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UN Working Group on Business and Human Rights
Thematic Engagement, Special Procedures and Right to Development Division
Special Procedures Branch
UNOG-OHCHR
CH-1211 Geneva 10, Switzerland

By email: hrc-wg-business@un.org

Dear UN Working Group on Business and Human Rights,

Re: Call for input – Investors, ESG and Human Rights Questionnaire

On behalf of Australian Red Cross, the International Committee of the Red Cross (ICRC) and RMIT University, we welcome this opportunity to submit our comments to the UN Working Group on Business and Human Rights (the Working Group). This submission responds, in whole or in part, to several of the questions relating to 'Corporate responsibility to respect human rights' and 'Good practices', outlined in the questionnaire provided. We are particularly pleased to express our unanimous views on the importance, relevance, and applicability of international humanitarian law (IHL) and conflict sensitivity, generally, to the financial sector and to investment decision making.

Summary

Whichever way ESG in finance is defined and understood, the adoption of effective ESG strategies and the genuine implementation of the UN Guiding Principles on Business and Human Rights (UNGPs), in the context of armed conflict, must include a consideration of IHL *in addition to* human rights and other associated responsibilities. The Working Group has an opportunity to highlight IHL and conflict-related risk in this dialogue, where in the past it has remained in the periphery, and to provide clarity on the integration of IHL as part of the human rights lens in ESG in its guidance to investors. Our reflections in support of this recommendation can be summarised as follows:

1. Human rights standards and frameworks considered by investors, including the UNGPs and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), reference IHL but fail to articulate actual steps towards an IHL-informed or conflict-sensitive approach to investment decision making.
2. The growing awareness around ESG and human rights presents an opportunity for investors to extend their responsible investment practices to encompass conflict sensitivity and IHL, as a means of heightening their human rights due diligence.
3. Failure to comply with IHL may translate into operational, financial, reputational and legal risks for businesses and investors. This failure also poses a significant risk to the life and dignity of civilian populations affected by armed conflict.
4. Resources already exist to support investors on their journey towards improved IHL awareness and conflict sensitivity.¹

¹ See **Annex A** for a list of relevant resources written or edited by the undersigned.

Macro-level ESG trends in the financial sector

Investors are increasingly cognisant of the importance of integrating ESG factors into their daily operations, including into enterprise risk frameworks and corporate risk registers. As indicated by Deloitte,² ESG-mandated assets are on track to represent half of all professionally managed assets globally by 2024. There is also a heightened level of public, stakeholder and shareholder scrutiny across the financial sector, particularly in instances where investors have indirectly contributed to adverse human rights impacts through their provision of finance.

Consequently, there has been improved alignment among investors with voluntary frameworks such as the UNGPs, OECD Guidelines, UN Principles of Responsible Investment (PRI), Equator Principles, UNEP Principles for Responsible Banking, and UN Sustainable Development Goals. There has also been a proliferation of industry-led guidance on how to address ESG issues, including human rights impacts.³ This alignment is further complemented by the emergence of a suite of reporting and disclosure requirements, which encourage (or in some cases compel) investors to be more transparent about their environmental and social performance, alongside financial performance. These developments signify a growing commitment to responsible investing and a conscious effort to mitigate harmful effects on society.

The growing attention on ESG issues, and expectations regarding responsible investment and lending, are also consistent with the contemporary geopolitical trends shining a light on corporate involvement in conflict environments. Major global events, including the conflict in Ukraine, and instances of criminal and civil claims based on IHL violations brought in European and US courts, bring IHL and its relevance into sharper focus and underscore an urgent need for a nuanced understanding of conflict sensitivity, including IHL risks, in investment risk assessment and decision-making.

The existing governance landscape

Although there are several legal frameworks that apply in situations of armed conflict, including IHL and international refugee law, businesses generally only familiarise themselves with international human rights law and the risks, rights and responsibilities that flow from relevant human rights treaties. As a result, there is a knowledge gap among investors – but also in the private sector broadly – regarding corporate awareness of IHL and organisational exposure to conflict-affected areas.

To a degree, the sector has begun to address this gap through the widespread acceptance and adoption of the concept of heightened human rights due diligence (hHRDD). According to the UNGPs, the risk of businesses becoming involved in serious human rights abuses increases exponentially in contexts of armed conflict. In such situations, businesses are expected to not only respect major international human rights treaties, but also to ‘respect the standards of international humanitarian law’. Under the UNGPs, businesses are called upon to conduct hHRDD to strengthen their understanding of the context in which they operate and to ensure their activities do not contribute to violence by identifying potential triggers and drivers of the conflict.

