publicly commit to the protection of the environment in FCAS from harm caused by state and non-state actors, including corporations;
2. Identify gaps in the implementation of the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the UN International Law Commission's Principles on the Protection of the Environment in Relation to Armed Conflicts;
3. Adopt and enforce specific regulations on the licensing, establishment, operation, security, and supervision of corporate activities that may have harmful environmental effects in conflict and post-conflict settings, and which apply to both parent and subsidiary companies;
4. Require proof of origin documentation for materials imported from FCAS;
5. Adopt a National Action Plan on Business, Human Rights and the Environment in the context of corporate activities in FCAS;
6. Consider adopting corporate criminal liability legislation;
7. Adopt mandatory due diligence legislation, which should cover parents, subsidiaries and entities in the supply chain;

8. Establish independent mechanisms to monitor the implementation of mandatory corporate due diligence;

9. Facilitate public information and public participation on issues related to environmental damage caused by corporate entities in FCAS;

Enforcement domain

1. Properly investigate allegations of corporate-induced environmental damage in FCAS through effective and independent mechanisms;
2. Facilitate access to justice for victims of environmental damage in FCAS;
3. Review legislation regarding the provision of effective remedies and the effective allocation of reparations for corporate-induced environmental damage in FCAS;
4. Review or adopt legislation regarding the enforcement of fines or penalties for corporate-induced environmental damage in FCAS;
5. Monitor non-judicial grievance mechanisms for corporate environmental abuses in FCAS.

2. Corporations should:

1. Actively review the environmental implications of their activities in FCAS and their derived consequences for the enjoyment of human rights;
2. Assess and address foreseeable environmental, health, and safety-related impacts associated with processes, goods and services over their full life-cycle;
3. Review and adopt internal policies that are consistent to the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the UN International Law Commission's Principles on the Protection of the Environment in Relation to Armed Conflicts;
4. Design and implement due diligence strategies for the direct, indirect, actual and potential environmental impact of their activities, including those of their subsidiaries and other entities in their supply chain;
5. Publish information on their environment-related activities in FCAS;
6. Publish information on the results of their due diligence assessments, as well as their corporate social responsibility policies;
7. Establish alternatives to any environmentally harmful activities in FCAS that are identified and put in place mitigation measures;
8. Consider due diligence as an issue of legal compliance and liability;
9. Consult stakeholders that might be affected by their operations in FCAS;
10. Conduct and publish Environmental Impact Assessments;
11. Put in place environmental management systems to collect and evaluate information, and to establish measurable objectives for improved environmental performance and resource utilisation;
12. Develop and maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage from their operations in FCAS;
13. Adopt technologies and operating procedures that enable and enhance environmental protection throughout their operations in FCAS;
14. Engage with national authorities to provide judicial grievance mechanisms;
15. Create effective non-judicial grievance mechanisms;
16. Provide adequate, effective and appropriate reparations for environmental damage they have caused or contributed to in FCAS;
17. Monitor their progress towards achieving the environmental objectives listed above.

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1. Setting the scene

1.1 Methodology and structure

In terms of methodology, the report begins by documenting the environmental consequences of corporate activities in fragile and conflict-affected settings, and their implications for human and environmental security. Subsequently, the report delves into the intersection of environmental protection in conflict-affected areas with security and rule of law, and unravels the foundational concepts of environmental security and environmental rule of law (Section 1). Following that, it briefly touches upon different branches of international law, such as international humanitarian law, international human rights law and international criminal law, so as to infer their role in regulating corporate conduct in fragile settings (Section 2). We then undertake a comparative analysis of relevant legal instruments to identify best practices that would improve the environmental and social conduct of corporations and states in these settings (Section 3).

It has to be clarified at the outset that the legal instruments examined in Section 3 do not reflect binding obligations; instead, they are qualified as soft law instruments. We are mostly preoccupied with these non-binding, soft law initiatives, since they carry the potential to effectuate changes in corporate environmental conduct. The underlying assumption is that soft law regulation has the capacity to engineer behavioural changes, even if the norms under consideration do not form part of the existing law and thus are not enforceable.

In this context, the report explores how the standards on corporate conduct prescribed in three soft law documents, namely the United Nations (UN) International Law Commission's (ILC) draft principles on the Protection of the environment in relation to armed conflicts, the Organisation for Economic

Co-operation and Development (OECD) Guidelines on Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights, overlap and differ on issues of due diligence, modes of corporate liability, remedies for environmental harm and access to justice in conflict-affected areas, including the institution of grievance mechanisms to promote the environmental rule of law.

This research choice is justified on the basis of relevance and expediency given also the constraints of time. Other pertinent instruments were excluded from the scope of the current project. For example, the EU Conflict Minerals Regulation that will enter into force on 1 January 2021 and thus become 'hard law' falls automatically beyond the core of our project, since we are interested in focusing on soft law regulation. Another instrument that will attract significant attention when it will be eventually concluded is the draft binding treaty on business and human rights, but at this point it is not entirely clear what its final form will be.

1.2 Environmental security

By means of introduction, it is first to be noted that the UN Security Council holds a significant role in the domain of 'environmental security', as it is tasked with the maintenance of international peace and security.¹ Against this background, the UN Security Council has acquired significant experience in dealing with the linkages between natural resources and armed conflicts² by having adopted sanctions with respect to natural resources extraction and trade in conflict-

1. Article 24(1), Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

2. Daniëlla Dam-de Jong, 'Elected Members and Agenda-Setting: The Security Council as Peace Broker' in Nico J. Schrijver and Niels M. Blokker (eds) *Elected Members of the Security Council: Lame Ducks or Key Players?*, Brill Nijhoff, 2019, 197-216, 205.

affected areas,³ and by including the management of natural resources in the mandate of certain peacekeeping missions.⁴

Moreover, the UN Security Council has engaged in thematic debates touching upon environmental security issues, the frontrunner being the open debate held on Energy, Climate and Security in 2007.⁵ In the same vein, it has also integrated concerns relating to climate change in its resolutions and mandates for its missions.⁶

Throughout recent years, the UN Security Council has increasingly convened various Arria-formula meetings, that is, informal briefing meetings,⁷ on topics pertaining to the nexus between security and the environment, such as Water, Peace and Security (22 April 2016), Security Implications of Climate Change: Sea Level Rise (10 April 2017), Climate Change: Preparing for Security Implications of Rising Temperatures (14 December 2017, Water, Peace and Security (16 October 2018), the Protection of the Environment in Armed Conflict (7 November 2018 and 9 December 2019), Climate and Security Risks: The Latest Data (22 April 2020).⁸ All these initiatives can be seen as the means through which the UN Security Council is attempting to assert its own position in the environmental security field.

Turning to its definitional elements, 'environmental security' should firstly be read as a component of 'human security'. As Hulme notes, 'while states have traditionally taken a state-centric focus to security,

3. See UNSC Res. 792 (1992) on Cambodia; UNSC Res. 1173 (1998) on Angola; UNSC Res. 1306 (2000) on Sierra Leone; UNSC Res. 1343 (2001) and 1478 (2003) on Liberia.

4. See the United Nations Transitional Authority in Cambodia (UNTAC) and the United Nations Mission in Liberia (UNMIL).

5. UN Security Council 5663rd meeting, S/PV.5663, 17 April 2007.

6. Judith Nora Hardt, 'A Climate for Change in the UNSC? Member States' Approaches to the Climate-Security Nexus', IFSH Policy Brief 05/20, *citing* Resolution 2349 (2017); 2408 (2018); 2457 (2019) and field mission mandates as the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA); United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA); United Nations Office for West Africa and the Sahel (UNOWAS); African Union - United Nations Hybrid Operation in Darfur (UNAMID).

7. Note by the President of the UN Security Council, UN Doc. S/2006/507, para 54: 'The members of the Security Council intend to utilize "Arria-formula" meetings as a flexible and informal forum for enhancing their deliberations.'

8. The list of the Arria-formula meetings is available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/working_methods_arria_formula_meetings.pdf

a more modern interpretation of security would incorporate the environment: as an object to be protected or possibly as the source of the instability'.⁹ The link between environmental protection and security is best exemplified by the fact that there is considerable overlap between biodiversity hotspots and areas of civil tensions and war. To further illustrate this point, it has been documented that over 90% of major armed conflicts with more than 1,000 casualties occurred in countries containing biodiversity hotspots between 1950 and 2000.¹⁰ Environmental change is increasingly considered a risk or threat multiplier and thus, ecosystem degradation, intense resource competition, and uneven distribution of benefits exacerbate existing vulnerabilities and conflict risk, and further undermine human security.

For our purposes, it should be noted that violent conflict by necessity takes place within the 'natural environment.' Accordingly, environmental security issues in relation to armed conflict are by definition linked both to human security in light of the harm caused to agriculture and livelihoods, and to ecological security by virtue of the damage caused to the environment per se.¹¹

The UN Environment Programme (UNEP) approaches the notion of environmental security 'as a "conceptual envelope" including a variety of issues involving the role that the environment and natural resources can play across the peace and security continuum, including environmental causes and drivers of conflict, environmental impacts of conflict, environmental recovery and post-conflict peacebuilding'.¹² All things considered, the concept of environmental security should be defined in an inclusive fashion in order to encompass 'both the environment's ability to impact on human security, and humans' ability to impact on

9. Hulme, K. (2009). Environmental security: implications for international law. *Yearbook of international environmental law*, 19(1), 3, 8.

