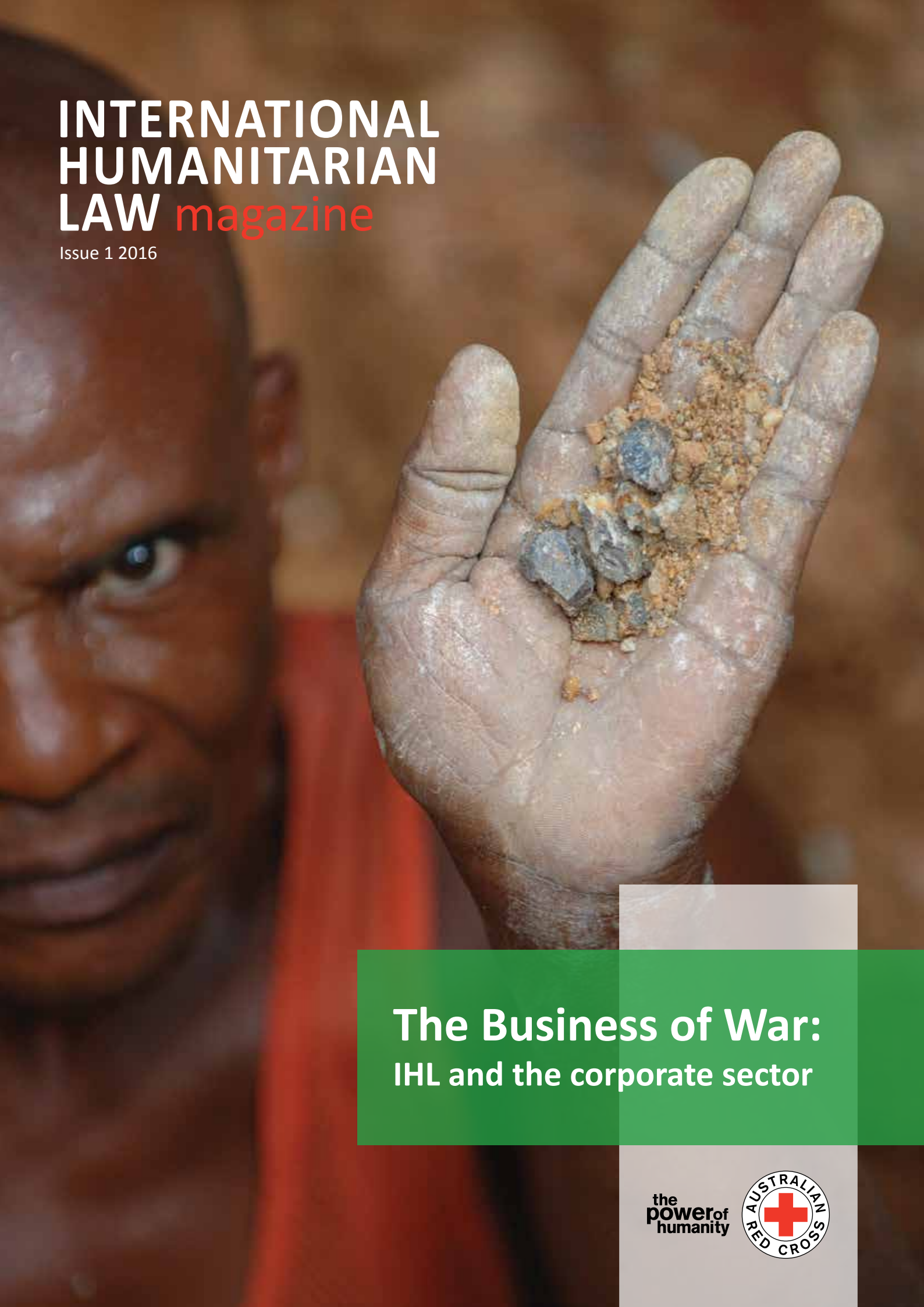


INTERNATIONAL HUMANITARIAN LAW magazine

Issue 1 2016

The Business of War:
IHL and the corporate sector

the power of humanity

AUSTRALIAN RED CROSS

Content

Front cover
Wolframite mining.
Photo: Julien Harneis

Back cover
Democratic Republic of the Congo (DRC)
Colton/Tantalum.
Photo: Responsible Sourcing Network

Editorial

Welcome to the first issue of our flagship international humanitarian law (IHL) magazine for 2016. Promoting understanding and respect for the 'laws of war' is a key focus for Australian Red Cross. Our IHL magazines aim to create debate on key themes and challenges in IHL, bringing together a wide variety of viewpoints and ideas from experts around Australia and the world.

