

Sheri P. Rosenberg
POLICY PAPERS IN PREVENTION

GETTING DOWN TO BUSINESS

Uncovering the Roles Played by
Enterprises in Enabling and Preventing
Atrocity Crimes

Tatiana Gos





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The Auschwitz Institute for Peace and Reconciliation
2 West 45th Street, Suite 1602
New York, NY 10036

<http://www.auschwitzinstitute.org>

Cover Design by:

Mirko Ilić Corp.

studio@mirkoilic.com

<http://mirkoilic.com/>

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Getting Down to Business

Uncovering the roles played by enterprises in enabling and preventing atrocity crimes

Non-existent, weak or poorly enforced legislation against a backdrop of violence, social tension, poverty and corruption may prove a blessing for the unscrupulous but for the majority of companies, it offers a minefield of extremely complex management issues through which they are ill-prepared to navigate.¹

Introduction

Human rights violations are not only a State matter. Contemporary business enterprises, especially multinational corporations, possess immense and increasing levels of state-like power in the national and international political economies of the present world order,² and have acquired both political authority and political responsibility.³ These enterprises have the means and opportunity to violate all recognized human rights and can potentially play an important role in human rights abuses that amount to atrocity crimes. Such atrocities include, for example, the systematic reliance of companies on state forces to torture or summarily execute leaders standing in opposition to upcoming or ongoing projects,

¹ Institute for Human Rights and Business, *From Red to Green Flags. The corporate responsibility to respect human rights in high-risk countries*, 2011, 1.

² A. Grear, B. Weston, *The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Landscape*, Human Rights Law Review, 2015, 15, 21–44, 25.

³ F. Wettstein, *Silence as Complicity: Elements of a Corporate Duty to Speak Out Against the Violation of Human Rights*, Human Rights Business Ethics Quarterly, 22, 37–61, 48, 49.

railroad companies arranging the transportation of civilians to death camps, and telecommunication companies being pressured by governments to provide information about social activists that may be used to enable the perpetration of atrocities against them.⁴

According to current international law and policy, atrocity crimes, namely, genocide, war crimes and crimes against humanity must be prevented.⁵ The obligation to protect populations at home and abroad by preventing such crimes lies primarily with States. However, other actors, most notably in the private sector, also have their own responsibilities and can make key contributions to atrocity crime prevention efforts.

This policy paper builds on current standards and research in the realms of both atrocity prevention and businesses' human rights responsibilities, which, although abundant, have developed somewhat independently. The purpose of the text is to fill this existing gap and adopt a holistic and comprehensive approach aimed at connecting and intertwining these standards in order to better analyze the role of businesses in the prevention of atrocity crimes.

The introduction explains the analytical framework applied throughout the policy paper, namely, the Guiding Principles on Business and Human Rights (hereafter referred to as the "Guiding Principles"), endorsed by the United Nations Human Rights Council, and the UN doctrine of the "Responsibility to Protect". Drawing on

⁴ See, *inter alia*, J. Calderón-Meza, *Arbitration for Human Rights: Seeking Civil Redress for Corporate Atrocity Crimes*, Harvard International Law Journal, Vol. 57, Spring 2016, Online Symposium; Holocaust survivors' lawsuits against the French national railroad company that transported 76,000 civilians to Nazi death camps, information available at: <https://business-humanrights.org/en/sncf-lawsuits-re-holocaust>.

⁵ UN, Report of the Secretary General, *Responsibility to protect: State responsibility and prevention*, A/67/929-S/2013/399, 9 July 2013.

this framework, Chapter 1 describes States' obligations to prevent and act upon the involvement and complicity of enterprises in atrocity crimes. Chapter 2 analyzes the responsibilities of enterprises to prevent, and not contribute to, atrocity crimes, particularly through the implementation of suitable enhanced human rights due diligence mechanisms. Annex 2 provides a more detailed explanation of these mechanisms and examples of the actions that could be adopted at each stage of the enhanced human rights due diligence framework. Chapter 3 discusses the role played by International Financial Institutions in preventing financial assistance from contributing to the commission and/or perpetuation of atrocity crimes. The concluding section summarizes the policy paper's main arguments and calls for acknowledgement and action.

A. Atrocity crimes: businesses as enablers and preventers

Atrocity crimes are identity-based crimes that violate fundamental human rights and *ius cogens* norms of international law.⁶ As international crimes, mass atrocities engender responsibility before international tribunals and domestic courts of home and host States, as well as third-party States exercising universal jurisdiction.⁷ Atrocity crimes are systematic and concern a plurality

⁶ The distinct feature of genocide lies in the intent of perpetrators to “destroy in whole or in part” a national, ethnic, racial or religious group. War crimes can be committed only in the context of international or non-international armed conflicts or occupation. Crimes against humanity are distinguished by the systematic or widespread nature of the gross human rights violations committed. Ibid, para. 2, 6, 14.

⁷ See, *inter alia*, Rome Statute of the International Criminal Court; ACHPR, *ONG Zimbabwe Human Rights Forum v. Zimbabwe*, Communication no 245/02, 26 May 2006; ECHR, *X and Y v. The Netherlands*, App. no 8978/80, Judgment 26 March 1985; I/A Court H.R., *Manuel Cepeda Vargas v. Colombia*, Judgment 26 May 2010; Pinochet 1999 6 BHRC 24.

of offenders, an extensive network of resources and complex structures.⁸ At the same time, such crimes are the result of an accumulation of “factors that combine, interlock and magnify with potential ‘tipping points’ that could catalyze tensions.”⁹ Therefore, they exist as processes, not singular events,¹⁰ and have identifiable transition events throughout the cycle of violence. These transition events have been conceptualized by atrocity crime prevention models.¹¹

For methodological purposes, this policy paper adopts a broad understanding of prevention, namely, all actions that could be put in place at the different phases in which atrocity crimes escalate and de-escalate: (i) **upstream prevention** (the “before” analysis of the longer-term governance, historical, economic and societal factors that leave a country at risk for atrocity crimes and the available avenues for inoculation to mitigate these risk factors); (ii) **midstream prevention** (immediate, real-time relief efforts “during” the crisis – political, economic, legal, and military – that are direct crisis management tactics to slow, limit, or halt mass violence), (iii) **downstream prevention** (the “after” efforts to foster resiliency by dealing with the acute long-term consequences of mass violence through pursuits of justice, truth and memory to help stabilize, heal

⁸ E. van Sliedregt, *System criminality at the ICTY* in A. Nollkaemper, H. van der Wilt, *System Criminality in International Law* (2009), 183.

⁹ International Alert, *Why conflict sensitivity matters for business and human rights*, Background Paper, April 2016.

¹⁰ United Nations, Report of the Secretary General, *Responsibility to protect: State responsibility and prevention*, para. 30.

¹¹ See, *inter alia*, classification, symbolization, discrimination, dehumanization, organization, polarization, preparation, persecution, extermination, denial. O. Pell, K. Bonner, *Corporate Behavior and Atrocity Prevention: Is Aiding and Abetting Liability the Best Way to Influence Corporate Behavior?*, in S. Rosenberg, T. Galis, A. Zucker (eds.), *Reconstructing Atrocity Prevention*, Cambridge University Press 2016, 396.

and rehabilitate a post-atrocity society, and promote non-recurrence).¹²

Using the terminology of the conflict prevention framework, **structural prevention tools** address the first and third phases and should mitigate risk factors that could increase the likelihood of mass atrocities, as well as focusing on the long-term measures that address the root causes of potential/past crimes (i.e. “capacity building”, accountability, access to justice, economic development programs).¹³ For their part, **direct prevention tools** address the second phase and should prevent the short-term and/or imminent escalation of a potential conflict, mitigate or eliminate reason(s), means and opportunity(ies) for (potential) perpetrators and enablers to commit atrocity crimes, and strengthen the protection of potential victims (i.e. negotiation, mediation, sanctions, and media campaigns).¹⁴

Although it is impossible to draw a direct causal connection between the presence of specific risk factors and the occurrence of atrocity crimes, such crimes are rarely committed in the absence of the following risk factors:¹⁵

1. A history of discrimination (direct, indirect, social, economic, political) or other human rights violations against members

¹² J. Waller, *Confronting Evil, Engaging Our Responsibility to Prevent Genocide*, Oxford University Press, 2016.

¹³ T. Alleblas, *The Responsibility to Protect and the Private Sector: Making the Business Case for Private Sector Involvement in Mass Atrocity Prevention*, The Hague Institute for Global Justice, Working Paper 5, January 2015.

¹⁴ Ibid.

¹⁵ Atrocity crimes are more likely to occur during armed conflict. However, focusing exclusively on conflict prevention would overlook atrocity crimes that occur outside of armed conflict or that are not necessarily related to armed conflict. UN, Report of the Secretary General, *Responsibility to protect: State responsibility and prevention*, *supra* note 5, para 12, 13.

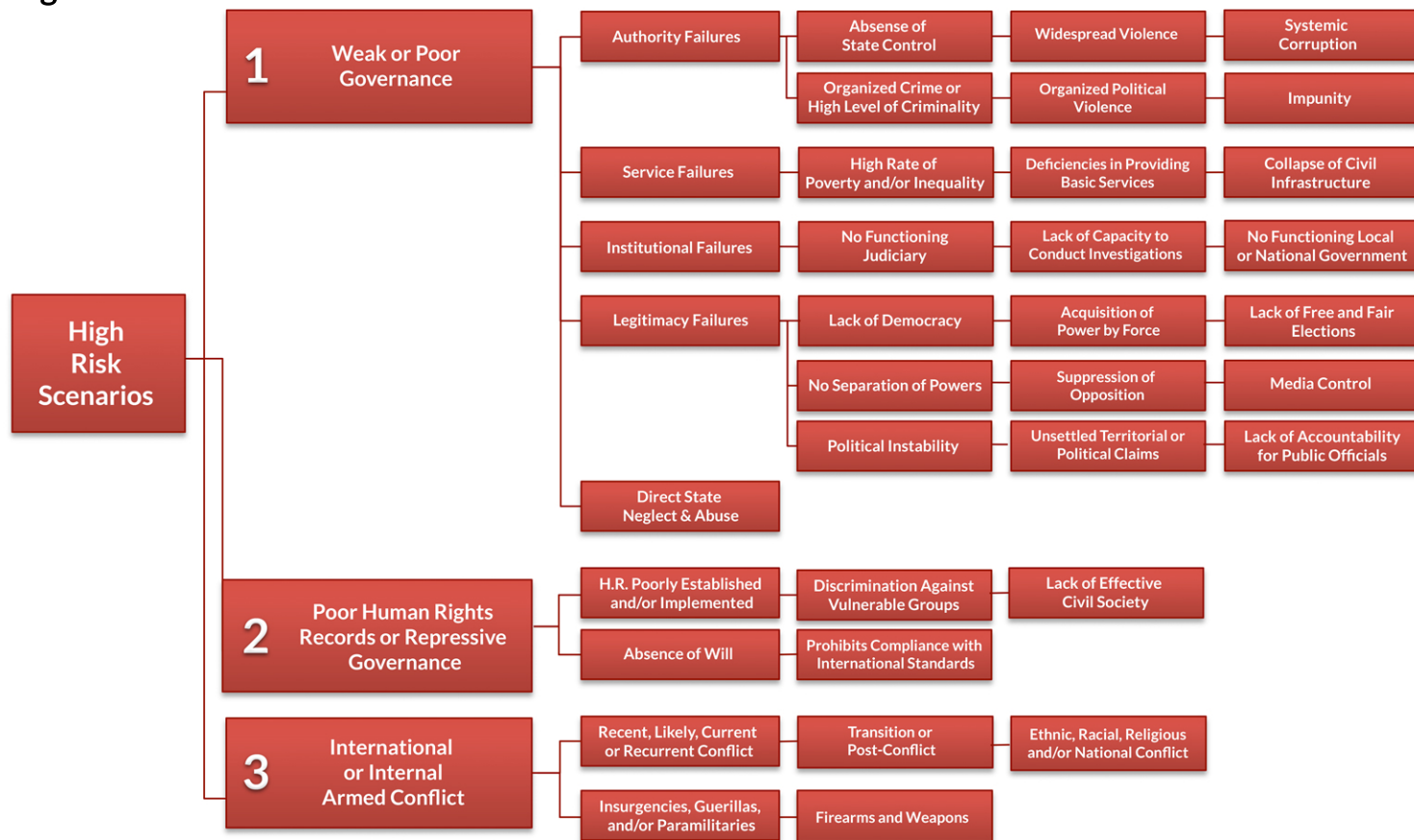
of a particular group or population, often along ethnic, racial or religious lines.

2. Underlying motivations for targeting a community, which can be political, economic, military or religious.
3. The presence of armed groups or militias and their capacity to commit atrocity crimes.
4. Particular circumstances, such as any development that suggests a trajectory towards mass violence or the existence of a longer-term plan to commit atrocity crimes or policies that enable them.
5. A government's lack of capacity to prevent atrocity crimes and the absence of structures or institutions designed to protect the population.
6. The commission of serious human rights violations that could be considered as elements of genocide, war crimes, and crimes against humanity, as set out in the Rome Statute of the International Criminal Court.¹⁶

In **Figure 1**, you will find some elements that define high-risk contexts. This scheme is not exhaustive, and the organization is somewhat arbitrary, but intends to provide a comprehensive view of the most common elements identified in these contexts.

¹⁶ Ibid, para. 16 – 27.

