

**Corporate human rights due diligence and liability in armed conflicts:
The role of the ILC Draft Principles on the protection of the
environment and the Draft Treaty on business and human rights**

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1. *Introduction*

The activities of private companies may involve violations of fundamental rights of individuals and communities, including forced labour, slavery and inhuman or degrading treatment. At the same time, private companies may also have negative impacts on the environment and human health of local communities affecting their rights, including the human right to life. The risks of affecting fundamental human rights are heightened in fragile contexts, such as situations of armed conflict and post-conflict settings.

The paper will examine and compare two international documents, namely the International Law Commission's Draft Principles on the Protection of the Environment in Relation to Armed Conflicts ('ILC Draft Principles') adopted on first reading in 2019¹ and the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises ('Draft

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¹ UNGA, 'Report of the International Law Commission' UNGAOR, 74th Session Supp. No.10 29 UN Doc A/74/10 (2019) 209-296. For an analysis of the 2019 ILC Draft Principles, see M Lehto, 'Armed Conflicts and the Environment: The International Law Commission's New Draft Principles' (2020) 29 Rev Eur Comparative and Intl Environmental L 67.



Treaty’).² Both instruments include provisions on corporate due diligence and liability.³ Moreover, according to the Draft Treaty, states parties have to ensure that private companies adopt and implement ‘enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation’.⁴ The inclusion of a duty of an enhanced human rights due diligence in situations of armed conflict and post-conflict settings is a significant development of the Draft Treaty, given the lack of obligations in international humanitarian law (‘IHL’) specifically addressing private companies.

The provision on enhanced human rights due diligence affirmed in Article 6(4) (g) on prevention of the 2021 Draft Treaty should be read together with Article 16(3), devoted to the implementation of this instrument. Under this provision states parties must pay

‘[s]pecial attention [...] in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence, the use of child soldiers and the worst forms of child labour, including forced and hazardous child labour.’

This Article may help to define the meaning of enhanced human rights due diligence, as to include the identification, prevention and mitigation of potential risks of human rights abuse. Private companies

² UNHRC Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, ‘Second revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’ (6 August 2020); UNHRC Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, ‘Revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’ (16 July 2019); UNHRC Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, ‘Revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’ (17 August 2021).

³ Draft Principles 10 and 11 (n 1); 2020 and 2021 Draft Treaty (n 2) arts 6 and 8.

⁴ 2020 Draft Treaty (n 2) art 6(3)(g); 2021 Draft Treaty (n 2) art 6(4)(g).



should adapt the duty of human rights due diligence to the heightened risks of human rights abuse in situations of armed conflicts and post-conflict settings. Under this perspective, this duty provides, for example, that private companies have to pay special attention and adopt specific measures in order to prevent sexual and gender-based violence, the risks of slavery, forced labour, inhuman and degrading treatment, as well as the use of child soldiers and the worst form of child labour. Such human rights abuses could happen more frequently in armed conflicts or post-conflict settings. Moreover, such heightened risks also include the potential negative impacts to the environment and human health. In this context, private companies should put in place measures to prevent harm to the environment and human health and such measures should be part of the implementation of the duty of corporate human rights due diligence.

The paper will firstly examine the relationship between private companies, armed conflicts and IHL. The second and third sections will in turn analyse the content and the extent of the obligation of corporate due diligence in armed conflicts and post-conflict settings, as well as the legal liability of both the personnel of private companies and private companies as such. The Draft Treaty and the ILC Draft Principles represent important contributions in addressing the corporate liability and fill a gap under IHL: while pursuant to the latter, the responsibility of individuals who commit war crimes is well established, corporate liability is indeed still in an infancy stage in international law.

2. Private companies, armed conflicts and international humanitarian law

Though several areas of international law apply during armed conflicts, IHL is the specific body of law tailored for situations of international and non-international armed conflicts. The Draft Treaty gives a limited role to IHL. This area of international law is mentioned in the preamble⁵ and in Article 16, requiring that:

⁵ The preamble states: ‘*Upholding* the right of every person to have effective and equal access to justice and remedy in case of violations of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion’. 2020 Draft Treaty (n 2).

‘[t]he application and interpretation of these Articles shall be consistent with international human rights law and international humanitarian law and shall be without any discrimination of any kind or on any ground, without exception.’