In this issue I invite you to investigate the relationship between businesses and IHL, with a distinctly Australian focus. The connection may not be immediately obvious, but the truth is, most multinational businesses will soon find themselves operating in regions experiencing conflict and instability - if they're not doing so already.

It's important for businesses and their staff to understand their legal obligations in this context, so that business operations do not exacerbate a conflict or contribute to violations of IHL; violations for which staff or company directors could find themselves individually criminally responsible. It's equally vital to understand what protections IHL offers company employees, corporate assets and capital investments.

Red Cross works with businesses to clarify their understanding of international humanitarian law and their rights and obligations under this body of law. We have seen strong commitments from the corporate world to conduct operations in a conflict-sensitive manner, primarily through human rights law and corporate social responsibility models, however there has been much less focus to date on existing obligations found in IHL.

This magazine aims to be a catalyst for discussion. The issue starts with a candid interview on the challenges that businesses face in navigating IHL and human rights law in conflict affected areas; then move on to field-level engagement with business actors, the crime of ecocide, the regulation of private military and security companies in Australia, and the debate on the regulation of autonomous weapons. Alongside these articles we profile the civil and criminal cases brought against businesses around the world, and highlight the positive role that businesses have played in preventing and alleviating conflict.

As you can see, there is plenty to explore in this issue and I do hope that you will read, reflect, challenge us and engage with us on this important emerging topic for so many Australian businesses.

I would like to take this opportunity to thank all our contributors to this issue of the magazine and to thank the Attorney General's Department for their generous support to produce this issue.

I hope you enjoy this issue of our magazine, *'The Business of War'*.

Judy Slatyer
Chief Executive Officer
Australian Red Cross

How businesses navigate IHL and human rights

Combatants of the Cameroonian Bataillon d'Intervention Rapide receive human rights and Voluntary Principles training from The Fund for Peace. *Photo: J.J. Messner/The Fund for Peace*

Vanessa Zimmerman, board member of the Global Compact Network Australia (GCNA) and chair of the GCNA Human Rights Leadership Group

Q What rights and laws within the international humanitarian law (IHL) and international human rights law framework must companies respect and uphold?

A Businesses are capable of positively and negatively impacting nearly all internationally recognised human rights through their activities and relationships, and should make it clear they will respect all of those rights. What rights are included? According to the UN Guiding Principles on Business and Human Rights (UNGPs), the authoritative global standard for preventing and addressing business-related human rights abuse, at a minimum those rights in the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The UNGPs also say that in armed conflicts businesses should respect IHL.

The reality is that different sectors may impact on particular rights based on their physical footprint, interactions with stakeholders such as local communities and workers and their operating context.

Q You mentioned the UNGPs, adopted by the UN Human Rights Council in June 2011. These principles provide a global standard for preventing and addressing the risk of adverse human impacts linked to business activity. How has the business world responded to the implementation of the Guiding Principles so far?

A We could not have imagined the momentum with which the business community and other stakeholders would work to implement the UNGPs. They have become the global reference point for business and human rights. Business take-up has ranged from drafting human rights policies for the first time (see the Business and Human Rights Resource Centre for a helpful database), to last year seeing the first business (Unilever) publish a stand-alone human rights report. There are various reasons for the interest in the UNGPs but in speaking to businesses,

a common theme has been relief at finally having a framework for identifying and acting on their human rights responsibilities, an area not usually in commercial comfort zones.

Transnational corporations in particular are trying to learn more about human rights and show that they are respecting them through the human rights due diligence process described in the UNGPs. This is an ongoing process to help identify, prevent, mitigate and account for how businesses address involvement in human rights harm. Encouragingly, many businesses have moved beyond the "why" to the "how". Of course there are slower movers, particularly amongst privately-owned businesses operating only in one jurisdiction, but increasingly inter-connected supply chains and investment climates mean that once a player in the chain implements its responsibility to respect human rights, others face more pressure to follow.

Q What are some of the challenges companies face when conducting business in conflict areas?

A Working in a conflict area often means there will also be weak governance. Harvard Professor John Ruggie, author of the UNGPs, referred to this as operating in an area where the human rights regime cannot be expected to function as intended - where businesses may not be able to rely on functioning legal and other enforcement mechanisms to make sure that their employees and business partners, including government, are doing the right thing.

Businesses are also likely to face complex political challenges intertwined with commercial decision-making if they are navigating relationships with different sides to the conflict. It may be hard to know who is truly a legitimate business partner, especially without in-depth, on the ground knowledge of the conflict.

Conducting business in conflict areas does not equate to breaching human rights. But businesses are expected not to harm rights themselves, not to make matters worse and increasingly, to help support peace-building, in many cases through collective action.

Q In the event that business-related human rights abuses do occur, what judicial and non-judicial mechanisms are available to hold offending companies to account?