Figure 1



High-risk contexts involve an environment in which human rights violations, including atrocity crimes, occur or might occur. Enterprises connected to such environments are more likely to commit, contribute to, or be complicit in, human rights violations. What should businesses do if keeping populations poor and disenfranchised appears as a strategic choice? What if the development of a certain disadvantaged region affects the interests of a repressive ruling elite or if the income generated by a company project helps an abusive State to resist international or local pressure to reform?¹⁷

Under such circumstances, corporate decision-makers may wish to reevaluate whether the business opportunity is truly as lucrative as it appears.¹⁸ Corporate leaders should determine whether investment or continuous engagement in the given country would run the risk of incurring legal or social liabilities for human rights abuses, as well as consider the costs of implementing a robust and comprehensive human rights program in a context where violations are frequent and atrocity crimes are likely to continue taking place. If the enterprise decides to move forward or continue with the project, then it should anticipate an elevated level of risk and the associated difficulties and adapt its human rights management and due diligence framework to the situation. In extreme conditions where risk is unacceptable and/or mitigation not feasible, such as when a State abdicates all responsibility and/or does not allow enterprises to act in accordance with international best practices, businesses should divest, suspend, disengage, refuse to initiate, or exit the project, as appropriate.¹⁹

¹⁷ Institute for Human Rights and Business, *supra* note 1.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

However, avoiding engagement may not be a default or sufficient strategy for managing high-risk contexts.²⁰ In such contexts where investment and the presence of the private sector are needed, enterprises could act as a force for change and improvement. The myth of “company neutrality” and the “apolitical or illegitimate political interference excuse” must be avoided, as:

- i. the private sector is politically active in terms of defending its interests:²¹ it is involved at all stages of public policy formation, from participating in negotiations to setting standards, supplying public goods, and even, on occasion, directly developing legislation. The private sector rarely hesitates to make itself heard when economic rules and regulations affect business projections;²² and
- ii. most contexts and conflicts where atrocity crimes are committed are, “at least partly, driven or sustained by concrete economic agendas.”²³

All enterprises, but especially large companies in high-risk contexts, can have a major impact and a high degree of leverage. In practice, the amount of leverage will depend on a range of factors, such as the nature of the operation - whether or not it is a joint venture and whether or not the company is the operating partner - and the skills and remit of those “at the negotiating table” (i.e. understanding the relevance, empowerment, and endorsement of senior leaders). In

²⁰ F. Mbithi Muia, *The private sector in conflict prevention and post-conflict reconstruction*, International Labour Office, Infocus Programme on Crisis Response and Reconstruction, September 2002.

²¹ N. Killick, V. Srikantha, C. Gündüz, *The Role of Local Business in Peacebuilding*, Berghof Research Center for Constructive Conflict Management, February 2005.

²² Wettstein, *supra* note 3, 48- 53.

²³ Killick, Srikantha, Gündüz, *supra* note 21.

any context, leverage is a limited resource and companies must make strategic decisions about where and when to exercise it.²⁴

Enterprises have a set of skills and experiences that potentially makes them great contributors to atrocity prevention efforts. First, businesses' most obvious contribution is encouraging economic activity, through which they help to: "strengthen local economies and build resilience in society"²⁵ by generating tax revenues, creating job opportunities, and ensuring equitable access to jobs; bring diverse groups together to work towards shared and mutually beneficial economic and social development; create value locally by ensuring the use of local products and services in supply chains wherever possible, particularly through the inclusion of vulnerable and conflict-affected segments of the population; and develop infrastructure related to company operations that can benefit local communities, in addition to many others.²⁶ **Case Study 1: "Nespresso and TechnoServe: Rebuilding the Coffee Sector in South Sudan"** and **Case Study 2: "Cordaid Investments in Myanmar"** provide information about companies operating in high-risk contexts.

Second, no other sector has such expertise with publicity and media campaigning, which can be directed towards awareness-raising and the mobilization of society in demanding conflict deactivation, an end to ongoing conflicts, the cessation of gross human rights violations, and the construction or maintenance of peace.²⁷ **Case Study 3: "Kenya Private Sector Alliance (KEPSA) and Post-Election Violence"** provides information about positive

²⁴ International Alert, *supra* note 9.

²⁵ Alleblas, *supra* note 13.

²⁶ See, *inter alia*, International Alert, *Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector*, 2006; Institute for Human Rights and Business, *supra* note 1.

²⁷ Killick, *supra* note 21.

contributions made by the business sector towards preventing violence from escalating. Third, enterprises' connections and networking may be useful in reaching and engaging broader stakeholder participation. Fourth, businesses have experience in managing complex problems involving different actors (i.e. collective bargaining and negotiations). Companies that have operated for a longer period of time have invaluable knowledge of the local context and can enjoy a certain degree of acceptance that other actors may lack.²⁸ Finally, enterprises can provide essential assistance in humanitarian relief, including post-conflict reconstruction and long-term stabilization.²⁹

On the other hand, precisely because of enterprises' influence in high-risk contexts, they can also function as a major destabilizing force by taking advantage of administrative or legal loopholes, allowing for corruption or maladministration, and benefitting from, and/or contributing to, abusive practices. Large-scale investment can place stress on already fragile environments³⁰ and investment without adequate regulation and accountability can have a devastating impact on human rights.³¹ A recent field report found that:

...[s]ome companies operating in fragile and conflict-affected situations adapt their business strategy to benefit from the fragility and the governance gap. This is contradicting the widespread belief that private sector development has a predominantly positive influence on peace building and economic

²⁸ B. Ganson, *Business and Conflict Prevention: Towards a Framework for Action*, Geneva Peacebuilding Platform Paper N° 2, 2011.

²⁹ Mbithi Muia, *supra* note 20.

³⁰ *Ibid.*

³¹ World Economic Forum, *Responsible Investment in Fragile Contexts*, May 2016.

reconstruction. The business strategies of so-called “hit and run” companies operating in fragile and conflict affected settings share a number of characteristics, namely that they are mostly short term and high risk; enable rapid growth of the business; involve frequent changes in ownership and management; often use tax havens to minimise or avoid paying taxes; exaggerate claims; and make empty promises.³²

Business enterprises can be direct perpetrators and/or accomplices of atrocity crimes. Corporate complicity can occur if the relevant actions have a substantial effect in enabling, facilitating, or improving the efficiency of human rights violations. As explained by Dr. George A. Lopez, enterprises can provide opportunity, assistance, and influence as atrocity enablers when: (i) they “provide resources, goods, services, financial resources or other practical support – directly or indirectly – to the perpetrator;”³³ (ii) such provision is a “critical ingredient that enables or sustains the commission of the atrocities, without which the atrocities would not have taken place to the same extent;”³⁴ and (iii) the enterprise “knows or should have known about the atrocities and the ways in which its goods or support” could have potentially contributed to the commission of such crimes.³⁵ Furthermore, enterprises can

³² M. van Dorp (SOMO), *Fragile! Handle with Care: Multinationals and Conflict Lessons from SOMO’s Multinational Corporations in Conflict-Affected Areas programme*, November 2016, 5.

³³ G. Lopez, *Dealing with “Enablers” in Mass Atrocities: A New Human Rights Concept Takes Shape*, Carnegie Council for Ethics in International Affairs, 2013.

³⁴ Ibid.

³⁵ Ibid. For example, the 2009 U.N. Panel of Experts on Sudan reported that Al-Futtaim Motors Company, the official Toyota dealership in the United Arab Emirates (UAE), was, along with second-hand dealers in UAE, the source of “by far the largest number of vehicles that were documented as part of arms embargo violations in Darfur.” See, *inter alia*, Human Rights First, *Disrupting*

benefit from atrocity crimes,³⁶ and even unintentionally create or exacerbate tensions or conflicts due to the lack of appropriate human rights due diligence (hereafter “HRDD”) mechanisms and prevention-oriented policies.³⁷ A business’ proximity to, and its activities with, a given perpetrator will demonstrate the probability that it will have “substantial effect on the chain of causality.”³⁸ Corporate responsibility will also depend on the nexus of the affected populations, the individual right in question, and principles of attribution that connect those committing the violations to the company.³⁹

In other words, corporate complicity can be categorized as direct complicity, indirect complicity, beneficial complicity and silent complicity, depending on the nature of its contribution to the wrongdoing. While direct complicity denotes the explicit involvement of a corporation in an abuse of human rights, indirect complicity involves mere facilitation, that is, an indirect contribution to the general ability of a perpetrator to commit

the Supply Chain for Mass Atrocities. How to Stop Third-Party Enablers of Genocide and Other Crimes Against Humanity, July 2011, quoting UN Panel of Experts on Sudan, Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan (New York: United Nations, 2005), S/2009/562, para 158.

³⁶ See, *inter alia*, Nazi industrialists who used forced labor. Pell and Bonner, *supra* note 11, 404.

³⁷ A recent report by Chatham House concluded that even a “do no harm” approach in line with conflict-sensitive guidelines may inadvertently fuel conflict. Chatham House, *Investing in Stability: Can Extractive-Sector Development Help Build Peace?*, June 2015.

³⁸ J. Bohoslavsky, *Tracking Down the Missing Financial Link in Transitional Justice*, *International Human Rights Law Review* 1 (2012), 54-92, 61.

³⁹ S. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* (2001), 24-525. For a comprehensive study on domestic remedies for enterprises’ human rights abuses see, J. Zerk, *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights*, 2013.

human rights violations. Cases of beneficial complicity require that the corporation profits either directly or indirectly from human rights violations. In the case of silent complicity, even “merely” standing by while human rights are violated is increasingly perceived as a form of complicity: silence can constitute not merely indifference, but tacit support and may have “a legitimizing or encouraging effect” on the perpetrator.⁴⁰ Many important challenges are posed by the contributions to violations of human rights made by corporations during the course of their “‘regular’ business conduct”, as opposed to those incurred through “specific, overt, and deliberately harmful” activities.⁴¹

In practice, sanctions for direct perpetration and/or complicity in atrocity crimes differ according to the nature of the perpetrator, that is, whether the responsibility lies with the company itself or with its directors, senior management, and employees. Although there should be no objection to the proposition that a corporate actor is bound to observe human rights law to the same extent as a natural person,⁴² many domestic legal systems do not recognize criminal liability for corporations as legal entities. Along the same lines, international jurisprudence has recognized that corporations bear some fundamental international obligations. However, international sanctions are most often applied to individual managers,⁴³ as international criminal tribunals do not usually have jurisdiction (*ratione personae*) over those private legal entities.⁴⁴

⁴⁰ Wettstein, *supra* note 3, quoting Clapham and Jerbi 2001; Ramasastry 2002.

⁴¹ Ibid, 38.

⁴² P. Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation*, Business Ethics Quarterly, 22 (2012), 145-177, 154.

⁴³ One corporate executive, Joshua Arap Sang - former head of operations and well-known radio personality of Kass FM in Nairobi, Kenya - recently faced prosecution at the ICC as an indirect co-perpetrator of three counts of crimes against humanity. He was charged with using coded messages in his radio

broadcasts to commit murder, forcible transfer, and persecution. However, the Trial Chamber vacated the charges against Sang on April 5, 2016. D. Scheffer, *Corporate Liability under the Rome Statute*, Harvard International Law Journal, Vol. 57, Spring 2016, Online Symposium. See, *also*, International Human Rights Clinic at Harvard Law School, International Federation for Human Rights (FIDH), Corporación Colectivo de Abogados José Alvear Restrepo (CAJAR), *Article 15 Communication to the International Criminal Court*. The contribution of Chiquita corporate officials to crimes against humanity in Colombia, May 2017, available at <https://www.fidh.org/en/region/americas/colombia/human-rights-coalition-calls-on-icc-to-investigate-role-of-chiquita>.

⁴⁴ When the Rome Statute of the International Criminal Court was being negotiated there were an insufficient number of national jurisdictions that held corporations liable under criminal law, as opposed to civil tort liability. Since the Court's mandate and jurisdiction are based on the "principle of complementarity", the Court's provisions had to be compatible with criminal law provisions of State Parties. *Ibid.* See, *inter alia*, Pell and Bonner, *supra* note 11, 402-405. Currently, Austria, Brazil, Belgium, Chile, China, Croatia, Cyprus, Czech Republic, France, Guatemala, Hungary, Iceland, Indonesia, Japan, Lebanon, Lithuania, Morocco, Netherlands, Norway, Portugal, Republic of Korea, Romania, Senegal, Spain, Switzerland, Syria, and the United Arab Emirates, have enacted legislation under which corporations could be held liable under criminal law. Moreover, in a recent decision, the Special Tribunal for Lebanon took an innovative approach by investigating charges of contempt and interference with the administration of justice against a broadcasting company that aired the identities of confidential witnesses and failed to remove this information from its website and another third-party web platform, thus violating the tribunal pre-trial order, Special Tribunal for Lebanon, *Case against New TV S.A.L. Karma Mohamed Tahsin al Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Case No. STL-14-05/PT/AP/AR126.1, 2 October 2014, para. 33-74, 93. In the same line, the African Union's Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights (2014) has expanded the jurisdiction of the recently merged African Court of Justice and Human Rights "over legal persons" for crimes defined in the Rome Statute and other crimes. J. Calderón-Meza, S. Lee, S. Chang, A. Cabrera Silva, *An International Jurisdiction for Corporate Atrocity Crimes*, Harvard International Law Journal, Vol. 57, Spring 2016, Online Symposium.

B. The Guiding Principles on Business and Human Rights

The Guiding Principles on Business and Human Rights, as endorsed by the United Nations Human Rights Council in 2011, mirrored an international consensus in relation to the human rights impacts of business enterprises and the need to prevent, mitigate, and remedy any human rights violation that may come as a result of their operations. As highlighted by their author, Dr. John Ruggie, the Guiding Principles' normative contribution lies not in the creation of new obligations under international law, but in the elaboration of the implications of existing standards and practices for States and businesses:⁴⁵

The UNGPs stipulate three categories of business involvement in human rights harm; where a business enterprise (i) causes or may cause; (ii) contributes or may contribute; (iii) the impact is nevertheless directly linked to its operations. [...] There is a continuum between contribution and linkage. A variety of factors can determine where on that continuum a particular instance may sit. They include the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it.⁴⁶

⁴⁵ UN, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011 (hereinafter "Guiding Principles").

⁴⁶ J. Ruggie, Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context, 21 February 2017.

The Guiding Principles establish a threefold framework for analysis and action based on: (i) States' obligations to protect human rights and prevent violations from third parties, including enterprises; (ii) enterprises' responsibility to respect and not violate human rights; and (iii) the need to ensure better and wider access to justice for victims of human rights violations, through judicial and non-judicial mechanisms.⁴⁷

In other words, Pillar 1 reaffirms States' obligations to protect against human rights abuses by third parties, including business enterprises, within their territory and/or jurisdiction. This is accomplished by taking appropriate steps to prevent, investigate, punish, and redress such abuse through effective policies, legislation, regulations, and adjudication.⁴⁸

According to Pillar 2, all businesses – whether local or multinational – have the responsibility to respect human rights and avoid violations within their sphere of influence.⁴⁹ The responsibility to respect human rights is a global standard of expected conduct for all business enterprises. It is a standard that exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish them. Such responsibility exists over and above compliance with national laws and regulations designed to protect human rights.⁵⁰ The responsibility of enterprises to respect human rights, which includes the adoption of measures aimed at preventing atrocity crimes, will be examined throughout this paper.

Access to remedy – Pillar 3 – ascertains that State-based judicial and non-judicial grievance mechanisms should form the foundation

⁴⁷ Ibid.