10. Hanson T, Brooks TM, Da Fonseca GA, Hoffmann M, Lamoreux JF, Machlis G, Mittermeier CG, Mittermeier RA, Pilgrim JD. Warfare in biodiversity hotspots. *Conserv Biol*. 2009 Jun, 23(3):578-87.

11. Hulme, 'Environmental security' (n 9) 16.

12. Ratner, B.D. 2018. Environmental security: dimensions and priorities. Scientific and Technical Advisory Panel to the Global Environment Facility. Washington, DC, 5.

the stability and viability of the biosphere'.¹³

1.3 Environmental Rule of Law

Turning to the second concept that transcends the report, the environmental rule of law forms a relatively new area of study and practice. It was in 2013 when the UNEP's Governing Council Decision 27/9, used the term for the first time in an international instrument.¹⁴ In 2014, the UN Environment Assembly picked up the baton by adopting resolution 1/13, urging countries 'to work for the strengthening of environmental rule of law at the international, regional and national levels.'¹⁵

Even though the 2015 Sustainable Development Goals (SDGs) do not refer explicitly to the notion of environmental rule of law, SDG 16 echoes its defining elements in that it urges to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.'¹⁶

In 2016, the World Environmental Law Congress, sponsored by the International Union for the Conservation of Nature (IUCN) and UNEP, approved the IUCN World Declaration on the Environmental Rule of Law, which asserted the importance of environmental rule of law as the legal foundation for promoting 'environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, sub-national, regional, and international levels.'¹⁷

According to UNEP, the concept of environmental rule of law 'describes when laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people

and the planet.'¹⁸ The IUCN World Declaration on the Environmental Rule of Law further explains that the concept of environmental rule of law adds a 'framework of procedural and substantive rights and obligations that incorporate the principles of ecologically sustainable development.'¹⁹

In this report, the concept of environmental rule of law is understood as an expansion of the traditional rule of law principle, which denotes that the state and private institutions are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. Environmental rule of law provides an extra layer whereby the laws that are promulgated, enforced and applied should be in addition consistent to environmental needs and protection.²⁰ Environmental rule of law connects rights and obligations from the one hand, to governance on the other hand, albeit under the lens of environmental sustainability. As UNEP emphasised, environmental rule of law substantiates environmental governance, and relieves it from arbitrariness, discretion, subjectivity and unpredictability.²¹

On a final note, it should be noted that the concept at hand was mainly developed to fit national and international, peacetime international environmental law. We argue, however, that the environmental rule of law holds a significant role in conflict-affected areas and fragile settings, and this report attempts to foreground this role in relation to corporate conduct. Consequently, the following sections will examine how the existing normative landscape addresses and carries the potential to enhance corporate environmental accountability in such contexts by reference to environmental SRoL.

13. Hulme, 'Environmental security' (n 9) 25.

14. UNEP's Governing Body, Decision 27/9, on *Advancing Justice, Governance and Law for Environmental Sustainability*, 2013.

15. UNEA Resolution 1/13, 'Implementation of Principle 10 of the Rio Declaration on Environment and Development', 27 June 2014, operative para. 4.

16. UN General Assembly RES/70/1, 'Transforming our World: The 2030 Agenda for Sustainable Development', SDG 16.

17. IUCN, *World Declaration on the Environmental Rule of Law*, April 2016, available at https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf

18. UNEP, *Environmental Rule of Law: First Global Report*, January 2019, 1.

19. IUCN, *World Declaration on the Environmental Rule of Law* (n 17) 2.

20. UNEP, *Environmental Rule of Law* (n 18) 8.

21. *Ibid* 20.

1.4 The intersection of environmental protection in conflict with SRoL

The intersection of conflict and the environment is a relatively recent field of study and practice, even though environmental harm during conflict has been present since ancient times. For example, scorched earth methods have been recorded as a method of warfare since 370 BC by Xenophon in his *Anabasis*. Other known examples span along centuries, from the Romans who salted the soil at Carthage, to Saddam Hussein who set Kuwaiti oil wells on fire in the 1991 Gulf War.

Beyond intentional environmental harm as a tool of war, scholars have indicated that conflict might intersect with the environment under different forms, including conflict over natural resources, as is the case in Colombia where the conflict has been historically attributed to the unequal distribution of land;²² conflict over declining resources; conflict that causes environmental degradation; and conflict over natural resource extraction processes.²³

Among the four types of intersection between environment and conflict, the third, namely “conflict that causes environmental degradation” is the most frequent. According to Colombia’s National Department of Planning (2016), armed conflict-related oil spills and illegal mining have affected 60% of watersheds in the country, with around 75 tonnes of mercury released annually, whereas 58% of the deforestation that took place in the country between 1990 and 2013 was related to the conflict.²⁴

Corporate involvement in those environmentally harmful activities has also been recorded. In many

instances, illegal natural resource exploitation has funded the conflict, such as the case of Cambodia with timber, and Liberia where during the civil war, logging concessions were granted to timber companies by the National Patriotic Front of Liberia. The Panel of Experts on the Illegal Exploitation of Natural Resources in the DRC listed various companies that have been found to act in contravention to the OECD Guidelines on Multinational Enterprises,²⁵ and whose illegal mining activities funded and perpetuated the conflict. One of the most well-known cases against a corporation for environmental harm in the context of an armed conflict was brought by Vietnamese victims before US courts against chemicals’ companies for personal damage caused by the use of Agent Orange during the Vietnam War, which did not come to fruition.²⁶

Therefore, the effect of corporate involvement in environmentally harmful activities during conflict is twofold: from the one side it evidently causes damage to the environment, and from the other side it enables the perpetuation of the conflict, through funding, and further feeds into the vicious cycle of environmental damage. The case of Colombia is not only recent but also illustrative of those assertions. Armed groups have secured funding by forcibly displacing the population and land grabbing, so that the soil is clear for businesses to extract oil, for monocropping or cattle ranches.²⁷ Similarly, large scale illegal gold extraction has had serious environmental impacts and has funded various rebel groups.²⁸

Although environmental damage is present in most conflicts around the globe, the measures taken in the aftermath of conflict to enable the transition to peace and democracy (transitional justice) rarely

22. Sanchez Leon NC (2017) *Tierra en transición. justicia transicional, restitución de tierras y política agraria en Colombia*. Bogotá DC: Dejusticia.

23. Brisman A, South N and White R (2015) *Toward a criminology of environment-conflict relationships*. In Brisman A, South N and White R (eds) *Environmental Crime and Social Conflict: Contemporary and Emerging Issues*: 1–38. Surrey, UK: Ashgate; Brisman A and South N (2018) *Environment, conflict, and profit: Harmful resource exploitation and questionable revenue generation*. In Spapens T, White R, van Uhm D and Huisman W (eds) *Green Crimes and Dirty Money*: 19–41. London: Routledge.

24. National Department of Planning estimates of 2016. See also PNUD (2014) *Consideraciones ambientales para la construcción de una paz territorial estable, duradera y sostenible*. Bogota: Naciones Unidas.

25. UN Security Council, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Annexes I-III, UN DOC S/2002/1146 (Oct 15, 2002).

26. *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*, US Court of Appeals for the Second District, Judgment of 22 February 2008.

27. Sanchez Leon NC and Marin Lopez D (2017) *Corporate accountability in transitional justice in Colombia*. In van de Sandt J and Moore M (eds) *Peace, Everyone’s Business! Corporate Accountability in Transitional Justice: Lessons for Colombia*: 120-140. Utrecht: PAX.

28. OECD, *Due Diligence in Colombia’s gold supply chain Gold Mining in Chocó*, OECD 2017, available at <https://mneguidelines.oecd.org/Choco-Colombia-Gold-Baseline-EN.pdf>

address the environment. This might be due to a lack of understanding of how environmental harm can spill over, cause adverse impacts to both security and rule of law and ultimately hamper the peace process.²⁹ In terms of security, this is the case when inadequate environmental protection leads to community relocation and subsequent insecurity, as is the case in various areas of Sudan and South Sudan.

It is in more recent transitions, that the environment managed to secure a place in the transitional discourse. In Colombia, the 2011 Decree Law 4633 on reparation and restitution of territorial rights of Indigenous peoples considered the harm induced to the environment by the armed conflict.³⁰ Similarly, judgements on land restitution cases ordered the restoration of ecosystems, due to conflict-related environmental harms.³¹

A further limitation to the inclusion of environmental concerns in transitional discourses, is that the approach to environmental damage is usually undergirded by the state responsibility approach. For example, after Iraq's occupation of Kuwait, Security Council Resolution 687 reaffirmed that Iraq was liable under international law for environmental damage and the depletion of natural resources, as a result of the unlawful invasion and occupation of Kuwait.³² Similarly, Ethiopia claimed before the Eritrea-Ethiopia claims commission that Eritrea was liable for damage to natural resources and the environment, although the Commission rejected the claim for lack of evidence.³³ In fewer cases, criminal courts in the aftermath of conflict prosecuted individuals for the environmental harm they caused. This was the case of Alfred Jodl, a Nazi General, who was convicted by

29. For a comprehensive account, see CEOBS, 'How does war damage the environment?', 4 June 2020, available at <https://ceobs.org/how-does-war-damage-the-environment>

30. Orduz N (2011) The Decree Law of Indigenous People's Reparations. Available at <https://www.dejusticia.org/en/column/the-decree-law-of-indigenous-peoples-reparations>

31. Cases of land restitution to ethnic groups: Emebera Katios (23 September 2014) and Timbiqui (1 July 2015). McClanahan, B., Parra, T. S., & Brisman, A. (2019). Conflict, environment, and transition: Colombia, ecology and tourism after demobilization. *International Journal for Crime, Justice and Social Democracy*, 8(3), 74–88.