A The UNGPs highlight the need for greater access by victims of business-related human rights harm to effective judicial and non-judicial remedies. Mechanisms may range from the courts to State-based non-judicial mechanisms such as national human rights institutions, National Contact Points under the OECD Guidelines for Multinational Enterprises and ombudspersons. Donor agencies and international financial institutions may have complaints mechanisms and businesses themselves are setting up their own operational-level grievance mechanisms.

A number of countries have made it possible for companies to be held criminally liable for violations of IHL and human rights, and general negligence principles are being used to bring civil claims, especially in the US, UK and Canada.

In some conflict areas, access to local courts may not be realistic because of factors ranging from decreased capacity to dangers posed to human rights defenders. In these situations, business led operational-level mechanisms may be particularly important.

Victims of business-related abuse in conflict areas can face significant procedural and substantive hurdles in accessing all of the above mechanisms, which some have described as an "accountability gap". This is behind a call by some countries and NGOs for a treaty on business and human rights (the UNGPs are not binding international law) which some argue could target gross human rights abuses by companies in conflict areas.

Q You were working as Legal Advisor to Professor John Ruggie, the UN Special Representative on Business and Human Rights, at the time the UNGPs were developed. Can you tell us something about that time, the challenges he faced, and whether special consideration was given to businesses working in conflict zones?

A I feel fortunate to have been part of the UNGPs drafting process under the leadership of Professor Ruggie.

Conflict areas were absolutely a focus throughout Professor Ruggie's mandate. We held consultations with both home and host States around how to prevent and address business-related human rights abuses in conflict-affected areas. The result is clear guidance for States and business in the UNGPs around conflict-affected areas. This includes a call for home and host States to provide adequate assistance to businesses to assess and address the heightened risk of involvement in gross human rights abuses in conflict-affected areas. Such help might come through embassies, trade missions or other resources such as the US Government's country specific human rights reports. For their part, businesses are advised to treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate, but especially in conflict-affected areas, given expanding legal liability.

Since the UNGPs came out there have been a variety of resources developed for businesses and other stakeholders to help prevent and address business involvement in human rights harm in conflict areas. They include a toolkit from the Geneva Centre for the Democratic Control of Armed Forces and the International Committee of the Red

Cross on Addressing Security and Human Rights Challenges in Complex Environments; the Conflict and Peace portal hosted by the Business and Human Rights Resource Centre; and a recent report from the Centre for Research on Multinational Corporations (SOMO) on the Risks and Challenges around Human Rights and Conflict.

Closer to home, the Global Compact Network Australia (GCNA) has established a Security and Human Rights Community of Practice, a forum for extractives sector security and community representatives, together with select security experts and the Australian Government, to discuss how to respect and support human rights when protecting operations in challenging environments.

Q In August 2015, the GCNA, on whose Board you sit, and the Australian Human Rights Commission convened over 100 representatives from business, government, civil society and academia at the 2015 Australian Dialogue on Business and Human Rights. What were some of the key outcomes from this Dialogue? Were any IHL concerns discussed?

A The implications of working in conflict areas were raised in a number of sessions, including relating to land access and resettlement; whether there are any issues such as gross human rights abuses that company-led grievance mechanisms should not handle; and the role of multi-stakeholder initiatives like the Voluntary Principles on Security and Human Rights (VPSHR) to help businesses better prepare for working in these areas.

One outcome from the Dialogue was that in 2016 the GCNA will, alongside parallel work by other key stakeholders including NGOs, convene roundtables with the Australian business community to explore an Australian national action plan (NAP) on business and human rights. These plans are essentially roadmaps for how those governments will support businesses to implement the UNGPs. Of the 28 countries that have developed/are developing a NAP, several have included guidance around respecting human rights in conflict areas.

Q Businesses can have both a positive and negative impact on individuals and communities in times of armed conflict and other situations of violence. In your opinion, what are some of the positive roles that companies can play?

A Individually and in many cases collectively, companies can have a positive role in contributing to peace-building. An obvious point is that they can help create demand for good governance and the rule of law, contributing to an enabling environment for sustainable business. The World Bank and other institutions have also promoted business support for development in States emerging from conflict.

Vanessa Zimmerman speaking at the launch of GCNA/AHRC/ACCSR Human Rights in Supply Chains report, December 2015. *Photo: ACCSR*

Businesses may also play a more targeted role in helping to keep the peace – for example by using contractual arrangements and joint capacity-building to help prevent conflicts from reigniting. This could include provisions in an agreement with the government that highlight expectations of both parties to follow the VPSHR in securing the company's assets. Beyond of course helping the business to respect human rights, these measures are good for business, as they aim to mitigate a variety of risks, and may also help to avoid re-escalation of conflict.