⁴⁸ Ibid, Principle 1.

⁴⁹ Ibid, Principle 11.

⁵⁰ Ibid.

of a wider system of remedy for business-related human rights abuses. Within such a system, enterprises' operational-level grievance mechanisms can provide early-stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.⁵¹ Remedy can take a variety of forms, including apologies, restitution, rehabilitation, financial and/or non-financial compensation, punitive sanctions (whether criminal or administrative), and injunctions or guarantees of non-repetition.⁵²

The three pillars of the Guiding Principles are inextricably intertwined and mutually reinforcing: sovereign States establish the rules under which private activity develops. Enterprises operate in accordance with applicable international standards as well as domestic legal and regulatory frameworks established by home and host countries with the objective of maximizing their competitiveness and profitability. Finally, effective remedies are put in place in order to avoid the violations of rights, to provide for the restoration of rights, and to remedy harm.

However, in high-risk contexts, the Guiding Principles' framework becomes unbalanced, as Pillars 1 and 3 are not fully and effectively functioning. This leads to additional responsibilities for enterprises and increased complexities for management. In effect, States may not be able, or well positioned, to fulfill their responsibility to protect human rights due to a lack of resources, capabilities, or political will. In addition to this, and myriad other direct and indirect obstacles in accessing justice, a State's judiciary system might be non-functioning or prohibitively corrupt.

⁵¹ Ibid, Principle 25.

⁵² European Commission, *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2012, ECHRSG.OG.12.

Throughout the following chapters, these pillars will be discussed in relation to the prevention of atrocity crimes. Each chapter will discuss applicable principles and provide practical guidance, as well as highlight real-life examples in order to give an understanding of the challenges and lessons learned in this field.

Chapter 1: The obligations of States towards businesses and atrocity crimes prevention

According to existing obligations under international human rights, humanitarian, criminal, and refugee law, a State has the primary responsibility to protect its population by preventing atrocity crimes.⁵³ This duty includes both a prohibition on engaging, facilitating, and/or tolerating the commission of atrocity crimes as well as several positive obligations aimed at guaranteeing conditions that prevent the commission of atrocity crimes and/or to provide reparations for those already committed.⁵⁴

Among States' positive obligations to prevent atrocity crimes is the duty to protect against abuses by business enterprises. Such duty is a standard of conduct. Therefore, States are not *per se* responsible for human rights abuses by private actors. However, States may be in breach of their international obligations in cases where such abuse can be attributed to them or where they fail to take "appropriate steps to prevent, investigate, punish and redress" abuses committed by private actors.⁵⁵

With respect to attribution, it is a principle of international law that a State is responsible for the acts or omissions of its agents carried out in their official capacity, even if they are acting beyond the scope of their authority.⁵⁶ The international responsibility of the

⁵³ UN, Report of the Secretary General, *Responsibility to protect*, *supra* note 5 , para. 2, 6, 14.

⁵⁴ See, *inter alia*, Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

⁵⁵ Guiding Principles, Principle 1.

⁵⁶ See, *inter alia*, *Responsibility of States for Internationally Wrongful Acts*, U.N.Doc. A/RES/56/83; I/A Court H.R., *Mapiripán Massacre v. Colombia*. Judgment 15 September 2005, para. 108; *Pueblo Bello Massacre v. Colombia*. Judgment 31 January 2006, para. 111.

State includes the acts or omissions of any branch of government or organ thereof, independent of its rank. This responsibility is incurred immediately with the international wrongful act being attributed to the State.⁵⁷ In this regard, acts of State-owned business enterprises may be directly attributed to the State.⁵⁸

The international responsibility of the State may also arise when third-party human rights violations can be attributed to it, in the context of its obligations to ensure respect for those rights, such as when the State is in a position of guarantor.⁵⁹ In other words, acts of businesses may be attributed to States indirectly, due to a lack of due diligence to prevent such violations and/or due to the State's negligence or impunity.⁶⁰ Positive human rights obligations cannot represent a burdensome or disproportionate obligation;⁶¹ thus it must be established that, at the time of the violation, authorities knew or should have known about the real and immediate risk to an

⁵⁷ IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II., Doc. 57, December 31, 2009, para. 39.

⁵⁸ See, *inter alia*, I/A Court H.R., *Abril Alosilla and others v. Peru*, Judgment 4 March 2011.

⁵⁹ See, *inter alia*, I/A Court H.R., *Moiwana Community v. Suriname*. Judgment 15 June 2005, para. 211; *Bulacio v. Argentina*. Judgment 18 September 2003, para. 111.

⁶⁰ See, *inter alia*, I/A Court H.R., *Velásquez Rodríguez v. Honduras*, Judgment 29 July 1988, para. 174; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Judgment 20 November 2013, para. 378; ACHPR, *SERAC et al v. Nigeria*, Communication No. 155/96, 27 October 2001, para. 57, 58; IACHR, *Campeño Leaders of Bajo Aguán, Honduras*, Precautionary Measure No. 50/14 (2014); *Hacienda Brasil Verde Workers v. Brazil*, Judgment 20 October 2016, para. 317-320.

⁶¹ See, *inter alia*, I/A Court H.R., *Masacre de Pueblo Bello v. Colombia*, Judgment 31 January 2006, para. 124; ECHR, *Rantsev v. Cyprus and Russia*, App. 25965/04, Judgment 7 January 2010, para. 287

individual (or groups of individuals) and did not take any appropriate measures to avoid or prevent this risk.⁶²

Additionally, States' supervisory and regulatory obligations encompass both the services provided by the State, directly or indirectly, as well as those offered by private individuals.⁶³ Hence, it covers situations where the services have been delegated - in which private individuals provide them on behalf of the State - and also the supervision of private services relating to rights of the "greatest social interest", as monitored by public authorities.⁶⁴

Thus, in accordance with the Guiding Principles, States should "exercise adequate oversight in order to meet their international obligations when they contract with businesses... to provide services that may impact the enjoyment of human rights."⁶⁵ Equally, States should also "take additional steps to protect against human rights abuses by enterprises that... receive substantial support and services from State agencies."⁶⁶

With respect to indigenous peoples in particular, extractive activities should not take place within their territories without their "free, prior and informed consent (FPIC)."⁶⁷ In all cases, States must ensure that the rights of indigenous peoples are not ignored in any activity or agreement reached with private individuals nor in the

⁶² See, *inter alia*, I/A Court H.R., *Comunidad Indígena Sawhoyamaya v. Paraguay*, Judgment 29 March 2006, para. 155; ECHR, *Osman v. The United Kingdom*, App. 87/1997/871/1083, Judgment 28 October 1998, para. 116.

⁶³ I/A Court H.R., *Ximenes Lopes v. Brasil*, Judgment 4 July 2006, para. 141.

⁶⁴ I/A Court H.R., *Albán Cornejo et al. v. Ecuador*, Judgment 22 November 2007, para. 119; *Suarez Peralta v. Ecuador*, Judgment 21 May 2013, para. 149.

⁶⁵ Guiding Principles, Principle 5.

⁶⁶ Guiding Principles, Principle 4.

⁶⁷ See, *inter alia*, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries and indigenous peoples*, A/HRC/24/41, 1 July 2013.

context of decisions made by public authorities that would affect their rights and interests. Therefore, as applicable, States must also carry out the task of inspecting and supervising the preservation of these rights and, when pertinent, deploy effective means to safeguard them through the corresponding judicial organs.⁶⁸

Finally, the obligation of States to act with due diligence entails facilitating access to suitable and effective judicial and non-judicial remedies when there has been a violation of human rights.⁶⁹ Accessing justice should, in a reasonable time, ensure the right of the alleged victims or their next-of-kin to have every necessary effort carried out in order to discover the truth about what happened, to punish the persons responsible, and to obtain comprehensive reparations.⁷⁰ When gross violations of human rights and atrocity crimes are perpetrated, States must conduct *ex officio* a prompt, genuine, impartial and effective investigation, over and above the procedural activity of the interested parties. The investigation must be conducted by all available legal means and designed to determine not only the direct perpetrators, but also the structures that played a role in allowing these violations as well as patterns of collaborative action behind the crime and its justifications, causes, and beneficiaries. Contextualizing such crimes

⁶⁸ I/A Court H.R., *Sarayaku v. Ecuador*, Judgment 27 June 2012, para. 167, quoting articles 6, 15, 17.2, 22.3, 27.3, and 28 of ILO Convention No. 169, and articles 15.2, 17.2, 19, 30.2, 32.2, 36.2 and 38 of the United Nations Declaration on the Rights of Indigenous Peoples.

⁶⁹ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, January 20, 2007.

⁷⁰ See, *inter alia*, I/A Court H.R., *Miguel Castro Castro Prison v. Peru*, Judgment 25 November 2006, para. 382; *Ituango Massacres v. Colombia*, Judgment 1 July 2006, para. 289.

in this fashion will provide the necessary elements to understand its operational structure.⁷¹

In the following sections, this policy paper will address three main aspects of operationalizing States' obligations towards business and atrocity crimes prevention: adequate regulation and remedy, enforcement, and engagement.

A. Adequate legal framework and remedy

States should set out clearly the expectation that all business enterprises – large or small; local or multinational⁷² – domiciled in their territory and/or jurisdiction respect human rights throughout the entirety of their operations.⁷³ A sufficiently detailed and robust legal framework ensures predictability for business enterprises by sending coherent and consistent messages,⁷⁴ levels the playing field, and provides tools for States to identify and prevent enterprises from taking on an enabling or complicit role in atrocity crimes. National Action Plans⁷⁵ and/or National Mechanisms for the

⁷¹ See, *inter alia*, I/A Court H.R., *Manuel Cepeda Vargas v. Colombia*, Judgment 6 May 2010, para. 117-118; *Pueblo Bello Massacre v. Colombia*, Judgment 31 January 2006, para. 143; *Río Negro Massacres v. Guatemala*, Judgment 4 September 2012, para. 190; *Contreras et al. v. El Salvador*, Judgment 31 August 2011, para. 127; ECHR, *C.N. and V. v. France*, App. 67724/09, Judgment 11 October 2012, para 109; *Osman v. The United Kingdom*, *supra* note 61, para. 288.

⁷² At least 70% of jobs globally are generated by small and medium-sized enterprises so more research should focus on the role of local businesses and not only on multinational corporations. World Economic Forum, *supra* note 31.

⁷³ Guiding Principles, Principle 2.

⁷⁴ *Ibid.*

⁷⁵ National Action Plans are government-drafted policy documents that articulate state priorities and indicate future actions to support implementation of legal obligations or policy commitments on a given topic. As such, they may promote convergence of state practice towards achievement of goals or

Prevention of Genocide and other Atrocity Crimes⁷⁶ may be useful tools in achieving this goal. Weak, incoherent or inconsistent regulation not only undermines the effectiveness of legal regimes, but also creates additional barriers to accountability by adding to the costs and complexities of enforcement and creates legal uncertainties and compliance dilemmas for companies.⁷⁷

standards, delivering better ‘vertical’ alignment of national laws, policies, and institutional practices with international commitments. At the same time, National Actions Plans processes should encourage the cross-government participation needed to secure ‘horizontal’ policy coherence as well as transparent, inclusive and broad stakeholder participation. Research suggest that the following elements should be taken into consideration for developing robust National Action Plans: (i) coverage of the full range of human rights, domestic and extraterritorial issues with a “hard law”/regulatory approach; (ii) inclusion of clear and evidence-based targets, milestones, and indicators (basis for accountability and comparative analysis); (iii) inclusion of a baseline assessment (addressing gaps in protection), (iv) publicity of the information about the process, results, contents, and arrangements for co-ordination of implementation and reporting; (v) identification of responsible entity for implementation and delivery of commitments; (vi) sufficient resources. C. Methven O’Brien, A. Mehra, S. Blackwell, C. Bloch Poulsenhansen, *National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool*, Business and Human Rights Journal (2016), 1, 117-126.

⁷⁶ National Mechanisms are vehicles through which States exercise their responsibility to prevent genocide and other atrocity crimes, as is required by all those party to the UN Convention for the Prevention and Punishment of the Crime of Genocide and other relevant international treaties, regional protocols, and national legislation. National Mechanisms differ from State to State, but four major themes emerge in their mandates and activities: risk assessment and early warning, development of training programs for their members and other civil servants, development of policy recommendations geared towards the protection of vulnerable populations, and communication with regional and international organizations on issues surrounding atrocity prevention. AIPR, *National Mechanisms for the Prevention of Genocide and other Atrocity Crimes: Durable Solutions to Challenges in Effective Prevention*, 2016. <http://www.auschwitzinstitute.org/publications/>

⁷⁷ UN, Report of the High-Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, para. 18, 30.

An adequate legal framework must ensure that policies, legislation, regulations, and enforcement measures **are suitable and serve to clarify** the applicability of national and international legal frameworks on atrocity crimes to business enterprises.⁷⁸ As international responsibility is not tantamount to jurisdiction or the mechanisms to implement it; domestic laws must recognize, incorporate, and define the concrete implications of certain principles of public international law:⁷⁹ standards of conduct, different modes and levels of corporate responsibility, and sanctions for enterprises' involvement in atrocity crimes should all be expressly enshrined in law and aligned with the responsibility of enterprises to conduct HRDD.⁸⁰ Corporate abuses must be directly addressed in human rights terms,⁸¹ and not only as an extensive interpretation of environmental, community, or social issues.⁸² Moreover, the legal framework should be useful in addressing the risk of business involvement in atrocity crimes⁸³ and provide **practical guidance** on how to respect human rights throughout enterprises' operations.

Additionally, the legal framework should establish sufficient mechanisms for **deterrence and redress**. Criminal law imposes strict requirements and a heavy burden on the justice system (i.e. burden of proof, presumption of innocence, proof beyond reasonable doubt). Currently, in jurisdictions where corporations can be held criminally liable, cases are often settled by penalties consisting of cash payments coupled with a commitment that there be no criminal prosecutions; thus allowing those who caused or

⁷⁸ Ibid, para. 13.

⁷⁹ Bohovslasky, *supra* note 38, 76.

⁸⁰ Report of the High-Commissioner for Human Rights, *supra* note 77, para. 18.

⁸¹ Gear, Weston, *supra* note 2, 37.

⁸² Muchlinski, *supra* note 42, 159.