32. UN Security Council, Security Council resolution 689 (1991) [Iraq-Kuwait], 9 April 1991, S/RES/689 (1991), par 16.

33. Eritrea–Ethiopia Claims Commission, Damages Claim, Final Award–Ethiopia's Claims, UNRIAA XXVI 2009, 631, para. 421, 425.

the IMT Nuremberg for the regime's scorched earth policies.³⁴

However, focusing only on state responsibility falls short of addressing the reality of environmental damage during conflict, which can also be caused by various other non-state actors, and most importantly for this report, with the implication of corporate actors. A positive step towards recognizing that corporate activities cause environmental damage in areas ravaged by conflict like South Sudan was the recent temporary injunction issued by the East African Court of Justice in June 2020. The Court did not limit its findings on environmental pollution on the state, but instead barred both the government of South Sudan and two mining companies, the Greater Pioneer Operating Company (GPOC) and Dar Petroleum Operating Company Ltd, 'from operating and exporting oil due to spills that have polluted the environment'.³⁵

Based on the above observations, it is submitted that navigating the intersection of rule of law and security with environmental issues, as well as inserting the corporate angle in such a discussion, can prove beneficial in adding an extra layer of protection both conceptually and in practice.

This report aims to identify the applicable legal framework with respect to corporate environmental conduct in conflict-affected areas, the underlying rationale being that if corporations implement the relevant rules and best practice recommendations, then environmental security will be enhanced, or at least not be undermined, and the environmental rule of law will be strengthened. Against this backdrop, we are focusing our analysis on the self-regulation of corporate environmental conduct, which is undertaken in Section 3.

34. Trial of Alfred Jodl, Judgment of the International Military Tribunal, Trial of the Major war criminals, 1 October 1946, pp. 324-325, reprinted in (1947) 41 *American Journal of International Law* 172-333 at 316.

35. The East African, 'East African court bars South Sudan, two firms from exporting oil', 22 June 2020, available at <https://www.theestafrican.co.ke/business/EACJ-bars-South-Sudan-two-firms-from-exporting-oil/2560-5580610-avvvtz/index.html>

2. State obligations under international law

Before delving into the soft law regulation of corporate conduct, it is appropriate to briefly outline state obligations in relation to corporate environmental responsibility in conflict settings under international law, since states remain the primary actors in international affairs. The following inquiry examines in turn state obligations stemming from international humanitarian law (IHL), international human rights law, and international criminal law.

2.1 International Humanitarian Law

IHL is that branch of international law that regulates the conduct of hostilities, attempting to limit the effects of armed conflict, including on the natural environment. More specifically, it includes two environment-specific provisions, such as articles 35(3) and 55 of Additional Protocol I to the four 1949 Geneva Conventions,³⁶ and many provisions that afford indirect protection to the environment and parts thereof.

For our purposes, the prohibition against pillage is very pertinent, as it applies to private entities, including corporations.³⁷ This prohibition comprises a well-established and widely accepted prohibition in IHL,³⁸ which covers occupied territories, and

both international³⁹ and non-international armed conflicts.⁴⁰ In addition, the prohibition has been widely incorporated into national legislation as well as in military manuals,⁴¹ and in the ILC draft principles, which have recently been adopted on first reading.⁴²

It is noteworthy that the pillage of natural resources has garnered the interest of the international community on various occasions, as evinced in the establishment of the Kimberley Process Certification Scheme,⁴³ and by efforts stemming from the private sector itself to ensure that natural resources are traded in a fair manner and do not serve as means to finance armed conflicts.

In practice, the protection of property, assuming the form of a prohibition of pillage under IHL, has indeed been applied in an environmental context. After World War II, the violation of the prohibition of pillage perpetrated through the destruction of forests was considered to constitute a war crime for which

39. Arts 28 and 47, Convention IV respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague Convention IV); Art 33(2), Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV).

40. Art 4(2)(g), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

41. Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law: Volume I: Rules (CUP 2009) 182-5, Rule 52, 'Pillage is prohibited'.

42. ILC, 'Protection of the environment in relation to armed conflicts: Text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading', 6 June 2019, available at <http://legal.un.org/docs/?symbol=A/CN.4/L.937>, draft principle 18. In the latter instrument the prohibition is explicitly addressed against pillage of natural resources. Moreover, even if draft principle 18 is situated within the part relating to the *in bello* period of the conflict cycle, it applies equally in situations of occupation. International Law Commission, 'Report of the International Law Commission of its 71st session' (29 April–7 June and 8 July–9 August 2019), A/74/10, Chapter VI 'Protection of the environment in relation to armed conflicts', commentary to Part Four, 264, para 8, commentary to draft principle 18.

43. The Kimberley Process Certifications Scheme was set up and then endorsed by the UN. For further information, see <https://www.kimberleyprocess.com/en>

36. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), arts 35(3) and 55.

37. See James G Stewart, Corporate War Crimes: Prosecuting the Pillage of Natural Resources (Open Society Justice Initiative 2011).

38. The prohibition of pillage was enshrined in the early codifications of IHL. Art 44, Instructions for the Government of Armies of the United States in the Field, originally adopted as General Orders No. 100: The Lieber Code (24 April 1863) (Washington D.C., Government Printing Office, 1898); arts 18 and 39, the Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874) (Brussels Declaration).

people could be held individually responsible.⁴⁴ The Committee on Facts and Evidence (Committee I) of the United Nations War Crimes Commission found prima facie evidence that nine Germans:

‘... all of whom had been heads of various Departments in the Forestry Administration in Poland during the German occupation (1939–1944), could be listed as war criminals on a charge of pillaging Polish public property.’⁴⁵

Reinforcing the widespread and universal condemnation of pillage, the International Court of Justice (ICJ) held Uganda responsible for ‘looting, plundering and exploitation of natural resources’, including diamonds, gold and coffee, in the territory of the Democratic Republic of Congo, which it regarded as pillaging, prohibited under articles 47 of Hague Convention IV and 33 of the Geneva Convention IV.⁴⁶

At this juncture, reference should be made to common article 1 of the four 1949 Geneva Conventions, which stipulates that ‘[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ In the light of the above observations on the prohibition of pillage, the ‘obligation to respect encompasses a state obligation to prevent and punish pillage’.⁴⁷ This applies equally in situations of occupation by virtue of article 43 of the 1907 Hague Regulations, since it has been interpreted by the ICJ as imposing the obligation on occupying powers ‘to secure respect for the applicable rules of international human rights law and international humanitarian law’.⁴⁸

44. Art 6(b) of the Nuremberg Charter which includes under war crimes ‘plunder of public or private property’ and the discussion of this crime by the Tribunal in its Final Judgment: International Military Tribunal (Nuremberg), *Judgments and Sentences*; Oct 1, 1946, American Journal of International Law, Vol 41, 1947, 235–8. For a detailed overview of the related jurisprudence, encompassing post-Second World War trials and modern international criminal tribunals, see Garima Tiwari, ‘Breaking the ‘Resource Curse’: Prosecuting Pillage of Natural Resources’ in Francesca Romanin Jacur, Angelica Bonfanti and Francesco Scazzola (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill 2015) 407ff.

45. See Commission No 7150, in: The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty’s Stationary Office, London, 1948, 496.

46. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, 252, paras 245–6.

47. Dam-de Jong, Daniëlla, and Saskia Wolters. “Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC.” *Goettingen J. Int’l L.* 10 (2020): 111, 123.

48. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, 231, para 178.

In the same vein, the ICRC’s recently updated commentary to the first 1949 Geneva Convention claims that ‘the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally.’⁴⁹ Moreover, the ICJ has clarified that the obligations enshrined in common article 1 applies both to state parties and states not party to an armed conflict.⁵⁰ Accordingly, not only belligerent states and occupying powers are obliged to prevent and punish acts of pillage by private persons, including corporations, but also non-belligerent states to the extent this falls reasonably within their control.

2.2 International Human Rights Law (IHRL)

The field of IHRL holds significant potential in addressing corporate environmental wrongdoings in the context of fragile and conflict-affected settings. Throughout the last three decades, the link between the enjoyment of human rights and environmental degradation or harm has been increasingly recognised and brought to the fore. In this respect, the right to a healthy environment has been acknowledged as forming a component of the right to life,⁵¹ and the right to health.⁵² More specifically, the Human Rights Committee, which operates in the context of the International Covenant on Civil and Political Rights, recently held that the

‘[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on

49. ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016, commentary to art 1, para 119.

50. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 199–200, para. 158.

51. Human Rights Committee, General Comment 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc. CCPR/C/GC/36, 30 October 2018, 13, para 62.

52. Committee on Economic, Social and Cultural Rights, General Comment 14 on the Right to the Highest Attainable Standard of Health, 2, para 4.

measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.’⁵³

This finding, coupled with the relevant, recent jurisprudence of the Inter-American Court of Human Rights,⁵⁴ could be read as acknowledging an obligation incumbent on home states to take all necessary legislative measures to ensure that corporations domiciled and operating in their territory do not violate the human rights of individuals abroad. In Dam-de Jong’s words, ‘a trend has emerged which recommends that home States should regulate corporate activities which originate on their territory and have consequences beyond their territory, especially when this concerns corporate activities in conflict zones.’⁵⁵

With respect to extraterritorial environmental damage, the Committee on Economic, Social and Cultural Rights has held that states are obliged ‘to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction’.⁵⁶ However, this obligation does not extend to extraterritorial environmental damage caused by subsidiaries (of corporations domiciled in the home state) operating abroad in fragile and conflict-affected areas.⁵⁷

On a final note, it is worth referring to Principle 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation, which stipulates that ‘... in cases where a person, *a legal person*, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to

the victim.’⁵⁸

2.3 International Criminal Law (ICL)

Turning to ICL, it should be clarified at the outset that the International Criminal Court does not have jurisdiction over legal persons, such as corporations. Nevertheless, home states possess jurisdiction over corporate officials, such as members of the Executive Board, in relation to international crimes perpetrated via the corporation, assuming that these officials are nationals of the home state (active personality jurisdiction).⁵⁹ Needless to say, corporations could be prosecuted by home state courts, provided that the applicable domestic law allows for the prosecution of corporate crimes.