Moreover, while the 2019 version of the Draft Treaty included a list of crimes for which the states parties shall impose criminal liability,⁶ the 2020 and 2021 versions do not enshrine such a list and lack an explicit reference to the International Criminal Court (‘ICC’). However, both versions make clear that states shall not limit

‘the prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole’.⁷

Differently, the third version of the Draft Treaty avoids an explicit reference to international humanitarian law providing that states shall adopt

‘any legislative or other measures necessary to ensure that statutory or other limitations shall not apply for the commencement of legal proceedings in relation to human rights abuses resulting in violations of international law which constitute the most serious crimes of concern to the international community as a whole’.⁸

States and non-state armed groups have the primary responsibility to respect and ensure respect for IHL. However, private companies may play a role during armed conflicts and could affect conflicts dynamics.⁹

⁶ Art 6(7) provided that: ‘[s]ubject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offences: a. War crimes, crimes against humanity and genocide as defined in articles 6, 7 and 8 of the Rome Statute for the International Criminal Court.’

⁷ 2019 Draft Treaty (n 2) art 8(1); 2020 Draft Treaty (n 2) art 10(1).

⁸ 2021 Draft Treaty (n 2) art 10(1).

⁹ Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Business, human rights and conflict-affected regions: towards heightened action’ (21 July 2020) UN Doc A/75/212, para 43.



The activities of private companies could involve the violations of IHL and, in these cases, individuals have

‘the right [...] to have effective and equal access to justice and remedy in case of violations of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion’.¹⁰

In some circumstances, the activities of private companies may be directly or indirectly linked to an armed conflict.¹¹ A direct connection to an armed conflict may exist when private companies provide financial, military, or logistical support, to one of the parties of an armed conflict.¹² An example is when a company collaborates directly with an armed group that is involved in the exploitation of natural resources as part of their war effort.¹³

Although there are no specific provisions of IHL on private companies, some general IHL principles and rules confer protection to the personnel, assets, and facilities of a private company. For example, according to the principle of distinction, parties to a conflict must at all times distinguish between civilians and combatants and attacks may only be directed against combatants.¹⁴ In case of doubt whether a person is a civilian or a combatant, a person working for a private company should be considered a civilian.¹⁵ Moreover, property and investments of a private company are also protected under IHL. This is the case of the properties of a private company, including factories, vehicles, or types of machinery

¹⁰ 2020 and 2021 Draft Treaty (n 2) preamble.

¹¹ On this topic, see D Hughes, ‘Differentiating the Corporation: Accountability and International Humanitarian Law’ (2020) 42 Michigan J Intl L 47 52-53; E-C Gillard ‘The Position with regard to International Humanitarian Law’ (2006) 100 Proceedings of the American Society of International Law Annual Meeting 130.

¹² Australian Red Cross and RMIT University, *Doing responsible business in armed conflict: risks, rights and responsibilities* (2020) 7.

¹³ JJ Stewart, *Corporate War Crimes: Prosecuting Pillage of Natural Resources* (Open Society Foundations 2010) 31 para 36.

¹⁴ ICRC, ‘Customary IHL Study’ (2005) Rule 1 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6>.

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3 art 50. See also Customary IHL Study (n 14) Rule 6.



which are protected against deliberate attacks.¹⁶ However, if a property is used for military purposes and makes an effective contribution to military action, it loses this protection and can be legitimately attacked during the hostilities.¹⁷

Furthermore, in case of legitimate attacks against military objectives causing incidental impacts to the facilities and properties of a private company, the principle of proportionality has to be taken into account.¹⁸ Therefore a legitimate military target cannot be attacked if the expected 'collateral damage' to the civilians and civilian objects, including properties of a private company, is excessive in relation to the military advantage anticipated.¹⁹

During armed conflicts or occupation, private investments and properties may face the risks of looting or misappropriation. In this case, IHL clearly states that private property must be protected and confiscation and pillage are prohibited.²⁰ Unlawful appropriation of assets of private companies may amount to pillage which is considered a war crime.²¹

There have been attempts to regulate the activities of certain private companies during armed conflicts. The International Committee of the

¹⁶ Protocol I (n 15) arts 48 and 52(2) and Rule 7. 'The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.'

¹⁷ *ibid* art 52(2) and Rule 8. 'In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

¹⁸ *ibid* art 51(5)(b) and Rule 14. 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.' According to the ICRC Customary IHL Study, this rule is applicable in both international and non-international armed conflicts.

¹⁹ *ibid*.