⁸³ Guiding Principles, Principle 7.

benefitted from the crime(s) to avoid any serious consequences.⁸⁴ At the same time, mere individual criminal prosecution would not lead to the organizational change necessary at the corporate level to reform the policies and structures that have facilitated the commission of the crimes. Thus, both the individual responsible and the company should be targeted,⁸⁵ as human rights violations can be deterred by criminal punishment of perpetrators as well as civil and/or administrative liability of the companies responsible.⁸⁶

There is a range of possible and appropriate sanctions for corporations involved in atrocity crimes. These sanctions fall within the scope of civil, administrative or criminal law, depending on the particularities and specifics of each legal system. For example, the best-known sanctions are fines, as corporations are profit-driven entities and would be expected to respond to monetary incentives. However, when viewed from a behavioral perspective, “monetary incentives run the risk of commoditizing moral values and social norms.”⁸⁷ Therefore, other complementary sanctions should be applied, including: the dissolution of the corporation, “judicial surveillance,” a public display and distribution of the sentence, general or special confiscation of assets, exclusion from public procurement, a permanent or temporary closure of one or more of the company’s establishments that were used to commit the crimes,

⁸⁴ See, *inter alia*, B. Ferencz, *An International Jurisdiction For Corporate Atrocities: Observations of a former Nuremberg War Crimes Prosecutor*, Harvard International Law Journal, Vol. 57, Spring 2016, Online Symposium; H. White, L. Stewart, D. Krehmeyer, T. Donaldson, *Chiquita and the Department of Justice*, Business Roundtable. Institute for Corporate Ethics, 2 February 2012.

⁸⁵ C. Kaeb, *A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors*, Harvard International Law Journal, Vol. 57, Spring 2016, Online Symposium.

⁸⁶ Ferencz, *supra* note 83.

⁸⁷ Kaeb, *supra* note 84.

and the appointment of independent compliance monitors,⁸⁸ among others. In the latter case, the appointment of monitors could facilitate change from within the corporation and serve a dual purpose: to “put in place effective compliance structures” and “to promote a corporate culture of integrity.”⁸⁹

Sanctions should be proportionate to the severity of the crime(s) and impacts, as well as the company’s level of responsibility and actual involvement: if the company negligently contributed to atrocity crimes due to ineffective HRDD mechanisms, an independent monitor could serve the purpose of promoting a culture of compliance. On the other extreme, if the company based its business case on complicity in atrocity crimes, then dissolution might be more appropriate.

The legal framework should also ensure **consistency and coherence** among different *corpus iuris* (i.e. corporate law does not constrain, but instead enables enterprises’ respect for human rights).⁹⁰ Boards of Directors and Senior Management may find it difficult to convince their shareholders of the necessity of becoming actively involved in atrocity prevention efforts as, “in principle, a publicly traded company needs to be accountable... only to shareholders pursuant to its fiduciary duties.”⁹¹ However, a reluctance to address human rights issues may be detrimental to the enterprise’s interests due to inherent legal and reputational risks.⁹² Such reluctance to address human rights issues might be avoided by harmonizing legal obligations and standards from different branches of law.

⁸⁸ Ibid. See, *inter alia*, United States Foreign Corrupt Practices Act; A. Kirsch, *Criminal Liability for Corporate Bodies in French Law*, EUR. BUS. L. REV. 41 (1998).

⁸⁹ Ibid.

⁹⁰ Guiding Principles, Principle 3.

⁹¹ Alleblas, *supra* note 13.

⁹² Muchlinski, *supra* note 42, 158.

Finally, the legal framework should provide **effective remedy**, including impartial, independent, and effective judicial and non-judicial remedies for business-related human rights abuses. Barriers in accessing justice, such as a lack of legal assistance, a lack of protection mechanisms for victims and human rights defenders, and litigation costs, should be properly addressed.⁹³ Access to remedy from a legal framework perspective should comprise effective avenues through which to seek and obtain legal assistance in cross-border cases as well as straightforward mechanisms through which authorities can order enforceable and appropriate sanctions and remedies, among others.⁹⁴

In the case of multinational corporations, home countries should also establish provisions with **extraterritorial reach** in their legal frameworks. These provisions must include the notion that companies in control of subsidiaries or other entities with whom they do business are legally responsible for the harm these entities cause, assuming that they knew, or should have known, of the likelihood of this harm.⁹⁵ Hence, violations are not tolerated “at home” nor “abroad”.⁹⁶ There are strong policy reasons for home States to clearly set out the expectation that businesses respect human rights abroad, especially where the State itself is either involved with, or acting in support of, such businesses (i.e. ensuring predictability, addressing the matter of alleged competitive

⁹³ FIDH, *Corporate Accountability for Human Rights Abuses A Guide for Victims and NGOs on Recourse Mechanisms*, May 2016.

⁹⁴ Report of the High-Commissioner for Human Rights, *supra* note 77, para. 18.

⁹⁵ Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, POL 30/001/2014 (Mar. 7, 2014).

⁹⁶ Within the European Union realm, see, *inter alia*, Brussels I Regulation provides that ‘national courts within the EU have jurisdiction over all who are domiciled in their national jurisdiction’ and the Rome II Regulation imposes a uniform rule dictating that the applicable law of a claim shall be the law of the state where the damage occurred, irrespective of where the claim is brought. See, *also*, Case of Chandler v Cape, [2012] EWCA (Civ) 525 (Eng).

disadvantage and preserving the State's own reputation).⁹⁷ Moreover, as explained by the Guiding Principles:

In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.⁹⁸

It has been established that numerous large corporate actors have the capacity to “operate across borders in ways that transcend the regulatory control of any one State”.⁹⁹ Therefore, in addition to explicitly establishing enterprises’ human rights responsibilities, home States should ensure access to effective remedies within their jurisdiction and work to overcome common barriers in accessing justice. These often include a lack of jurisdiction, material competence, standing, or cause of action, among others.¹⁰⁰

The degree to which **international cooperation in cross-border cases** is realized has a profound effect on overall accountability and access to remedy in practice. States should strengthen methods, systems, and norms to ensure legal assistance and cooperation in such cases.¹⁰¹ International cooperation does not end with the implementation of formal international legal arrangements, since,

⁹⁷ Guiding Principles, Principle 2.

⁹⁸ Guiding Principles, Principle 7.

⁹⁹ Gear, Weston, *supra* note 2, 26.

¹⁰⁰ FIDH, *supra* note 93.

¹⁰¹ Report of the High-Commissioner for Human Rights, *supra* note 77, para 25.

as explained by the United Nations High Commissioner for Human Rights:

State agencies can experience a range of practical challenges that may undermine effective cooperation, including a lack of information about how to make requests to agencies in other States, a lack of opportunities for cross-border consultation and coordination, differences of approach regarding issues of privacy and the protection of sensitive information, a lack of resources needed to process requests in a timely manner, and a lack of awareness of investigative standards in other States.¹⁰²

i. Voluntary Initiatives

For several years, many voluntary initiatives, guidelines, and standards have been developed to aid businesses in upholding their responsibility to respect human rights. These initiatives have been led by the private sector, as well as through multi-stakeholders alliances. There are no specific initiatives for atrocity crimes prevention, although some of the existing mechanisms might be useful for understanding, analyzing, and acting upon relevant risk factors.

In 2000, the Voluntary Principles on Security and Human Rights were adopted as a guide designed specifically for the extractive industry. The Voluntary Principles involve States, business enterprises, and non-governmental organizations and establish several standards related to: (i) the evaluation and management of security risks; (ii) the interaction between enterprises and public

¹⁰² Ibid, para. 27.

security; (iii) enterprises' coordination efforts with private security providers; (iv) available mechanisms for periodic and ongoing consultations with States and civil society; and (v) the need to adopt response processes in case of abuse. These principles are only a guide and have no disclosure mechanisms or sanctions in case of non-compliance.¹⁰³

In 2003, the Extractive Industries Transparency Initiative (EITI) emerged as a global standard to promote the open and accountable management of natural resources. The EITI standard entails the analysis of several elements such as licenses, contracts, production oversight, tax collection, income distribution, and income management. These elements are consolidated in a report that discloses States' income from extractive activities as well as relevant payments made by businesses. The report is then evaluated by an independent auditor according to international accounting standards. EITI compliant countries must create a working group with interested stakeholders, including enterprises and civil society. This working group is subsequently in charge of developing and monitoring the work plan.¹⁰⁴

In 2009, the Sustainable Stock Exchanges (SSE) Initiative was organized jointly by the UN Conference on Trade and Development, the UN Global Compact, the UN Environment Program Finance Initiative, and the Principles for Responsible Investment (PRI).¹⁰⁵ This initiative promotes reporting on environmental, social, and corporate governance issues by listed enterprises. It is aligned with the demand for information on businesses' human rights performance by insurance companies,

¹⁰³ Information available at <http://www.voluntaryprinciples.org/>.

¹⁰⁴ Information available at <https://eiti.org/>.

¹⁰⁵ Information available at <http://www.sseinitiative.org/>.

institutional investors, and shareholders, so that they may better prevent liabilities, damages, and losses.¹⁰⁶

In 2011, the Organization for Economic Co-operation and Development (OECD) issued the Guidelines for Multinational Enterprises. These guidelines contain non-binding principles and recommendations from governments to enterprises and create National Contact Points as mediation and conciliation platforms. The National Contact Points work to implement the aforementioned principles, but have no adjudication powers.¹⁰⁷

Voluntary initiatives have the advantage that duty-holders (enterprises) can take their own particularities and shortcomings into consideration and adopt measures that better account for these circumstances. However, the results of the previously mentioned initiatives have been limited and have not achieved substantial improvements. This is largely due to the small number of participants, lack of effective implementation, disclosure of false, partial and/or distorted information, and the lack of monitoring and supervision mechanisms.¹⁰⁸ Therefore, although these initiatives can represent a first step towards compliance with enterprises' responsibilities to respect human rights, adequate legal regimes are

¹⁰⁶ See, *inter alia*, E. McAteer et al, *Shareholder Activism and Corporate Behaviour in Ecuador: A Comparative Study of Two Oil Ventures*, in EARTH MATTERS: INDIGENOUS PEOPLES, THE EXTRACTIVE INDUSTRIES AND CORPORATE SOCIAL RESPONSIBILITY 182, (C. O'Faircheallaigh and S. Ali eds., Greenleaf, 2008); L. Becchetti, R. Ciciretti, I. Hasan, N. Kobeissi, *Corporate social responsibility and shareholder's value*, Journal of Business Research 65 (2012) 1628–1635.

¹⁰⁷ Information available at: <http://www.oecd.org/corporate/mne/>.

¹⁰⁸ C. Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability* (Human Rights Watch, 2013), 33. Pensamiento y Acción Social; Arbeitsgruppe Schweiz Kolumbien, *Informe sombra de sostenibilidad de las operaciones de Glencore en Colombia* (2015), available in Spanish at http://www.askonline.ch/fileadmin/user_upload/documents/Thema_Wirtschaft_und_Menschenrechte/Bergbau_Rohstoff/Glencore_Kolumbien/INFORME_SO_MBRA_GLENCORE_-_SHADOW_REPORT_layout.pdf.

needed to define the roles, responsibilities, standards of conduct, and legal consequences for enterprises involved in gross violations of human rights and atrocity crimes.¹⁰⁹

¹⁰⁹ Ratner, *supra* note 39, 443, 533.

ii. *Human rights due diligence as a legal requirement*

In order to overcome the shortcomings of voluntary initiatives, legal frameworks should establish the responsibility of businesses to conduct HRDD as an explicit obligation by law. Upgrading the status of HRDD to that of a concrete legal requirement - and not only a good corporate governance standard - would promote increased harmonization between corporate and human rights law. It would also clarify enterprises' expectations, responsibilities, and standards of conduct for their directors (i.e. "fiduciary duties") with respect to the State, shareholders and investors.¹¹⁰

As a consequence of this legal requirement, companies would have to implement internal risk identification and management processes that would cover the company itself, as well as providers and subsidiaries. Businesses would also be required to adopt adequate rules for corporate governance and to assign roles and responsibilities to employees with regard to appropriate communication and decision-making processes.¹¹¹ Along the same lines, a legal requirement for HRDD would clarify and facilitate supervision and oversight by competent authorities and tribunals.¹¹² In high-risk contexts related to atrocity crimes, States should adopt enhanced HRDD standards.¹¹³

¹¹⁰ O. De Schutter et al, *Human Rights Due Diligence: The Role of States*, December 2012; E. García, *Empresas y derechos humanos: la visión de una empresa extractiva* in DERECHOS HUMANOS Y EMPRESAS (Aportes DPLF, no. 20, ago. 2015), 57.

¹¹¹ Muchlinski, *supra* note 42, 157.

¹¹² De Schutter, *supra* note 110.

¹¹³ UN, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and human rights in conflict-affected regions: challenges and options towards State responses*, A/HRC/17/32, 27 May 2011.

Moreover, as a legal obligation, HRDD might allow for discernment between enterprises' primary obligations (to respect human rights and act with the required standard of care according to the circumstances) and secondary obligations (necessary measures for compliance with the primary obligation, depending on the specifics of the enterprise and the context).¹¹⁴ Currently, the private sector is familiarized with the concept of "due diligence duty" since it has been widely accepted and applied in many legal systems as well as in the international realm as a legal standard to determine the scope and applicability of administrative, civil, and criminal sanctions.¹¹⁵

In practice, there are different approaches that would allow for the inclusion of an HRDD obligation within the legal framework. The first approach would impose a due diligence requirement as a matter of regulatory compliance. States would implement rules that require enterprises to conduct due diligence directly, as a legal obligation, or indirectly, by offering companies the opportunity to use due diligence as a defense against charges of criminal, civil or administrative violations. The second regulatory approach would provide incentives and benefits to companies in return for their being able to demonstrate due diligence practice (i.e. "whitelisting" cooperative business enterprises for State procurement, investment, export credit and other transactions).¹¹⁶

A third approach involves States encouraging due diligence through transparency and disclosure mechanisms. Mandatory disclosure regimes based on precedents, as with anticorruption regimes, may deter improper corporate behavior by allowing businesses to protect themselves from complicity in human rights abuses while

¹¹⁴ Ratner, *supra* note 39, 516-518.

¹¹⁵ See, *inter alia*, *Financial Action Task Force (FATF) recommendations*, available at <http://www.fatf-gafi.org/>.