For our purposes, the relevant environment-specific war crime provision of the ICC Statute reads as follows:

‘For the purpose of this Statute, ‘war crimes’ means: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.’⁶⁰

It should be noted that the above provision applies only in the context of an international armed conflict. Moreover, in the ICC Statute this environmental damage standard has been subjected to a

53. Human Rights Committee, General Comment 36 (n 51) 13, para 62 [emphasis added].

54. See *Environment and Human Rights*, Advisory Opinion of 15 November 2017, IACtHR Series A, No. 23.

55. Dam-de Jong, Daniëlla, and Saskia Wolters. “Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC” (n47).

56. CESCR, General Comment No. 24 (2017) 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, 5, para. 16.

57. Dam-de Jong, Daniëlla, and Saskia Wolters. “Through the Looking Glass: Corporate Actors and Environmental Harm Beyond the ILC” (n 47) 148.

58. UN GA, Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005, (‘Basic Principles’), Principle 15.

59. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 12 (ICC Statute).

60. Art 8(2)(b)(iv), ICC Statute.

proportionality test, which includes the intentional launching of an attack that will cause clearly excessive human or environmental damage in relation to the overall military advantage anticipated.⁶¹

The addition of a proportionality test entails that even the most serious ecological destruction can be justified on the grounds of military necessity.⁶² However, given that the occurrence of a military operation ‘causing such a high scale of harm whilst lawfully attacking a legitimate target’ seems quite improbable, the additional requirement of proportionate balancing has been succinctly characterised as ‘somewhat superfluous’.⁶³

Notwithstanding the foregoing, the war crime of pillage is provided for in articles 8(2)(b)(xvi) and (e) (v) of the ICC Statute. On a final note, the 2006 Lusaka Protocol Against the Illegal Exploitation of Natural Resources, which concerns states in the African Great Lakes region, obliges state parties to criminalise domestically acts of illegal exploitation of natural resources.⁶⁴

61. Jean-Marie Henckaerts, ‘Towards Better Protection for the Environment in Armed Conflict: Recent Developments in International Humanitarian Law’ (2000) 9 *Review of European Community and International Environmental Law* 13, 16.

62. Ines Peterson, ‘The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?’ (2009) 22 *Leiden Journal of International Law* 325, 343.

63. Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Martinus Nijhoff 2004) 78.

64. International Conference on the Great Lakes Region, ‘Protocol Against the Illegal Exploitation of Natural Resources’ (adopted 30 November 2006, entered into force June 2008), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resourcess.pdf

3. Soft law regulation of corporate environmental conduct: The way forward

Section 3 analyses soft law instruments that endeavour to regulate the conduct of corporations with respect to environmental protection in conflict-affected areas. The analysis is undertaken through the lens of environmental security and rule of law, and constitutes the main contribution of the report. The examination begins with the UN Guiding Principles on Business and Human Rights, or Ruggie principles, which were ground-breaking at the time of their adoption. After which, the UN International Law Commission's draft principles on the Protection of the environment in relation to armed conflicts are scrutinised, placing at centre stage the two principles addressing corporate due diligence and corporate liability. Finally, the analysis turns to the OECD Guidelines for Multinational Enterprises, a very influential instrument, which has been faring well, despite its shortcomings.

3.1 United Nations Guiding Principles on Business and Human Rights (UNGPs)

The discourse around business and human rights (BHR), which has been developing since the 1970s culminated in the adoption of the United Nations Guiding Principles (UNGPs) on Business and Human Rights in 2011. While the UNGPs did specifically address the increased risk of serious human rights violations in conflict-affected areas, they made no mention of the need for environmental protection in those contexts. However, they are relevant for the topic of this report given that environmental harm can also be channelled through the language of human rights, and can amount to human rights violations.

Nature

The UNGPs apply to all states and to all enterprises, regardless of their size, sector, location, ownership and structure. They do not create new obligations. Instead they create a tripartite typology of responsibilities, the so-called three pillars: the state duty to protect human rights, the corporate duty to respect, and access to remedies. They draw a strict dividing line among the obligations deriving from the first pillar, and the voluntariness of the second, thus rejecting the idea of corporate obligations and further postponing any such construction. By reiterating time and again the mere 'responsibility' of corporations to respect, they are insulated from any potentially binding obligation.

State duties in general

The UNGPs declare early on that they do not intend to create new obligations for states.⁶⁵ Instead, they nest state obligations in relation to business incurred abuses under the already existing state duty to protect human rights from third party abuses. Regulating corporate conduct stems from the state duty to protect human rights. For conflict zones, in particular, principle 7 of the UNGPs urges home states to help ensure that corporations are not involved with human rights abuses in conflict-affected areas.

State Duty in relation to corporate due diligence

The first pillar of the principles is dedicated to the already established state duty to protect human rights from business incurred abuses. It entails a state obligation to regulate the activities of corporations domiciled in their territory, so as not to violate human

65. UN Human Rights Council, Report of the SRSG: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. A/HRC/17/31, 21 March 2011, p. 1.

rights.⁶⁶ By regulating, states should (the principles mentions that ‘states should’ and not that ‘states are obliged’) ‘enforce laws that are aimed at or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.’ The commentary to this principle clarifies that guidance to business enterprises should advise on appropriate methods, including human rights due diligence.

A first limitation to the state duty to enforce laws in general, and due diligence laws in particular, is the *domicile requirement* chosen by the UNGPs, certainly in comparison to the respective ‘operating in or from their territories’ requirement of the ILC Principles and the OECD Guidelines. However, as will be seen below, the UNGPs expand the scope of due diligence laws to those ‘domiciled or operating,’ but only when it refers to harm occurring in conflict zones.

In particular, where an enterprise is operating in *conflict zones*, principle 7 stipulates that the state duty to protect requires that the state ‘should help ensure that business enterprises operating in those contexts are not involved in abuses by engaging with them to help them identify, prevent, mitigate human rights risks of their activities,’ with due diligence being just one of the measures proposed to ensure corporate respect.⁶⁷

While the principle recognises the potential incapacity of the host state to perform its duty to protect, it does not correspondingly expand the role of the home state. It mentions that ‘home states [...] have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse.’ This, in turn, means that the parent entity located in the home state is not meaningfully regulated, or is not obliged to conduct due diligence.

Principle 7’s commentary clarifies that states –

66. Principle 2 stipulates that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. Ibid.

67. See principle 7. For non-conflict areas, see also *ibid*, commentary to GPs 3 and 4.

presumably both host and home states of enterprises operating in conflict zones – should review ‘whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business.’ In case of gaps, states should take steps to rectify them, including ‘exploring civil, administrative or criminal liability for enterprises *domiciled or operating in* their territory and/or jurisdiction that commit or contribute to gross human rights abuses.’

Essentially, principle 7 seemingly presents the adoption and enforcement of due diligence legislation as one of the options that host and home states can explore for businesses operating in conflict zones. However, its commentary dilutes the home state’s duty to adopt due diligence laws, by stipulating that ‘[w]here transnational corporations are involved’, home states have ‘roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse.’

If home states do not have an explicit duty to impose due diligence obligations on their companies operating in conflict zones, it can be extrapolated that the UNGPs envision due diligence quite narrowly, limiting it to the confines of home states’ territorial jurisdiction and thus excluding subsidiary companies. It is only in the voluntary second pillar on the corporate responsibility to respect that the UNGPs clarify that subsidiaries should be covered by due diligence.⁶⁸

A further limitation of state duties is the limited reliance of the principles on developments regarding *extraterritorial* state obligations. On the one hand, the Principles recommend to states to set out an expectation that corporations domiciled in their territory or under their jurisdiction respect human rights throughout their operations. They also urge states to ensure the effectiveness of domestic judicial mechanisms with respect to business-related human rights abuses.⁶⁹

68. *Ibid*, principle 17.

69. *Ibid*, principles 2 and 26.

However, the commentary to principle 2 mentions that ‘at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.’

Yet by refraining to take a stance towards the issue of extraterritoriality, the UNGPs seem to ignore the Maastricht Principles and other relevant recent developments regarding extraterritoriality. Accordingly, the commentary merely states that there are ‘strong policy reasons for home states to set out clearly the expectations that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses,’ ignoring as such the legal reasons for such an approach.

Corporate duty

The second pillar on the corporate responsibility to respect human rights is voluntary.⁷⁰ Principle 11 foresees that ‘Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.’⁷¹ Principle 12 adds that in situations of armed conflict enterprises should respect the standards of IHL. Principle 23 stipulates that business enterprises should treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. This recommendation is emphasised for conflict-affected areas where the risk of complicity to abuses is increased.

70. Mares, R. (2018). Human Rights Due Diligence and the Root Causes of Harm in Business Operations: A Textual and Contextual Analysis of the Guiding Principles on Business and Human Rights. *Northeastern University Law Review*, 10(1), 1-71.