²⁰ Convention IV respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land ('Hague Regulations') (The Hague 18 October 1907) arts 46 and 47 <<https://ihl-databases.icrc.org/ihl/INTRO/195>>; Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Fourth Geneva Convention') (adopted 12 August 1949) 75 UNTS 287 arts 33 and 53.

²¹ Customary IHL Study (n 14) Rule 52; Hague Regulations (n 20) arts 28 and 47; Statute of the International Criminal Court ('ICC Statute') (adopted 17 July 1998) 34 ILM 482 (1995) arts 8(2)(b)(xvi) and (e) (v).



Red Cross (‘ICRC’) has devoted attention to the regulation of private military and security companies (‘PMSCs’). Such companies have specific features, including the particular nature of services they provide (i.e., logistic support, intelligence services, training of troops, protection of personnel and military assets, and protection of commercial shipping from piracy) and their link with several states.²² Multiple states may exercise legal control over the PMSC’s activities, such as the host state where the company operates, the state that has contracted the company, and the company’s home state.²³ The 2008 Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (‘Montreux Document’) provides guidance on the existing rules of international law that apply to states in their relations with PMSCs and their activities during armed conflicts, in particular under IHL and human rights law.²⁴

Besides the ICRC, the United States and the United Kingdom, together with the companies in the extractive and energy sector, have been the promoters of the Voluntary Principles on Security and Human Rights (‘Voluntary Principles’), which expressly refer to IHL. In particular, this document recognizes that companies should consider in their risk assess-

²² International Law Commission (ILC), ‘Second report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur’ (27 March 2019) UN Doc. A/CN.4/728, para 96.

²³ The 2008 Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (‘Montreux Document’) points out that legal control is intended as ‘the actual exercise of effective control by the state over a private actor’s conduct’ and highlights the responsibilities of the contracting state. It states that : ‘Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are [...] acting on the instructions of the State (i.e. the State has specifically instructed the private actor’s conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor’s conduct)’. ICRC, ‘The Montreux Document on Private Military and Security Companies’ (2008) 12.

²⁴ *ibid* 9.

ments the possible lack of mechanisms in the host countries to hold accountable those who are responsible for human rights abuse and violations of IHL.²⁵

The UN Guiding Principles on Business and Human Rights ('UNGPs')²⁶ expand some of the elements enshrined in the Montreux Document and the Voluntary Principles. For example, according to the Montreux document, the host state, the state that has contracted the company and the company's home state are required to put in place due diligence measures to prevent or minimize human rights abuses by private military and security companies.²⁷ The UNGPs for the first time refer to the 'heightened risk' of private companies of being involved with human rights abuses during armed conflicts. In particular, according to the UNGPs:

'States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas' and they should 'review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business.'²⁸

²⁵ Voluntary Principles Initiative, 'Voluntary Principles on Security and Human Rights' (2000) 3. According to the Voluntary Principles: 'companies should record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities. Where appropriate, companies should urge investigation and that action be taken to prevent any recurrence.' Voluntary Principles on Security and Human Rights 5.

²⁶ OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc HR/PUB/11/04 (2011).

²⁷ Montreux Document on Private Military and Security Companies (n 20) 34. In this respect, it has been noted that: 'the risk of IHL violations should be a factor in assessing the due diligence obligation of a State. In this regard, due to the nature of the services offered by PMSCs and the fact that their employees often carry arms and operate in situations of violence, the Home State should take specific measures to ensure respect of IHL by PMSCs of its nationality.' M-L Tougas, 'Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (2014) 96 *Intl Rev Red Cross* 305, 343.

²⁸ UNGPs (n 26) 10.



The UNGPs specify that these measures ‘are in addition to States’ obligations under international humanitarian law in situation of armed conflicts, and under international criminal law.’²⁹ Moreover, under the section on ‘corporate responsibility to protect human rights’, the UNGPs also point out that private companies should consider additional standards in situations of armed conflicts, including IHL.³⁰

While the UNGPs state that private companies should comply with rules of IHL, they do not describe what measures need to be taken by these actors.³¹ In this respect, the introduction of a duty of enhanced human rights due diligence by the Draft Treaty³² is an important development compared to the UNGPs. As explained by the Working Group on the issue of human rights and transnational corporations and other business enterprises in its 2020 report on the topic of ‘Business, human rights and conflict-affected regions: towards heightened action’, given the risks of human rights abuse during armed conflicts, action by states and due diligence by business should be heightened.³³

3. *Human rights due diligence in armed conflicts and post-conflict situations, in light of the Draft Treaty and the ILC Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*

This section will firstly address the general features of the corporate human rights due diligence principle and then focus on the specific characteristics of an enhanced corporate human rights due diligence during armed conflicts and in post-conflict settings.