The UN Global Compact has two global projects which may be particularly relevant. One is the Business for the Rule of Law framework, which provides guidance on how business can respect and support the rule of law in all countries. The second is the Business for Peace platform, including over 130 companies from 37 countries dedicated to collaborative action to advance peace.

All of the above needs a meaningful understanding of the local context. This will help business avoid dangerous assumptions that may, at best, lead to ineffective development approaches and at worse, refuel the conflict.

Vanessa was part of the drafting team for the UN Guiding Principles on Business and Human Rights, developed by the UN Special Representative on Business and Human Rights, Harvard Professor John Ruggie, and endorsed by the UN in 2011.

Changing 'business as usual':

The ICRC's role in addressing the human rights impacts of business operations in complex security environments

Claude Voillat, Economic Advisor, International Committee of the Red Cross and Romily Faulkner, Trainee to the Economic Advisor, International Committee of the Red Cross

Professor John Ruggie, who led the development of the *UN Guiding Principles on Business and Human Rights*, believes that '[t]he most egregious business-related human rights abuses take place in conflict affected areas and other situations of widespread violence'. Today, with mounting pressure on businesses to operate responsibly, particularly in fragile and conflict-affected environments, business entities are increasingly calling for granular guidance on how to incorporate human rights and IHL standards into their core business and security operations. Given this need, and given the mandate of the International Committee of the Red Cross (ICRC), the organisation has a clear interest in guiding companies to advance humanitarian ends rather than contributing to humanitarian challenges in conflict settings.

The ICRC has been engaging with business actors for fifteen years to reduce the risk of human rights and IHL violations that affect local communities. As part of this program of work, the ICRC was involved from the early stages of development of the *Voluntary Principles on Security and Human Rights ('the VPs')*, a set of principles that guide companies in the extractive and energy sectors to maintain the safety and security of their operations in accordance with human rights. Companies, Governments and NGOs have signed on to the VPs, and the ICRC was invited to be an observer in 2001.

The ICRC has also partnered with the Geneva Centre for the Democratic Control of Armed Forces (DCAF) to develop practical tools that help businesses navigate the security and human rights challenges that they face in complex environments. The DCAF-ICRC team began by developing an online Knowledge Hub platform – a one-stop-shop that allows businesses and organisations to access case studies and guidance documents. DCAF-ICRC also produced a Toolkit, which provides practical recommendations in response to a list of real-life challenges faced by companies working with host governments and security forces (both public and private). A chapter is also being developed with a focus on corporate-community relations.

From the moment that the Toolkit and Knowledge Hub were created, DCAF-ICRC began receiving requests from companies and organisations around the world to develop further practical tools that improve security and human rights practices on the ground. The DCAF-ICRC team is responding to this demand, in collaboration with a number of partner organisations. For example, DCAF-ICRC is working with the global oil and gas industry association for environmental and social issues (IPIECA, formerly the International Petroleum Industry Environmental Conservation Association) to create guidance for companies establishing memoranda of understanding with host governments related to security operations. DCAF-ICRC has also partnered with NGOs such as Socios Perú to support local implementation of good practices and dialogue between companies, communities and governments.

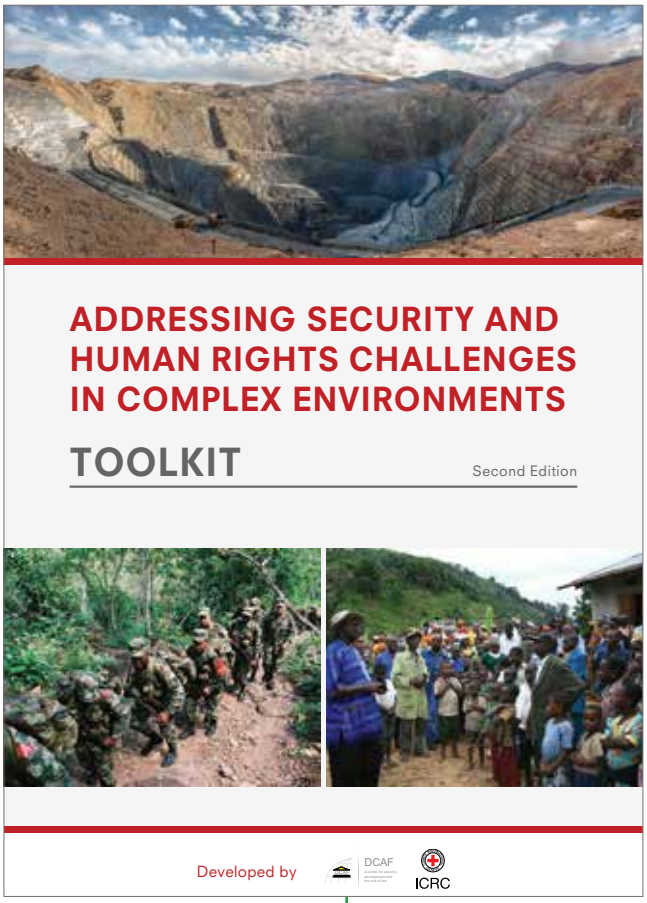
> The ICRC has been engaging with business actors for fifteen years to reduce the risk of human rights and IHL violations that affect local communities.