71. Addressing adverse human rights impacts requires on the part of the enterprise to take measures to prevent, mitigate and where appropriate remediate.

Corporate entities covered

The corporate duty to respect human rights applies to corporate entities of any size, sector, operational context, ownership and structure, but the same factors - along with the severity of the impact - condition the scale and complexity of the means that should be used to meet that duty.

The Principles foresee three ways that an enterprise can be linked to a harm, namely when it causes said harm, when it contributes and when its operations, products or services are linked to it. According to principle 13, the responsibility to respect requires that business enterprises avoid causing or contributing to adverse human rights impacts and addressing those impacts when they occur. When the impact is directly linked to an enterprise’s operations, products or services by their business relationships, the responsibility to respect requires prevention and mitigation of those impacts. ‘Business relationships’ are understood to include relationships with business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products, or services. The UNGPs also foresee different performances of the duty to respect, depending on whether the impact is actual or potential.

Corporate due diligence

Due diligence is seemingly envisioned by the UNGPs as part of a broader enterprise risk management system and not as an enforceable legal concept. It is mainly stipulated in the second pillar of the voluntary corporate duty to respect, which leads to the conclusion that the GPs fall short of framing due diligence as a duty, and prefer its framing as a voluntary commitment. As mentioned above, there is only a small reference to due diligence as part of the obligatory first pillar, when in principle 7 states - presumably both host and home - are urged to review their policies, legislation, regulations and enforcement measures in order to effectively address the heightened risks posed by conflict, including through provisions for human rights due diligence by business.

According to principle 15 the corporate responsibility to respect is materialised through a 'human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.' The steps of this ongoing process include assessment of actual and potential impacts on human rights, integration and action upon the finding, and tracking of responses and communication of the ways chosen to address them. Given the greening of human rights, this due diligence process is important for adopting adequate policies to prevent and mitigate environmental harm in conflict-affected areas.

The entities covered by the due diligence obligation are both parents and subsidiaries, as well as those belonging to the supply chain, given that principle 17 on due diligence mentions that the due diligence process should cover impacts that the enterprise has caused, contributed to or are directly linked to its operations, products or services.⁷² However, in supply chains with large numbers of entities, the enterprise is free to prioritise the areas that face the most significant risk and is not urged to carry out due diligence along the chain unconditionally.

Therefore, the outer limit of due diligence depends on the size of the enterprise, the risk of severe impacts, and the nature and context of its operations. This is particularly important for value chains, for which the commentary clarifies that where there are large number of entities, the enterprise should prioritise for due diligence the areas where the risk is most significant.

Measures to be taken by the corporation when due diligence reveals potential impact

Where the due diligence process reveals potential impact, which the enterprise *might cause*, it should engage in preventing and mitigating that impact. When the enterprise *might contribute* to such potential impact, it should additionally use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage depends on the ability of an

72. Principles 18 to 22, 'UN Human Rights Council, Report of the SRSG: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 65).

enterprise to effect change.⁷³

When the potential impact *is merely directly linked* to an enterprise's operations, products or services, then it should use its leverage to prevent or mitigate the impact. The appropriate action should be decided upon weighing in the leverage, the nature of the relationship to the enterprise, the severity of the abuse and the consequences of a potential termination of the relationship upon human rights.⁷⁴

Measures to be taken by the corporation when due diligence reveals actual impact

When the impact has already taken place, the corporate entity should remediate them, provided that the enterprises caused or contributed to that impact. The obligation of remediation does not apply, when the due diligence process demonstrates that the enterprise was directly linked to the impact.⁷⁵ The remedy, conditioned upon the involvement of the corporation to the harm, can be provided by the enterprise or in cooperation with judicial mechanisms or other actors, or as operational level grievance mechanism.

The Principles seems to envision that appropriate human rights due diligence might help enterprises to address the risk of legal claims, since it demonstrates that they took every reasonable step to avoid involvement with the abuse. However, they add that due diligence does not automatically and fully absolve them from liability for causing or contributing to harm, leaving open cases where they are linked to such harm.

Remedy

The third pillar on access to justice stipulates that the provision of remedies falls under the state duty to protect human rights and is materialised through appropriate measures that ensure the effectiveness of domestic judicial remedies.⁷⁶ Remedy may include

73. For a criticism on leverage and mitigation see Mares, R. (2018). Human Rights Due Diligence and the Root Causes of Harm in Business Operations (n 70).

74. Principle 19 delimits those actions depending on the involvement of the enterprise to the impact and the extent of its leverage.

75. Principle 19, UN Human Rights Council, Report of the SRSG: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (n 65).

76. Ibid, principles 25 and 26.

apologies, restitution, rehabilitation, financial or non-financial compensation and criminal or administrative sanctions and injunctions or guarantees of non-repetition.

From the corporate side, the duty to respect is materialised through ‘Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.’ [Principle 15] Principle 17 on due diligence mentions that in the case of actual – already occurred impacts, the enterprise should engage in remediating them. Thus, remediation is foreseen by the UNGPs when the enterprise has caused or contributed to an impact and not when it was directly linked to it.⁷⁷ In the latter case, it “may take a role in doing so.”⁷⁸ Remediation by the enterprise is also conditioned on the extent of its leverage.⁷⁹

The remedy can be provided by the enterprise or in cooperation with judicial mechanisms or other actors, or as an operational level grievance mechanism. From their side, enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. Those mechanisms should be legitimate, accessible, predictable, equitable, transparent and rights compatible.⁸⁰

Issues of liability

The Principles are reticent in clarifying issues of liability and instead prefer to construct a polycentric governance system that affords primary importance to the voluntary commitments of corporate entities. Criminal, civil or administrative liability is a measure that states are urged to ‘explore’ when corporations domiciled or operating in their territory and/or jurisdiction commit or contribute to gross human rights abuses.⁸¹

77. For example, there is no obligation of remediation by a principal company when the harm took place along the supply chain or more generally when a company was not involved in any direct activity leading to the harm, but entities linked to it were (like subsidiaries).

78. Principles 15, 17 and 19, principle 19, UN Human Rights Council, Report of the SRSG: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (n 65).

79. Ibid, principle 19.

80. Ibid, principle 29.

81. Ibid, principle 7.

From the corporate lens, principle 12 clarifies that ‘The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions,’ thus delinking corporate liability from the business responsibility to respect. The same is also evident by the mere use of the term ‘responsibility’ in relation to corporations, while keeping the term ‘obligation’ only for the state. The UNGPs instead employ a more permissive approach, opting in favour of a sliding scale based on business size and geographical location.⁸² Under the UNGP’s framework, adopting laws on parent company liability was not intended to be an obligation of home states, but merely something that they ‘may explore’, among other measures.⁸³

It is interesting to note that the Principles do not adopt a clear stance on whether proper due diligence absolves corporate entities from legal liability. From the one side, it is reasonable to assume that appropriate human rights due diligence demonstrates that corporations took every reasonable step to avoid potential involvement with the abuse and can therefore be used in their favor in the event of legal claims. From the other side, the UNGPs clarify that due diligence does not ‘automatically and fully’ absolve entities from liability.

Overall, the inclusion of due diligence in the UNGPs is insufficient both as a state duty and as a corporate responsibility. Instead, corporate due diligence insofar as it also includes environmental harm prevention, mitigation and remediation could be an effective way to give effect to the state duty to protect human rights, especially those harmed by environmental damage in conflict zones. The inclusion of corporate due diligence, as well as its environmental component, in domestic law would help ensure that this becomes

82. Blitt, Robert C. “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance.” *Texas International Law Journal* 48 (2013), 33.

83. Commentary to GP 7. But even in such a case, namely when home states choose to explore the liability option, they are called to address instances where enterprises commit or contribute to gross human rights abuses, thus leaving outside of the scope of liability companies that might be directly linked or otherwise connected to harm, such as parent companies for the harm caused by business partners.

an obligatory practice for corporate entities often operating in conflict-affected areas.⁸⁴

3.2 The UN International Law Commission's principles⁸⁵

In 2019, the ILC adopted 28 draft principles on the protection of the environment in relation to armed conflicts (DPs). The Principles include two principles on corporate due diligence and liability, which are relevant for the current report. The ILC's study into the Protection of the environment in relation to armed conflicts (PERAC) is expected to conclude in 2022, with the adoption of a set of draft legal principles intended to guide the conduct of both state and non-state actors. As environmental harm in areas affected by conflict is not restricted to that caused by state militaries or armed groups, the ILC has included two principles on the responsibilities of corporations. These might include mining or timber companies, or Private Military and Security Contractors.

The ILC's newly adopted DPs (DPs 10 and 11) aim to address the issue of environmental protection before, during and after armed conflicts, by complementing the existing regulatory framework, which lacks an environmental focus (such as the UNGPs). Along with environmental protection per se, they also refer to 'human health,' thus integrating environmental and human rights concerns.

They have not been universally welcomed by states, with the United States querying why '...the ILC has singled out corporations for special attention. The draft principles do not address any other non-State actors such as insurgencies, militias, criminal organizations, and individuals. This has the effect of suggesting that corporations are the only potential

bad actors when it comes to non-State activity in the context of protection of the environment.'⁸⁶

Nature

According to the commentary of draft principle 10, it does not reflect a binding legal obligation and is instead a recommendation. Although it is a soft law instrument, the ILC principles distance themselves from previous documents in the business and human rights field, in that they abstain from drawing a strict dividing line between state duties and corporate responsibilities. That reasoning was followed primarily by the UNGPs and attached voluntariness to the corporate pillar. Instead, the ILC principles use terms such as 'obligation' for both the state and the corporate sector. In the absence of voluntariness, they seemingly reject the idea that corporations are free from any human rights obligations entailing the adoption of environmental measures.⁸⁷

Further to that, the ILC commentary, by citing various developments in case law and theory, seems to endorse the view that corporations do not only have a responsibility to respect, but something more than that, approaching an obligation to protect. On closer inspection of the wording of the due diligence principle, it seems that the DPs envisage the protection of the environment in relation to armed conflict as a legitimate aim to be pursued not only by states but also by businesses.