Similar references also exist in other major initiatives and frameworks, for instance the OECD Guidelines and the Voluntary Principles on Security and Human Rights, as well as in industry guidance documents, including the UN Global Compact and PRI’s *Guidance on Responsible Business in Conflict-Affected and*

² Deloitte, 2022, ‘Ingraining sustainability in the next era of ESG investing’, <https://www2.deloitte.com/content/dam/insights/articles/us154481_cfs-the-next-era-of-esg-investing-sustainability-at-the-core/DI_The-next-era-of-ESG-investing.pdf>.

³ See for example, Responsible Investment Association of Australasia, 2023, ‘Investor Toolkit on Human Rights and Armed Conflict’ <<https://responsibleinvestment.org/wp-content/uploads/2023/05/Investor-Toolkit-on-Human-Rights-and-Armed-Conflict.pdf>>.

High-Risk Areas, and the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. In 2020, this Working Group issued their report on *'Business, human rights and conflict-affected regions: towards heightened action'*, which reiterated the need for businesses to respect the standards of IHL in situations of armed conflict, and to ensure they allocate resources and attention to IHL and conflict-related issues. More recently, in 2022, the Working Group and the UNDP published a guide on *'Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts'*. The guide, written for businesses and other actors, references IHL and outlines how they might meet their responsibilities in accordance with hHRDD in conflict-affected areas. In August 2023, the OHCHR's latest contribution to business guidance was the release of *'Business and Human Rights in Challenging Contexts'*, which seeks to provide guidance to companies on how to implement their adherence to the UNGPs in challenging contexts, including conflict-affected areas. IHL was not mentioned or referenced at all in this document.

Despite explicit and implicit references to IHL and armed conflict across the existing normative landscape, there remains a lack of commentary and interpretive guidance when it comes to articulating practical steps towards effective IHL integration. The latest "Challenging Contexts" guidance illustrates this gap.

The relevance of IHL and conflict sensitivity

There are more than 100 non-international and international armed conflicts taking place around the world today and a record 339 million people in need of humanitarian assistance and protection, more than double the number ten years ago. The operations of a significant number of investment-intensive industries, such as the extractive and technological sectors, are conducted in conflict-affected areas or directly contribute to armed conflict dynamics. It has therefore become increasingly common for businesses, their investors, supply chains, partners, and customers to encounter these contexts, and evermore pressing to be able to identify and avoid or mitigate the risks that accompany these environments.

Businesses can – and frequently do – have a negative impact on conflict, including sparking or intensifying conflict. Furthermore, it is widely acknowledged that the most egregious human rights abuses occur in conflict-affected areas. Beyond this heightened risk of human rights abuses, private actors also risk perpetrating or being complicit in serious violations of IHL, including war crimes, on account of IHL being triggered once a situation of armed conflict arises. This is because IHL does not just bind States, organised armed groups and soldiers, but it also binds any actor whose activities are closely linked to an armed conflict. Consequently, although States and organised armed groups bear the greatest responsibility for implementing IHL, a business carrying out activities that are closely linked to an armed conflict must also respect applicable rules of IHL. This gives rise to unique risks, distinct from more commonly understood human rights-related risks. For example:

- Committing or being complicit in **pillage**, that is, acquiring property (including transfer of company shares) or natural resources without the freely given consent of the owner;
- Criminal liability risks relating to **military occupation**, for example involvement, participation or assistance in settling civilians in occupied territories, and maintaining or developing settlements;
- Being complicit in, allowing or facilitating the dissemination of **misinformation, disinformation and hate speech** leading to serious violations of IHL;
- Committing or being complicit in the **forced displacement of, or attacks on, civilians** with the support or acceptance of State forces or non-State armed groups in circumstances linked to the armed conflict; and

- Losing the **protected civilian status** afforded to businesses by failing to carefully manage their operations, personnel and connections to the ongoing armed conflict, thus becoming a **potential military objective** (for instance, when company security providers engage in hostilities).

Considering these complex and multifaceted risks, it is imperative for investors not only to understand the potential implications of financing activities and operations in conflict-affected areas, but also to adopt robust risk mitigation and ethical conduct strategies that align with IHL.

Investors' current engagement with IHL and conflict sensitivity

In 2022, Australian Red Cross engaged Deloitte Australia to undertake a review of the extent to which the financial sector incorporates IHL and conflict-related considerations in investment and operational decision-making.⁴ The review was limited to Australian institutions, so the findings aren't necessarily indicative of the global context, but it does offer valuable insight into the general state of IHL and conflict awareness in the finance sector. In addition, the report indicates that consultations with non-Australian stakeholders suggested that Australian investors aren't any less mature than their European counterparts, in terms of approaches to IHL or conflict sensitivity, despite ESG integration being arguably more advanced in Europe than Australia.