¹¹⁶ Report of the Special Representative of the Secretary-General, *supra* note 113, para. 16; De Schutter, *supra* note 110.

pursuing legitimate corporate goals. Transparency-based models are comparatively easier to develop and implement as they focus on knowledge channels tied to those necessary for pre-existing disclosures, as required by law (i.e. security laws).¹¹⁷ Finally, a fourth category would involve a combination of one or more of these approaches. States regularly combine different aspects of these approaches in order to construct an incentive structure that promotes businesses' respect for standards laid out in the rules and also ensures that compliance can be assessed in an efficient and effective manner.¹¹⁸

B. Enforcement

Even if the legal framework is adequate, the failure to enforce existing laws and regulations that directly or indirectly regulate businesses' respect for human rights often represents a significant legal gap in State practice.¹¹⁹ For example, Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act requires companies listed on United States stock exchanges to verify and disclose whether their products contain "conflict minerals" from Central Africa. However, a recent study revealed that 79 of the 100 companies analyzed failed to meet the minimum requirements of the law; only 16% of companies go beyond their direct suppliers to contact, or attempt to contact, the smelters or refiners that process the minerals; and more than half of the companies sampled do not even report to senior management when a risk is identified in their supply chain.¹²⁰

¹¹⁷ Pell and Bonner, *supra* note 11, 426.

¹¹⁸ De Schutter, *supra* note 110.

¹¹⁹ Guiding Principles, Principle 2.

¹²⁰ Amnesty International, *Digging for Transparency: How U.S. Companies are Only Scratching the Surface of Conflict Minerals Reporting*, April 22, 2016.

In order to comply with States' obligation to prevent the involvement of business enterprises in atrocity crimes, a robust legal framework needs to develop in tandem with a suitable institutional infrastructure, qualified and trained staff, adequate follow-up and oversight mechanisms, and an effective system for the application of sanctions. Relevant agencies must have clear mandates and political support and must be properly resourced to address the problem of business involvement in atrocity crimes.¹²¹ States must deny access to public support and services for any business that is involved with atrocity crimes and refuses to cooperate in addressing the situation.¹²² Moreover, through intelligence collection and analysis, States should identify and interrupt supply chains that fuel atrocities, as well as targeting and isolating the relevant enablers (i.e. blocking transactions, applying diplomatic pressure).¹²³ **Case Study 4: "International Conference on the Great Lakes Region (ICGLR)" provides information about a regional mineral tracking and certification mechanism.**

Encouraging civil society accountability mechanisms may also be helpful in promoting the State's enforcement role. The inclusion of well-designed participation and accountability processes, with respect to enterprises' implementation of human rights responsibilities, can help to promote good governance as part of a broader array of approaches emphasizing conflict-sensitivity.¹²⁴ However, effective civil society scrutiny is only possible if there are appropriate guarantees of protection and security for victims, witnesses, lawyers and human rights defenders who are usually subject to violence and harassment, among other intimidating

¹²¹ Report of the Special Representative of the Secretary-General, *supra* note 113, para. 13.

¹²² Guiding Principles, Principle 7.

¹²³ Human Rights First, *Disrupting the Supply Chain*, *supra* note 35.

¹²⁴ J. Robinson, *Making social accountability work. Promoting peaceful development in Uganda*, International Alert, March 2016.

practices. A recent report on extractive and agro-industries in five countries concluded that:

...in fragile states, the space for civil society to hold the private sector accountable and to call on the government through judicial or non-judicial cases in case of business-related human rights violations is often limited, and this space is increasingly shrinking. This is due to weak legal frameworks, a lack of political will or a culture of fear and intimidation among local populations, human rights defenders and other civil society members.¹²⁵

C. Active engagement

States should engage with enterprises at the earliest possible stage in order to effectively prevent atrocity crimes. States should provide adequate assistance to assess and address heightened risks of abuses, paying special attention to both gender-based and sexual violence. States can help to assess and address risks by providing information (and/or gathering and making information available in the public domain) about human rights as well as by assisting in the identification of pertinent and effective tools (i.e. due diligence). States should ensure that their own agencies are sufficiently competent to provide useful and effective advice.¹²⁶ Awareness-raising campaigns and efforts to address enterprises' human rights responsibilities within formal business education and degree

¹²⁵ M. van Dorp (SOMO), *Fragile! Handle with Care: Multinationals and Conflict Lessons from SOMO's Multinational Corporations in Conflict-Affected Areas programme*, *supra* note 32, 53.

¹²⁶ Report of the Special Representative of the Secretary-General, *supra* note 113, para. 14, 15, 16.

programs could work towards fostering a culture of compliance and function as useful engagement tools in their own right.

In addition, States should express their expectations with regards to the behavior of business enterprises. This involves establishing, requiring, and communicating legal obligations such as heightened due diligence, conflict sensitivity, and atrocity prevention standards for enterprises operating in high-risk contexts. Equally, as enumerated by the Guiding Principles, States should encourage enterprises to communicate how they address their human rights impacts.¹²⁷

¹²⁷ Guiding Principles, Principle 3, United Nations, Report of the Special Representative of the Secretary-General, *supra* note 113, para. 10.

Chapter 2: The responsibility of enterprises to prevent atrocity crimes

Enterprises' responsibility to respect human rights includes, but also exceeds, "corporate social responsibility" programs. In effect, corporate social responsibility measures, usually involving *pro bono* work, scholarship programs, and monetary donations are voluntary initiatives that depend on the business case and are based on the companies' preferences and/or priorities. The responsibility to respect human rights is imbedded in law and is based on universally recognized principles.¹²⁸ Human rights are not voluntary goals that businesses can pick and choose from. Atrocity crimes violate fundamental and non-derogable human rights; thus, preventing atrocity crimes should be one of the main elements of the broader responsibility to respect human rights.

As enumerated by the Guiding Principles, in every context and locale in which they operate, business enterprises should (i) comply with all applicable laws and respect internationally recognized human rights, (ii) seek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements, and (iii) treat the risk of causing, or contributing to, human rights abuses as an issue of legal compliance.¹²⁹ Human rights law and international humanitarian law (when applicable) should be included in the compliance objectives of any business enterprise. Management frameworks that do not include human rights risks and impacts are incomplete,

¹²⁸ C. Avery, *The difference between CSR and human rights*, Corporate Citizenship Briefing, 2006, available at <http://business-humanrights.org/en/pdf-the-difference-between-csr-and-human-rights>.

¹²⁹ Guiding Principles, Principle 23.

as important gaps and material weaknesses are not identified and/or addressed.¹³⁰

As a consequence of increasing pressures from governments, shareholders, investors, insurers, civil society, employees, trade unions, and customers, there are currently many reputational, operational, financial and legal risks related to human rights issues. For example, the risk of legal claims for human rights abuses is evident, taking into account the increasing number of judicial proceedings and non-judicial mechanisms aimed at holding business enterprises accountable.¹³¹ Neither amnesty, immunity, nor any statute of limitations applies to atrocity crimes.¹³² Therefore,

¹³⁰ Human rights risks are as much commercial risks as social or ethical concerns. Muchlinski, *supra* note 42, 156.

¹³¹ On 21 April 2017, the Dutch Court of Appeal in 's-Hertogenbosch issued a decision holding Mr. Guus Kouwenhoven, a Dutch national, responsible as an accessory to war crimes committed in Liberia and parts of Guinea between August 2000 and December 2002. As the president of the Oriental Timber Company (OTC) and director of the Royal Timber Company (RTC), Mr. Kouwenhoven supplied weapons, and material, personnel and other resources to former Liberian President Charles Taylor and his armed forces, which were used to fuel their fight against a rebel group, the Liberians United for Reconciliation and Democracy (LURD). The court held Mr. Kouwenhoven liable not only for directly violating a UN arms embargo in place at the time, but equally as an aider and abettor to war crimes that were committed using the resources he provided, including rape, pillage, murder, and inhumane treatment. D. de Vos, *Corporate accountability: Dutch court convicts former "Timber baron" of war crimes in Liberia*, 24 April 2017, available at <https://ilg2.org/2017/04/24/corporate-accountability-dutch-court-convicts-former-timber-baron-of-war-crimes-in-liberia/>. See, also, Business & Human Rights, *Corporate Legal Accountability* reports, available at <https://business-humanrights.org/es>.

¹³² See, *inter alia*, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147; *The rule of law and transitional justice in conflict and post-conflict societies*, UN Secretary General, S/2004/616; *Rule of Law Tools for Post-Conflict States – Amnesties*, OHCHR, (2009); Resolution 11/12, *Human Rights and Transitional Justice*, Human Rights Council, 1 October 2009, cons. 8; F. Lessa; L. Payne

management should demonstrate how a given business activity can remain viable and deliver its expected benefits while accounting for existing or potential human rights risks, their impacts, and the proposed prevention, mitigation, and improvement measures.¹³³

The underlying premise of risk management is that every entity exists to provide value for its stakeholders. Value is maximized when management sets objectives and employs strategies to strike an optimal balance between growth and return, goals, and related risks, and is subsequently able to deploy resources effectively in pursuit of the entity's objectives. Within the context of an enterprise's established mission, vision, and values, management establishes strategic objectives, selects strategy, and sets aligned objectives, which cascade through the entity.¹³⁴

Starting to integrate human rights into business management requires the support of the Board of Directors and Senior Management, along with a shared understanding of the advantages that a "rights-aware" approach offers to the business. A rights-aware approach means that "a business is willing to accept that its stakeholders (employees, suppliers, communities, customers) have

(eds.), *Amnesty in the Age of Human Rights Accountability Comparative and International Perspectives*, Cambridge University Press (2012).

¹³³ COSO, *Internal Control – Integrated Framework*, 2013; COSO, *Enterprise Risk Management – Integrated Framework*, 2004; The International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), in association with the UN Global Compact, *Guide to Human Rights Impact Assessment and Management* (HRIAM), 2010; The Danish Institute for Human Rights. Human Rights & Business Project, *HUMAN RIGHTS COMPLIANCE ASSESSMENT (HRCA)*, 2006; BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, *A Guide for Integrating Human Rights into Business Management*.

¹³⁴ Ibid.

universal rights and that any decisions made by the business should strive to respect them.”¹³⁵

A company becomes aware of, addresses, and prevents human rights risks through the development of appropriate and relevant policies, risks and impacts assessment processes, and management systems. These allow the entity to respond to human rights challenges effectively. While actions focused on mitigation will usually address the human rights risks and potential impacts at the business activity level, integration of human rights into management strategies should happen at the corporate level.¹³⁶

However, a significant consideration is that human rights, conflict prevention, and strategic engagement are “still largely perceived to be the domain of the corporate social responsibility or community relations ‘ghetto’.”¹³⁷ That is to say, that they are still “not part of mainstream management training and development.”¹³⁸ Thus, until “a corporate culture of concern for human rights” is imparted onto the constituent employees of an enterprise, due diligence initiatives may be rendered ineffective and “degenerat[e] into a ‘box-ticking’ exercise designed for public relations” instead of functioning as a vital consideration in the corporate decision-making process.¹³⁹

¹³⁵ The International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), in association with the UN Global Compact, *Guide to Human Rights Impact Assessment and Management* (HRIAM), 2010.

¹³⁶ Ibid.

¹³⁷ Ganson, *supra* note 28.

¹³⁸ Ibid.

¹³⁹ Muchlinski, *supra* note 42, 156.

A. Human rights due diligence

In order to implement the responsibility to respect human rights, enterprises must adopt HRDD mechanisms to understand, recognize, and demonstrate that they have adopted the necessary measures to prevent and remedy any human rights violations that have been committed and/or allowed.¹⁴⁰ While many businesses may not use a distinct “human rights vocabulary,” most of them cover a number of human rights issues through their existing policies and procedures (i.e. “health and safety” or “labor” issues).

However, these existing policies and procedures rarely address human rights issues in a systematic and/or comprehensive way, nor do they regularly include methodologies dedicated to atrocity crimes prevention. This most often leads to efforts that are incomplete, limited, and uncoordinated. HRDD can be incorporated within other processes, such as risk assessments or environmental and social impact assessments, assuming that they comprehensively include all internationally recognized human rights as a reference point.¹⁴¹ As explained by the Guiding Principles, “[HRDD] can also be included within broader enterprise risk-management systems, provided that it goes beyond identifying and managing material risks to the company itself and includes considerations of risks to rights-holders.”¹⁴²

The Guiding Principles also assert that HRDD should:

...include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. HRDD must take into account country,

¹⁴⁰ Guiding Principles, Principles 11, 15.

¹⁴¹ Ibid, Principle 18.

¹⁴² Ibid, Principle 17.

region, the company's policies, procedures and practices, existing business relationships within the project, and the business activity's time frame and lifecycle.¹⁴³

HRDD must also consider: (i) intrinsically high-risk components specific to the **industry** (i.e. security, arms, surveillance and public services industry; large-scale projects); (ii) **client** relationships (i.e. if the company is a Government provider and/or partner or, more generally, in cases where companies' products, services, and/or assets might be used to commit atrocity crimes) and; (iii) **provider and partner** relationships (i.e. if a company sources from and/or engages with companies related and/or involved in atrocity crimes).

HRDD should be initiated as early as possible and should be simultaneously ongoing, proactive, and reactive. The scope and characteristics of HRDD will depend on the size and complexity of the enterprise, as well as the level of human rights risks inherent in, and related to, its activities.¹⁴⁴ However, in general, it should include the following phases:

¹⁴³ Ibid, Principle 23.

¹⁴⁴ Ibid.

Figure 2



Strategize - Define the business enterprise's human rights strategy. Plan and outline the approach, scope and methodology for the human rights management and due diligence framework.

Identify & Assess - Identify and prioritize key human rights risks, impacts and objectives. Assess the probability and impact of each actual and potential human rights risk. Establish the maturity level.

Address - Implement control systems for prevention and remediation of adverse human rights impacts. Ensure effective implementation of control systems.

Evaluate - Audit and measure impact. Evaluate the business enterprise's performance.

Report - Communicate business enterprise's human rights strategy, assessment, action plan, progresses and shortcomings.

B. Enhanced human rights due diligence

In fragile contexts, such as conflict-affected and/or weak governance areas, enterprises are used to identifying, taking into account, and dealing with increased costs and threats. These often include maintaining security, safeguarding staff, and protecting assets (property, infrastructure, equipment); losses of personnel and expertise; disruptions of local markets, supply chains, and networks; as well as difficulties in raising capital and steep withdrawal costs and financial losses, among others.¹⁴⁵ However, enterprises are less used to analyzing and managing the human rights impacts associated with such contexts.