In any case, one should not downplay the potential role of the DPs in the evolving relationship between international law and corporate entities. The DPs can be added to a growing list of international law documents with progressive views on corporate regulation, such as the draft treaty on Business and Human Rights, the Draft Articles on Prevention and Punishment of Crimes Against Humanity, the Malabo Protocol, the Human Rights Committee General

84. Dam-de Jong, Daniëlla, 'Standard-setting Practices for the Management of Natural Resources in Conflict-Torn States: Constitutive Elements of Jus Post Bellum' in Carsten Stahn, Jens Iverson, and Jennifer S. Easterday (ed.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford: OUP, 2017) 169.

85. This sub-section draws on Michalakea, Taygeti, 'Corporate responsibility for the protection of the environment in relation to armed conflicts', 21 February 2020, available at <https://ceobs.org/corporate-responsibility-for-the-protection-of-the-environment-in-relation-to-armed-conflicts>

86. United States of America, UNGA Sixth Committee (UN Doc. A/C.6/74/SR.30), 5 November 2019, para 117.

87. This assumption was made by the GPs. See Mihir Kanade, 'The United Nations Guiding Principles on Business and Human Rights: Presenting the Problem' in Laura Westra and Mirian Vilela (eds) *The Earth Charter, Ecological Integrity and Social Movements* (Routledge, 2014) 39; Florian Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment', (2015) 14(2) *Journal of Human Rights*, 162.

Comment 36 on the right to life and others. On this account, the DPs should be commended, if not for other things, at least for furthering the discussion on business and the environment and for belonging for the ‘most part to the domain of *lex ferenda*.’⁸⁸

In addition, as Dam De-Jong explains, the DPs are important in that they resonate in the actual practice of states and consolidate their distinct obligations under customary international law for which their responsibility may be engaged.⁸⁹

State obligations

Unlike the UNGPs and the OECD Guidelines that directly spoke to corporate entities, the ILC Principles primarily address states in relation to two points, namely due diligence and liability for corporate harm. Regarding due diligence, principle 10 urges states to adopt legislative and other measures in order to safeguard that corporate entities carry out due diligence with respect to the protection of the environment, including human health, when acting in an area of armed conflict. The principle clarifies that due diligence should also address the purchase of natural resources in an environmentally sustainable manner.

Remarkably, the DPs cast the net of the state obligation to enforce mandatory due diligence, wider than previous instruments like the UNGPs. They address states where corporations “operate in or from their territories”, henceforth avoiding the limiting domicile requirement of the GPs.⁹⁰ Quite importantly, the DPs recommend the adoption of mandatory due diligence legislation for both the host and the home state. In this respect, Sierra Leone, having had first-hand experience of the issue, rightly noted before the Sixth Committee of the UN General Assembly that ‘the scope of the duty will be higher in relation to the State of domicile of the corporation given that the State of business/operation may itself be facing governance challenges during

or in the aftermath of conflict.’⁹¹ However, the state obligation to enforce due diligence is seemingly an obligation of conduct and is therefore satisfied when the state took all reasonable measures, even if it did not manage to prevent the harm.

In relation to liability issues, the Principles urge states to take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other 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.

Corporate obligations

While the ILC Principles do not directly address corporate entities, the obligations of the latter can be inferred. The corporate duty to respect the environment in relation to armed conflicts, as articulated in the DPs, goes beyond that required by the GPs. It is not only about avoiding causing or contributing to adverse human rights impacts.⁹² The DPs actively demand the exercise of due diligence covering parents and subsidiaries to the extent that the latter acts under its *de facto* control, as well as in supply chains. When harm to the environment is caused, the respective entity will be liable and under an obligation to repair such harm.

Corporate due diligence: DP 10

Based on DP 10, it can be inferred that corporate entities should carry out due diligence in relation to environmental protection, including human health

88. Dam-de Jong, Daniëlla, ‘Standard-setting Practices for the Management of Natural Resources in Conflict-Torn States: Constitutive Elements of *Jus Post Bellum*’ (n 84).

89. *Ibid.*

90. See principle 2 of the GPs.

91. Sierra Leone, UNGA Sixth Committee (UN Doc. A/C.6/74/SR.29), 1 November 2019, para 65.

92. Mares, R. (2018). ‘Human Rights Due Diligence and the Root Causes of Harm in Business Operations’ (n 70).

and the purchase of natural resources.⁹³ According to the ILC's accompanying commentary, the extent of DP 10's due diligence is equivalent to that proposed by the GPs.

Mirroring the UNGPs, the ILC principles require that due diligence covers adverse impact that the business enterprise may cause or contribute through its own activities, or which maybe directly linked to its operations, products or services by its business relationships. Furthermore, due diligence should be modified (varied in complexity) based on the size of the business enterprise, the risk of severe adverse impacts, and the nature and context of its operations. It is to be noted, that the due diligence obligation is not conditioned on concepts such as 'leverage' or 'mitigation' that were used in the UNGPs and provoked criticism. Finally, as in the UNGPs, it should be ongoing, in order to capture the changes in the business operations and the operating context.

However, an important development that distinguishes the due diligence in the DPs from previous documents, is that in the former due diligence is not used as a risk management tool, but is rather understood as an enforceable legal concept undergirded by a legally binding duty of care. At that point, the DPs seem to refrain from the do-no-harm approach, since they provide means - like legal liability - for due diligence to be meaningful.

It is not entirely clear whether the protection of the environment is the aim of the due diligence, or of the state duty to enforce due diligence. Since environmental sustainability is factored into the second sentence of DP 10, the latter seemingly vouches for protection being the aim of the corporate activity itself. This is important in that it signals a shift of focus from a mere corporate obligation to respect, to an encouragement to protect as well.

93. States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. Such measures include those aimed at ensuring that natural resources are purchased or obtained in an environmentally sustainable manner.

Entities covered by due diligence

According to the commentaries, the ILC principles seemingly cover various corporate configurations, from transnational corporations to simple companies. As the commentaries further explain, this was done intentionally, so that the chosen term is not "unnecessarily limiting."

The various modalities of contribution to environmental harm along with the fact the enforcing due diligence is an obligation of both the host and the home state, attest that due diligence should cover both the parent and the subsidiary companies.

As described above, the UNGPs limit due diligence in corporations' value chains, by conditioning it upon the number of entities within the chain. The ILC's DPs help to rectify the situation by relocating due diligence as an obligation of both the host and home states. Importantly, and by providing that 'natural resources are purchased or obtained in an environmentally sustainable manner', the DPs also require that due diligence covers corporate entities in the supply chain.

Weaknesses in DP 10

However, the DPs do not indicate specific actions tailored to the nature of environmental harm, nor the appropriate processes that have to be put in place to ensure that corporate entities comply with their due diligence obligations. In addition, they also fail to clarify what exactly due diligence will entail for the allocation of legal responsibility. This is important as the notion of 'due diligence' raises questions in relation to both criminal and civil corporate liability. By way of illustration, it remains an open question whether the exercise of appropriate due diligence can be used as a defence; how it will interplay with theories of attribution of fault and the obligation to avoid complicity in criminal law.

In relation to natural resources, the DPs condition the acceptable threshold for due diligence on the sustainability of the corporate activity, omitting the initially proposed second term of 'equity' as well as the terminology of 'sustainable, equitable and effective

development’, as found in the respective OECD Due Diligence Guidance document. Hopefully, those issues will be addressed by the same legislative measures that will detail the pertinent state measures in the first place.

Liability: DP 11

In relation to parent company liability, ILC DP 11 urges states to take legislative and other measures to ensure that corporations and other business enterprises operating in or from their territories can be held liable for the harm they cause, including that caused by their subsidiaries acting under their *de facto* control.⁹⁴ In this, the DPs differ significantly from the UNGPs by explicitly providing for the direct and primary liability of parent companies.

In DP 11’s commentary, the ILC refers to various theories for the attribution of liability to the parent company, including the agency theory and the ‘duty of care’ theory. However, the choice of the words ‘*de facto* control’ hints towards the interpretation of the duty of care in line with recent case law,⁹⁵ such as the *Vedanta* case before the UK Supreme Court.⁹⁶ This means that corporate entities can be held liable for environmental harm caused by their subsidiaries, provided that they had control or claim of control over the subsidiary, without need to have known or be able to have foreseen said harm. This suggests that the ILC accepts a broader notion of parental liability, and its focus on ‘control’ may also provide opportunities for supply chain liability.⁹⁷

94. States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories can be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Such measures should, as appropriate, include those aimed at ensuring that a corporation or other 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.

95. Roorda, L. ‘Not quite ‘beating your head against a brick wall’: The Supreme Court’s decision in *Vedanta v. Lungowe* Rights as Usual, 18 April 2019, available at <https://rightsasusual.com/?p=1317>.

96. In contrast to the previously established test of knowledge and foreseeability, recently in the *Vedanta* case, the court accepted that control (or the claim of control) over the subsidiary might suffice. See UK Supreme Court’s (UKSC), *Vedanta Resources PLC and another. v Lungowe and others* [2019] UKSC 20, 10 April 2019.

