



Responsible
Investment
Association
Australasia



INVESTOR TOOLKIT ON HUMAN RIGHTS & ARMED CONFLICT

Managing human rights impacts and international humanitarian law implications before, during and after armed conflicts arise

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About this investor toolkit

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Executive summary

In a world where armed conflict continues to be pervasive and widespread, companies and investors must be aware of their risks, responsibilities and legal obligations in relation to conflict. This toolkit seeks to provide investors with the information and guidance they need to engage with companies on the issue of armed conflict – before, during and after. The key issues it covers are summarised below.

While there is no universal definition for the term ‘conflict-affected area’ or related terms that businesses have become increasingly familiar with – well-established legal criteria for determining the existence of an armed conflict exist. Applied on a case-by-case basis, these criteria can assist in determining when the requisite threshold of violence is met.

Investors are increasingly recognising that adverse human rights impacts pose regulatory, financial (investment), legal and reputational risks to business, and that, when these human rights impacts are not managed or mitigated, they could erode the value of the company.¹

The risk of companies being involved in grave human rights abuses, as well as violations of international humanitarian law (IHL), is heightened in conflict-affected contexts. Often, these areas are already affected by unstable governance, conflict over control of territory and resources, or a

heightened presence of private security actors or other non-state armed groups. As a result, investors whose portfolio companies are exposed to conflict have heightened exposure to those human rights and IHL risks, which then intersect with regulatory risks, investment risks, legal risks and reputational risks.

Under the UN Guiding Principles on Business and Human Rights (UNGPs), investors have a responsibility to respect human rights and, in situations of armed conflict, IHL. Applying this responsibility to an investment portfolio means investors have a responsibility to:

- identify actual and potential adverse human rights and IHL impacts in their investment portfolio;
- avoid causing, contributing to or being directly linked to adverse human rights impacts or violations of IHL through their investments; and
- where impacts occur, to address and remedy those impacts.

This toolkit includes detailed guidance for investors to identify where portfolio companies may be operating in a conflict-affected context, and how to identify actual and potential adverse human rights and IHL impacts. The toolkit then provides detailed guidance on how investors can engage with companies on these issues.

¹ UNPRI (2022) <https://www.unpri.org/human-rights/what-data-do-investors-need-to-manage-human-rights-risks/10856.article>

Introduction

In a world where armed conflict continues to be pervasive and widespread, companies and investors must be aware of their risks, responsibilities and legal obligations in relation to conflict. It is important to recognise the role they can play in protecting the human rights of all people affected by conflict.

In many cases, there can also be a direct earnings-related risk to companies, including loss of revenue and legal battles, as well as reputational impacts. Responsible investors therefore have a role to play in identifying, managing and mitigating these risks, as well as seeking to minimise the adverse impacts of conflicts.

It is important to acknowledge that there are different types of armed conflict, from civil war (for example, in Myanmar, Nigeria and Yemen) right through to conventional, interstate war (such as between Russia and Ukraine) and military occupation (such as the Israeli occupied-Palestinian Territories). There are also situations of violence and unrest that do not meet the threshold of armed conflict, but which also raise human rights concerns. This means that companies with international footprints need to monitor operations for latent risks of conflict, as well as manage the extant risks that come from open hostilities.

The complexity of these issues poses a challenge for companies that have exposure to, and operate in, conflict-affected areas. It is also an issue for responsible investors that seek to invest in these companies.

This toolkit aims to set out the key issues and frameworks for companies and investors to consider when navigating the human rights risks posed by armed conflict.

How does armed conflict intersect with responsible investment?

Investors are increasingly recognising that adverse human rights impacts pose regulatory, financial (investment), legal and reputational risks to business. When these human rights impacts are not managed or mitigated, they may erode the value of the company.²

Just as for all businesses, institutional investors have a responsibility to respect human rights. This responsibility was formalised in 2011, and since then expectations – from employees, beneficiaries, clients, governments and wider society – have only increased.

Leading investors also recognise that meeting international standards – and preventing and mitigating actual and potential negative outcomes for people – leads to better financial risk management, and helps to align their activities with the evolving demands of beneficiaries, clients and regulators – United Nations Principles for Responsible Investment.³

² UNPRI (2022) <https://www.unpri.org/human-rights/what-data-do-investors-need-to-manage-human-rights-risks/10856.article>

³ UNPRI (2020) <https://www.unpri.org/human-rights/why-and-how-investors-should-act-on-human-rights/6636.article>

For investors, it is important to recognise that human rights risks are heightened in conflict-affected contexts, as is the risk of **international humanitarian law (IHL)** violations. As a result, investors whose portfolio companies are exposed to conflict will have heightened exposure to those IHL and human rights risks that overlap or intersect with regulatory risks, investment risks, legal risks and reputational risks.

The case for a proactive approach

Even if it seems unlikely that your firm, or a business it invests in, would be involved in a conflict zone or connected to breaches of IHL, it is prudent to manage these risks preventatively. This is particularly so if the business is already exposed to a fragile or conflict-prone region. IHL will not apply until an armed conflict is in existence (though at all times, human rights law continues to apply), however, a situation of civil unrest or other violence can quickly escalate to meet the threshold of armed conflict, thus triggering IHL's application.

Operating in the grey area between a non-conflict and conflict context presents human rights-related risks; and once conflict does break out, it is often too late to develop and implement relevant policies in response. Therefore, **the best time to deepen understanding of armed conflict and embed IHL and conflict sensitive policies and practices, is before conflict or violence break out.**

In addition, taking a proactive approach to promoting IHL and conflict sensitivity will help create a culture of respect within the business and investor community; a culture based on positive action that encourages partners, suppliers and other third parties to also manage the risks associated with doing business in conflict-affected areas.

The United Nations Development Programme (UNDP) states that:

1. Conflict will always create adverse impacts on human rights.
2. Business activities in a conflict-affected area will never be 'neutral' and without impact.
3. Generally, businesses should respect the standards of international humanitarian law in addition to internationally agreed human rights.

Section 2 of this paper sets out the risks, and how to mitigate them, in more detail. By investing in companies that operate in areas affected by conflict, and failing to manage the obligations this gives rise to, the overarching risk for investors is that they could – even unknowingly – contribute to adverse human rights impacts, exacerbate conflict or facilitate breaches of IHL.

Before detailing the risks, it is useful to understand exactly what we mean by 'armed conflict', and how it intersects with human rights.

Section 1: Armed Conflict Overview



What is armed conflict?

While there is no universal definition for ‘conflict-affected area’ or related terms that businesses have become increasingly familiar with, there are well-established legal criteria for determining the existence of an armed conflict. These criteria must be applied on a case-by-case basis, and will assist in determining when a requisite threshold of violence is met.

There are only two types of armed conflict recognised in international legal frameworks, specifically under international humanitarian law (IHL) – discussed in further detail below – which governs and regulates conduct in situations of armed conflict. Under IHL, an armed conflict arises whenever there is:

- use of force between States or military/belligerent occupation of one State by another. This is known as **international armed conflict (IAC)**; or
- protracted armed violence between government authorities and organised armed groups, or between organised armed groups within the borders of one State. This is known as **non-international armed conflict (NIAC)** but is often colloquially referred to as **civil war**.

It is important to understand the difference between these types of conflict, as different rules will apply to different contexts. It is relatively straightforward to identify an IAC, but for companies and investors, identifying the emergence or existence of a NIAC can be more challenging. Peacetime, clearly, does not trigger the application of IHL.

Similarly, internal disturbances and tensions – riots, isolated and sporadic acts of

violence and similar acts – within the borders of a State do not meet the requisite threshold of a NIAC, which includes a minimum level of intensity and level of organisation within parties to the conflict. But there is always a risk that such situations may escalate into armed conflict, in turn invoking IHL.

Occupied populations are also a particularly vulnerable – and protected – class of civilians during military occupations, even after active hostilities end. For example, IHL prohibits the exploitation of resources without the occupied population’s consent or for purposes other than their exclusive benefit. It also proscribes business operations or relationships that financially or otherwise incentivise the maintenance or expansion of settlement activity, or activities that contribute to the construction of settlements.

Companies and investors would benefit from a nuanced understanding of, and ability to identify, situations of armed conflict and the human rights risks which may be impacted or elevated in conflict-affected contexts as part of their human rights due diligence. This is referred to as heightened human rights due diligence (**hHRDD**) (see Section 3).

Throughout this toolkit, we use the terms ‘conflict-affected’ areas, settings or contexts to refer to situations of armed conflicts (as defined under IHL) and a range of other situations of widespread violence. We have adopted this language from the United Nations Development Programme’s (UNDP) *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*, which is based on the United Nations Guiding Principles on Business and Human

Rights (**UNGPs**). It is the authoritative, global framework guiding States and companies in preventing and addressing adverse business-related human rights impacts.

Legal frameworks in armed conflicts

There are several international frameworks relevant to companies operating in conflict zones. Three of the key frameworks are outlined below (noting that others may also apply):

- **International humanitarian law (IHL)** is also known as ‘the law of armed conflict’ or ‘the law of war’. Its fundamental premise is that even in times of armed conflict, human dignity must be respected and protected, and the means and methods of warfare regulated.
- **International Human Rights Law (IHRL)** is a set of international rules, established by treaty and custom, on the basis of which individuals and groups can expect and claim certain rights that must be respected and protected by States. States also have an obligation to protect individuals against human rights abuses by third parties, including business entities.
- **International Refugee Law (IRL)** is the branch of international law which deals with the rights and duties states have regarding refugees. (These laws are

important but not a key focus of this toolkit.)

International humanitarian law, refugee law and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact – International Committee of the Red Cross.⁴

While the legal frameworks are distinct from each other, they are also inextricably linked. Perhaps one of the most fundamental distinctions is that IHRL is traditionally only binding on State actors, whereas IHL binds both State and non-State actors. This can include legal persons, such as companies, as well as individual personnel and executives of businesses whose activities are closely linked to an armed conflict.

Because of the limitations of IHL and its overlap with IHRL, investors and portfolio companies may need to adopt a conflict-sensitive analysis to human rights risks even where the conflict does not trigger the application of IHL. A conflict-sensitive approach will consider how a company or investor can minimise its impact on the conflict, and identify opportunities to contribute to a stable operating environment.⁵

⁴ Statement at the International Association of Refugee Law Judges world conference, Stockholm, 21-23 April 2005, by Emanuela-Chiara Gillard, ICRC Legal Adviser

⁵ Swiss Peace (2016) *Enhanced Human Rights Due Diligence in Conflict-Affected and High-Risk Areas*, <https://www.connectingbusiness.org/system/files/2018-11/Enhanced-Human-Rights-Due-Diligence-in-Conflict-Affected-and-High-Risk-Areas.pdf>, p.2

The UN Guiding Principles

In 2011, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. The Guiding Principles contain three chapters, or pillars: protect, respect and remedy. Each defines concrete, actionable steps for governments and companies to meet their respective duties and responsibilities to prevent human rights abuses in company operations and provide remedies if such abuses take place.

Where is armed conflict happening?

Today, armed conflict is widespread, even if only a few key conflicts attract global media attention.

The Geneva Academy's *Rule of Law in Armed Conflict Online Portal* (RULAC) classifies all situations of armed violence that amount to an armed conflict under IHL.⁶


RULAC currently monitors more than 110 armed conflicts and provides information about parties, the latest developments, and applicable international law standards. Some of these conflicts make the headlines, others do not. Some of them started recently, while others have lasted for more than 50 years.

A spectrum of conflict

Some regions experience levels of unrest or violence that might not rise to the level of 'armed conflict', but present risks nonetheless. Resources that provide insight include:

- Uppsala Conflict Data Program
- Fragile States Index
- Global Peace Index

⁶ RULAC, accessed April 2023, <https://www.rulac.org/>

The background of the slide is a photograph of a severely damaged building, likely a residential structure, with significant rubble and debris scattered around. The image is overlaid with a semi-transparent orange filter. A large, semi-circular white cutout is visible in the bottom right corner of the image.

Section 2: Why should investors care about armed conflict, IHRL and IHL?

There is a growing recognition amongst investors that failure by companies to manage human rights risks poses regulatory, financial, legal and reputational risks. Section 1 above outlines how these risks are heightened in conflict-affected contexts, and this section outlines how those risks can play out in practice.