²⁹ *ibid* 10.

³⁰ *ibid* 14.

³¹ *ibid* 14.

³² 2019 Draft Treaty (n 2) art 5(3)(e); 2020 Draft Treaty (n 2) art 6(3)(g); 2021 Draft Treaty (n2) art 6(4)(g).

³³ Working Group on the issue of human rights and transnational corporations and other business enterprises (n 9) para 13.

3.1. *Traditional approach to corporate human rights due diligence*

Both the ILC Draft Principles and the Draft Treaty include the obligation of corporate due diligence. On the one hand, the ILC Draft Principle 10 affirms that ‘States should take appropriate legislative and other measures’ to ensure that private companies ‘operating in or from their territories exercise due diligence with respect to the protection of the environment, including in relation to human health’. On the other, the Draft Treaty affirms that states ‘shall require business enterprises, to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations.’³⁴ Due diligence measures include: 1) the identification and assessment of ‘any actual or potential human rights abuses’ that may arise from the activities of a private company or ‘from their business relationships’; 2) to ‘[t]ake appropriate measures to prevent and mitigate effectively the identified actual or potential human rights abuses, including in their business relationships’; 3) to ‘[m]onitor the effectiveness of their measures to prevent and mitigate human rights abuses, including in their business relationships’; 4) to ‘[c]ommunicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships’.³⁵

The inclusion of the obligation of human rights due diligence included in the ILC Draft Principles and its commentaries as well as the Draft Treaty builds on a number of international instruments. Examples are the binding instruments dealing with the illegal exploitation of natural resources in situations of armed conflicts and post-conflict settings developed at the regional and domestic levels. These examples include the 2006 Lusaka Protocol Against the Illegal Exploitation of Natural Resources adopted under the aegis of the International Conference on the

³⁴ 2020 Draft Treaty (n 2) art 6(2); 2021 Draft Treaty (n 2) art 6(3).

³⁵ 2021 Draft Treaty (n 2) art 6(3) (a)-(d).



Great Lakes Region³⁶ the US Dodd-Frank Act of 2010,³⁷ as well as the regulations of the European Union on conflict minerals and timber.³⁸

Moreover, the obligation of corporate human rights due diligence is affirmed in the proposed EU directive on corporate due diligence and accountability.³⁹ The Organisation for Economic Co-operation and Development ‘Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’ (‘OECD Due Diligence Guidance’) also enshrine the principle of human rights due diligence, including for private companies operating in armed conflicts and post-conflict settings.⁴⁰

The UN Security Council Resolution 1952 (2010) specifically targeted the Democratic Republic of Congo and its neighbours in Central Africa, calling for supply chain due diligence to be observed. Following

³⁶ International Conference on the Great Lakes Region, Protocol Against the Illegal Exploitation of Natural Resources (30 November 2006) <https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resource.pdf>. While the Lusaka Protocol does not include an explicit reference to a human rights-based due diligence, it notes that states ‘shall ensure that third parties do not infringe upon human rights’ and that ‘multinational companies and other third parties abide by human rights, in accordance with the United Nations Norms on the Responsibilities of Transnational corporations and other business enterprises with respect to human rights.’ The Protocol also requires that states parties establish the liability of legal entities for participating in the illegal exploitation of natural resources (arts 8 and 17).

³⁷ United States Dodd-Frank Act (11 July 2010), Pub.L.111–203, 124 Stat. 1376–2223 <www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf>. Section 1502 of the Act deals with conflict minerals originating from the Democratic Republic of the Congo and requires US publicly-listed companies to exercise due diligence on tin, tungsten, tantalum and gold originating from this country and neighbouring states.

³⁸ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (‘EU conflict minerals regulation’) OJ L130 (19 May 2017) 1–20; Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down obligations of operators who place timber and timber products on the market OJ L295 (12 November 2010) 290–301.

³⁹ EU Parliament, ‘Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability’ (2020/2129(INL)) para 20 <www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html>. See also EU Parliament, ‘Committee on Legal Affairs’ (2020/2129(INL)) (11 September 2020) art 3 <https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf>.