97. Bergkamp, P., UK Supreme Court enables expansive supply chain liability A parent company’s liability for damage caused by its subsidiary is grounded in control, 30 April 2019, available at <https://corporatefinancelab.org/2019/04/30/uk-supreme-court-enables-expansive-supply-chain-liability>

The DPs also take a firmer stance on the issue of extraterritoriality. While the GPs avoided delving into states’ extraterritorial obligations, the DPs seem to be aligned with the respective Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.⁹⁸ This is because the DPs seemingly ask home states to enforce mandatory due diligence legislation on parent and subsidiary companies for their actions abroad, and thus not only permit but rather require the exercise of prescriptive extraterritorial jurisdiction on the basis of the active personality of the parent company. The issue is not equally clear in relation to the extraterritorial applicability of the liability principle, as this seems to depend on the approach to parent company liability chosen in the domestic jurisdiction. In any case, DP 10 seems to acknowledge the trend of extending obligations extraterritorially.

Weaknesses in DP 11

In spite of their important contributions, DP 11 is silent on some issues that might prove very important. Firstly, it attaches liability only to an enterprise ‘causing’ harm. While this might have been used as an umbrella term, the explicit inclusion of other forms of involvement such as ‘contribution’ or ‘benefit’ could have avoided future ambiguities and captured a wider scope of corporate environmental harm caused by parents, subsidiaries and entities in the value chain. Besides, attaching liability only to the act of causing the harm, narrows down the respective duties of an entity, stemming from due diligence.

In addition, it seems that liability as a result of causing harm, excludes potential liability for not conducting proper due diligence and thus deprives due diligence from its enforcement aspect, at least in cases where the corporate entity is not directly causing harm. Furthermore, neither the principle nor the commentary offer any clues regarding the resolution of other jurisdictional issues, such as *forum*

98. ETO Consortium for human rights beyond borders, https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

non conveniens.⁹⁹ Such issues are arguably left to the relevant provisions of each state's national law, and hence states enjoy a wide margin of discretion in this regard.

Remedies

Turning to the issue of remedies, DP 11 on corporate liability mentions that states should provide adequate and effective procedures and remedies, in particular for the victims of environmental harm, including in relation to human health. The commentary indicates that states are urged to establish procedures at state level, through which victims can claim remedies by the liable corporation.

Conceptually, coupling remedy obligations to the finding of liability, echoes Principle 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation, which stipulates that '...in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.'¹⁰⁰ Regrettably, the wording of the DPs is not as clear cut. As mentioned in paragraph (11) of DP 11's commentary, this was aimed to 'allow states a certain flexibility when applying this provision at the national level.'

Beyond that, it is interesting to note that the DPs contain one more principle relating to reparation, DP 26 on relief and assistance, which applies after armed conflicts.¹⁰¹ At first sight, this might prompt enthusiasm for proponents of corporate remedies, since it seemingly assumes that any non-state actor, which caused environmental damage, should be called to provide reparations, before triggering the respective state obligation.

Regrettably, a closer examination of the commentary

99. Whereby a court acknowledges that another forum or court is more appropriate and sends the case to such a forum. A change of venue, where another venue is more appropriate to adjudicate a matter, such as the jurisdiction within which an accident occurred and where all the witnesses reside.

100. Basic Principles (n 58) principle 15.

101. DP 26 provides that 'when, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States are encouraged to take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.'

to DP 26 and the Special Rapporteur's report reveals that the principle was not intended to address environmental harm caused by non-state actors in relation to armed conflicts. Rather, DP 26 was prompted from the need to restore and compensate environmental harm even when responsibility cannot be properly apportioned to the liable party due to legal, factual or other reasons.

Overall, the corporate duty to provide remedy in the ILC DPs is triggered without the limiting conditions found in the GPs, where it was conditioned upon the size and the location of the entities of the corporate group, as well as their involvement in the harm. It also channels reparations through state-based judicial mechanisms rather than through the myriad of non-state remedy mechanisms evoked by the GPs (third pillar). Apart from efficiency considerations, this demonstrates a perception of remedies as obligatory, rather than voluntary.

3.3 OECD Guidelines for Multinational Enterprises

Nature and aim of the guidelines

On 25 May 2011, the 42 governments adhering to the OECD Declaration on International Investment and Multinational Enterprises adopted the updated OECD Guidelines for Multinational Enterprises, in line with the framework developed by Professor John Ruggie, former UN Special Representative on Issue of Human Rights and Transnational Corporations and Other Business Enterprises.

The Guidelines aim to strengthen confidence between enterprises and the societies where they operate, improve the investment climate, and contribute to sustainable development. They are meant to serve as a point of cooperation between enterprises and governments towards the common aim of sustainable development.

The adhering governments jointly recommend to multinational enterprises operating in or from their

territories the observance of the Guidelines.¹⁰² They are not a binding document nor legally enforceable unless the same matters are regulated by law. Instead, they constitute recommendations and expectations by governments for responsible business conduct. They do not aim to substitute or override domestic law, but to act in a supplementary way to the provisions of national and international law. Their importance, amongst others, lies in the fact that they are the product of negotiations among national delegations, which demonstrates a sort of potential *opinio juris* on the respective issues.¹⁰³

Obligations of states

While the Guidelines are voluntary for the enterprises, the adhering countries make a binding commitment to implement them.¹⁰⁴ However, since the Guidelines concern business conduct, they do not provide new information on states' obligations. They merely reiterate that states have the primary obligation to protect and respect the objects of interest of the Guidelines, such as human rights and the environment and to prevent adverse impacts to them. The states in question are the ones where the enterprises are operating in or from, provided that they have adhered to the Declaration, but the Guidelines extend to non-OECD member countries where enterprises registered in OECD member states, operate. In as much, as the home and the host state have both adhered, then they are both obliged to promote the Guidelines to the enterprises operating in their territories.

Enterprises

Importantly, the Guidelines leave open the definition of the multinational enterprises concerned. They apply to public, private or mixed enterprises of whatever sector of the economy, under various modes of coordination and internal influence, as well as

102. The Guidelines reiterate that governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country. OECD, 'OECD Guidelines for Multinational Enterprises 2011 Edition' (OECD Publishing, 2011), p. 17.

103. Morgera, E 2006, 'An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review', *Georgetown International Environmental Law Review*, vol. 18, pp. 751-77, p. 756.

104. OECD, 'OECD Guidelines for Multinational Enterprises 2011 Edition' (n 102) par. 1.

degree of autonomy. In accordance with their title, the Guidelines apply to multinational enterprises, but authors suggest that all business entities are subject to the same expectations of good corporate conduct.¹⁰⁵

The Guidelines cast the net wide concerning the geographical scope of activities of their addressees, applying to companies operating in or from countries adhering to the Declaration. Furthermore, the Guidelines apply to all the entities, within the multinational enterprise,¹⁰⁶ including parent companies, local subsidiaries and other entities within the corporate formation. Although, it is accepted that boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation, compliance and control systems should extend where possible to these subsidiaries.¹⁰⁷

Notably, the Guidelines do not engage with the allocation of responsibility among the entities of the enterprise. Finally, regarding supply chains, the Guidelines explicitly advise for responsible supply chain management. From that, it can be extrapolated that corporate entities should respect the Guidelines along their supply chains.

Obligations of enterprises

The OECD Guidelines contain various sets of recommendations for multinational enterprises, including general obligations/recommendations, human rights issues and environmental concerns. Particularly for human rights, it is to be noted that the respective chapter is pertinent for this analysis insofar as harm to human rights is linked to the environment.

In line with the UNGPs, the Guidelines foresee that enterprises 'should respect the internationally recognized human rights of those affected by their activities,' and in situations of armed conflict enterprises should, further, respect the standards

105. Morgera, E 2006, 'An Environmental Outlook on the OECD Guidelines for Multinational Enterprises' (n 103).

106. Good corporate principles should apply across enterprise groups. See OECD, 'OECD Guidelines on Multinational Enterprises 2011 Edition' (OECD Publishing, 2011), p. 17.

107. *Ibid.*, p. 22.

of IHL.¹⁰⁸ The obligation to respect according to the Guidelines is limited to the enterprises' 'own activities'¹⁰⁹ and encompasses 'avoiding infringing' human rights and addressing adverse impacts, in which they are involved. Avoid infringing is interpreted by the commentary as 'avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.'

In the event of causing adverse human rights impact, an enterprise should take steps to cease or prevent it, whereas in the event of contributing to such impact, it should additionally use its 'leverage to mitigate any remaining impact to the greatest extent possible.' According to paragraph 42 of the commentary, leverage exists when the enterprise 'has the ability to effect change in the practices of an entity that cause adverse human rights impacts.' In case of an impact that is directly linked to the enterprise's operations, products or services by reason of its business relationship with another entity, the enterprise should use its leverage to influence the entity causing the impact so that the latter is prevented or mitigated.

This leverage covers business partners and entities in the supply chain but does not shift responsibility from the entity to the one which is directly linked. Leverage is also conditioned upon the nature of the relationship between the entities, the gravity of the impact and the consequences of a potential termination of the business relation upon human rights.