Regulatory risk and normative expectations

The promotion and protection of human rights is articulated in international law, as outlined in the previous section. States are the primary duty-bearers under international human rights law and international humanitarian law, and collectively they are the trustees of the international human rights regime.

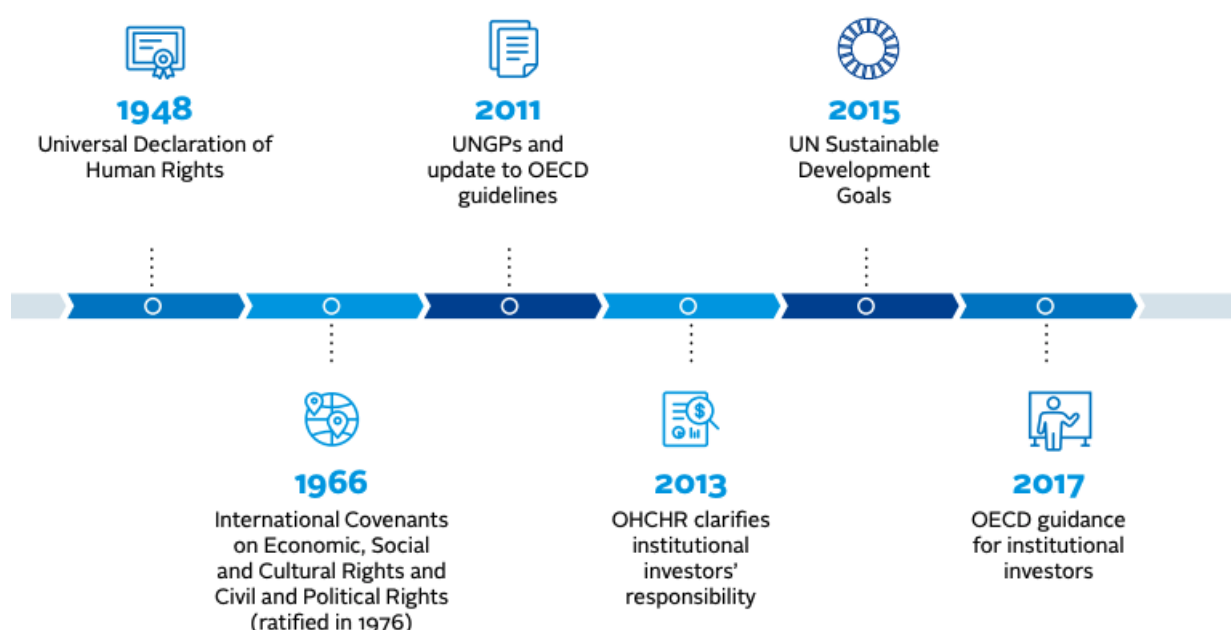
A number of global frameworks and guidelines outline the role and responsibilities of business in respecting human rights and IHL by preventing, mitigating and remedying adverse human rights and conflict-related impacts. While

these instruments are not legally binding and cannot be enforced against companies that fail to adhere to those requirements, they often shape and dictate stakeholders' expectations of what constitutes responsible business conduct. Moreover, such frameworks are increasingly being codified into law in various countries.

In the absence of legally binding obligations on businesses, investors who want to understand the expectations of responsible business conduct in conflict-affected settings can look to a number of voluntary frameworks and guidelines outlined in *Appendix F*.

Human rights regulation

Several jurisdictions have proposed or implemented mandatory regulations under which businesses are required to conduct due diligence and report on human rights risks and impacts. The human rights regulatory landscape is rapidly evolving and at the time of writing, over 15 countries had



implemented business and human rights regulation.⁷

This includes import bans and mandatory reporting regimes on conflict minerals, modern slavery, forced labour and child labour; and mandatory human rights due diligence laws that have been introduced in France, Norway and Germany, and are currently proposed in the EU. See *Appendix G* for details.

Investors can be directly subject to specific regulation on investment activity and human rights, such as sustainable finance taxonomies and disclosures or modern slavery reporting requirements.

Enforcement is therefore a live consideration when it comes to assessing regulatory and legal risk relating to conflict-related human rights risks. More detailed mandatory reporting on human rights has emerged in some regions, with regulations and guidance concerning the integration of IHL, specifically, into mandatory reporting and due diligence. However, IHL-specific regulation has, to date, been less prominent.

IHL obligations

It is also worth noting that, unlike human rights frameworks and guidelines, IHL is already expressly binding on any business or private individual conducting activities that are closely linked to an armed conflict. A number of jurisdictions have enacted domestic laws that provide for the prosecution of contraventions of IHL and human rights obligations in domestic courts.

Companies' failure to manage IHL and human rights risk in conflict-affected settings can therefore expose the company and individual officers to criminal or civil liability. Take, for example, a company that appropriates, or pillages, property or natural resources for private use without the owner's consent; a company that contracts private security forces that engage in hostilities and commit violations of IHL; or a company that provides logistical, financial or other support to an armed group found to be committing war crimes.

Companies have in some circumstances been prosecuted for breaches of IHL or human rights obligations when operating in an armed conflict, which has in some instances led to the imposition of fines on the company and/or criminal charges being laid against individual officers of the company who face fines or prison sentences. Australian Red Cross observes that:

In Australia, persons or companies suspected of committing war crimes can be tried under the Criminal Code Act 1995 (Cth) and prosecuted irrespective of where the crimes were committed, who committed them, or whether the crimes were committed against Australian citizens or property. Victims of war crimes may also pursue civil claims in domestic courts, including claims for financial compensation.⁸

⁷ Institutional Shareholder Services, Inc. (2022) *The Rapidly Changing World of Human Rights Regulation: A Resource for Investors*, <https://www.issgovernance.com/file/publications/iss-esg-the-rapidly-changing-world-of-human-rights-regulation.pdf>, p.2

⁸ Australian Red Cross and RMIT University (2020) *Doing Responsible Business in Armed Conflict: Risks, Rights and Responsibilities*, <https://www.redcross.org.au/globalassets/cms-assets/documents/ihl--no-ihl/doing-responsible-business-in-armed-conflict-final-publication-web.pdf>, p.17

Litigation risks

As global conflict has escalated, so has the use of targeted sanctions, including Magnitsky-style restrictions, by countries and regions including Australia, the US, Canada, the UK, and the EU. Magnitsky-style sanctions laws enable governments to sanction those engaging in 'egregious conduct' such as corruption and serious violations of human rights and IHL. These are often related to conflict-affected areas, and strategic litigation is a real risk for companies and investors that continue to operate in markets with a targeted sanctions regime, or that have indirect exposure to them.

It is important to remember that in contexts where armed conflict is considered, the primary frame of reference should not be limited to compliance with sanctions laws. Rather, as this toolkit demonstrates, even where sanctions laws do not apply, similar risks – particularly legal liability risks – exist for those who are responsible for, or complicit in, serious violations of IHL.⁹

Investment risk

Where companies cause or contribute to adverse human rights impacts in conflict-affected contexts, or commit breaches of IHL, this can often translate to investment or financial risk. Below are some examples of civil and criminal proceedings against

companies or their officers that highlight how these issues can manifest as regulatory and investment risk for companies:

- **Lafarge:** The cement group has been found guilty of 'aiding and abetting crimes against humanity' for its involvement in Syria's civil war and deals that provided funding to Islamic State. In October 2022, Lafarge was ordered by a US District Court to pay US\$778 million in fines and forfeiture for conspiring to provide material support to foreign terrorist organisations.¹⁰ Criminal proceedings were initiated against Lafarge in France in 2018.¹¹ In September 2021 the Cour de cassation, France's highest court of appeal, clarified the legal framework under which a company may be charged with complicity in crimes against humanity and in May 2022 the Paris Court of Appeal confirmed the charges against Lafarge for complicity in crimes against humanity in Syria. Lafarge also faces charges of deliberately endangering the lives of its Syrian employees.¹²
- **Lundin Oil:** In November 2021, Sweden charged two Lundin Oil executives for aiding and abetting war crimes in Sudan between 1999 and 2003. The trial is scheduled to take place in September 2023.¹³

The crimes will be prosecuted on the basis of universal jurisdiction, as provided for in the Swedish Penal Code.

⁹ Australian Red Cross (2023) <https://www.redcross.org.au/globalassets/cms/ihl/corporate-war-crimes-and-other-liabilities.pdf>

¹⁰ US Department of Justice (2022) <https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations>

¹¹ Business & Human Rights Resource Centre (2016) <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/>

¹² Business & Human Rights Resource Centre (2022) <https://www.business-humanrights.org/en/latest-news/charges-confirmed-against-lafarge-for-complicity-in-crimes-against-humanity-in-syria/>

¹³ Business & Human Rights Resource Centre (2021) *Lundin Energy Lawsuit (re complicity in war crimes, Sudan)*

If found guilty, the defendants face a life sentence and a fine of €300 million.¹⁴ In 2018, the Swedish Prosecution Authority notified the Company that it may seek to impose a corporate fine of SEK3 million (US\$311,000) and forfeiture of economic benefits in the amount of SEK3.3 billion (US\$348 million) at the conclusion of a trial.¹⁵

- **VW Brazil:** Volkswagen (VW) Brazil was accused of complicity with the military dictatorship that governed Brazil between 1964-1985.¹⁶ In 2014, a truth commission made preliminary findings about the collaboration of VW with the repressive regime that led to torture and illegal detention of workers.¹⁷ In 2015, the Public Prosecutor's Office allowed for a preliminary investigation and judicial truth finding into a civil claim filed by the Workers' Forum for Remembrance, Truth, Justice and Reparation (despite Brazilian amnesty laws). The civil case was settled and VW paid approximately US\$6.4 million in compensation; however, the agreement was highly criticised for not including any recognition of VW's responsibility.¹⁸ It is worth noting that while this case wasn't related to armed conflict, meaning IHL didn't apply, IHRL frameworks were still relevant.

Poor management of human rights, both directly in company operations, and indirectly in supply chains, can impact upon the commercial success, stability and longevity of a company and therefore upon the value of the investment.

When companies are seen to behave unethically, especially in the context of armed conflicts or civil unrest, the damage to a company's social license to operate has the potential to materially curtail the company's success. Clearly, where companies or executives are facing charges and fines, financial implications are more likely and the examples above demonstrate this.

Where companies' operations are directly or indirectly supporting or profiting from business relationships with parties to an armed conflict, who may be committing IHL violations or adversely impacting human rights, that business association can also create investment risk for the company.

Understanding how conflict elevates the investment risks associated with human rights impacts can be a more complex exercise. In peacetime, a company that fails to respect human rights (for example, by not consulting with impacted indigenous communities as required under international

¹⁴ Australian Red Cross, accessed April 2023, <https://www.redcross.org.au/ihl/business-and-ihl/what-liability-operational-and-reputational-risks-does-your-business-face-in-armed-conflict/liability-risks/>

¹⁵ GlobeNewswire (2018) <https://www.globenewswire.com/news-release/2018/11/01/1641420/0/en/Lundin-Petroleum-receives-information-regarding-a-potential-corporate-fine-and-forfeiture-of-economic-benefits-in-relation-to-past-operations-in-Sudan.html>

¹⁶ Business & Human Rights Resource Centre (2015) <https://www.business-humanrights.org/en/latest-news/volkswagen-re-military-dictatorship-brazil/>

[humanrights.org/en/latest-news/volkswagen-re-military-dictatorship-brazil/](https://www.business-humanrights.org/en/latest-news/volkswagen-re-military-dictatorship-brazil/)

¹⁷ Independent (2015) <https://www.independent.co.uk/news/world/americas/volkswagen-embattled-car-maker-s-employees-were-victims-of-torture-and-illegal-detention-in-brazil-under-military-dictatorship-10513657.html>

¹⁸ ECCHR, accessed April 2023, <https://www.ecchr.eu/en/case/volkswagen-in-brazil-automobile-group-collaborated-with-military-dictatorship/>

human rights law) may incur costs relating to project delays.

In conflict-affected contexts, these risks and costs are exacerbated by political instability, corruption, weakened rule of law, economic insecurity and lack of access to reliable information on which to base operational decisions. The International Finance Corporation notes that such environments create 'business risks that are much greater than those in other emerging markets. These include the destruction of physical capital, as well as deaths and injuries, weak state control, lack of security, and supply-chain disruptions.'¹⁹

Companies operating in conflict-affected areas are therefore at a greater risk of facing significant business disruption and associated costs if they cause, contribute to or are directly linked to human rights risks and impacts in a conflict-affected setting.