In high-risk contexts, where States do not fulfill their obligations to promote and protect human rights, enterprises may find it difficult to comply with their responsibility to respect human rights. At the same time, heightened risks demand heightened care and vigilance. The failure of States to effectively regulate and control activity within their borders increases the pressure on enterprises to assume additional responsibilities. The company might not be responsible for the existence of human rights abuses but it is responsible for ensuring that its operations do not widen, deepen and reinforce such reality.¹⁴⁶ Therefore, enterprises must conduct enhanced HRDD procedures and implement a formal reporting mechanism in order to provide transparency and accountability and to explain how risks are managed.¹⁴⁷

The following section briefly analyzes the main components of an enhanced HRDD framework that is oriented towards atrocity

¹⁴⁵ Institute for Human Rights and Business, *supra* note 1.

¹⁴⁶ *Ibid.*

¹⁴⁷ Guiding Principles, Principle 23.

crimes prevention. **Annex 2** provides a practical guide to better understanding and applying an enhanced HRDD framework.¹⁴⁸

i. *Strategize*

Define, design, and adopt a suitable strategy to deal with atrocity prevention, taking into account the nature and scope of the business enterprise's human rights impacts while avoiding reactive approaches. Anticipation reveals genuine concern, and not improvised or *ad hoc* responses. An enterprise's response should be both straightforward and flexible. Systems oriented towards anticipating and recognizing potential risk factors ("overcoming... organizational myopia, or short-sightedness"), as well as calibrating and mobilizing responses to them ("overcoming... organizational dyspraxia, or motor impairment") are critical to conflict and atrocity prevention.¹⁴⁹

¹⁴⁸ See, *inter alia*, Institute for Human Rights and Business, *supra* note 1; UN Global Compact – PRI, *Guidance on Responsible Business in Conflict-Affected and High -Risk Areas*, 2010; OECD, *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 2006; Shift Project - Mazars, *UN Guiding Principles Reporting Framework*, 2015; *Voluntary Principles on Security and Human Rights, Implementation Guidance Tool*; OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2012; Nomogaia, *Human Rights Impact Assessment. A toolkit for practitioners conducting corporate HRIAS*, 2012; ICRC, *Businesses and International Humanitarian Law*; International Alert, SOMO Paper, *Reality Check The gender dimensions of the impact of multinational companies' operations in fragile and conflict-affected areas – Guidance for research*, December 2015; DCAF-ICRC, *Addressing Security and Human Rights Challenges in Complex Environments Toolkit*, June 2016 available at the hub <http://www.securityhumanrightshub.org/content/toolkit>.

¹⁴⁹ Ganson, *supra* note 28.

ii. Identify & Assess

Identify and prioritize key human rights risks – including patterns of discrimination and exclusion – and objectives and assess their probability and impact. Conduct a thorough investigation: assess the broader environment as well as the political and socio-economic context. Introducing considerations for human rights, conflict-sensitivity, and atrocity prevention may allow for more leverage and control over how these issues are addressed.

Engage directly with potential and actual affected stakeholders through **meaningful consultation mechanisms**; show respect for, and meet the expectations of, local communities and build genuine relationships. Meaningful engagement involves direct interaction between the business enterprise and its key stakeholders and includes different levels of information disclosure, consultation, and partnership. Providing information to, and receiving information and feedback from, stakeholders is a “two-way process” for companies.¹⁵⁰ Meaningful consultation requires an explicit architecture for engagement that has been negotiated collaboratively with stakeholders, especially those who suffer severe impacts and have little to no power or influence.¹⁵¹ In high-risk contexts, robust stakeholder engagement needs to be carried out in a practical manner that is mindful of the situation. For instance, it needs to take into consideration risks that could be generated for stakeholders by engaging in the process (i.e. armed group exerting pressure on, and carrying out violence against, stakeholders). At the same time, it must adapt its methods of communication according to the context. That is to say,

¹⁵⁰ The International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), in association with the UN Global Compact, *Guide to Human Rights Impact Assessment and Management* (HRIAM), 2010.

¹⁵¹ Ganson, *supra* note 28; International Alert, *supra* note 9.

communities need to better understand the most important technical aspects of a project; what they can expect from its presence, and what impacts it is expected to have in their everyday lives (i.e. moving livestock or changing routes to schools).¹⁵²

iii. Address

Implement control systems for the prevention and remediation of adverse human rights impacts and ensure that they are effectively implemented. Clarify expectations and be transparent: explain the limits of enterprises' responsibilities and capabilities. Address gaps in domestic legislation through internal policies. Conduct adequate human rights training for target groups, integrating real life dilemma resolution into training efforts. Establish early-warning risk-awareness systems to monitor atrocity risk factors. Speak out about wrongdoing: silent complicity "reflects the expectation on companies that they raise systematic or continuous human rights abuses with the appropriate authorities."¹⁵³

Set up effective and accessible operational-level grievance mechanisms to engage directly with the business enterprise to assess emerging issues and provide remediation of any harm, without undermining existing state-based processes.¹⁵⁴ In high-risk contexts, such mechanisms, created and administered by

¹⁵² Ganson, *supra* note 28.

¹⁵³ Wettstein, *supra* note 3.

¹⁵⁴ See, as an example, *Olgeta Meri Igat Raits, a framework of remediation initiatives developed by Barrick Gold Corporation ("Barrick") and the Porgera Joint Venture ("PJV") for women who have been victims of sexual violence by security personnel at the Porgera mine in Papua New Guinea. Comments from the UN Office of the High Commissioner for Human Rights*, available at: <http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf>.

enterprises, may be the only available avenue for accessing justice and can help prevent tensions from escalating.

Operational-level grievance mechanisms should: (i) be accessible directly to individuals and communities; (ii) consider the context (i.e. literacy rates) and not be particularly formal or bureaucratic; (iii) take into account traditional ways of resolving grievances; (iv) not require that those bringing a complaint first access other means of recourse; (v) not preclude access to judicial or other state-based processes or undermine the role of legitimate trade unions; (vi) have triggers for complaints to be escalated within the enterprise; and (vii) provide adequate protection to prevent retaliation against complainants.¹⁵⁵

iv. *Evaluate*

Put in place both periodic and ongoing monitoring mechanisms aimed at measuring the impact and performance of the implemented human rights strategy. Independent third party audits may also be useful for identifying potential flaws or weaknesses. Be receptive to human rights reports developed by civil society. For example, recent research conducted on company responses to civil society reports on business-related human rights abuses concluded that:

While the average company response rate to human rights reports remains stable at 70 percent there are significant differences between companies, industrial sectors, and corporate home states. The least responsive companies are state-owned conglomerates

¹⁵⁵ See, *inter alia*, European Commission, *supra* note 52.

and companies based in China, India, Israel, and Russia. Companies based in Brazil and South Africa have a much higher response rate than companies headquartered in BRICS in the Northern hemisphere. Companies are generally more inclined to respond to reports about alleged abuses within their own countries than to abuses committed abroad. Companies participating in the UN Global Compact have an above average response rate but being a participant in the Global Compact does not in itself guarantee a high response rate. Company responses containing references to international instruments or multi-stakeholder initiatives are rare indeed. Less than 1 percent of responses acknowledge that companies have a responsibility to respect human rights.¹⁵⁶

An unwillingness to respond to human rights reports does not, in itself, prove that a company has committed human rights abuses. However, it does serve as a signal indicating that a company does not take its due diligence obligation to engage with civil society seriously, as required by the Guiding Principles.¹⁵⁷

¹⁵⁶ Companies generally are more inclined to mention international instruments in their policy statements than in their responses to civil society. One reason may be that managers have not really internalized the codes of conduct posted on their corporate websites so that they are not able to cite the relevant provisions when appropriate. M. Kamminga, *Company Responses to Human Rights Reports: An Empirical Analysis*, Business and Human Rights Journal (2016) 1, 95-110.

¹⁵⁷ Ibid.

v. *Report*

Communicate the business enterprise's human rights strategy, assessment, action plan, progresses, and shortcomings. Formal reporting is expected where risks of severe human rights impacts exist, regardless of whether this is due to the nature of the operating context or the business' operations themselves. Provide a measure of transparency and accountability both to individuals or groups who may be directly affected and also to other relevant stakeholders, including investors. The report should provide sufficient information to evaluate the adequacy of a business enterprise's response to the particular human rights impacts involved.

Chapter 3: The role of international financial institutions in the prevention of atrocity crimes

As enumerated by the Guiding Principles, States should “ensure that international organizations neither restrain the ability of their member countries to meet their duty to protect nor hinder business enterprises from respecting human rights.”¹⁵⁸ Moreover, States should “encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity building and awareness-raising.”¹⁵⁹

As international organizations, international financial institutions (hereinafter “IFIs”) cannot violate customary international law by directly or indirectly financing the commission of atrocity crimes that breach *ius cogens* norms. This “hierarchical application of *ius cogens* norms avoids entering into the discussion over whether gross violations of human rights have a direct and obvious economic effect, so their consideration would be formally included in the IFIs mandates.”¹⁶⁰ Furthermore, “States are not allowed to deploy IFIs to violate international law when they cannot do so in their capacity as individual States: delegation cannot be used to avoid responsibility.”¹⁶¹

IFIs must recognize that “economic assistance can contribute to the perpetuation of human rights abuses, and such abuses, in turn, might bring about the necessary conditions to attract and obtain

¹⁵⁸ Guiding Principles, Principle 10.

¹⁵⁹ Ibid.

¹⁶⁰ Bohovlasky, *supra* note 38, 78.

¹⁶¹ Ibid., 81.

economic assistance.”¹⁶² For example, the complex “conditionality” packages issued by such institutions sometimes lower human rights and environmental protection standards and increase pressure on poor and marginalized societies, insisting upon “structural adjustments” such as deregulation, privatization and the removal of protective policies¹⁶³ which could stress already fragile environments. The World Bank has recognized that in fragile contexts, “even though prevention would be a far more cost-effective solution for all sides involved, avoiding the loss of many lives and livelihoods, regional and global actors often do not act until a full-blown war or civil conflict has erupted and directly threatens broader stability within a country and beyond.”¹⁶⁴ At the same time, international donors, both multilateral and bilateral, can provide the necessary financial guarantees and political confidence required for business to mobilize in volatile settings.¹⁶⁵ Thus, “countercyclical support” is able to assist by ensuring continued access to finance, imports, and exports.¹⁶⁶

As a historical case, the “machinery” employed by the Nazis effectively demonstrates how atrocity crimes “need access to huge financial resources in order to attain their ultimate goals.”¹⁶⁷ In this regard, research on the links and responsibilities of lenders to atrocity crimes perpetrators is gaining momentum and there are

¹⁶² Ibid, 68.

¹⁶³ Grear, Weston, *supra* note 2, 27.

¹⁶⁴ World Bank, *The Role of the Private Sector in Fragile and Conflict-Affected States*, World Development Report 2011. Background Paper.

¹⁶⁵ World Economic Forum, *supra* note 31.

¹⁶⁶ World Bank, *supra* note 164.

¹⁶⁷ Bohovlasky, *supra* note 38.

examples of enterprises and individuals investigated for providing financial assistance under such circumstances.¹⁶⁸

Thus, every lender should behave in a manner that respects the basic rules on due diligence in order to understand the likely consequences of its own behavior. Lenders should refrain from providing services “when financial assistance would predictably contribute to perpetuating conflict by strengthening an authoritarian regime and perpetrating crimes.”¹⁶⁹

However, to date, (i) IFIs risk management frameworks for determining, assessing and managing projects lack a specific human rights and atrocity crimes prevention approach;¹⁷⁰ (ii) those IFIs that do explicitly reference human rights commitments do not operationalize them by requiring human rights due diligence; (iii) IFIs themselves do not comprehensively and continually analyze social risks; and (iv) no IFIs ensure that the environmental and social due diligence of companies that they finance encompasses human rights due diligence.¹⁷¹ **Case Study 5: “Berta Cáceres” illustrates the violence faced by human rights defenders opposing large infrastructure projects financed by IFIs.**

¹⁶⁸ See, *inter alia*, information available at <https://www.mpf.gob.ar/lesa/>; Ministerio de Justicia y Derechos Humanos de la Nación Argentina, *Responsabilidad empresarial en delitos de lesa humanidad*, November 2015. On 25 November 2015, Argentina passed a law creating a Truth Commission (the “Bicameral Commission for the Truth, Memory, Justice, Reparation and Strengthening of Democratic Institutions”) to investigate, identify and report on the economic actors –national and foreign- who contributed to and/or benefited from the country’s military dictatorship of 1976-1983.

¹⁶⁹ Bohovlasky, *supra* note 38, 67.

¹⁷⁰ See, *inter alia*, the Equator Principles. Information available at <http://www.equator-principles.com/>

¹⁷¹ J. Evans, *The Record of International Financial Institutions on Business and Human Rights*, *Business and Human Rights Journal* (2016), 1, 327-332, 327-328.

The presence of human rights policies and due diligence practices should help investors differentiate and benchmark companies against their peers on their human rights performance.¹⁷² Nevertheless, irrespective of their standards, IFIs face the broader problem of a culture and incentive structure that measure results purely in financial terms which “encourage[s] staff to overlook, fail to articulate, or even conceal potential environmental, social, and conflict related risks, regardless of the organization’s policies.”¹⁷³

Lenders’ due diligence procedures should take into account internal and external political contexts. These include the political role of military forces; the seriousness and volume of human rights abuses and public knowledge about them; denunciations by international organizations, other States, and NGOs; features and performance of the national economy; monetary, trade and financial policies adopted by the government, the international financial context; the type, volume, date, frequency, and objective of relevant loans; human rights conditionalities; post-disbursement monitoring; the impact of the loans on the national economy as well as on the bureaucratic apparatus; the general evolution of the national budget and military expenditures, particularly those related to domestic security. An “empirical, interdisciplinary and holistic evaluation” should therefore be undertaken for every emerging case.¹⁷⁴

In addition, once atrocity crimes have been committed, it is important that IFIs contribute to ending such crimes and protecting and restoring the rights of the victims. This includes not resorting to

¹⁷² See, *inter alia*, UN Global Compact, *Investing the Rights Way. A Guide for Investors on Business and Human Rights*, 23 April 2013; N. Attig, S. El Ghoul, O. Guedhami, J. Suh, *Corporate Social Responsibility and Credit Ratings*, *Journal of Bus Ethics* (2013) 117:679–694.

¹⁷³ Evans, *supra* note 171, 328.