The work of DCAF-ICRC in sensitising businesses to their human rights and humanitarian impacts is guided by a number of overarching principles. Firstly, the ICRC aims to provide guidance that is practical and solutions-driven, to facilitate implementation by stakeholders. Secondly,

it is core to the approach of the DCAF-ICRC project that tools are developed through engagement with actors who are experiencing the challenges themselves, including companies, communities, government officials and security forces. Regular dialogue with stakeholders ensures that the tools are relevant and adaptable. For example, the development of the Toolkit included field missions to Colombia, Peru, the Democratic Republic of the Congo, South Africa, Ghana and Papua New Guinea, to analyse challenges faced by businesses in complex security environments. DCAF-ICRC always engages with companies in a framework of constructive dialogue aimed at improving companies' social and humanitarian impacts, rather than 'naming and shaming' them. Thirdly, DCAF-ICRC seeks to support local actors to develop and guide their own solutions to human rights issues; it provides guidance, but recognises that ownership of implementation projects should be at the local level. Fourthly, DCAF-ICRC adopts a multi-stakeholder approach to its work. Progress on security and human rights challenges will only be achieved if all affected parties are involved in the conversation.

> From the moment that the Toolkit and Knowledge Hub were created, DCAF-ICRC began receiving requests from companies and organisations around the world to develop further practical tools that improve security and human rights practices on the ground.

Over the years, the ICRC has worked in various contexts (such as Colombia, Indonesia, Azerbaijan, Madagascar, Peru and Papua New Guinea) to enhance the capacity of public security forces operating around extractive sites to reduce the risk of harm and tension. Although to date the ICRC's work on business and human rights has focused on the extractive sector and security forces, looking ahead the ICRC plans to expand both the geographical and sectoral scope of its work. In 2013, the ICRC began engaging with Chinese stakeholders on security and human rights concerns related to Chinese companies operating transnationally. Despite the challenges of gaining traction



The DCAF-ICRC Toolkit offers human rights and IHL-sensitive guidance to companies operating in complex environments

in China on issues labelled as 'human rights', significant progress has been made. Chinese companies, industry associations and other organisations are starting to turn to the ICRC for advice on overseas operations. Stakeholders have also shown interest in having the DCAF-ICRC Toolkit translated into Chinese.

In armed conflict or other situations of violence, business actors have a frightening potential to further intensify problems and tensions, for instance, by ignoring local community needs, sustaining repressive governments or inflicting damage on the environment. However, businesses also have tremendous potential to create economic opportunities and hope – ingredients that can help societies move from situations of chaos and armed violence to stabilisation and regeneration. For this reason, the ICRC is intent on providing guidance that can assist businesses in mitigating their negative impacts and maximising their contributions to achieving and maintaining peace.

Widespread damage to infrastructure hinders the authorities' ability to provide basic services, such as rubbish collection and water and electricity supplies.
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'Crimes against the environment' and warfare:

Accountability for businesses under the Rome Statute of the International Criminal Court?

Steven Freeland, Professor of International Law at Western Sydney University, and Permanent Visiting Professor at the iCourts Centre of Excellence for International Courts, Denmark

Acts perpetrated during the course of warfare have, through the ages, led to significant environmental destruction. Throughout history the environment has been a silent victim of human conflict. These have included situations in which the natural environment has intentionally been targeted as a 'victim', or has been manipulated to serve as a 'weapon'. The problem is ongoing. On 6 November 2015, the United Nations marked the "International Day for Preventing the Exploitation of the Environment in War and Armed Conflict".

The deliberate despoliation of the environment can have catastrophic effects, not only on human populations, but also in ecological terms. For example, nuclear, biological and chemical weapons, as well as having the potential to kill many thousands of people in a single attack, have effects that may persist in the environment, in some cases indefinitely. The devastating effects of environmental warfare can continue long after the conflict is resolved, jeopardising or destroying the lives and livelihoods of those reliant on the natural environment.