Beyond isolated cases and individual company implications, systemic human rights risks are exacerbated by conflict and create risks for investors with exposure to companies, sectors and geographies in conflict-affected areas, often with multi-year and multi-decade time horizons. Russia's invasion of Ukraine has shown how investors can have exposure to conflict-affected sectors and commodities including energy, food and timber.

Investors might have been largely able to avoid direct implications from other conflicts given the lower direct portfolio exposure to companies and assets in Afghanistan, Syria, Yemen etc. and the less impactful supply chain implications. But the sheer number of conflict zones around the world, in combination, destabilises global and regional governance and weakens rule of

law. This only increases instability and reduces the ability to focus on the systemic, environmental and social issues to be mitigated through public and private collaboration for mutually beneficial outcomes.

Reputational risk

Reputational risks arise where a business' association with, or response to, human rights risks has a potentially detrimental impact on stakeholders' perception of the organisation.

Where investors fail to manage and mitigate regulatory and investment risk, there may be heightened reputational risks to consider. This is due to the gravity of the issues at stake; the level of scrutiny by media and civil society in relation to businesses' role in armed conflict; and the potential to be associated with international crimes such as 'war crimes' or 'crimes against humanity'.

Reputational risk for investors can arise either directly or through human rights breaches occurring in the operations and business relationships of a portfolio company. These can be exacerbated where peers respond to an emerging issue more promptly or robustly.

The reputational risk of being adversely associated with armed conflict can be damaging for the investor's relationship with its investor clients or fund members, or with regulators, as it can be seen as pointing to weak or ineffective risk management.


It can also lead to a negative public perception of the investor and undermine the investor's 'social licence to operate'.

¹⁹ IFC (2019) *Generating private investment in Fragile and Conflict-Affected Areas*, https://www.ifc.org/wps/wcm/connect/publications_e

[xt_content/ifc_external_publication_site/publications_listing_page/201902-fcs-study](https://www.ifc.org/wps/wcm/connect/publications_e_listing_page/201902-fcs-study)

While there is often considerable overlap between investment risk, regulatory risk and reputational risk, which can impact on share prices and long-term earnings, it is important to note that reputational risk can arise even where the risk of regulatory enforcement or actual financial loss is low.





Section 3: How can investors identify armed conflict and human rights risks in their portfolios?

It can be challenging for investors to identify companies with links to armed conflict, particularly for investors with exposure to a large number of companies, and given there is often a lack of data on the location of business operations and supply chains of a company. Nonetheless, investors have a number of actions open to them to better understand the exposure of companies in their portfolio to armed conflict-related risks, and how those companies are managing said risks.

This section provides detailed guidance for investors seeking to identify *where* portfolio companies may be operating in a conflict-affected area, and *how* to identify actual and potential adverse human rights impacts.

How to identify armed conflicts

Identifying links to armed conflict for portfolio companies can be challenging in scenarios where reliable information is not readily available. Governments involved in armed conflict can sometimes deny involvement and seek to manipulate the classification of the use of violence. Using independent information sources to identify armed conflicts serves to ensure investors approach each conflict situation consistently.

Key information sources on armed conflict

- The Geneva Academy
- RULAC by the Geneva Academy
- International Committee of the Red Cross (ICRC)

How to identify if an investee company is exposed to an armed conflict

Tools to identify whether a company is potentially exposed will vary between conflicts, but might include:

Tool	Details
Company level analysis	Identifying where a company is domiciled, and where available, where its operations or key business relationships and suppliers are located. Companies themselves can be a meaningful source of information for investors trying to identify human rights risks (see the section below on addressing risks).
Sector level analysis	Identifying key sectors that are exposed to the conflict. This will vary between conflicts but could include sectors where products and services could be used to support a conflict (such as weapons, automobiles, financial services and consumer staples) or those that are material in the areas where the conflict is taking place.
Civil society organisations	These might include global organisations like the Business and Human Rights Resource Centre , Human

	<p>Rights Watch and the Ethical Trading Initiative, or those specific to a conflict, such as B4Ukraine, Justice for Myanmar, the KSE Data Set, Yale CELI List of Companies Leaving and Staying in Russia, and OHCHR's list of businesses operating in settlements in the Occupied Palestinian Territory. These groups often produce reports that may identify specific companies and/or sectors that are exposed (as outlined above) and can help facilitate stakeholder engagement.</p> <p>The Heartland Initiative is a non-profit working with investors to identify, assess, prevent, and mitigate the human rights and other material risks associated with business operations and relationships in conflict-affected and high-risk areas.</p>
Controversy screening	Available from ESG research providers and media coverage

Please see *Appendix D* for a non-exhaustive list of resources to help investors navigate and identify human rights risks related to specific sectors, regions or focus areas.

Case studies: Myanmar and Russia-Ukraine

In July 2021, a group of 86 investors with more than \$US4 trillion in assets under management published a joint statement calling on companies with business activities or business relationships in Myanmar to identify their links to the ongoing conflict, undertake enhanced due diligence to assess and address potential human rights impacts, and report on their due diligence and mitigation measures. Many of the investors noted that they were 'directly or indirectly exposed to companies with direct business activities or business relationships in Myanmar' and therefore were 'actively seek[ing] to understand how companies address certain ESG factors'.²⁰

In relation to the Russia-Ukraine conflict, some investors have published their approach to engaging with high-risk portfolio companies, in order to understand their exposure to conflict-related human rights

risks. Sixty-two investors with over US\$1.7 trillion AUM signed the *Investor Statement on the Crisis in Ukraine*.

State Street Global Advisors (SSGA) has a *Framework for Stewardship in the Context of Geopolitical Risk Arising from Unexpected Conflict Between or Among Nations*.²¹ It was one of the investors to sign the joint statement on Myanmar, and it published details of its stewardship approach to the Russia-Ukraine conflict. SSGA committed to engaging with identified holdings in its portfolio that are domiciled outside of Russia and Ukraine but may have material exposure to the conflict, to understand how they are managing human rights-related risks of operating in the region (among other risks).²²

How to prioritise risks in conflict situations

A company applying the UNGPs can rank the order in which human rights risks and impacts should be assessed according to severity.²³ The commentary to Principle 14 of the UNGPs establishes a typology of assessing severity of human rights impacts

by considering the scale, scope and irremediability of the impact.²⁴

In conflict-affected contexts, businesses should consider salient risks in terms of both human rights and conflict. This means that the prioritisation of the most severe impacts must be considered alongside the likelihood

²⁰ Investor Alliance for Human Rights (2021) *Investor Statement on Human Rights and Business Activities in Myanmar*, <https://investorsforhumanrights.org/investor-statement-myanmar-human-rights-and-business-activities-supporting-military-junta>

²¹ State Street Global Advisors (2022) <https://www.ssga.com/library-content/pdfs/global/framework-for-stewardship-in-context-of-geopolitical-risk.pdf>

²² State Street Global Advisors (2022) <https://www.ssga.com/library->

<content/pdfs/global/our-stewardship-approach-for-ukraine.pdf>

²³ State Street Global Advisors (2022) <https://www.ssga.com/library-content/pdfs/global/framework-for-stewardship-in-context-of-geopolitical-risk.pdf>

²⁴ UNDP (2022) *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*, <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>, p.30

and consequences of conflict. Businesses may consider the following questions:

- How severe are the human rights implications of the conflict-related risks identified?
- How likely are those human rights implications to create or exacerbate conflict?
- How likely is the risk that activities may amount to the commission of, or

complicity in, war crimes or other violations of IHL?

The UNDP has developed a set of criteria to complement the UNGP's 'severity' analysis and assist companies to apply an analogous analysis to the likelihood and consequences of conflict, as set out in the table below.²⁵

Risk Rating	Scope: How widespread is the armed conflict that impacts people?	Scale: How grave or serious is the armed violence i.e., does it include a large number of deaths and casualties?	Irremediability: What are the limits to restoring the people impacted to at least the same, or equivalent to, their situation before the armed violence occurred?
High	Large number of people affected, which might include the workforce, families or workers and surrounding communities	The abuse involves severe impact on the physical, mental and/or emotional well-being of a person and/or communities; the community is considered especially vulnerable	Unless the action is taken immediately, the impact of human rights abuses can never be remedied
Medium	A moderately large number of people impacted	The abuse involved a moderate impact on the physical, mental and/or emotional well-being of people and/or communities	Unless action is taken soon the impact of abuses will not likely be remedied
Low	A small number of people impacted	The abuse does not have a long term or substantive effect on the victims' lives and does not target vulnerable populations	Action not required immediately to remedy the abuses in full

A conflict-sensitive human rights assessment which incorporates these questions will enable companies to identify the most salient human rights risks and prioritise their response to those risks.

²⁵ UNDP (2022) *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*,

<https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>, p.31

When to identify risk

Companies seeking to apply the UNGPs should conduct human rights due diligence in order to meet their responsibility to respect human rights. Identifying and assessing actual and potential adverse human rights impacts is the first fundamental step of **human rights due diligence (HRDD)**.

While standard due diligence exercises are typically directed at identifying 'risk to business', HRDD supplements this analysis by requiring businesses to consider 'risk to people'. In conducting HRDD it is necessary to ask: how many people may be harmed as a result of business activity, decisions, transactions, relationships or purchasing and procurement practices? Any risks identified must then be incorporated into the organisation's existing risk management and decision-making frameworks and processes.

The business relationships or activities that may link a business to conflict may not be typically perceived as giving rise to salient human rights issues in peacetime, and therefore will not necessarily be captured or prioritised in standard HRDD. However, many activities that may be human rights-compatible outside of a conflict-affected setting might, in conflict-affected settings, contribute to or fuel conflict.

For example, where a business has operations in a conflict-affected area, it is common for the company to engage public or private security to protect the safety of

their personnel and assets. However, even if security forces perform their duties in a manner consistent with human rights and IHL, their presence may impact local conflict dynamics and may lead to an escalation of violence.²⁶ A company's engagement with security forces may be fully compliant in terms of human rights impacts and IHL, but may nonetheless fuel a perception of supporting or advantaging one party to the conflict over another, and lead to an escalation of grievances and violence.²⁷

In some cases, companies with business activities in a conflict-affected area that would not necessarily be linked to any human rights violations, may still have a heightened risk of exacerbating the conflict because they are part of a high-risk sector or because of the relationships it maintains. They may be carrying out projects or paying a sizeable amount of tax to an oppressive regime, which may in turn be seen as complicity by some societal actors. It might be helpful for investors to identify these companies and review their source of revenue from the conflict-affected area.

Importantly, the UNGPs emphasise that in contexts with a heightened risk of human rights abuses, companies should proportionally adapt their human rights due diligence efforts to conduct heightened human rights due diligence (hHRDD).

²⁶ United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (2020) *Business, human rights and conflict-affected regions: towards*

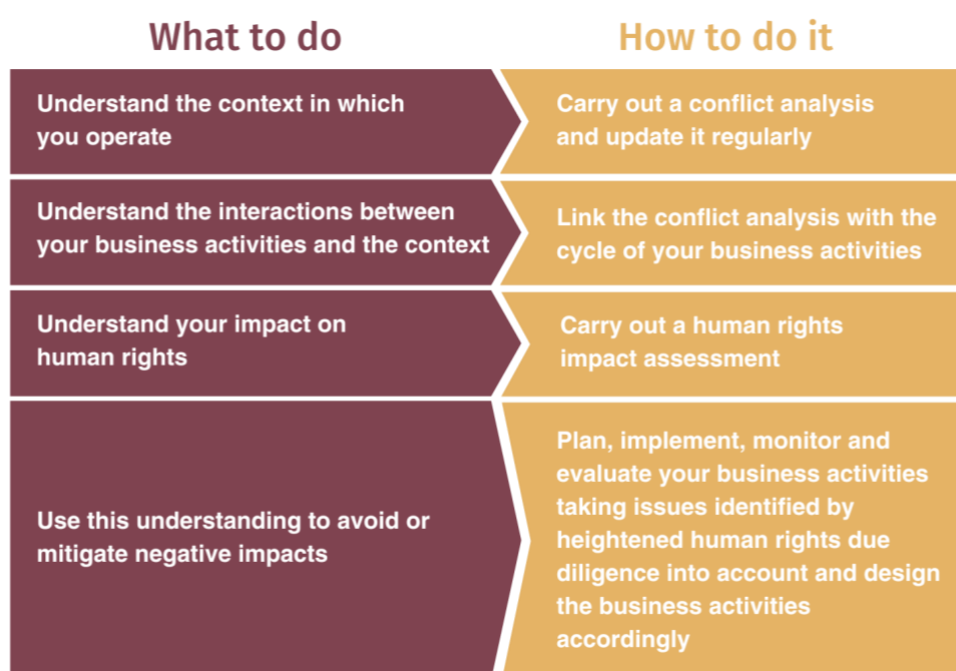
heightened action, UN General Assembly, 75th sess, Agenda Item 72(b), UN Doc A/75/150

²⁷ Ibid.