⁴⁰ OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3rd ed. 2016) <www.oecd.org/daf/inv/mne/mining.htm> accessed 9 July 2021; UNGPs (n 26) Principle 15.



up on that Resolution, the UN Group of Experts on the Democratic Republic of Congo also advocated compliance with the OECD Due Diligence Guidance.⁴¹ Other UN Panels of Experts have analysed conflicts in Angola, Sierra Leone, Liberia showing the direct or indirect involvement of private companies in resource-related armed conflicts.⁴² These various instruments address the requirement of human rights due diligence during and after armed conflicts. While they do not explicitly refer to an enhanced human rights duty of due diligence, they could be used as reference points to strengthen this duty in situations of armed conflicts or post-conflicts settings, especially when private companies operate in resource-related armed conflicts and are more exposed to the risks of being involved in human rights abuses.

Both ILC Draft Principle 10 and its commentary as well as Article 6 of the 2020 and 2021 version of the Draft Treaty support the adoption of domestic frameworks with a specific focus on human rights due diligence for private companies operating in armed conflicts or post-conflict situations. These proposals, still under discussion, have several merits. First, states have to take legislative action concerning private companies that operate either in or from their territories. Second, the adoption of due diligence frameworks should include the respect of human rights as well as international environmental and health standards. Third, the Draft Treaty gives specific attention to companies operating in situations of armed conflicts or post-conflict settings, through the requirement of enhanced human rights due diligence. This enhanced duty of human rights due diligence for private companies could help to address the lack of specific provisions on private companies under IHL.

3.2. *Enhanced corporate human rights due diligence*

As currently drafted, the ILC Draft Principle 10 presents a different language from the 2020 and 2021 versions of the Draft Treaty. In fact, while the Draft Principle includes a general recommendation for states on due diligence with respect to the protection of the environment and

⁴¹ 'Final Report of the Group of Experts on the Democratic Republic of Congo' (2 December 2011) UN Doc S/2011/738, 100, paras 335 and 375.

⁴² D Dam-De Jong, *International Law and Governance of natural resources in conflict and post-conflict situations* (CUP 2015) 17. See also M Pertile, *La relazione tra risorse naturali e conflitti armati nel diritto internazionale* (CEDAM 2012).



human health,⁴³ the Draft Treaty provides that states parties ‘shall ensure that human rights due diligence measures undertaken by business enterprises’ include the adoption and implementation of ‘enhanced human rights due diligence’ in occupied territories and in areas affected by armed conflicts.⁴⁴ The enhancement of the obligation of human rights due diligence in situations of armed conflicts and post-conflict may contribute to prevent the heightened risk by private companies of being involved in human rights abuse in such situations.

During armed conflicts or in post-conflict settings, states’ institutions may be weakened or even absent, and although states continue to be bound by human rights law, their ability to fulfil those obligations is affected. Common features of states’ dysfunction during or after armed conflicts are the lack of an independent and impartial judiciary, the lack of control on security forces and high levels of corruption.⁴⁵ In such fragile environment, the population is more vulnerable to human rights abuses. Moreover, armed conflicts span increasingly over decades and some states may have a record of serious violations of human rights law and international humanitarian law. Other signs which may involve heightened risks of human rights abuse are related to the presence of paramilitary groups in a state. When states’ institutions are fragile or absent, private companies should strengthen their corporate human rights due diligence. For example, when the private company carries out a human rights impact assessment, the issue of human rights abuses should be examined and assessed.⁴⁶

Moreover, the measures related to the prevention, assessment and mitigation which are part of the traditional corporate approach on human rights due diligence could not be sufficient during or after an armed

⁴³ In this respect, a joint civil society submission to the ILC underlines that the Draft Principle should refer to all human rights instead of limiting the Draft Principle to human health only. Al Haq, Amnesty International, Conflict and Environment Observatory, Geneva Water Hub, International Human Rights Clinic Harvard Law School, *Joint civil society submission to the Secretary General of the International Law Commission following First Reading*, May 2021, 13 <<https://ceobs.org/joint-civil-society-submission-to-the-international-law-commissions-perac-study/>>.

⁴⁴ 2020 Draft Treaty (n 2) art 6(3)(g); 2021 Draft Treaty (n 2) art 6(4)(g).

⁴⁵ Working Group on the issue of human rights and transnational corporations and other business enterprises (n 9) para 17.