Beyond respect, enterprises are also urged to prevent human rights impacts, which are directly linked to their to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. Lastly, some commentators argue that the Guidelines contain emergent corporate obligations to protect human rights, on the basis of paragraph 13 of Section A of the

General Policies,¹¹⁰ which stipulates that enterprises 'should encourage . . . business partners . . . to apply principles of responsible business conduct.' Despite the use of the word 'should', the Guidelines seemingly suggest a corporate obligation to protect human rights, given that 'respect for human rights is the global standard of expected conduct for enterprises.'¹¹¹

Due diligence

According to the part on general policies and the commentary, due diligence should cover the issues addressed by the Guidelines, including human rights and the environment, which are of interest for the present report.¹¹² By extrapolation, it means that environmental harm can be addressed or prevented through the due diligence process either directly as an environmental matter, or indirectly as an issue affecting respective human rights.

The Guidelines foresee that enterprises should conduct risk-based due diligence, by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts, and account for how those impacts are addressed. When the enterprise has not contributed to the impact, but is nevertheless directly linked to it, it should use its leverage to prevent or mitigate it, under the light of relevant practical limitations. Particularly for the remediation process, the commentary to the human rights-related guidelines recommend that enterprises have processes in place to enable remediation, and that they cooperate with judicial or state-based non-judicial mechanisms.

The due diligence process is to be applied as appropriate to 'their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.' In the case of supply chains,

110. In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines. OECD, 'OECD Guidelines for Multinational Enterprises 2011 Edition' (n 102) General Policy 13.

111. Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, par. 37.

112. However, some authors contend that due diligence covers human rights whereas environmental impact assessment is the process to address environmental concerns. For example, Dam De Jong mentions that "the notion due diligence is not specifically mentioned in the environment chapter and that yet corporations are expected to fulfil some obligations."

108. Ibid, Commentary para. 40.

109. Letnar Cernic, Jernej, Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises (December 17, 2008). Hanse Law Review (HanseLR), Vol. 3, No. 1, September 2008.

the areas of most significant risk of adverse impacts is to be prioritised.

The impact at question is the one the enterprise is causing or substantially contributing to through its own activities. The contribution includes activities that cause, facilitate or incentivise another entity to cause an adverse impact and does not include minor or trivial contributions. Beyond contribution, an impact might also be directly linked to an enterprise's operations, products or services by a business relationship, including relationships with business partners and entities in the supply chain. This means that due diligence carried out by enterprises should extend to parent-subsidiaries relationships as well as to supply chains.

The OECD Due Diligence Guidance for responsible business conduct enumerates the steps included in the process, namely, (a) identification of actual or potential adverse impacts, (b) ceasing, preventing or mitigating them, (c) tracking implementation and results, (d) communicating how impacts are addressed; and (e) enabling remediation when appropriate.¹¹³ Similarly, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas foresees that due diligence should attempt to prevent, mitigate, account for and address the respective impact.

These five steps consist of strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings in annual sustainability or corporate responsibility reports.

Supply chain

The Guidelines expect that due diligence, and the ensuing recommendation to avoid causing, or contributing to adverse impacts, applies to entities linked by supply chain structures, including

113. OECD, 'OECD Guidance Due Diligence Guidance for Responsible Business Conduct' (2018).

franchising, licensing or subcontracting, as long as they operate in or from the countries adhering to the Declaration. In the face of a risk of causing an adverse impact through the supply chain, an enterprise should take steps to cease or prevent it, whereas if there is a risk of contribution, then it should cease or prevent that contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible,¹¹⁴ depending on the severity and probability of adverse impacts and how crucial that supplier is to the enterprise.¹¹⁵

The Guidelines accept that the ability of an enterprise to effect change in the supply chain entities is limited by product characteristics, the number of suppliers, the structure and complexity of the supply chain, and the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain.¹¹⁶

Without intention to rearrange legal responsibility among the entities, the Guidelines foresee that the measures to influence suppliers include contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and license or franchise agreements. Depending on the severity and probability of adverse impacts and how crucial that supplier is to the enterprise, the latter might take various measures,¹¹⁷ including focusing on risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact.¹¹⁸

114. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm. By way of illustration, leverage should be used to influence independent suppliers.

115. OECD, 'OECD Guidelines for Multinational Enterprises 2011 Edition' (n 102) Commentary para. 21.

116. Ibid.

117. Other measures to improve the performance of supply chain entities include personnel training and other forms of capacity building, and to support the integration of principles of responsible business conduct compatible with the Guidelines into their business practices.

118. After taking into consideration the social and economic adverse impacts related to the decision to disengage.

Environment

The environment holds a prominent role in the Guidelines, which foresee that enterprises should strive to develop and provide products and services that have no undue environmental impacts. The Guidelines stipulate that enterprises should conduct their activities in line with the need to protect the environment, public health, and safety and with the aim to contribute to the goal of sustainable development.

In addition to their due diligence obligations, enterprises should have in place a system of environmental management to collect and evaluate adequate information, establish measurable objectives for improved environmental performance and resource utilisation and monitor the progress towards those objectives.¹¹⁹ The commentary envisions sound environmental management as an important part of sustainable development, enabling the control of potential direct and indirect environmental impacts. It also underlines that beyond a business opportunity, it is also a business responsibility. The Guidelines make also a point that an environmental management system is linked to ‘reduced compliance and liability charges.’

In the broad context of their decision-making, enterprises should also assess and address foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them.

Furthermore, in cases of potential significant environmental impact, and where they are subject to a decision of a competent authority, then an environmental impact assessment should be carried out, expanding to the activities of sub-contractors and suppliers.¹²⁰ That assessment should include a broad

119. The guidelines recommend the establishment of a system of environmental management appropriate to the enterprise, consisting of collecting information on environmental and other impacts, establishing measurable objectives for improved environmental performance and regular monitoring of those objectives, and communicating and consulting with the communities directly affected by the environmental policies of the enterprise.

120. The Guidelines stipulate that the EIA ‘may’ contain the enterprise’s activities and those of the sub-contractors and suppliers [...].

and forward-looking view of the potential impacts of an enterprise’s activities, and of the activities of sub-contractors and suppliers, the relevant impacts and the alternatives and mitigation measures to avoid or redress adverse impacts.¹²¹

Moreover, enterprises should maintain contingency plans for preventing, mitigating and controlling serious environmental and health damage from their operations. They should also seek to improve corporate environmental performance throughout the supply chain by adopting respective technologies and operating procedures, and develop products and services that have no undue environmental impacts.

The Guidelines refer also to the ‘precautionary’ principle articulated by several instruments.¹²² Based on that they proclaim that enterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities. The Guidelines clarify that in relation to the precautionary principle they do not intend to create new commitments on the governments’ part, but merely to recommend how it should be interpreted at the level of the enterprises.

Remedies

Remarkably, remedy provisions are absent from the general policies chapter, but are included in the human rights chapter. Regrettably, this might be interpreted as leaving direct environmental claims outside the scope of applicable remedies.¹²³

In cases of human rights violations, the Guidelines prescribe that enterprises should provide effective remedies, provided that they have caused or contributed to the impact. The commentary to the human rights chapter, mentions that ‘some situations require cooperation with judicial or State-based non-judicial mechanisms,’ without however, stipulating

121. The Guidelines also recognise that multinational enterprises have certain responsibilities in other parts of the product life cycle.

122. However, the fact that the Guidelines are addressed to enterprises means that no existing instrument is completely adequate for expressing this recommendation. The Guidelines therefore draw upon, but do not completely mirror, any existing instrument.

123. However, the Guidelines underline that an environmental management system is linked to ‘reduced compliance and liability charges.’

the criteria for resorting to one of the two kinds of mechanisms. Operational-level grievance mechanisms can also be used, provided they meet the criteria of 'legitimacy, accessibility, predictability, equitability, compatibility with the Guidelines and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions,' and should not preclude access to judicial or non-judicial grievance mechanisms.

According to the OECD Due Diligence Guidance for Responsible Business Conduct, the remedy may include apologies, restitution or rehabilitation, financial or non-financial compensation, punitive sanctions and guarantees of non-repetition. Importantly, it should be proportionate to the significance and scale of the adverse impact.

The Guidelines emphasise that enterprises should cooperate with legitimate remediation mechanisms, to enable affected stakeholders and rightsholders to achieve redress, especially when there are disagreements on the enterprise's involvement in the impact, or the nature and extent of the remediation. However, the remedy is not an element of the due diligence process, but the latter should enable it and support it. 'Grievance and remediation processes interact with and may ultimately support due diligence by providing channels through which the enterprise can become aware of and respond to RBC impacts.'¹²⁴

National Contact Points

The OECD Guidelines foresee the National Contact Points as a non-judicial grievance mechanism, established by states adhering to the Declaration. Their mandate is to promote the OECD guidelines, to assist in and monitor the implementation of the Guidelines, act as a forum of discussion on issues relating to the Guidelines, handle enquiries and contribute to the resolution of issues that arise relating to the implementation of the OECD Guidelines for MNEs in specific instances.

Individuals and organisations can bring claims against an enterprise, to the NCP of the country where the enterprise is operating or based, for adverse impacts of its activities anywhere in the world. That process results in either an agreement between the parties or a recommendation on how the enterprise can comply to the Guidelines.¹²⁵ Several cases brought before NCPs concern environmental harm in conflict-affected areas, such as the complaint brought to the British NCP by the NGO Global Witness against mineral trading company Afrimex in relation to the illegal exploitation of natural resources.¹²⁶

124. OECD, 'OECD Guidance Due Diligence Guidance for Responsible Business Conduct' (2018).

125. Dam-de Jong, Daniëlla, 'Standard-setting Practices for the Management of Natural Resources in Conflict-Torn States: Constitutive Elements of Jus Post Bellum' (n 84).

126. See OECD Watch, *Global Witness v. Afrimex*, available at https://complaints.oecdwatch.org/cases/Case_114