Much of the technology associated with such tactics is the product of research by private enterprise, which is often engaged by the military to develop ever more destructive weapons, whose use has the capacity to render widespread and devastating environmental damage. Moreover, access to natural resources – or the lack of access – can itself be the trigger for conflict. Approximately five million people were killed during the 1990s in armed

conflicts relating to the exploitation of natural resources such as timber, diamonds, gold and oil. The United Nations Environment Programme (UNEP) has found that, over the last 60 years, at least 40% of all internal conflicts have been linked to the exploitation of natural resources, for example recent conflicts in Sierra Leone, the Democratic Republic of Congo, Liberia and Angola. These have often been with the involvement of private companies. This phenomenon can be described as 'conflict resources', where natural resources commercialise and prolong conflict, with the connivance and active involvement of businesses. It becomes a vicious self-perpetuating cycle.

Business therefore can, and often does, play a significant role in environmental degradation and exploitation, which can be seen as both a cause and a consequence of armed conflict. The International Court of Justice has clearly recognised that damage to its environment may constitute an 'essential interest' of a State. Such recognition is only likely to increase as the world gains further insights into the broader state of the global environment, including the disastrous effects of climate change.

Burning oil-wells at Al Magwa – destruction in Iraq has caused tremendous damage to the region's environment. *UN Photo/John Isaac*

Despite all of the evidence, however, deliberate environmental destruction during warfare is still largely regarded as an unfortunate consequence of war. The existing rules under international humanitarian law, international environmental law and international criminal law purporting to limit deliberate environmental destruction have largely been ineffective and inappropriate. The impact of environmental destruction has paled when measured against perceived military advantages. The United Nations International Law Commission is currently looking at this issue in an attempt to establish the relevant applicable principles.

It is, of course, true that war and armed conflict are inherently destructive of the environment. But that is no reason to allow leaders to deliberately or recklessly target the environment in order to achieve their military goals. We can no longer turn a blind eye to deliberate destruction, particularly given the ongoing development of weapons capable of widespread and significant damage.

It is for this reason that I have argued that, just as international law has made great strides forward by classifying rape during armed conflict as a war crime, a crime against humanity, or even genocide in certain circumstances, we should recognise that intentional environmental destruction can and should also constitute an international crime. Rigorous modes of accountability should be incorporated into the mechanisms of international criminal justice. I have strongly advocated that 'crimes against the environment' should be incorporated as a separate crime within the jurisdiction of the International Criminal Court (ICC), as an important step towards better protecting our most cherished assets for future generations.

Yet, while this would be a positive step in terms of deterring military and political leaders, and regulating their actions during warfare, even this will not provide an appropriate mode of accountability for those businesses that are involved in these destructive acts of war. The ICC, and indeed all of the mechanisms of international justice, are limited in their jurisdiction to the prosecution of 'natural persons', meaning that legal entities (companies/corporations) cannot be prosecuted alongside those individuals charged with the commission of international crimes. Whilst there have been calls by various interest groups to extend the jurisdictional mandate of the ICC to include such entities, this is unlikely to happen in the short to medium term.

It is important, therefore, that, in appropriate circumstances, every other avenue be explored to complement the reach of international criminal law, as other legal 'tools' may be used to ensure accountability for businesses complicit in deliberate environmental destruction during warfare.

The International Criminal Court
© ICC-CPI

Can a business be guilty of a war crime?

Catherine Drummond, Research Scholar, Centre for Public International and Comparative Law, University of Queensland

International criminal law has been traditionally applied to individuals. As early as 1945, German industrialists were prosecuted for their culpable involvement in WWII war crimes. Corporate officials continue to be prosecuted today. For example, in the Netherlands a Dutch businessman, Van Kouwenhoven, has a retrial pending for his complicity in the massacre of civilians committed by militias that were hired by his Liberian based timber companies, and for war crimes committed with weapons provided by him to former Liberian President Charles Taylor. In Sweden, investigations continue into executives of Lundin Petroleum for their complicity in war crimes committed by government and rebel forces in connection with their oil extraction sites in South Sudan.

But can a business be guilty of a war crime? To date, there have been no prosecutions of business entities for international crimes. In the last few years, however, a number of domestic criminal investigations have been commenced. French judicial authorities opened investigations into two companies, Amesys and Qosmos in May 2012 and April 2014 respectively, for their complicity in acts of torture based on the supply of surveillance technology to the Gaddafi regime in Libya and the Assad regime in Syria. In November 2013, Swiss prosecutors opened an investigation into a gold-refining company, Argor-Heraeus, for receiving pillaged Congolese gold from rebel-affiliated intermediaries. These developments signal what one prominent international criminal law academic, James Stewart, has called the next 'obvious discovery' in corporate accountability: domestic prosecutions of corporate war crimes. Despite the lack of prosecutions thus far, the answer to the title question is unequivocally yes. Not only can businesses be guilty of war crimes, the potential for their prosecution in domestic courts represents the strongest legal mechanism to ensure corporate compliance with IHL.