What is heightened human rights due diligence (hHRDD)?

hHRDD is based on the concept of proportionality as identified by the UNGPs. As the risk of human rights abuses is heightened in conflict-affected areas, companies' due diligence should be 'heightened accordingly'.²⁸ Traditional HRDD enables companies to identify, assess, mitigate and report on human rights risks to people. hHRDD overlays this with a

conflict-sensitivity analysis, which identifies how these risks are impacted or elevated by businesses operating in conflict-affected contexts and integrates consideration of the 'flash points, potential triggers or the forces that are driving the conflict'.²⁹ The UNDP provides a helpful guide outlining the various steps of undertaking hHRDD and how to undertake them, which include:



Source: UNDP (2022) *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*, p.11

When determining whether a company should undertake hHRDD, the guide provides a list of relevant triggers, and suggests asking the following questions:

1. Is widespread 'non-conventional' armed violence taking place?
2. Is there an international armed conflict between two states?
3. Is there an internal armed conflict?
4. Is there a military occupation?
5. Are gross human rights violations (genocide, crimes against humanity, war crimes) taking place?
6. Are there early warning signs of the above?³⁰

²⁸ UNDP (2022) *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*, <https://www.undp.org/publications/heightened->

[human-rights-due-diligence-business-conflict-affected-contexts-guide](#), p.9

²⁹ Ibid., p.10

³⁰ Ibid., p.11

Case study – Ericsson

Ericsson has integrated HRDD into its sales process through its Sensitive Business Framework for the purpose of assessing, preventing, and mitigating potential misuse of Ericsson's technology. Ericsson's response to the Business and Human Rights Resource Centre's questions regarding HRDD related to operations in Russia and Ukraine notes:

The Sensitive Business Framework evaluates sales opportunities from a human rights risk perspective. Risks are identified based on the parameters of the Sensitive Business risk methodology (country, customer, product and purpose). As a result of these due diligence measures, Ericsson decides how to

proceed with the opportunity and how to mitigate identified risks. The decision can be to approve, with or without conditions, or to reject the sales engagement [...] Ericsson conducts screening on all its customers and suppliers in Russia [...] and] use different screening tools when evaluating entities we interact with...³¹

In a conflict context, hHRDD acts as an in-depth, ongoing and iterative process to understand and address human rights impacts related to a conflict.

Additional information is available in Appendix E – hHRDD Identification Questions.



³¹ Ericsson (2022)

https://media.bhrrc.org/media/documents/Ericsson_response.pdf



Section 4: How can investors engage with companies on armed conflict and human rights risks?

An article in the *Business and Human Rights Journal* on investor responses to the Russia-Ukraine conflict helpfully distinguishes between what investors must, should and can do in a conflict:

- **must** ensure that they, and the companies in which they invest, comply with sanctions and export controls;
- **should** take a principled approach to the situation, grounded in human rights and international humanitarian law, which includes undertaking hHRDD and recognising the need to avoid doing harm together with broader business needs; and
- **can** take a number of additional actions, including releasing public information on the approach taken, taking escalation measures such as collaborative engagement and filing shareholder proposals, and consider divestment after undertaking proper due diligence to ensure this action would not result in related human rights issues.³²

Company engagement is an important part of investment stewardship. It seeks to communicate the concerns and priorities of investors to a company's leadership, foster better business practices, and protect client capital.

As outlined in Section 2, companies that fail to effectively manage the risks posed by armed conflict can face significant legal, reputational and financial impacts.

As such, this section provides guidance for investors to more confidently and effectively engage with companies on the issue.

This section is focused on investor exposure to conflict-related human rights issues through their investment portfolios, and

provides guidance on how investors can address human rights risks that have been identified in the following circumstances:

1. Prior to an armed conflict breaking out
2. During an armed conflict
3. After an armed conflict has ceased

Prior to an armed conflict breaking out: identifying red flags

As Section 1 discusses, armed conflict is complex and there is usually a build up to its outbreak. Companies should be monitoring for 'red flags' indicating the potential for armed conflict – recalling that IHL is triggered once an armed conflict starts, at which point, the risks and responsibilities increase. They need to take proactive steps to mitigate human rights issues and their contribution to them before they occur.

Like their portfolio companies, investors may consider performing hHRDD prior to conflicts breaking out, treating a deterioration in the human rights regime as a 'canary in the coal mine' that should trigger increased scrutiny. Further, recent conflicts in Ukraine, Myanmar, and Ethiopia have demonstrated that human rights harms often take place due to, or are financed by, bad actors in a company's value chain, suggesting the need for improved and human-rights-integrated Know Your Customer (KYC) due diligence.

³² Rebecca DeWinter-Schmitt, Samuel Jones, Richard Stanzinski (2022) *Missing in Action? Investor Responses to the War in Ukraine*,

Case study: Anglo American's Social Way Policy

Anglo American is a global mining company that employs over 106,000 people across 15 countries.³³ As part of its broader policy suite in relation to human rights, the company has developed a Social Way Policy which applies globally to employees, contractors and suppliers and sets the company's vision for social performance. To implement this policy, Anglo American has developed a Social Way Toolkit and Social Way Assurance Framework. The Social Way Toolkit includes detailed guidance on (amongst others) proactively addressing potential human rights issues including in relation to cultural heritage, community management and security management.

Potential questions to ask investee companies

It is important to understand a company's potential exposure to armed conflict risks (and any past exposure), if it has an approach in place to proactively manage it, and if that approach is grounded in human rights and mitigating risk of harm to people. Some general questions to ask a company on this topic could include:

- Does the company have an ongoing human rights due diligence process in place? If so, does it include an assessment of whether the company's operations or supply chain are linked to any potential conflicts?
- What framework does the company use to determine the level of tolerance for

operating in conflict-affected settings, including situations of military occupation? Is it prepared to take proactive steps where there is a risk of armed conflict to mitigate human rights issues and the company's contribution to them?

- Has the company identified any links to potential conflicts through its operations or supply chain? If so:
 - What is the nature, sector, scale, and geographic area of these links?
 - How is the company addressing or planning to address this issue in order to prevent and mitigate heightened human rights risks such as the commission of, or complicity in, war crimes and other violations of IHL?
 - Does the company have any leverage that it can exercise in relation to these issues?

In relation to a specific potential armed conflict, questions could include:

- Does the company or any subsidiary have exposure to [insert details of potential conflict] through its operations or supply chain? Can the company briefly describe the nature, sector, scale, and geographic area of this exposure?
- How is the company enhancing its due diligence to identify, prevent, and mitigate human rights risks and comply with international humanitarian law?
- What measures is the company taking to ensure it relies and acts upon robust monitoring of the situation, including

³³ Anglo American (2021) <https://www.angloamerican.com/~media/Files/A/Anglo-American-Group/PLC/sustainability/approach->

[and-policies/social/anglo-american-2021-voluntary-principles-report.pdf](https://www.angloamerican.com/~media/Files/A/Anglo-American-Group/PLC/sustainability/approach-and-policies/social/anglo-american-2021-voluntary-principles-report.pdf)

through consultation with workers, affected communities, human rights groups, and/or humanitarian organisations?

- What framework does the company use to determine the level of tolerance for operating in potential conflict zones? Is it prepared to take proactive steps where there is a risk of armed conflict to mitigate human rights and IHL-related issues and the company's contribution to them?
- Does the company have any leverage that it can exercise in relation to these issues?

Another lens relates to a company's value chain partners, and the contractual and operational human rights safeguards the company can put into place as a preventative step. Investors can consider asking the following questions:

- What steps does the company take to identify parties to a conflict, especially those with rights-violating records, beyond sanctions compliance?
- If the company identifies a high-risk customer, what contractual and operational measures does it put into place to monitor, prevent, and mitigate rights-violating behaviour?
- What resources does the company use to monitor deteriorating human rights and other conditions in a market as a precursor to conflict?
- Has the company assessed the risks specific to its product and services and if so, what steps has the company put into place to prevent/mitigate such risks?
- If the company employs a private security company, does that company adhere to the Voluntary Security and

Human Rights Principles, including training their personnel in the Principles?

During an armed conflict: the challenges of a 'responsible exit'

As discussed above, HRDD can be a proactive way to avoid links to conflict. However, in many cases, conflicts escalate rapidly and previously unforeseen human rights risks arise. In those circumstances, companies have to face the challenge of a reactive exit. This is well illustrated in the Russia-Ukraine conflict; despite various allegations of human rights issues in Russia beforehand, and Russian occupation of Crimea since March 2014, it was the escalation of (an existing) international armed conflict between Russia and Ukraine in February 2022 that led to a major exodus from Russia.

This exodus was partly a response to the imposition of sanctions by many governments, but in many cases it was also a voluntary reaction by companies that wanted to avoid being connected with Russia's war effort. The initial boycott was led by energy companies but companies from other sectors soon followed. In some cases, there were legal challenges to overcome from a practical perspective, such as franchise agreements or joint-venture structures, finding buyers for the business and the Russian government increasingly putting barriers to exit in place.

In terms of the sanctions, the decision to exit was relatively straightforward, but when it comes to voluntary actions, critical voices noted the mixed impacts (positive and negative) that exits could have on both the conflict and human rights.

This means a reactive exit is a complex challenge, and in order to ensure they exit responsibly, companies need to carefully weigh the human rights implications of withdrawing versus the human rights implications of staying. If a company's operations could be directly or indirectly facilitating, enabling or connected to human rights harms, it may be necessary to withdraw. But if a company provides essential goods or services, the adverse impacts of withdrawing (for example, depriving civilians of access to essential goods like food or medicines) might be more significant than the adverse impacts of continuing to operate in that context. It should be acknowledged that in some circumstances there may be adverse human rights impacts whether a business stays or exits, meaning that there is no right way to execute a responsible exit. In such a case, having a robust decision-making framework that includes a consideration of human rights and other ESG risks, that can be clearly articulated to stakeholders, is critical. In this decision making, companies naturally need to consider the impact on their brand and reputation from a holistic perspective.

While the term 'responsible exit' has no exact definition, it is commonly understood to involve:

- planning;
- identifying consequences of leaving;
- being sensitive to rights;
- meaningful stakeholder consultation;
- preventing or lessening negative impacts on human rights;
- monitoring and following up the situation of human rights in the region; and

- public communication of decisions.

The steps identified can be challenging once a conflict has escalated and many companies have been accused of not adequately considering the human rights implications of a decision to stay or exit. The range of considerations a business needs to engage with in making a decision regarding responsible exit is broad and multifaceted.

For example, businesses need to consider whether by leaving, their assets would fall into the hands of a government or party to the conflict who may be perpetrating human rights abuses. If a business is providing essential goods or services, it will need to give consideration as to whether there are other providers that will ensure the population can continue to access those goods or services in its absence. The positive impact of staying to provide essential services should, in turn, be weighed against the adverse consequences of being required to pay taxes, royalties, fees and the like, which may finance a party committing war crimes or human rights abuses.

There are key learnings from conflict regions such as Myanmar. In the early 2000s there were campaigns calling on companies to boycott the country, which saw some companies shut down their operations in Myanmar on human rights grounds.