¹⁷⁴ Bohovlasky, *supra* note 38, 89.

a reliance on the veil of the international organization's immunities before domestic courts¹⁷⁵ – which could not be invoked to deny victims their right to access justice in the context of violations of *ius cogens* norms¹⁷⁶ as well as implementing complaint mechanisms which, depending on the circumstances, may be the only available remedy. In practice, IFIs' existing complaint mechanisms lack resources and relevant expertise. They are unable or unwilling to consider indirect and/or long-term damages caused by the projects they support and there is little evidence of IFIs' changed behaviors as a result of their existence. Moreover, such mechanisms remain largely unknown: communities are required to identify not only the company involved, but also the financier and its independent mechanism for ensuring accountability.¹⁷⁷ To remedy this, critical improvements are needed to allow for greater access to information, higher levels of awareness in the community, and additional monitoring of corrective action plans.¹⁷⁸ **Case Study 6: “National Association of Professional Environmentalists” illustrates shortcomings in the policies and compliant mechanisms of IFIs.**

¹⁷⁵ See, *inter alia*, *Jam v. International Finance Corporation*. Fishermen and farmers from north-western India sued the International Finance Corporation (IFC) in a US federal court over a \$450m loan for a coal-fired power plant. On 24 March 2016, the District Court ruled that the IFC has immunity from suit in US courts and dismissed the case. Information available at <https://business-humanrights.org/en/intl-finance-corp-lawsuit-re-financing-of-coal-fired-plant-in-india>.

¹⁷⁶ Bohovlasky, *supra* note 38, 88.

¹⁷⁷ Evans, *supra* note 171, 331-332.

¹⁷⁸ FIDH, *supra* note 93, 596.

Conclusion

Atrocity crimes do not come about as the consequences of isolated incidents or exceptionally irrational or senseless behavior by those in power. Instead, they must be understood as processes that, despite differing degrees of probability, could erupt in any country at any given time as the result of specific pressures becoming too great to manage by existing institutions within the political process.¹⁷⁹ While atrocity crimes require the support of complex networks and structures, the actors that are integral to the enabling of mass atrocities are also the ones that can deactivate risk factors in a timely manner.

Mass atrocities permeate deeply into societies, profoundly affecting and influencing them and carrying enduring consequences. The recovery process that follows the eruption of mass atrocities is invariably traumatic, protracted, and in many cases, disappointing. By contrast, identifying and acting upon risk factors before they escalate is easier, less expensive, and more effective. The prevention of atrocity crimes requires resolve, commitment, tenacity, and a willingness to embark upon collaborative action. States and international organizations alike need to strengthen their political, legal, and practical responses to business-related abuses of human rights. Equally, businesses have to own their distinct role and responsibilities towards the prevention of mass atrocities.

All actors need to acknowledge the power of national and international business enterprises and their role in the political process. This is necessary to overcome the myth of “company neutrality.” Leaving the role of enterprises unregulated, in relation

¹⁷⁹ African Development Bank Group, *Strategy for Addressing Fragility and Building Resilience in Africa 2014-2019*.

to atrocity crimes and their prevention, only contributes to the potential for negligence and impunity. Moreover, fragile contexts highlight the potential leverage of businesses and their dual role as both a destabilizing factor – that can enable the commission of atrocities – and as an important actor that can support efforts towards the prevention and/or cessation of atrocity crimes. In effect, while business enterprises, their managers, and their employees can be direct perpetrators as well as direct, indirect, beneficial, or silent accomplices of atrocities, they can also encourage economic activity, build resilience, promote awareness, and provide much needed goods and services to societies engaged in post-conflict reconstruction.

As has been examined throughout this paper, States need to improve their approach towards businesses' involvement in atrocity crimes. According to international standards, the positive obligations of States to prevent atrocity crimes include acting with due diligence to prevent and punish business-related abuses in addition to controlling and supervising private activities in an effective manner. Specific standards have been developed in relation to indigenous peoples, who have suffered disproportionately as a result of activities carried out by private businesses.

All of these relevant standards should be solidified in adequate legal frameworks, effective enforcement mechanisms, and active engagement policies, as necessary tools with which to navigate complex and nuanced scenarios. States should establish norms that clearly define the obligations of enterprises such as the necessity of conducting human rights due diligence and enhanced human rights due diligence in high-risk contexts. These norms should be compatible with the overarching legal framework and be able to provide predictability by consistently regulating private activity. The legal framework should also provide mechanisms for deterrence and non-recurrence through the use of proportionate and appropriate sanctions against businesses and individual

managers that fail to comply with human rights obligations. Additionally, the legal framework should establish provisions for effective remedy (such as the reinstatement of the rights of those affected and compensation for damages) to any resulting victims.

In considering the fact that State structures and officials have consistently demonstrated their capacity to torture, kill, rape, discriminate against, and deny protections to, their own populations, it would be reasonable to conclude that, in such circumstances, regulation by the same State is an impossibility. Hence, the role of other States and international organizations becomes essential and could be further improved by establishing norms that regulate business enterprises' human rights obligations with extraterritorial reach and international cooperation in cross-border cases.

An adequate practical and legal framework that addresses the complexities of transnational corporations and capital is important for overcoming political and military approaches that are too often hypocritical and ambiguous in nature. In this regard, decades of experience with businesses' voluntary initiatives reveal that, although they are important as a first step, they are not singularly sufficient. States still need to enhance their approach to business-related human rights abuses, including the enforcement of existing regulations and penalties, as well as active engagement to identify key lessons learned and address shortcomings and deficiencies.

State-level efforts should be coupled with encouragement for enterprises to leave their "comfort zone" and embrace their human rights responsibilities – including efforts towards the prevention of mass atrocities – with commitment and determination. Businesses should integrate human rights and atrocity crimes prevention into their culture, values, and overall management systems. Human rights due diligence mechanisms that have been included in companies' risk management frameworks should be developed

through the consideration of human rights risks as a matter of legal compliance and not as an aspirational, philanthropic, or public relations goal. Moreover, companies operating in high-risk industries, such as arms or security providers, that might be engaged in State-designed or otherwise tolerated abusive practices, should qualify the risk of involvement in atrocity crimes with a high probability and impact risk rating.

Atrocity crimes are international crimes that violate *ius cogens* norms of international law. Thus, no immunity, amnesty or statutes of limitation apply. Moreover, nowadays, information flows around the world, irrespective of borders, and abuses are immediately denounced by a growing coalition of interested parties. Additionally, judicial and non-judicial processes are being carried out against corporations for their behavior stretching as far back as seven decades ago. Despite the many obstacles that inhibit society's ability to hold enterprises accountable for their human rights abuses, the era of full impunity seems to have ended.

Enterprises that do not want to be targeted as atrocity crimes enablers or accomplices should adopt enhanced human rights due diligence frameworks to help them identify, assess, address, evaluate, and report on their human rights performance. A proactive strategy, meaningful consultation mechanisms adapted to the circumstances, an approach emphasizing conflict sensitivity and atrocity crimes prevention, robust policies and procedures to manage risk factors – such as speaking out about wrongdoing and systems to report non-compliance, effective operational-level grievance mechanisms, third-party audits, and formal reporting are all important elements of an enhanced human rights due diligence framework suitable for high-risk contexts and atrocity prevention strategies.

Finally, international financial institutions should also join in this new vision and approach to the prevention of business-related

human rights abuses. While it is true that these institutions should not unduly interfere in the political decisions of any country, it is also true their international obligations prohibit them from financing and supporting to gross human rights violations and atrocity crimes. In order to contribute to prevention efforts, international financial organizations should improve their culture of viability and financial analysis. They should also expand their risk identification and assessment principles to include human rights standards and considerations, in addition to implementing effective remediation procedures and actions undertaken upon the discovery of negative findings.

Business enterprises are key actors in the prevention of mass atrocities and their contributions should be encouraged and promoted. The cases reviewed in this policy paper exemplify some possibilities. However, current research has not explored, in proper depth, business' opportunities to actively participate in upstream, midstream and downstream prevention strategies and to implement structural and direct prevention tools. A recent survey found that a majority of executives agree that human rights are a matter for businesses as well as governments and that their company's responsibility to respect these rights goes beyond simple compliance with local laws.¹⁸⁰

While business enterprises increasingly accept the notion that it is important to assess their human rights impact, the specific implementation of measures designed to do so remains a dilemma for States, companies, and international organizations. This policy paper provides practical guidance and examples of current standards, as applied to real-life situations and paves the way for further research on this topic.

¹⁸⁰ The Economist Intelligence Unit, *The Road From Principles To Practice 4* (2015). Information available at <http://www.economistinsights.com/business-strategy/analysis/road-principles-practice/fullreport>.

Annex 1

Case Studies

Case 1: Nespresso and TechnoServe: Rebuilding the Coffee Sector in South Sudan¹⁸¹

Nespresso is a coffee company headquartered in Switzerland that operates in 64 countries. TechnoServe is a global non-profit organization specializing in business solutions to poverty. In 2011, Nespresso began exploring the newly independent South Sudan as a potential new source of coffee. At the time, the country's coffee industry had been decimated by years of civil war and was struggling to recover.

Nespresso chose a “bottom-up” model, which emphasizes community ownership to develop the coffee market in South Sudan, enlisting TechnoServe as an implementation partner. Wet mills were set up and owned by coffee farmers themselves, with operations proceeding in accordance with a business plan that “enabled them to repay cap-ex loans and sustain profitable operations without subsidies within three years”.

Nespresso and TechnoServe are now working with several hundred smallholder farmers with the goal of improving the size and quality of their harvests through better agronomics. These practices are being taught through the organization of hands-on training sessions led by experts recruited from within the farming communities themselves. Cooperatives,

¹⁸¹ World Economic Forum, *supra* note 31, *Nespresso and TechnoServe: Rebuilding the Coffee Sector in South Sudan*, available at http://www3.weforum.org/docs/WEF_Nespresso_and_TechnoServe_in_South_Sudan.pdf.

owned and run entirely by the farmers, work to process the coffee of their members. It is then sold off for hulling and screening in order to meet Nespresso quality requirements before being sold to European markets. To ensure proper operation, cooperatives elect their own oversight committees, which work to guarantee transparency and benefit from provided training on financial and operational management.

In October of 2015, coffee generated by these South Sudanese cooperatives was sold in France for the first time. The result was not only a great commercial success but also functioned as a transformative influence on South Sudanese communities. Nespresso and TechnoServe are now working to increase the size of the program with the goal of reaching 15,000 farmers over the next 10 years. This would set the foundation for a developed industry with the potential to benefit 50,000 farmers and 250,000 people. The rebuilt coffee sector would provide a “grassroots” form of wealth generation and economic development that stands in stark contrast to the country’s centralized oil sector, which currently accounts for 99% of the country’s exports.¹⁸²

Case 2: Cordaid Investments in Myanmar¹⁸³

Cordaid Investment Management B.V. (CIMBV) is a responsible social impact investor, currently managing 63 million Euros of assets spread across 23 countries in Asia,

¹⁸² In October 2016, Nespresso announced a temporary halt in coffee operation due to deterioration of the country’s situation, <http://www.reuters.com/article/nespresso-southsudan-idUSL5N1CA3GO>.

¹⁸³ World Economic Forum, *Innovative blending in fragile contexts: Cordaid Investments in Myanmar*, available at http://www3.weforum.org/docs/WEF_Cordaid_Investments_in_Myanmar.pdf

Africa and Latin America. In Myanmar, the microfinance sector remains severely underdeveloped. Financial inclusion rates have been extremely low, with only 20% of the adult population able to access financial services. This has led to widespread reliance on the informal sector, that is, borrowing from moneylenders or pawnshops, often incurring abnormally high interest costs. As a result, a large national demand existed for international backing with which to create microfinance institutions. The services provided by these institutions would remedy the *de facto* dependence on the informal financial sector, providing a sizable benefit to the population, especially in terms of growth and development in remote and rural areas.

To confront this demand, a partnership was forged between CIMBV (the impact investor), LIFT (the donor) and TCX (the hedging facilitator from the private sector), which aimed to promote financial security in Myanmar's society. In this effort, LIFT provided backing to cover the significant currency risk that CIMBV faced as an impact investor as well as reducing credit risk by providing a grant for strengthening microfinance institutions through additional capacity building measures. The financial mechanism and the requisite knowledge for the hedge were provided by TCX, which allowed CIMBV to commit funding for investments towards the development and reinforcement of Myanmar's microfinance sector.

As explained by a report published by the World Economic Forum, this case demonstrates that "using grant funding or approaching donors for first-loss positions and/or to provide hedging could be an important step forward in persuading (impact) investors to invest in fragile contexts". Additionally, based on CIMBV's proposed structure, TCX and LIFT have reached a broader agreement to provide a hedging facility

for other impact investors, opening the door for further investment along similar lines.

Case 3: Kenya Private Sector Alliance (KEPSA) and Post-Election Violence¹⁸⁴

KEPSA covers the respective industry associations for small and big businesses, and for big corporate firms. To foster peaceful elections in 2013, it worked with key individuals from the media and trained media proprietors, journalists, and radio hosts in how to report on social and political issues. Another activity that impacted the prevention of violence was an initiative carried out by Safaricom, a member of KEPSA. This project was responsible for initiating the development of guidelines to block public messages of hate and prevented the country's mobile networks from being used to spread political speech used to incite violence.

The case of KEPSA presents several important lessons for businesses facing similar challenges. First of all, it demonstrates the ability of the business community to play a significant role in the prevention of mass atrocities. Second, it highlights the fact that the legitimacy of the private sector functioned as a crucial element in the effectiveness of KEPSA's initiatives. That is to say, the credibility of the private sector relative to central political actors in the mass atrocity prevention sphere enable access to high-level decision-making.

The collective nature of KEPSA's actions "enhanced the impact of the efforts made by Kenya's business community

¹⁸⁴ Alleblas, *supra* note 13.

and its ability to contribute to mass atrocity prevention as a whole” represents the third lesson for the business community. The variety of KEPSPA’s membership, which ranged from small and medium-sized enterprises to large multinational corporations, allowed for a wide range of contributing activities to be realized. Thus, an emphasis on inclusiveness and the existence of a shared vision were two primary factors that contributed to the success of KEPSPA’s work. Fourth, KEPSPA’s success shows us that, to maximize success, businesses must act collaboratively and in a coordinated fashion with other actors in society.

Case 4: International Conference on the Great Lakes Region (ICGLR)

As noted by a 2013 report published by the United Nations Economic Commission for Africa: ¹⁸⁵ Minerals such as tin, tantalum, tungsten and to a lesser degree, gold (known as the “three TGs”), which function as major inputs for smartphones, laptops and other products, are most significantly sourced from the Democratic Republic of Congo (DRC) and other countries in the Great Lakes Region of Africa. These minerals are mostly unearthed by artisanal and small-scale miners whose livelihoods very much depend on these supply chains. Unfortunately, these minerals also contribute to the financing of the DRC’s continuing armed conflict and have been labeled ‘conflict minerals’.