> Despite the lack of prosecutions thus far, the answer to the title question is unequivocally yes. Not only can businesses be guilty of war crimes, the potential for their prosecution in domestic courts represents the strongest legal mechanism to ensure corporate compliance with IHL.

At the international level, jurisdiction over corporate entities was discussed but rejected in the drafting of the Statutes of the ICTY, ICTR and ICC. The only international criminal court that has jurisdiction over corporate entities is the newly reconstituted African Court of Justice and Human Rights, which was granted jurisdiction in June 2014 over 'legal persons' in respect of a catalogue of war crimes broader than that contained in the Rome Statute of the ICC. The first case against a corporation is yet to be filed.

The picture at the domestic level is markedly more optimistic. There are three potential forums for domestic prosecutions of corporate war crimes:

1. the territorial State where the crimes are committed;
2. the home State of 'nationality' or control of the corporation; or
3. States exercising universal jurisdiction.

Each presents its own challenges but it suffices to note that there will likely be more than one available forum for prosecution in any given case. For a corporation to be prosecuted for a crime in any of these forums, corporate criminal responsibility as a legal construct must exist (as opposed to civil liability, on which the US' Alien Torts Statute cases against corporations for international crimes were based). Recent studies demonstrate that most States already recognise corporate criminal responsibility for ordinary crimes in their domestic law. This recognition of corporate criminal responsibility coupled with legislation that incorporates war crimes under international law into domestic law, provides the basis for the prosecution of corporate war crimes. For example, in Australia, section 12.1 of the Criminal Code 1995 (Cth) specifies that the 'Code applies to bodies corporate in the same way as it applies to individuals' and that a 'body corporate may be found guilty of any offence'. Div 268 incorporates war crimes from the Rome Statute into domestic criminal law. Together, section 12.1 and Div 268 permit the domestic prosecution of corporations for war crimes. Like individuals, corporations may be responsible through a number of modes of liability, the most relevant of which are perpetration, complicity (aiding and abetting) and superior responsibility. As many States party to the Rome Statute have implemented international crimes into jurisdictions which already recognise corporate criminal liability, there has been a conferral of domestic jurisdiction over corporate war crimes which domestic authorities may not yet appreciate.

Despite the slow start, the obligation of States to prosecute war crimes, the absence of a statute of limitations, the possibility for corporations to, theoretically, 'live' forever, and the increasingly well-organised NGOs monitoring corporate behaviour provide a basis on which to predict that the interest in corporate war crimes prosecution will only increase, and hopefully yield the first prosecution in the very near future. It is in the interest of promoting compliance with IHL that domestic law on corporate war crimes be enforced; the economic and social cost to businesses of even the risk of prosecution for war crimes suggests corporations would be highly susceptible to deterrence and reforming conduct to be IHL compliant.

Potential forums for domestic prosecutions of corporate war crimes:

1 the territorial State where the crimes are committed;

2 the home State of 'nationality' or control of the corporation; or

3 States exercising universal jurisdiction.

Investigating and prosecuting corporations

In the twentieth century, charges for violations of international humanitarian law (IHL) have been brought primarily against individuals, with very few cases having been brought against corporations. However, in the past two decades, the impact of globalised trade and proliferating technologies has seen an increasing focus on business in areas which are predominately unregulated and unstable.

Multinational companies continue to expand their reach across the world and into conflict zones. This has increasingly led to calls for greater accountability of corporations involved in human rights and IHL contraventions in situations of armed conflict.

As is discussed elsewhere in this edition, many States now allow corporations to be prosecuted for offences against IHL.

The following case studies offer a sample of some of the recent investigations and prosecutions – both civil and criminal – for violations of IHL by corporations.

France

Separate criminal complaints were filed in a Paris court in 2011 and 2012, alleging complicity in human rights violations committed in Libya and Syria by French companies. In the Libyan case, company Amesys allegedly provided communication surveillance equipment to the Gaddafi regime, which allowed it to develop the “Eagle solution” that led to the detention and torture of opponents to the regime. In the Syrian case, it was alleged that Qosmos, another French company, delivered internet intercept technology to the Bashar Al-Assad government, which allowed the government to monitor, arrest and torture dissidents. Both complaints have led to the opening of official criminal investigations against the two French companies, though both companies have denied any wrongdoing.

Switzerland

The Swiss NGO TRIAL filed a criminal complaint with the Swiss federal prosecutor's office against Argor-Heraeus SA, a Swiss gold refinery, on 1 November 2013. It was alleged that Argor-Heraeus was guilty of money laundering after having illegally processed gold pillaged from the Democratic Republic of Congo.

The Swiss prosecutor's office opened a criminal investigation into the complaint, though this was closed on 10 March 2015, with the prosecutor concluding that there was not enough evidence that the company was aware of the criminal origin of the gold.