However, the responses differed. For instance, Australian company Specialty Fashion Group exited Myanmar in 2009 after the 'Burma Campaign Australia' and there are no signs that the company resumed sourcing from Myanmar again.³⁴ Many others have returned, however. For example, PwC allegedly exited Myanmar over the country's human rights record,³⁵

³⁴ New Matilda (2009) <https://newmatilda.com/2009/10/14/who-do-we-hurt-when-we-boycott-burma/>

³⁵ ABC (2003) <https://www.abc.net.au/news/2003-11-29/international-accountancy-firm-quits-burma-lobby/1516442>

but appears to have resumed operations again, less than a decade later.³⁶

In 2022, the Ethical Trading Initiative (ETI) urged retailers sourcing from Myanmar to 'reassess their presence' on the basis that its code of labour practice had not been met; it is difficult for companies to conduct standard human rights due diligence in Myanmar. The ETI also provided guidance on responsible exits, which involved consultation with social partners, taking into account, inter alia, the impact on workers and their families.

The ETI also makes it clear that in the absence of the employment provided in garment factories, significant numbers of workers would be much worse off and some

will be made destitute. The ETI stressed that the latter reality must be taken into account in any action taken by business.

The UN Global Compact also provides guidance for this situation:

Where the domestic context renders it impossible to meet this responsibility fully, [i.e., the responsibility to respect human rights wherever they operate] business enterprises are expected to respect the principles of internationally recognised human rights to the greatest extent possible in the circumstances and to be able to demonstrate their efforts in this regard. – United Nations Guiding Principles on Business and Human Rights, #23



³⁶ PwC, accessed April 2023, <https://www.pwc.com/ip/en/services/globalization/country/myanmar.html>

Case studies: companies and investors managing conflict-related human right risks

Among companies announcing they would make a ‘responsible exit’ from sourcing in Myanmar, following the outbreak of conflict in 2021, **Marks & Spencer (M&S)** made the decision to exit, stating that it is no longer possible for the company to ensure its Global Sourcing Principles would be upheld while operating in Myanmar. This finding was based on the ETI’s Myanmar Enhanced Due Diligence Sectoral Assessment, and M&S committed to work closely with the ETI through a consultation process to ensure that its suppliers uphold human rights until their exit in March 2023. As part of that process, M&S is considering additional measures that could be put in place to mitigate the effects of its decision on the individual workers in Myanmar. **Primark** is another example of a company that announced a ‘responsible exit’ in 2022, based on the ETI Assessment.

Woodside announced its exit from Myanmar after similar announcements by Chevron and Total in January 2022, citing that its business conduct in the country had been guided by the UNGPs but the ‘deteriorating human rights situation’ meant the company could no longer undertake activities in Myanmar.³⁷ Woodside terminated a production-sharing contract with the state-owned oil and gas company MOGE in November 2021 and abandoned the remainder of its licences in the country in early 2022. Woodside had not conducted any activities in Myanmar since shortly after the military coup in 2021, and by the time of the announced exit, Woodside stated that it had not paid any permit fees to the government for a year, meaning the company’s exit resulted in reduced income to the junta from taxes and production rights. However, Woodside was criticised by some who argued that Woodside was divesting from assets irresponsibly as the junta could still sell the departing operators’ stakes to other companies with less regard for human rights.³⁸

ANZ operated a small office in Myanmar from 2013-2022, with mainly local workers. ANZ was the first international bank to exit the country, despite the lack of sanctions by Australia’s government (which the US and the EU had already imposed at the time). However, prior to ANZ announcing its decision to exit in November 2022,³⁹ there was criticism from the Australian media querying whether ANZ’s conduct in Myanmar prior to its exit was responsible. This was following accusations that the bank had previously facilitated deposits by international companies into accounts they hold with Innwa Bank – which is owned by a military conglomerate, the Myanmar Economic Corporation (MEC). In April 2022, ANZ had stated that it was continuing operations in Myanmar, including facilitating payrolls for multinationals operating in the country ‘to ensure Myanmar citizens receive wages’.⁴⁰

³⁷ Woodside (2022) <https://www.woodside.com/docs/default-source/asx-announcements/2022/woodside-to-withdraw-from-myanmar.pdf>

³⁸ Reuters (2022) <https://www.reuters.com/business/australias-woodside-joins-myanmar-retreat-flags-profit-hit-2022-01-28/>

³⁹ ABC (2022) <https://www.abc.net.au/news/2022-11-22/anz-pulling-out-of-myanmar-military-junta/101683180>

⁴⁰ Sydney Morning Herald (2021) <https://www.smh.com.au/business/banking-and-finance/silence-not-an-option-anz-refuses-to-sign-letter-condemning-myanmar-violence-20210404-p57qd5.html>

KLP, a Norwegian pension fund, made the decision to exclude 16 companies with links to Israeli settlements in the West Bank from its investment portfolios as part of a due diligence-based divestment exercise in June 2021.⁴¹ The companies were excluded after KLP's due diligence determined that there was an 'unacceptable risk that the excluded companies are contributing to the abuse of human rights in situations of war and conflict through their links with the Israeli settlements in the occupied West Bank'. The decision cited KLP's guidelines for responsible investment, which state that: 'KLP shall conduct due diligence in its investments and can decide due diligence-based divestments from companies if there is an unacceptable risk of companies being complicit in human rights abuses, based on a combination of country, sector or company risk.' KLP published its decision to exclude the companies, which provided an IHL analysis of the legality of Israeli settlements in the West Bank and noted that the settlements are characterised as a violation of international law, including Article 49 of the Fourth Geneva Convention, which constitutes a war crime. In assessing companies' links to human rights abuses, the decision identified companies in the following sectors as providing services or goods which were essential to the maintenance of the settlements:

- Banks were excluded because of their direct contribution to the development, expansion or maintenance of the settlements and their activities;
- The telecom sector was excluded because the provision of such services makes the settlements attractive residential areas;
- Building, construction and engineering services were excluded because of their provision of necessary materials and services for the construction of settlements and associated infrastructure; and
- A number of other companies were excluded because they provided services including access to power and fuel, and surveillance of the settlements' external boundaries.

Uber established a steering committee several weeks prior to Russia's invasion of the Ukraine to identify and address risks, and plan for further escalation. Uber states it commenced consultation with employees, local business partners, government officials and humanitarian organisations in Ukraine to better understand the situation and needs of stakeholders.⁴² Uber states that it has expanded its operations in Ukraine and is operating at a loss in the country in order to provide lower prices, as well as free rides for Ukrainian refugees, internally displaced families, aid workers, medical staff and patients.⁴³

In relation to the Russia-Ukraine conflict, **investors** have released information on how and why they have identified sectors in their investment portfolio as potentially high-risk on this issue.

BMO Global Asset Management has flagged that given the outsized role Russian propaganda

⁴¹ KLP (2021) <https://www.klp.no/en/corporate-responsibility-and-responsible-investments/exclusion-and-dialogue/Decision%20to%20exclude%20companies%20with%20links%20to%20Israeli%20settlements%20in%20the%20West%20Bank.pdf>

⁴² Business & Human Rights Centre (2022) <https://www.business-humanrights.org/en/latest-news/uber-response/>

⁴³ Uber (2022) <https://www.uber.com/newsroom/support-for-ukraine-2022/>

plays in this conflict, there are heightened human rights risks for media, information technology (IT) and telecom companies in the Russia-Ukraine conflict.⁴⁴

In 2019 a group of investors filed a shareholder proposal with construction and mining equipment company, **Caterpillar**, requesting the company to assess and disclose the approach taken to mitigating human rights risks associated with their activities in conflict zones.⁴⁵ In articulating the rationale for the proposal, the investors noted:

*as [Caterpillar's] global portfolio has expanded, so has the company's exposure to heightened risks in conflict-affected areas such as Armenian-Occupied Nagorno-Karabakh, Iraq, Iran, Israeli-Occupied Palestinian Territory (OPT), Moroccan-Occupied Western Sahara, Myanmar, Sudan, and Syria. Our Company's business activities in these areas entail potential legal, reputational, and financial risks associated with possible violations of international humanitarian and human rights laws, sanctions regimes and other state- or multilateral-based regulatory measures, and CAT's supplier code of conduct and human rights policy.*⁴⁶

Austrian lender **Raiffeisen Bank International (RBI)** is one of the largest foreign banks that has continued operations in Russia since Russia commenced its invasion of Ukraine in February 2022. RBI has been widely criticised for maintaining significant investments in Russia's oil and gas industry in particular. As one of two foreign banks on the Russian central bank's list of 13 'systemically important credit institutions'⁴⁷ it is alleged that RBI is indirectly financing Russia's hostilities in Ukraine.⁴⁸ RBI, as a signatory to the UN Global Compact, commits to ensuring it is not complicit in human rights abuses and has pledged in its Code of Conduct to comply with international standards in relation to human rights.⁴⁹ The bank also has in place policies supporting the European Convention on Human Rights which state that it will seek to avoid financing 'business with products that are intended to be used for abolition of demonstrations, political unrest or other violations of human rights'.⁵⁰ Investment managers including Nordea Asset Manager, Swedbank Robur and Norwegian pension fund KLP have publicly criticised RBI for opting not to exit from the Russian market. In reference to the Kremlin's recent proposal that banks operating in Russia 'grant loan payment holidays to Russian soldiers and write off entire debt if they are killed or maimed' a Nordea spokesperson remarked that this 'illustrates the

⁴⁴ BMO Global Asset Management (2022) <https://www.bmogam.com/ca-en/advisors/insights/ukraine-russia-conflict-through-a-responsible-investors-lens/>

⁴⁵ SEC (2019) <https://www.sec.gov/Archives/edgar/data/18230/000121465919003654/d517190px14a6g.htm>

⁴⁶ Ibid.

⁴⁷ Reuters (2023) <https://www.reuters.com/business/us-sanctions-authority-asks-raiffeisen-about-business-related-russia-2023-02-17/>

⁴⁸ B4Ukraine, accessed April 2023, <https://b4ukraine.org/actions/irresponsible-banking>

⁴⁹ Ibid.

⁵⁰ Raiffeisen Bank International (2023) https://www.rbinternational.com/de/ueber-uns/governance-und-compliance/code-of-conduct/_jcr_content/root/responsivegrid/contentcontainer_cop/contentbox/downloadlist.download.html/0/English.pdf, p.19

dangers of operating in jurisdictions where companies can ... be forced into actions that go directly against their corporate values'.⁵¹

Nutrien Ltd⁵² (the result of merger between Potash Corporation and Agrium Inc.) stands as an example of the risks when companies extract natural resources in occupied territory – in this case, the mining and trading of phosphate in Western Sahara, which has been occupied by Morocco since 1975 – and how investors can seek to positively influence company behaviour. Occupied territories are subject to both IHL and IHRL, and resource extraction without the consent of occupied peoples and for purposes other than their exclusive benefit is a violation of IHL and IHRL. Many investors raised their concerns with the companies about this and conducted lengthy engagement. Some large shareholders divested their stakes entirely, such as the Norwegian Pension Fund, which divested Nutrien shares worth US\$190 million. Ultimately, in 2018, Nutrien announced it had stopped all trading of Western Sahara Phosphate. It should also be noted that Nutrien was facing increased regulatory and operational risk of exporting phosphate from Western Sahara, with several legal rulings related to Morocco's occupation of Western Sahara potentially increasing the legal risks for companies continuing to operate in such occupied territory.

Potential questions to ask investee companies

Nature of involvement

- Does the company, its subsidiary, or any value chain partner have exposure to the conflict through its products/services, operations or value chain? Briefly describe the nature, sector, scale, and geographic area of these operations or investments.

Assessing risks

- How is the company conducting heightened due diligence to identify, prevent, and mitigate heightened human rights and conflict-related risks and comply with international humanitarian law? Please be specific.
- What measures is the company taking to ensure it relies and acts upon robust

monitoring of the situation, including through consultation with workers, human rights defenders, affected communities, human rights groups, and/or humanitarian organisations?

Mitigating risks and tracking effectiveness

- What steps is the company taking to monitor and address rights-violating behaviour in its value chain beyond sanctions compliance?
- Has the company established specific risk thresholds or 'red lines' to use in deciding when to exit the country/area? If so, please describe.
- What framework does the company use in deciding the tolerance level of human rights issues in a country? Is the framework based only on a sanctions list

⁵¹ Reuters (2023) <https://www.reuters.com/world/europe/loans-russian-soldiers-fuel-calls-european-banks-quit-2023-02-13/>

⁵² Case study provided by Heartland Initiative

or is it related to general human rights issues?