⁴⁶ *ibid* para 42.

conflict. It is thus important that a company integrates a ‘conflict-sensitive’ approach within its activities.⁴⁷ This would require a due consideration of the interaction between the activity and the particular context. For example, the engagement of public or private security forces by a private company in a situation of armed conflict may affect the local population and contribute to the escalation of violence.⁴⁸

The Working Group on the issue of human rights and transnational corporations and other business enterprises has identified four elements that an enhanced corporate human rights due diligence should contain. First, private companies should carry out an analysis of the factors, root causes and potential triggers of the armed conflict. Second, this analysis should map the main actors operating in these complex situations, including those participating in the violence and those supporting peaceful conflict resolution mechanisms. Third, private companies should anticipate how their activities may affect or aggravate the armed conflict. Fourth, the staff of private companies should be prepared to operate in these sensitive environments and have a knowledge of the causes and the actors involved in the armed conflict.⁴⁹

An enhanced duty of human rights due diligence should include the assessment of actual and potential human rights impacts of a business enterprise’s activity.⁵⁰ In addition, this requirement should be viewed as a process which includes the establishment of monitoring mechanisms to prevent and mitigate potential impacts on human rights.⁵¹ An enhanced human rights due diligence obligation should thus be viewed as including respect for norms of IHL, human rights law and international environmental law by companies operating during armed conflicts and in post-conflict settings.

An additional aspect common to the ILC Draft Principles and the Draft Treaty deals with the concept of legal liability which is addressed in the following section.

⁴⁷ *ibid* para 44.

⁴⁸ *ibid* para 42.

⁴⁹ *ibid* paras 46-49.

⁵⁰ B Fasterling, G Demuijnck, ‘Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights’ (2013) 116 *Journal of Business Ethics* 801.

⁵¹ *ibid*.



4. *Legal liability in the Draft Treaty and the ILC Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*

This section will address both the individual criminal responsibility under IHL and how the concept of corporate liability has been included in the ILC Draft Principles and the Draft Treaty.

4.1. *Individual criminal responsibility*

A core feature of IHL is the penal repression of violations of its norms committed by individuals. Not every violation of IHL triggers individual criminal responsibility but only those considered ‘serious breaches’, i.e., war crimes.⁵² According to IHL, not only the perpetrators but also their superiors and accomplices may be held criminally responsible for the commission of war crimes.⁵³ Such complicity can consist of practical assistance, support or encouragement.⁵⁴ Under Article 25(3)(c) of the Statute of the International Criminal Court (‘ICC Statute’), an individual will be held criminally responsible for a crime if he or she:

‘[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.’

The application of this provision not only entails the criminal responsibility of the manager of a private company who directly commits a war crime, but also provides that the personnel who facilitates or assist in the commission of a war crime may be held criminally responsible.

The fact that a manager has acted on behalf of a company does not confer him any kind of immunity for the commission of war crimes.⁵⁵ Moreover, given that some states have adopted national legislations for persecuting war crimes irrespective of the place where they have taken

⁵² ICC Statute (n 21) art 8.

⁵³ Customary IHL Study (n 14) Rule 158. ‘States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.’

⁵⁴ A Clapham, S Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (2001) 24 *Hastings Intl & Comparative L Rev* 339, 345.

⁵⁵ W Kaleck and M Saage-Maass, ‘Corporate Accountability for Human Rights Violations Amounting to International Crimes. The Status Quo and its Challenges’ (2010) 8 *J of Intl Criminal Justice* 699, 700-701.

place, their managers may face proceedings in countries other than those where the private company operates.⁵⁶ For example, Frans van Anraat was found guilty of war crimes for supplying chemical precursors to the Saddam Hussein regime in Iraq, which were used to manufacture mustard gas then used against Kurdish Iraqi villages, killing thousands.⁵⁷ In 2017, the Netherlands also convicted Guus Kouwenhoven, the President and Director of a timber company operating in Liberia, of being an accessory to war crimes - smuggling arms that President Charles Taylor's armed forces used to perpetrate crimes, during the Liberian civil war between 2000 and 2002.⁵⁸

4.2. *Corporate liability*

While the individual criminal responsibility for war crimes is well established under IHL, the same cannot be said for corporate liability which addresses the liability of private companies as such. In this context, the ILC Draft Principles and the Draft Treaty can be seen as an attempt at filling this important gap.