¹⁸⁵ Economic Commission for Africa, *Special report on the “The ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources (RINR) and other Certification Mechanisms in the Great Lakes Region: Lessons Learned and Best practices*, 2013. http://www.uneca.org/sites/default/files/PublicationFiles/special_report_icglr.pdf

In this case, a regional solution is important, as conflict minerals are frequently mined in one country and exported through another.

The ICGLR was founded in 2006 with the assistance of the African Union, the United Nations, and several bilateral partners. Its main objective is to “enhance regional security, stability and development”, coordinating through a Secretariat in Bujumbura, Burundi, which was established in 2007. The ICGLR is responsible for The Regional Initiative against the Illegal Exploitation of Natural Resources (RINR), which began in 2009 as a comprehensive mineral tracking and certification mechanism aimed at “breaking the link between mineral revenues and rebel financing.” The RINR initiative focuses on activities related to four specific minerals and blends a technical approach with a political process oriented towards creating opportunities for dialogue and building confidence.

Currently, the main outcomes of the regional certification mechanism are: the approval of a certification manual that provides a practical guide for its implementation; the adoption of a “model law” to facilitate the incorporation of regional provisions into domestic legislations; the creation of a database to gather data on the production and export of selected natural resources; the formation of the Regional Audit committee as an independent third party.

However, one of the primary challenges in the implementation of RINR has been posed by the array of similar transparency initiatives on the ground. The existence of several competing initiatives with the same objectives requires careful and extensive coordination to mitigate fatigue related to the completion of questionnaires, surveys, and other requirements by artisanal and small-scale miners, traders, and other participants in targeted supply chains.

Case 5: Berta Cáceres – Honduras

Berta Cáceres, the founder of the Civic Council of Popular and Indigenous Organizations Honduras (COPINH), was shot to death on March 3, 2016, in spite of a 2009 decision by the Inter-American Commission on Human Rights to grant her precautionary measures.¹⁸⁶ While enduring continuous attempts at intimidation, which took the form of gender-specific attacks, arrests, and violence, Ms. Cáceres persisted in her outspoken defense of the rights of the Lenca indigenous community of Río Blanco. She was notoriously vocal in her denunciation of, and opposition to, the exploitation of indigenous peoples' resources, especially with regards to the hydroelectric project known as "Agua Zarca."¹⁸⁷

As a result of her assassination, several UN agencies, international experts and members of civil society demanded that Honduras conduct an independent, impartial, and effective investigation. Following the killing of a second COPINH member, occurring just days after Ms. Cáceres' murder, the Dutch development bank "FMO" – which had been financing the project – publically condemned the killings and called upon the Honduran government to stop the ongoing violence in the country. FMO decided to immediately suspend all of its activities in

¹⁸⁶ IACHR, MC 196/09, Amplification of Precautionary Measures, Honduras, available at <http://www.cidh.org/medidas/2009.eng.htm>.

¹⁸⁷ Information available at

<http://unsr.vtaulicorpuz.org/site/index.php/en/statements/127-call-to-honduras-end-impunity>. Thanks to her complaints the World Bank and Chinese investors withdrew from the project in 2014, see:

http://www.commonfrontiers.ca/Single_Page_Docs/PDF_Docs/May11_16-doc02.pdf.

Honduras and announced that a delegation, including the CEO and the Director for the Energy Sector, would travel to Honduras and visit the communities around the Agua Zarca project to acquire a more complete understanding of the situation.¹⁸⁸

On April 6, during the conclusion of a speech at Union Theological Seminary in New York, the President of the World Bank, Dr. Jim Yong Kim, addressed a question about the impacts of large dam projects, as illustrated by the murder of Berta Cáceres. His reply, which was interpreted by several organizations as an inflammatory, insensitive, and inappropriate response, generated significant backlash among civil society.¹⁸⁹ The World Bank later dedicated a section of its website to clarifying its position.¹⁹⁰

Case 6: National Association of Professional Environmentalists – UGANDA (NAPE)¹⁹¹

In 2001, the National Association of Professional Environmentalists (NAPE) submitted an official complaint to the World Bank's Inspection Panel on behalf of communities affected by three projects: the Third and Fourth Bujagali Power Projects and the Bujagali Hydropower Plant. NAPE complained that the World Bank's "failures in the design,

¹⁸⁸ Information available at <https://www.fmo.nl/k/n1771/news/view/28133/20819/fmo-suspends-all-activities-in-honduras-effective-immediately.html>, 16 March 2016.

¹⁸⁹ Information about the correspondence between civil society and the World Bank regarding Berta Cáceres and large dams available at: <http://www.aida-americas.org/publication/open-letter-to-the-world-bank-president>.

¹⁹⁰ World Bank Group, *Fact Sheet: Honduras and Indigenous People*, available at: <http://www.worldbank.org/en/topic/indigenouspeoples/brief/honduras-and-indigenous-people>

¹⁹¹ Robinson, *supra* note 124, 11-12.

appraisal and implementation of the projects had materially affected [local communities'] rights and interests and were likely to jeopardize their future social, cultural and environmental security." The complaint also detailed the World Bank's poor assessment of the site's cultural significance, its relocation of affected families, the future tariff agreement between the government and the company building the plant, and the failure to publicly disclose relevant project information to affected communities. The Inspection Panel concluded that the World Bank had indeed been non-compliant regarding several of its own policies. The World Bank agreed to take corrective measures, including the development of a plan to protect the project site and to support wider consultations. This case sheds light on the barriers to action that project-affected communities can face in spite of the World Bank's policies. According to these policies, it was in fact the responsibility of the World Bank and the Ugandan government to provide grievance and accountability mechanisms for the project; however, only through the intervention of NAPE were communities able to seek redress.

Enhanced Human Rights Due Dilligence Framework

Strategize

- Express commitment to meet the responsibility to respect human rights through a statement of policy that stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services and that is publicly available and communicated internally and externally to all relevant parties.
- Consider the nature and scope of the business enterprise's human rights impacts and responsibilities, including atrocity crimes, in relation to core business and relations with business partners, local communities and governments.
- Recognize and incorporate that legal compliance might be insufficient and problematic, i.e. domestic laws allow security forces abusive practices or religious/gender discrimination.

¹⁹² See, *inter alia*, Institute for Human Rights and Business, *supra* note 1; UN Global Compact – PRI, *Guidance on Responsible Business in Conflict-Affected and High -Risk Areas*, 2010; OECD, *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 2006; Shift Project - Mazars, *UN Guiding Principles Reporting Framework*, 2015; *Voluntary Principles on Security and Human Rights, Implementation Guidance Tool*; OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2012; Nomogaia, *Human Rights Impact Assessment. A toolkit for practitioners conducting corporate HRIAS*, 2012; ICRC, *Businesses and International Humanitarian Law*; International Alert, SOMO Paper, *Reality Check The gender dimensions of the impact of multinational companies' operations in fragile and conflict-affected areas – Guidance for research*, December 2015; DCAF-ICRC, *Addressing Security and Human Rights Challenges in Complex Environments Toolkit*, June 2016 available at the hub <http://www.securityhumanrightshub.org/content/toolkit>.

- Define and embed appropriate management responsibility:
 - Ensure BOD and senior management involvement and approval (“set the tone at the top”).
 - Define leadership, coordination, implementation and reporting roles.
- Identify relevant international expertise and utilize local experts, knowledge and interpretation.
- Communicate high-risk contexts heightened risks internally and externally to all relevant parties.

Identify & Assess

- Understand demographics; political, economic, racial, ethnic and religious tensions; identify authority, services, institutional and legitimacy failures; Direct State neglect and abuse records and patterns; vulnerable, discriminated and marginalized groups; recent, likely, current or post-conflict situations.
- Include a gender perspective: sexual and gender-based violence issues usually takes place in high-risk contexts, amongst employees, as well as in the general area affected by enterprises’ operations. Women’ voices and opinions are also frequently marginalized during consultations and negotiations processes.
- Understand military’s size, resources, structure, payment and presence; public/private security forces’ records of human rights violations, international human rights, international humanitarian law and atrocity prevention trainings; armed groups’ size, reach, motivations, support base, sources of revenue and rationale.
- Grasp the root causes and dynamics behind discrimination and exclusion patterns against vulnerable and marginalized groups.
- Identify available judicial and non-judicial reparation mechanisms and their effectiveness; understand the cultural view of remedy.
- Understand the “inheritance”: role and legacy of past business’s behavior and dynamics.
- Deploy in-country presence in advance; establish on-the-ground assessment teams.
- Take into account local, national and international human rights institutions’ assessments and findings; UN sanctions; “situations”

under official investigation by the International Criminal Court and/or preliminary examinations from the ICC's Prosecutor.

- Include third-party risks assessments.
- Cross-check insights and findings.
- Send draft assessments to Governments to obtain feedback; engage with home and host competent agencies for further information and guidance.
- Assess risk factors continuously in order to determine appropriate structural or direct prevention tools: the majority of corporate analytic resources vis-à-vis high-risk contexts are invested before operations begin so by the time the project is operating, much of the insight about significant risks has been lost.

Address

- Establish or review enhanced procedures and control mechanisms to respond to, monitor and report on human rights risks.
- Put in place the actions and measures that will prevent/avoid/anticipate potential impacts and/or mitigate the previous/existing actual impacts, including structural and direct prevention tools as well as active prevention programs:
 - Establish appropriate responses based on the mitigation hierarchy: avoid (avert); reduce (minimize); restore (restitute); compensate (pay losses, damages or inconveniences).
 - Take into account the business enterprise's leverage and level of control regarding the actions and measures required to prevent/mitigate the impacts, including any implementation support that may be needed from business partners or third parties.
 - Ensure technical and financial feasibility. Mitigation and improvement actions should be feasible, namely, cost effective and practicable. They should be easily implementable at the local level and draw on local technologies and expertise.
 - Ensure cultural appropriateness. Mitigation and improvement actions should be culturally acceptable, designed in harmony with the local situation and accepted by local stakeholders, in keeping with the local culture, traditions and religions and

supportive of relevant international norms and national conditions.

- Establish adequate indicators and goals. Set relevant performance indicators for measuring human rights impacts across the different functions of the business. Key Performance Indicators (KPIs) are quantifiable measurements, agreed to beforehand, that reflect the critical success factors of a business enterprise in implementing the identified actions and measures. KPIs will differ depending on the business enterprise and the business activity but should follow the SMART criteria: **S**pecific; **M**easurable; **A**chievable; **R**elevant; **T**ime-bound.
- Clarify rules of engagement and employ contractual remedies. Expressly address risks of human rights abuses and issues of complicity in contracts with Government, suppliers and partners. Expressly establish a “right of termination” in cases of human rights abuses.
- Implement transparency strategies, including public disclosure of payments.
- Request assistance from host and home Governments; international cooperation and NGOs. Establish and support multi-stakeholder initiatives.
- Assign a focal point for relationship management with Government and stakeholders that has sufficient seniority and decision-making capacity.
- Establish channels for sharing information or expressing concern. Establish efficient lines of communication to ensure non-compliance reporting and whistle-blowing:
 - Provide mechanisms to report violations and raise complaints (i.e. hotline).
 - Develop incentives and rules for employees to report on human rights violations.
 - Provide mechanisms to protect people who report potential or actual human rights concerns within the business enterprise or with business partners (employees and other stakeholders).

- Document: (a) activities undertaken with Governments, communities, partners, providers and others stakeholders; (b) company decision-making and actions implemented.
- Communicate policies internally and externally.
- Conduct adequate trainings. Employees should be informed about human rights risks and opportunities that the business enterprise faces in its operation. Provide detailed guidance and training to key employees who will be directly confronted with difficult situations.
- Reprimand, discipline or dismissed employees who do not follow and apply human rights policies.
- Implement operational-level grievance mechanisms that are:
 - **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
 - **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
 - **Predictable:** providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
 - **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
 - **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
 - **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
 - **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;
 - **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their

design and performance, and focusing on dialogue as the means to address and resolve grievances.

- Obtain free, prior and informed consent (FPIC) of indigenous peoples.
- Avoid unrepresentative recruitment patterns and set a percentage of local hire.
- Adopt affirmative action recruitment policies for marginalized and discriminated groups.
- Maximize use of local providers, provided they conduct HRDD and do not contribute to atrocity risk factors.
- Ensure that charitable contributions and sponsorship programs are not used for illegitimate purposes.
- Establish a strict policy for handling requests for information from authorities.

Specific measures related to security issues:

- Enhance company security measures to include protection of local communities.
- Engage with Government agencies and public security forces for capacity-building and advocacy.
- Examine alternatives and establish safeguards for equipment transfers.
- Refrain from financing, providing means and opportunities (products, services, technologies) to the conflict or repressive public security forces.
- Investigate, remedy and keep records of security related complaints.
- Establish a policy manual clearly defining role and responsibility of security guards.
- Do not allow security forces to forcibly prevent or break up peaceful demonstrations.
- Avoid tolerating, facilitating and/or promoting arbitrary or unlawful detention of persons; extrajudicial executions; torture; sexual violence and forced displacement, among other gross human rights violations.

Evaluate

- Conduct independent third party audits.
- Increase frequency in monitoring and oversight.
- Monitor the progress of business enterprise's prevention, mitigation and improvement measures.
- Track the effectiveness of response according to the appropriate qualitative and quantitative indicators established.
- Maintain accurate and systematic records for the mitigation and improvement action plans, processes and outcomes.
- Monitor whether external commitments have been honored and legal requirements have been fulfilled.
- Identify reoccurring grievances/incidents and track how they are addressed, including time-frame, persons responsible and results, among others.
- Include feedback from stakeholders.

Report

- Establish internal reporting mechanisms to senior management, Board of Directors and shareholders. Open and transparent communications on performance and a willingness to act constructively are key to success.
- Set up external reporting mechanisms to stakeholders, government agencies, voluntary initiatives and/or in the business enterprise's webpage.
- Develop an adequate and effective reporting format. Explain:
 - How the business enterprise addressed all positive and negative human rights risks and impacts associated with the business activities, its operations, partners and third parties.
 - Mitigation and improvement action plans and how the business enterprise measures its human rights impacts.
 - Grievance mechanisms in place and their effective implementation.
 - Lessons learned.
 - Key decisions taken and changes made to the business.

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