- Has the company evaluated the impacts of continuing operations vs exiting?
- In deciding to exit from a conflict area, to what extent has the company meaningfully engaged with workers, local civil society groups and other stakeholders to assess negative social consequences?
- Is the company planning to scale-down or suspend operations in the area?
- If so:
 - What steps has the company taken to mitigate any negative impacts on workers and/or communities? To what extent has the company been able to act on potential negative social consequences?
 - Has the company made a plan for resuming operations in the country? If so, please describe the human rights- and conflict-related criteria that would inform such a decision.
- If not:
 - How is the company planning to prevent, mitigate and remediate any human rights impacts and ensure it complies with international humanitarian law?
 - How does the company determine whether products are 'essential'

for the market? Are there alternative products that could be provided locally? Could those products be used to support the conflict?

- Does the company have a plan in place to regularly re-evaluate its response?

The Business and Human Rights Resource Centre has written to over 400 companies asking a series of questions about their response to the Russia-Ukraine conflict. As at the date of writing this guide, 43 companies had provided full or partial responses. The survey questions (there is a general survey, and then specific surveys for technology companies and financial institutions) and analysis of the company responses are available.⁵³

The Investor Alliance for Human Rights has published an assessment on how the ICT sector can promote security and other human rights in conflict-affected areas and how their misuse can contribute to human rights being adversely impacted in these areas. It includes guidance and a series of questions for investors to ask companies on this topic.⁵⁴

⁵³ Business & Human Rights Resource Centre (2022) <https://www.business-humanrights.org/en/latest-news/russian-invasion-of-ukraine-what-companies-have-to-say-about-their-human-rights-due-diligence/>

⁵⁴ Investor Alliance for Human Rights and Heartland Initiative (2020) [https://investorsforhumanrights.org/sites/default/files/attachments/2020-03/Investor%20Alliance Salient%20Issue Conflict %20Security.pdf](https://investorsforhumanrights.org/sites/default/files/attachments/2020-03/Investor%20Alliance%20Salient%20Issue%20Conflict%20Security.pdf)

Case study: armed conflicts' links with modern slavery

Findings in the Modern Slavery Register (Australia's Modern Slavery Act)

As of December 2022, few companies make a direct reference to the war in the Ukraine in their Australian Modern Slavery Statements, although this could be a timing issue. Among those that do mention the conflict, Woolworths notes that the war has caused disruption to its supply chain, and AVG Technologies also makes a reference to the impact the conflict has had. Some, such as Kellogg Brown & Root Pty Ltd, also point out the risk of the conflict resulting in mass-movement of vulnerable people. However, many companies make a reference to 'conflict' in general in their Modern Slavery Statements, recognising the link between modern slavery and conflict (in line with the International Labour Organization). This includes references to being a cause of high migration flows, and exacerbating socioeconomic inequalities, widespread violence and crime, forced labour and labour exploitation, sexual violence and weakened governance and rule of law.

More specifically, many companies refer to 'conflict minerals' and 'conflict zones' in Modern Slavery Statements, e.g., the Democratic Republic of the Congo (DRC). As some companies point out, 3TG (Tantalum, Gold, Tungsten and Tin) are natural resources with a high prominence of extraction from conflict zones and often perpetuate and fund conflict. Some have also made a reference to 'war' in their risk assessment, in relation to geographical location. For instance, Anabelle Bits Pty Ltd

makes a reference to business operations or raw materials originating from countries that are affected by war or conflict countries with a high incidence of corruption and weak regulation around labour standards.

Some have conflict minerals policies (committed to avoiding the use of conflict minerals that directly or indirectly finance or benefit armed groups in the DRC or other places with armed conflicts) and some are members of the Responsible Minerals Initiative (RMI), which seeks to support responsible mineral sourcing. Others, such as Schneider Electric have a 'conflicts minerals compliance program', working with a third party to identify the source of the minerals with a view to ensuring they're recognised as 'conflict free'. According to its Modern Slavery Statement, as at the end of 2021:

85% of the smelters and refiners identified in our supply chain were designated as compliant with a recognized third-party validation scheme or actively engaging in same (equivalent to more than 87% of the relevant spend being compliant). The remainder are either from outside the conflict zone outlined in Section 1502 of the Dodd Frank Act, or solely using recycled and scrap materials.⁵⁵

The company also says when the country of origin is known to be in the conflict zone, 100% of the smelters and refiners were verified conformant.

⁵⁵ Schneider Electric (2022)
<https://www.se.com/us/en/download/document/SE-Modern-Slavery-Statement/>

After an armed conflict has ceased: continuing to monitor

As highlighted earlier in this toolkit, the human rights implications of armed conflict are varied and complex, with implications long after an armed conflict has ceased. For companies, hHRDD may still be necessary and HRDD certainly will be, in order to understand the ongoing human rights implications.

Businesses entering or re-entering post-conflict settings will often encounter complex challenges in respecting human rights as they operate in areas undergoing post-conflict peacebuilding. The pressure to attract capital and rehabilitate the economy rapidly in the aftermath of a conflict can lead to exploitation of local populations by opportunistic corporations. This risk is exacerbated by the often-fragile new governance structures and public institutions that contribute to weak rule of law, and limited legal frameworks or institutional safeguards for human rights.

A report of the UN General Assembly Working Group on the issue of human rights and transnational corporations and other business enterprises, on conflict-affected regions, provides the following guidance for investors financing reconstruction activities and businesses operating in post-conflict settings:

After the conflict, businesses will often have to partner with companies and individuals that have been parties to the conflict, or people who have committed human rights abuses. Screening of relationships is therefore particularly important. The statement of eminent jurists on legal obligations when supporting

reconstruction in Syria provides guidance for business in terms of what constitutes responsible engagement. Business activity should not further institutionalize the impacts of war crimes, for example, by solidifying the status of resettlements where forced displacements along sectarian lines have taken place. For business, it is not just a question of whom they are dealing with, but where they are going, which requires understanding of the specific local context. It is essential for businesses to consult with local communities and to develop appropriate tools for screening business partners as part of human rights due diligence, as well as to recognize that, in many cases, it will hardly be possible to invest in a way that is compliant with international standards.⁵⁶

Potential questions to ask investee companies

- How has the company's due diligence process evolved now that the conflict has ended?
- What are the key ongoing human rights risks the company has identified in relation to this conflict? How is it addressing those risks?
- If the company has exited the conflict area, what framework does it use to determine an appropriate time for re-entry (if at all)? Is the framework based only on a sanctions list or is it related to general human rights issues?
- How effective were the measures taken by the company? What are the key learnings in relation to human rights in conflict zones, and how will this inform the company's approach going forward?

⁵⁶ UN General Assembly Working Group on the issue of human rights and transnational corporations and other business enterprises (2020) *Business, human rights and conflict-affected regions: towards heightened action*, (A/75/212),

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/190/21/PDF/N2019021.pdf?OpenElement>

- Is the company undertaking appropriate hHRDD to understand the risks of resuming operations in a post-conflict setting?
- Does the company have a good understanding of any business partners and their relationship to the conflict?

Key learnings for investors from recent conflicts

The Myanmar conflict shows how a situation can gradually escalate. In contrast, while there were certainly allegations of major human rights violations in Russia – and Russian military occupation in Ukraine – prior to the invasion of Ukraine in 2022, it was the escalation of the conflict that acted as a catalyst for businesses leaving the country. In terms of brand damage, the exits from Russia have received both praise and criticism. The latter relates to so-called ‘virtue signalling’, why this conflict was different to other conflicts in the world, and why it took an invasion before the company acted. In addition, critics ask about the impact exits have had on Russian employees and communities, civilians protected by IHL and reliant on humanitarian assistance and other essential services, and the fact that valuable assets could fall into the hands of the Russian government as a result of the exit.

The most effective way to avoid moral dilemmas and the risks mentioned in this toolkit is for companies to undertake proactive hHRDD, and to consider the conditions and circumstances that may warrant exit in the future. This can avoid rushed and forced exits due to sanctions and it could also avoid the reputational and brand damage risks from perceived support of an oppressive regime.

When this is no longer feasible because a conflict has already escalated, companies need to look to navigate the complexities and various practical challenges in relation to a ‘responsible exit’, taking into account general principles mentioned above.

The ETI’s guidance articulates that if their base code cannot be met, businesses should no longer be in that particular country, with the argument that the corporate responsibility to respect human rights was significantly restricted. In regard to ‘responsible exits’, the ETI emphasises consultation with social partners to consider social impacts on both workers and their families. M&S committed to work with the ETI in their exit from Myanmar.

As the case studies in the energy sector in Myanmar have shown, companies do not need to wait for their own governments to impose sanctions before taking action themselves. While sanctions result in forced exits, companies have the ability to act on their own before that.

Planning a clear exit strategy is key. Planning exits internally before public announcements could protect workers who could otherwise become victims of retaliation by the local government. If planning is done properly, a company may be able to assist their employees and business associates to find alternative employment and opportunities, and mitigate the social impacts from the exit. Best practice can include providing safe notice to suppliers, workers, communities and other stakeholders, and having a plan to mitigate loss of employment and income.

Once exited, good practice involves assessing the situation and collaborating with civil society to ensure the company receives factual and accurate information to avoid a premature re-entry.

Conclusion

Unfortunately, armed conflicts continue to afflict people all over the world, and their widespread nature means that nearly all institutional investors can potentially be exposed to the risks they create. Armed conflicts can have a devastating impact on the people affected by them, and in many cases, can lead to significant adverse human rights impacts. As a result, it is better if companies – and the institutions that invest in them – are proactive in seeking to protect human rights and to uphold international humanitarian law.

Responsible investors therefore have a role to play in identifying, managing and mitigating these risks, as well as seeking to minimise the adverse impacts of conflicts. They can engage with companies to ensure that:

- HRDD is being undertaken to a level appropriate to the risk in the region;
- stakeholders and vulnerable groups are being consulted with, and afforded protections where possible;
- any decision to exit from a conflict-affected area is taken in a considered way; and
- once a conflict has ended, monitoring continues and risks are still managed.

In the face of such complex challenges, collaboration is crucial for investors. By working together, investors can help to encourage best practice for companies, manage their own investment risks, and contribute to protecting the human rights of those affected by conflict and its far-reaching impacts.

Appendices

Appendix A: FAQ on armed conflict, legal frameworks and human rights

Q. When does IHL apply?

A. In some cases, IHL will apply even if there is no obvious conflict taking place, or after the conflict ends, adding further complexity to conflict-awareness and sensitivity in due diligence efforts. For instance, there are some aspects of IHL that continue to apply in peacetime. For territories under military occupation, IHL remains applicable even after the fighting ceases. There are also specific weapons treaties that prohibit not only the use of certain weapons, but also the development, stockpiling, production, and sale of those weapons by States.

Interestingly, regardless of where combat actually takes place, IHL may still be relevant anywhere in a country experiencing conflict. This is because, in some instances, IHL is less concerned with the precise geography of a conflict zone than it is with the specific acts linked to that conflict.

This is important for companies and investors to know, because it extends risk and responsibility beyond a physical battlefield to include areas where businesses have established, or are looking to establish, assets like offices, mines and factories, and operations such as exploration activities. This also includes interactions that a company or investor has with parties to (or connected to) a conflict,

either within the territory of the warring state, or extraterritorially.

Q. Where are armed conflicts currently located?

A. According to RULAC, armed conflicts are located as follows:

- Middle East and North Africa: more than 45 armed conflicts
- Africa: more than 35 armed conflicts
- Asia: 21 armed conflicts
- Europe: seven armed conflicts
- Latin America: six armed conflicts

It is worth noting that the Geneva Academy does not see the Ukraine conflict as a new one.

‘Russia’s invasion of Ukraine did not change our classification of the armed conflicts in the region. Indeed, according to IHL criteria, there have been an IAC between Russia and Ukraine and two NIACs in Ukraine since 2014. What has changed, since February 2022, is the intensity of the violence and its impact on the civilian population. This means, according to our analysis, that war crimes could already have taken place before March 2022,’ explained Dr Chiara Redaelli.⁵⁷

It has also recently included cartel-related armed violence in its list:

‘While Colombia has experienced one of the longest non-international armed

⁵⁷ The Geneva Academy, accessed April 2023, *Today’s Armed Conflicts*, <https://geneva-academy.ch/galleries/today-s-armed-conflicts>

conflicts (NIACs) in modern times and is still the theatre of three NIACs, Mexico is characterized by three NIACs involving gangs' drug cartels. This is the first time we classify armed violence involving criminal organizations as NIACs and we did so given the level of organization of the cartels and intensity of violence,' said Dr Chiara Redaelli.