ILC Draft Principle 11 provides that states should take legislative measures to ensure that private companies operating in or from their territories can be held liable for harm caused to the environment and human health in an area of armed conflict or a post-conflict setting. Such measures should include those aimed at ensuring that private companies can be held liable to the extent that such harm is caused by their subsidiaries acting under their *de facto* control. In this context, states should

⁵⁶ In Australia, for example, persons or companies suspected of committing war crimes can be tried under the Criminal Code Act 1995. They can be 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. Australian Red Cross (n 9) 17. Other states include Canada, United Kingdom and the Netherlands. These countries are mentioned in: K Magraw, 'Universally Liable – Corporate-Complicity Liability under the Principle of Universal Jurisdiction' (2009) 18 *Minnesota J Intl L* 458, 465 (footnote 45).

⁵⁷ *The Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, Court of Appeal of The Hague, The Netherlands (9 May 2007).

⁵⁸ *The Public Prosecutor v. Guus Kouwenhoven*, Court of Appeal of Hertogenbosch, The Netherlands (21 April 2017).



provide adequate and effective procedures and remedies, particularly for the victims.

In its comments on the ILC Draft Principles, the United Nations Environment Programme (UNEP) noted the limited scope of corporate liability and suggested broadening it. Private companies should not only be liable when they directly commit war crimes such as pillage but also when they aid and assist parties to an armed conflict in pillaging natural resources, particularly in internal armed conflicts where private companies may support war parties.⁵⁹ This would be in line with what is established about individual penal responsibility, which also covers those helping or assisting in the commission of a war crime. Individuals – including the personnel of a private company – are criminally responsible for a war crime if they facilitate or help the commission of such a crime.⁶⁰ In this context, it has also been suggested that Draft Principle 11 addresses the liability of private companies not only when they directly harm the environment or human rights but also when they have contributed to the impact. Such liability should be extended to any entity which ‘can be held liable to the extent that such harm is caused or contributed to, by any entity which it controls or is able to control.’⁶¹

In addition, the Draft Treaty could fill the gap, dealing with corporate liability under IHL. In this respect, the second and third drafts of the Draft Treaty explicitly address the topic of liability of legal persons ‘for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.’⁶²

This draft article affirms that domestic law has to provide

‘for the liability of legal [...] persons conducting business activities, including those of transnational character, for their failure to prevent another legal [...] person with whom it has a business relationship, from causing or contributing to human rights abuses, when the former legally or factually controls or supervises such person or the relevant activity

⁵⁹ UNEP, ‘Comments on International Law Commission (ILC) Draft Principles on Protection of the Environment in Relation to Armed Conflicts’ (23 November 2020) <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_unep.pdf>.

⁶⁰ ICC Statute (n 21) art 25(3)(c).

⁶¹ Joint civil society submission (n 43) 14.

⁶² 2020 Draft Treaty (n 2) art 8; 2021 Draft Treaty (n 2) art 8.

that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse.⁶³

This provision of the 2020 and 2021 versions of the Draft Treaty has therefore expanded the scope of liability of private companies to those who legally or factually control or supervise another private company or the relevant activity that caused or contributed to the human rights abuse. The liability of a private company may also be established in the case the company has not foreseen the risks of human rights abuses in the conduct of its business activities, including those of transnational character, or in its business relationships and has thus failed to adopt adequate measures to prevent the human rights abuse to occur. This provision may be particularly useful to complement the obligation of enhanced human rights due diligence in situations of armed conflicts or post-conflict settings.

However, compared to the previous version of the Draft Treaty, the 2020 and 2021 versions do not include two relevant elements. First, the current text does not contain a list of crimes for which the states should impose criminal liability. Article 6(7) of the 2019 Draft Treaty affirmed that states have to ensure that their domestic legislation provides for criminal, civil or administrative liability of legal persons for specific criminal offences, including, *inter alia*, war crimes, crimes against humanity, and genocide as defined in Articles 6, 7 and 8 of the Rome Statute for the International Criminal Court.⁶⁴ The discussions on this provision highlight the different views of the delegations participating in the open-ended working group. On one hand, for some states and organizations, the list of criminal offences had to be considered as not exhaustive since some crimes such as those against the environment or against economic, social, and cultural rights were not explicitly included in this list.⁶⁵ On

⁶³ 2020 Draft Treaty (n 2) art 8(7); 2021 Draft Treaty (n 2) art 8(6).

⁶⁴ *ibid* art 6(7).