The research ultimately confirmed that IHL is not a formal consideration for most investors. Many institutions favour a highly risk-averse and avoidant approach to having links to conflict-affected regions or sectors, largely for compliance or reputational reasons. In circumstances where conflict is considered by investors, there is some reference to compliance with legal frameworks enforcing sanctions or responding to financial crimes such as anti-money laundering or corruption. There are also other references to risk in terms of avoiding commitments in high-risk sectors like weapons manufacturing and conflict minerals. Recent conflicts and increased scrutiny around supply chains and human rights practices have put conflict-related considerations on the radar for some institutions. However, overall, there is still very limited reference to armed conflict (and no reference to IHL) in ESG and human rights policies, risk management processes or investment frameworks.

That said, this landscape is evolving. The research found that there is an appetite among investors for deeper awareness and engagement in IHL and conflict-related issues. In some cases, investors had already started to think about their indirect exposure to conflict. Several institutions expressed an interest in receiving further guidance on questions such as:

- How exposed are financial institutions (directly or indirectly) to armed conflict? How material are conflict-related risks for financial institutions?
- What does good practice look like in terms of conflict-sensitive investment?
- How does IHL differ to, or build on, existing human rights responsibilities and other due diligence processes?

We recommend that any Working Group guidance should also address these questions or produce supplementary guidance specifically on UNGP implementation for investors in conflict-affected areas.

Conclusion

Business and investor responses to contemporary geopolitical events, including the ongoing conflict in Ukraine, have revealed a knowledge gap across the global corporate sector regarding exposure to armed conflict. Despite explicit and implicit references to IHL in many governance instruments and guidance, the adoption of ESG strategies and the implementation of the UNGPs vis-à-vis IHL has not been fully realised.

⁴ Deloitte 2022, *Responsible business and international humanitarian law in the finance sector*, unpublished confidential report.

As we know, businesses can either exacerbate or mitigate conflicts, making it crucial for the financial sector to go beyond traditional human rights considerations in the context of armed conflicts.

The humanitarian impact of armed conflicts around the world will continue to be felt by individuals, communities and the environment for many years to come. All societal actors have a role to play in minimising human suffering in such situations, including businesses and those entities that invest in them. John Ruggie recognised this, as has the UN Working Group by including in its agenda the operation of the UNGPs in conflict-affected situations in the past.

The Working Group has a unique opportunity to bring IHL and conflict-related risks to the forefront of its discussions. We urge the Working Group to ensure that IHL is not overlooked in its guidance to investors, offering clear steps for its incorporation in the investment process where appropriate.

We look forward to continued collaboration to advance the integration of IHL and conflict sensitivity into the financial sector, promoting responsible and ethical investment practices that contribute to global peace and stability.

Yours sincerely,



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Annex A

List of relevant resources (written or edited by the undersigned)

- Australian Red Cross and RMIT University, *Doing Responsible Business in Armed Conflict: Risks, Rights and Responsibilities* (June 2020) <https://www.redcross.org.au/getmedia/7ef922ac-7360-4bd9-97f9-fb9517547eba/Doing-Responsible-Business-in-Armed-Conflict-final-publication-WEB.pdf.aspx>
- Australian Red Cross and RMIT University, *Seven Indicators of Corporate Best Practice in International Humanitarian Law* (January 2021) <https://www.redcross.org.au/getmedia/7a742c8c-e184-4c0b-9146-ae4e2edef8bc/7-indicators-of-corp-best-prac-FINAL-2021.pdf.aspx>
- Geneva Centre for Security Sector Governance, International Committee of the Red Cross, and Geneva Center for Business and Human Rights, *Addressing Security and Human Rights Challenges in Complex Environments: A Practical Toolkit* (2022) <https://securityhumanrightshub.org/toolkit/a-practical-toolkit.pdf>
- Jonathan Kolieb, 'Don't forget the Geneva Conventions: achieving responsible business conduct in conflict-affected areas through adherence to international humanitarian law,' *Australian Journal of Human Rights* (2020) Vol. 26:1, 142-164. <https://doi.org/10.1080/1323238X.2020.1792137>
- Fauve Kurnadi and Adaena Sinclair-Blakemore, 'Investing in the laws of war: international humanitarian law and the financial sector', *Humanitarian Law and Policy Blog*, International Committee of the Red Cross (2023) [Investing in the laws of war: IHL and the financial sector \(icrc.org\)](https://www.icrc.org/en/news/blog/2023/04/12/investing-in-the-laws-of-war-ihl-and-the-financial-sector).