Q. Why 'armed conflict' and not 'war'?

A. In non-legal situations, people tend to use the terms armed conflict and war interchangeably. But the term armed conflict is much broader than war.

Under the 1945 United Nations Charter, the use of force by one State against another is prohibited (Article 2). States may resort to force in the exercise of their inherent right of individual or collective self-defence (Article 51) or as part of military sanctions authorised by the Security Council (Articles 43-48). Generally though, States today are less inclined to speak of war or declare that a state of war exists, despite the fact that armed conflicts certainly do exist.⁵⁸

An armed conflict can come into existence even when war has not been officially declared or acknowledged by those fighting it, provided the appropriate threshold or level of violence has been reached, as discussed above. Similarly, IHL will still apply even if there has been no formal declaration of war.

The **1949 Geneva Conventions** (the four international treaties that, along with their three Additional Protocols, form the cornerstone of IHL) adopted the more general term 'armed conflict' deliberately, to cover the complete range of situations and

to avoid legal arguments over the exact definition of war.

Appendix B: Deep dive into IHL and IHRL

There are several relevant international frameworks that apply to companies operating in conflict zones, outlined in the following sections.

International humanitarian law

International humanitarian law (IHL) is also known as 'the law of armed conflict' or 'the law of war'. Its fundamental premise is that even in times of armed conflict human dignity must be respected and protected, and the means and methods of warfare regulated. Rules reflecting these principles can be found throughout history in most if not all cultures.

The law of armed conflict is based on customs and traditions and our experience of armed conflict throughout the ages. A good example is the universal ban on poisoning as a form of warfare, which dates back to ancient times when, for example, the military on both sides would issue orders not to poison wells, as much for their benefit as for that of the civilian population – they might need the water one day.

Over the years, these customs, traditions and experiences have developed into 'hard law', namely treaty law and customary international humanitarian law. Both are legally binding and together comprise the key sources of modern IHL. In short:

- The four Geneva Conventions of 1949 and their Additional Protocols form the

⁵⁸ ICRC (2002)

<https://www.icrc.org/en/doc/resources/documents/misc/5p8ex4.htm>

fundamental core of IHL treaty law.

These are complemented by a series of other legally binding instruments, often designed to regulate specific means or methods of warfare, such as the use of certain weapons.

- Customary IHL consists of rules that arise out of repeated and consistent practice in armed conflict by States that, as a result, become accepted and recognised as universally binding law. Customary IHL exists independent of treaty law, but also complements and strengthens it.

At its core, IHL lays out the protections for those who are not or are no longer taking part in the fighting – civilians, prisoners of war, injured soldiers, medical personnel etc. – as well as civilian objects, property, and the environment.

IHL also dictates which weapons and military tactics can be used by parties to an armed conflict and how, what objects can be lawfully targeted, and which acts may amount to war crimes.

For business, IHL helps to clarify which actions are considered ‘closely linked to an armed conflict’. In many ways, ‘responsible’, and even ‘legal’, conduct in armed conflict may hinge on whether and how a business is directly or indirectly linked to that conflict or its parties. It is also important for businesses operating in a conflict-affected context to understand which actions could result in a company, its personnel or its assets losing the protections of civilian status under IHL. Take, for example, a telecommunications company that procures and provides intelligence to a party to an armed conflict, which results in a military strike against another party, or even disrupts

the logistics or communications of a party to the armed conflict. This will amount to ‘direct participation in hostilities’ and would result in the company losing civilian immunity under IHL.⁵⁹

Unlike the law governing the use of force by one State against another (*jus ad bellum*) – set out in the UN Charter – IHL is not concerned with the legality of war or the act of going to war. Rather, as long as an armed conflict exists, IHL will apply to any activity related to that conflict.

Similarly, as IHL only applies in the context of armed conflict, other legal frameworks (including international human rights law, see below) exist to govern conduct in peacetime or in a period of violence that fails to meet the threshold of armed conflict under IHL.

Situations such as these may require authorities to deploy specialist law enforcement, such as riot police, or even the armed forces to restore peace and order – but this will not automatically invoke the application of IHL. Rather, domestic law, including human rights law and national criminal law, will continue to apply.

In some cases, these laws act concurrently with IHL. For example, human rights law doesn’t simply cease to exist in situations of armed conflict, rather there is considerable overlap but also significant differences.

International human rights law

International human rights law (IHRL) is a set of international rules, established by treaty and custom, on the basis of which individuals and groups can expect and claim certain rights that must be respected and protected by States. International human rights standards also contain numerous non-

⁵⁹ *OpinioJuris* (2022) <https://opiniojuris.org/2022/09/12/military-information-sharing-by-ukrainian-citizens-in-the->

[digital-environment-dph-blurring-of-lines-between-civilian-and-military-actors-in-ukraine/](https://opiniojuris.org/2022/09/12/military-information-sharing-by-ukrainian-citizens-in-the-digital-environment-dph-blurring-of-lines-between-civilian-and-military-actors-in-ukraine/)

treaty-based principles and guidelines ('soft law'). The International Committee of the Red Cross (ICRC) has a useful explanation of the differences and similarities between IHL and IHRL.⁶⁰

The core principles of IHRL are enshrined in the **Universal Declaration of Human Rights** (UDHR), and the fundamental rights incorporated in the UDHR are codified in the two universal instruments:

- **International Covenant on Civil and Political Rights** (ICCPR); and
- **International Covenant on Economic, Social and Cultural Rights** (ICESCR)

Together these three instruments form what is known as the **International Bill of Rights**.

A series of subsequent international human rights instruments have expanded the body of international human rights law, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). In total, there are nine core international human rights instruments, each of which has a committee of experts to monitor implementation of the treaty provisions by its States' parties.

There are also regional instruments:

- European Convention on Human Rights (1950)
- American Convention on Human Rights (1969)
- African Charter on Human and Peoples' Rights (1981).

IHL and IHRL: how are they linked?

IHL is distinct from IHRL but also inextricably linked for business and investors.

*International humanitarian law and international human rights are complementary bodies of law that simultaneously apply in times of war. Both share certain common goals, such as the protection of life, health, dignity and property. Because international humanitarian law is more specifically focused on the regulation of armed conflict, in such contexts human rights will often be interpreted based on standards of international humanitarian law.*⁶¹

To reiterate, IHL is the specialist body of law that applies exclusively to situations of armed conflict and military occupation. Therein lies one of the key differences between these legal frameworks. IHL is intended to prevent and respond to humanitarian problems that arise during war and contains rules that deal with issues that are not found in human rights law, such as the conduct of hostilities, prisoner of war status and the protection of civilian people and infrastructure.

Unlike IHL, international human rights law applies at all times – in peace and in war – and sets standards for States' treatment of individual and collective rights and freedoms. Human rights are inherent entitlements that belong to every person because they are human. There are certain critical human rights that must never be derogated from, such as the right to not be tortured. However, it is possible for some human rights to be suspended in certain situations of public emergency, such as armed conflict. Such derogation is not

⁶⁰ ICRC (2015)
<https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law>

⁶¹ ICRC (2006)
<https://www.icrc.org/en/doc/resources/documents/misc/business-ihl-150806.htm>

permitted under IHL, as these laws were designed for that very emergency.

In addition to this difference in the temporal scope of application, IHL and IHRL also differ in their geographical scope of application. It is accepted that IHL applies extraterritorially, as it was borne of a need to regulate the conduct of State(s) involved in conflict on the territory of another and, similarly, in the context of non-international armed conflicts when that conflict crosses territorial borders. It is widely accepted that IHRL also applies extraterritorially, for example when a State occupies and exercises control over another territory, but the extent to which it does in other contexts is yet to be determined. For example, in the application of human rights norms in extraterritorial lethal-force operations, such as counterterrorism operations, that take place in non-conflict contexts.

Another fundamental distinction between these legal frameworks is that IHRL is traditionally only binding on governments (noting though that many IHRL principles are incorporated into domestic laws, creating criminal and civil liabilities for companies) – it governs the relationship between a State and individuals/groups on its territory and under its jurisdiction.

However, IHL binds all parties to an armed conflict – States and non-State armed groups – as well as other non-State actors. This can include legal persons, such as companies, as well as individual personnel and executives of businesses whose activities are closely linked to an armed conflict.

In summary, the outbreak of armed conflict (and therefore the application of IHL)

introduces rules and protections that will either complement, supplement or conflict with, and possibly prevail over, human rights laws in that territory, potentially increasing risk and exposure for companies and investors.

For example, IHRL dictates that any deprivation of life must not be arbitrary. In such cases, IHL can help to define arbitrariness in the context of an armed conflict, i.e. the use of lethal force between warring parties.

The risk of companies becoming involved in grave human rights abuses is particularly high in contexts affected by armed conflicts and other situations of widespread violence. These situations differ widely, involving state and non-state actors (such as armies or guerrilla groups), varying ambitions (such as obtaining territory or resources) and underlying motivations (such as imposing an ideology or gaining a profit).⁶²

Appendix C: Deep dive into the impact of armed conflict on human rights

Conflict situations generally lead to a proliferation of human suffering and human rights violations, as people are endangered, displaced, and impoverished. These effects can be long-lasting, as states can take a long time to recover economically and politically, while individuals are faced with economic loss, bereavements, and significant trauma.

The increasingly complex nature of modern armed conflict and the proliferation of

⁶² UNDP (2022) *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*, <https://www.undp.org/publications/heightened->

[human-rights-due-diligence-business-conflict-affected-contexts-guide](https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide)

terrorism and other forms of widespread violence have created a difficult environment for the application of, and compliance with, both IHL and human rights. Below are some of the key human rights issues which are exacerbated by conflict, and which businesses should pay special attention to when identifying and addressing their connection to conflict and human rights risks.

Gender-based and conflict-related violence

The United Nations' Office of the High Commissioner on Human Rights (OHCHR) explains that conflict can result in higher levels of violence against women and girls, but is not limited by gender. The UN definition of conflict-related sexual violence refers to 'rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict.'

OHCHR also points out that gender-based violence spikes in post-conflict societies, 'due to the general break down of the rule of law, the availability of small arms, the breakdown of social and family structures and the "normalisation" of gender-based violence as an additional element of pre-existing discrimination.' Unfortunately, sex trafficking is also exacerbated during and after conflict for similar reasons.

The ICRC notes the grave and dehumanising effects of sexual violence on victims, their families and entire communities. It says 'sexual violence can

take many forms, including rape, sexual slavery, forced prostitution, forced pregnancy, and forced sterilisation. Sexual violence can be used as a form of reprisal, to create fear, or as a form of torture. It may also be used systematically, as an unlawful method of warfare, aimed at destroying the social fabric.'⁶³

Children and armed conflict

Armed forces and insurgent groups sometimes resort to the unlawful recruitment of children, either by force or persuasion, thereby violating children's human rights and violating the strict prohibition against the recruitment or participation of child soldiers in hostilities.

The ICRC notes that '[children] are also often separated from their families and denied access to education and other essential services, including health care and psychosocial support. Unlawfully recruiting, using or otherwise associating children with armed forces or armed groups has a serious, long-lasting and complex impact on the children, their families and their communities'.⁶⁴

The norms of customary IHL also state that children affected by armed conflict are entitled to special respect and protection.⁶⁵ This includes the provision of food, clothing, health care and aid, access to education, special care for those orphaned or separated from their families, and evacuation from areas of combat. Read more on the [Convention on the Rights of the Child](#).

⁶³ ICRC (2013) <https://www.icrc.org/en/doc/resources/documents/statement/2013/10-18-protected-person-bruges.htm>

⁶⁴ Ibid.