⁶⁵ UNHRC Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 'Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (2020) UN Doc



the other hand, some delegations raised doubts about the applicability of these crimes to private companies and also indicated that some of the instruments mentioned in the Article were not acceptable by their states, for example, the Statute of the ICC.⁶⁶ Generally, there was the concern that the inclusion of a list of criminal offenses would make it difficult for states to become parties to a future Draft Treaty.⁶⁷

Second, the 2020 and 2021 versions of the Draft Treaty do not make reference to the concept of universal jurisdiction. The 2019 draft provided that, where applicable under international law, states 'shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to crimes.'⁶⁸ However, many delegations raised concerns about the concept of universal jurisdiction stating that there was no common agreement on this topic.⁶⁹ The delegation of Palestine with some non-governmental organizations, was the only delegation to propose to reinstate the provision on universal jurisdiction in the 2020 draft.⁷⁰

While the ILC Draft Principles do not explicitly mention that liability of private companies encompasses both criminal and civil, the Draft Treaty specifically addresses the topic of civil liability of legal persons

A/HRC/43/55, 13 and 'Annex to the report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights A/HRC/43/55 (2020) 40-45. See for example the statements of Ecuador, Mexico, Namibia and Palestine. In particular, Mexico and Namibia supported the inclusion of crimes related to the environment.

⁶⁶ *ibid.* See for example Russia and Saudi Arabia.

⁶⁷ 'Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (n 56) 13

⁶⁸ Draft Treaty (n 2) art 10(11). See also UNHRC Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 'Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (2019) UN Doc A/HRC/40/48, 13.

⁶⁹ *ibid.*

⁷⁰ UNHRC Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 'Annex to the report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (2020) UN Doc A/HRC/46/73, 54.

stating that '[c]ivil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts.'⁷¹

5. *Conclusion*

The ILC Draft Principles with their commentaries and the Draft Treaty may fill some of the gaps related to private companies under IHL. The duty of corporate human rights due diligence may help to prevent violations of IHL. Moreover, the concept of enhanced human rights due diligence introduced by the 2020 Draft Treaty and reaffirmed in the 2021 version is particularly adapted to the situations of armed conflicts and post-conflict settings. Given the sensitivity of these contexts, private companies could be more easily involved in violations of human rights law during and after armed conflicts. The provision on enhanced human rights due diligence relies on both Article 6(4) (g) on prevention and Article 16(3) on implementation of the Draft Treaty. The 2021 version has expanded the list of the heightened risks of human rights abuse as to include also those related to the use of child soldiers and the worst forms of child labour.

The Draft Treaty and the ILC Draft Principles make also an important contribution in the area of corporate liability. As noted, while IHL addresses individual criminal responsibility, it does not include provisions on the liability of legal persons. In fact, Article 25(1) of the ICC Statute excludes the jurisdiction of the Court over legal persons providing that '[t]he Court shall have jurisdiction over natural persons pursuant to this Statute'. However, this exclusion is not written in stones and an amendment to the Statute could perhaps be introduced. In 2019, for instance, the proposal to make starvation a war crime punishable before the ICC when committed in non-international armed conflicts was unanimously accepted by the ICC assembly of state parties.⁷² While the topic of corporate liability would probably be more difficult to be accepted as an amendment to the Statute, it is important to underline that the ICC

⁷¹ 2021 Draft Treaty (n 2) art 8(2).

⁷² 'Amendment to Article 8 of the Rome Statute of the International Criminal Court (intentionally using starvation of civilians)' available <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BE8BA00FA2C097FFC125861B005D30D6>>.



may prosecute the personnel of a private company who either contribute or directly commit international crimes under the Rome Statute.⁷³

Another important development envisaged by the Draft Treaty would deal with civil liability mechanisms. Criminal liability mechanisms could not be the only means to address the violations of IHL by the staff of private companies or the companies themselves. Individuals could also directly bring the case before a national civil court, where the standard of proof is lower than in criminal proceedings. While the latter address the commission of war crimes, civil liability cases focus on damages and allow individuals to seek compensation from companies before domestic courts.⁷⁴

⁷³ J Aparac, 'Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)accountability in Armed Conflicts' (2020) 5 *Business and Human Rights J* 270, 274.

⁷⁴ On the advantages of civil liability proceedings, See E Mongelard, 'Corporate civil liability for violations of international humanitarian law' (2006) 88 *Intl Rev Red Cross* 665, 666-667.