⁶⁵ ICRC, *Customary IHL - Rule 135. Children*, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule135>

Internally displaced persons and refugees

Conflict is one of the most common causes of people fleeing their homes to seek safety, and in some cases protection or asylum elsewhere. Amnesty International explains that ‘people will brave the most difficult hardships to flee to other countries when their lives or freedom are threatened. In some cases, parties to a conflict may deliberately set out to generate refugees. Regrettably, potential asylum countries are increasingly unwilling to open their doors to those in need of protection’.⁶⁶

In 2022, the number of people forcibly displaced worldwide reached more than 100 million – ‘a record that should never have been set’.⁶⁷ At the end of 2021, approximately 53.2 million people were internally displaced due to armed conflict, generalised violence or human rights violations, according to Internal Displacement Monitoring Centre (IDMC).⁶⁸

The creation of so many displaced, vulnerable people gives rise to other human rights implications, such as human trafficking, forced labour, forced marriage, sexual exploitation and other types of modern slavery.

Modern slavery

In December 2022, UN Special Rapporteur on trafficking in persons, Siobhán Mullallys, visited South Sudan, and observed that urgent action was needed to prevent trafficking and exploitation.

⁶⁶ Amnesty International (1993) *Violations of human rights in armed conflict: proposals for action*, <https://www.amnesty.org/es/documents/ior30/001/1993/en/>

⁶⁷ UN News (2022) <https://news.un.org/en/story/2022/05/1118772>

As the country recovers from a protracted war, Ms Mullallys said, ‘Internal displacement as a result of conflict and violence, coupled with climate-induced displacement, gender inequality, and limited access to education, increase the risks of trafficking, including for purposes of child recruitment and marriage, sexual exploitation, forced labour and domestic servitude.’

This illustrates the connection between armed conflict and resulting exploitation through forms of modern slavery.

In addition to modern slavery resulting indirectly from conflict, research released in 2022 found that most armed conflict between 1989 and 2016 used some kind of slavery as a strategy.⁶⁹ This included recruitment of child soldiers, forced marriage and sexual exploitation, forced labour and human trafficking. It is captured in the Contemporary Slavery in Armed Conflict dataset.

This use of slavery as a tactic of war – which is universally prohibited under IHL and IHRL – was illustrated in the Islamic State conflict, where ISIL targeted, enslaved and systemically raped thousands of women and girls from the Yazidi community. Men and boys are also vulnerable to trafficking, as entire families are abducted and forced to work in agriculture or industry.

Environment and climate change

Armed conflicts disrupt social, political and economic structures, and erode societies’ ability to withstand further disasters or disruptions. Climate change is increasing

⁶⁸ UNHCR, accessed April 2023, <https://www.unhcr.org/en-au/internally-displaced-people.html>

⁶⁹ The Conversation (2022) <https://theconversation.com/slavery-and-war-are-tightly-connected-but-we-had-no-idea-just-how-much-until-we-crunched-the-data-169904>

the frequency and severity of weather events, and in turn, threatening lives, physical and mental health, and food security. This in turn can lead to conflict over resources, displacement, vulnerability to exploitation/modern slavery and other human rights risks.

ICRC notes that 60% of the 20 countries considered to be most vulnerable to climate change by the ND-Gain Index are affected

by armed conflict, while 14 of 34 countries in food crisis experienced the double burden of conflict and climate shocks in 2017.⁷⁰

As such, businesses' approach to climate change action cannot be decoupled from their human rights obligations.

Appendix D: Further resources

- UN Guiding Principles on Business and Human Rights:
https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
- The Business and Human Rights Resource Centre has written to over 400 companies asking a series of questions about their response to the Russia-Ukraine conflict. As at the date of writing this guide, 43 companies had provided full or partial responses. The survey questions (there is a general survey, and then specific surveys for technology companies and financial institutions) and analysis of the company responses are available at the following link:
<https://www.business-humanrights.org/en/latest-news/russian-invasion-of-ukraine-what-companies-have-to-say-about-their-human-rights-due-diligence/>
- Missing in Action? Investor Responses to the War in Ukraine; Rebecca DeWinter-Schmitt, Samuel Jones, Richard Stazinski; Business and Human Rights Journal, Volume 7 Issue 3:
<https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/missing-in-action-investor-responses-to-the-war-in-ukraine/D5F510FEE872F09CAEE13FE5D4C2B8C5/share/76e817b4fd2d2b81f30403a4f39e9eb7764c6fea4>
- United Nations Development Programme – Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>
- The Investor Alliance for Human Rights has published an assessment on how the ICT sector can promote security and other human rights in conflict-affected areas and how their misuse can contribute to human rights being adversely impacted in these areas. It includes guidance and a series of questions for investors to ask companies on this topic:
[https://investorsforhumanrights.org/sites/default/files/attachments/2020-03/Investor%20Alliance Salient%20Issue Conflict%20Security.pdf](https://investorsforhumanrights.org/sites/default/files/attachments/2020-03/Investor%20Alliance%20Salient%20Issue%20Conflict%20Security.pdf)

⁷⁰ ICRC (2020) *When rain turns to dust: understanding and responding to the combined impact of armed conflicts and the climate and environment crisis on people's lives*,

<https://www.icrc.org/en/publication/4487-when-rain-turns-dust>

Resources to help investors navigate and identify human rights risks related to specific sectors, regions or focus areas:

Resource	Target sector for the guidance	Topics of focus
OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas	Mining	Due diligence
UNDP Heightened Human Rights Due Diligence for Business in Conflict Affected Contexts	All	Heightened human rights due diligence
DCAF Security and Human Rights Toolkit	All	Security and human rights
Voluntary Principles on Security and Human Rights	Extractive and energy sectors	Human rights and security forces
International alert – Conflict-Sensitive Project Finance: Better Lending Practice in Conflict-Prone States	Financial sector	Project finance
Ethical Trading Initiative – Conflict-affected and high-risk areas	All, with a focus on manufacturing	ETI has developed numerous initiatives and guidance notes on conflict-related topics and regions, including: <ul style="list-style-type: none"> • Guidelines for employment and integration of people displaced from Ukraine; • Garment sector in Myanmar
United Nations – Framework of analysis for atrocity crimes: a tool for prevention	All	The framework was designed to guide businesses and states to assist in the prevention of international crimes such as genocide, crimes against humanity and war crimes. It provides a set of risk factors and indicators to enable businesses (and States) to recognise when they should increase their level of due diligence to assist in the prevention of these crimes.
Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council	All	Identification of conflict-affected and high-risk areas in the context of conflict minerals

Appendix E: hHRDD identification questions

The following table can guide investors to understand:

- what risk identification looks like for companies with links to armed conflict; and
- what investors can do and when to identify risks related to armed conflict and understand their connection to such risks.

Human rights risk identification in a conflict context for companies and investors⁷¹

Risk identification action	What should companies do and when should they do it?	What should investors do and when should they do it?
Understand whether hHRDD is required	<p>What:</p> <ul style="list-style-type: none"> Identifying one or several 'red flags' <p>When:</p> <ul style="list-style-type: none"> As part of regular application of human rights due diligence Prior to major changes in company's operations (new country entry, new business activity) When changes in the company's operating context warrant it 	<p>What:</p> <ul style="list-style-type: none"> Identify company exposure to red flags <p>When:</p> <ul style="list-style-type: none"> Pre-investment screening / ESG due diligence During regular portfolio-level assessment of human rights risks Prior to major changes in company's operations (new country entry, new business activity) When changes in the company's operating context warrant it
If yes, then:		
Understand the operating context	<p>What:</p> <ul style="list-style-type: none"> Carry out conflict analysis and update it regularly 	<p>What:</p> <p>Ensure company has appropriately identified conflict(s) it is linked to and understands its operating context. This includes:</p> <ul style="list-style-type: none"> identifying the root causes of tensions and potential triggers for conflict mapping the main actors or parties involved in the conflict, this analysis should also identify other affected

⁷¹ Adapted from UNDP (2022) *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*, <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide> p.20

		<p>stakeholders like human rights defenders and other vulnerable groups</p> <p>When:</p> <ul style="list-style-type: none"> • When hHRDD is initially triggered • On an ongoing basis depending on conflict dynamics
<p>Understand the interaction between business activities and the context</p>		<p>What:</p> <ul style="list-style-type: none"> • Ensure company has identified and articulated its connection with the conflict (this means identifying the ways in which the businesses' own operations, products or services may impact upon conflict dynamics) and conducted a human rights impact assessment as soon as reasonably practicable • Understand investor's own level of connection with conflict as a result of investee involvement • Ensure companies engage with potentially affected stakeholders as part of stewardship activities <p>When:</p> <ul style="list-style-type: none"> • As regularly as operating context reviews
<p>Understand human rights impacts</p>	<p>What:</p> <ul style="list-style-type: none"> • Link conflict analysis with cycle of business activities • Carry out a human rights impact assessment 	

Appendix F: Human rights guidelines and frameworks

Name	Overview
<u>UN Guiding Principles on Business and Human Rights</u> (2011) (UNGPs)	These were endorsed by the UN Human Rights Council to help implement the ‘Protect, Respect, Remedy’ framework on human rights, provide clarity around the responsibilities of businesses to respect human rights, and enhance global business practices. Principle 11 of the UNGPs sets out business enterprises’ responsibility to respect human rights (which extends to all operations and the full value chain of that organisation) and Principle 7 specifically addresses ‘supporting business respect for human rights in conflict-affected areas’. The commentary to Principle 12 extends this call on businesses to include ‘respect [for] the standards of international humanitarian law’ when operating in conflict-affected areas. In <i>2013 the UN Office of the High Commissioner for Human Rights (OHCHR) confirmed that the UNGPs apply to institutional investors</i> . ⁷²
<u>OECD Guidelines for Multinational Enterprises</u> (2011)	These are the most comprehensive international standards on responsible business conduct across a range of issues including human rights, labour rights and the environment. The OECD Guidelines, which were first adopted in 1976, are adhered to by all 38 OECD countries, and 12 non-OECD countries. They assert that ‘Enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights’, and set an expectation that ‘in situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments’.
<u>OECD Due Diligence Guidance for Responsible Business Conduct</u> (2017)	This was developed particularly for multinational companies and on multiple occasions refers specifically to conflict-affected areas as higher risk areas requiring greater due diligence, particularly for conflict minerals in supply chains, but more broadly as well.
<u>OECD Responsible Business Conduct for Institutional Investors</u> (2017)	This was developed to support the OECD Guidelines for MNEs and help institutional investors implement the due diligence recommendations of the guidelines in order to prevent or address adverse impacts related to human and labour rights, the environment, and corruption in their investment portfolios.
UN Global Compact (2000)	This is a non-binding, voluntary initiative that asks organisations to ‘align their strategies and operations with implementing universal principles on human rights, labour, environment and anti-corruption’ through 10 key principles derived from international law. ⁷³ The UN Global Compact and Principles for Responsible Investment (PRI) have published <i>Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A resource for Companies and Investors</i> that ‘aims to assist companies in implementing responsible business practices in conflict-affected and high-risk areas consistent with the Global Compact Ten Principles’. ⁷⁴

⁷² UNPRI (2020) *Why and how investors should act on human rights*, <https://www.unpri.org/human-rights/why-and-how-investors-should-act-on-human-rights/6636.article>, p.8

⁷³ UN Global Compact, accessed April 2023, <https://unglobalcompact.org/what-is-gc>

⁷⁴ UN Global Compact and UNPRI (2010) https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FPeace_and_Business%2FGuidance_RB.pdf

Appendix G: Recent and emerging Human Rights Laws

Examples of this area of law include:

- Californian Transparency in Supply Chains Act 2010;
- UK's Modern Slavery Act 2015;
- Australia's Modern Slavery Act 2018;
- US Uyghur Forced Labour Prevention Act;
- EU Import ban on goods connected with forced labour;
- amendments to the Swiss Code of Obligations to introduce 'Conflict Area and Child Labour Reporting Obligations';
- French Duty of Vigilance Law;
- German Corporate Due Diligence in Supply Chains Law (which came into force as of 1 January 2023);
- Norwegian Transparency Act (which came into force as of 1 July 2022);
- Dutch Child Labour Due Diligence Act;
- EU Non-Financial Reporting Directive;
- EU Conflict Minerals Regulation;
- EU Regulation on Sustainability-related Disclosures in the Financial Services Sector; and
- the proposed EU Corporate Sustainability Due Diligence Directive, proposed in February 2022, which is expected to be passed by the end of 2023.

Similar laws and regulations have been proposed in New Zealand, the Netherlands, Mexico, Austria, Finland, Belgium and Canada.

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