United States

Presbyterian Church of Sudan v. Talisman Energy, 244 f. Supp. 2d 289, US District Court for the Southern District of New York, 19 March 2003

In 2001 the Presbyterian Church of Sudan filed an action against Canadian oil company Talisman in a US Court. This was a tortious liability suit for compensation under the Alien Tort Claims Act and therefore calls into question the civil responsibility of a corporation for violations of IHL. The plaintiffs alleged that Talisman was complicit in the Sudanese government's violations of human rights and commission of war crimes and genocide during the non-international armed conflict in southern Sudan.

The District Court of New York dismissed the claim on 12 September 2006 – a decision that was affirmed by the US Court of Appeals for the Second Circuit on 3 October 2009.

The International Criminal Court

The 1998 Rome Statute of the International Criminal Court (ICC) can only investigate and prosecute individuals.

The ICC might prosecute an individual involved in business dealings as part of a group or company that commits genocide, crimes against humanity or war crimes on the basis of direct and indirect perpetration, accomplice liability or superior responsibility. For example, in the case of *Prosecutor v Nahimana et al* the founding and controlling members of Radio Télévision Libre des Mille Collines and Kangura newspaper were found guilty on a number of counts, including genocide and extermination as crimes against humanity, for both the direct commission through these media companies of these crimes, and their superior responsibility for failing to prevent the incitement of these crimes.

Further, a commercial transaction – in arms dealing for instance – could fall within the jurisdiction of the ICC if the individuals involved knew that they were doing business with a group that intends to commit the crime of genocide, crimes against humanity or war crimes and they either:

- intended the transaction to further the commission of those crimes, or
- knew that the transaction would contribute to the commission of those crimes.

Source: *The American Non-Governmental Organizations Coalition for the International Criminal Court*

Research by Rebecca Rowling, research volunteer with the Australian Red Cross IHL program.

Anvil Mining

A cautionary tale for Australian companies

2005

In September 2005, the Australian Federal Police commenced an inquiry into the actions of Anvil Mining to determine whether there was evidence of the company's complicity in war crimes and crimes against humanity.

2004

In October 2004, Congolese insurgents known as the Revolutionary Movement for the Liberation of Katanga (MRLK) occupied the small town of Kilwa in the Democratic Republic of the Congo (DRC). While the occupation was largely peaceful, the MRLK looted military and police stores for weapons and sought the local community's support.

The Congolese Armed Forces (FARDC) launched a counter offensive against the occupation, and ultimately regained control over the village. Various Human Rights groups have reported that the military forces summarily executed insurgents and civilians, looted civilian property, and committed rape and arbitrary arrests. According to the United Nations, an estimated 100 civilians died as a direct result of the military action, including some who were executed and thrown in wmass graves.

At the time, witnesses claimed that Anvil Mining, a Canadian incorporated mining company with its principal headquarters in Australia, provided support to FARDC during the attack. It was alleged that this support came in the form of logistical support to the military forces, including trucks, planes, food and shelter. Anvil Mining denied any direct involvement with the killings.

2006

In October 2006, Anvil Mining employees were accused of facilitating breaches of international law by providing vehicles to the military forces. The case commenced in the Lubumbashi Military High Court in the DRC in December 2006, however, the military prosecutor determined that there was insufficient evidence of intent to establish that Anvil Mining or its employees had been complicit in war crimes.

2007

Anvil Mining's employees were acquitted in June 2007. The court also found Anvil Mining "not guilty", despite the fact that the company had not formally been tried. An appeal brought by the prosecution was denied in December 2007. These acquittals also led to the closure of the Australian inquiry.

2012

This decision was reversed on appeal and the case was dismissed in January 2012. This dismissal was upheld on appeal to the Canadian Supreme Court in November 2012.

2010

In November 2010, the Canadian Association Against Impunity launched a civil class action against Anvil Mining in the Quebec Superior Court, on behalf of the Kilwa victims. The class action alleged Anvil Mining's complicity in the 2004 Kilwa human rights violations. Initially, it was ruled that there was sufficient connection to Quebec to establish jurisdiction.

The Congolese Anvil Mining proceedings demonstrate the high evidentiary threshold when it comes to establishing the intent element in international criminal law. This evidentiary burden is complex in the context of corporate accountability for alleged violations of international humanitarian law where responsibility for decision making is passed up the corporate chain, while operational knowledge arguably lies with the lower ranks. Blame shifting in that context becomes easy, while pinpointing the directing mind behind the ultimate decision is difficult.

The Canadian aspect of the Anvil Mining case highlights a tendency toward a narrow interpretation of legal principles when establishing jurisdiction. Such an interpretation could impose a significant hurdle for victims seeking to hold corporations to account for their involvement in breaches of international humanitarian law.

Research by Jessica Thrower, research volunteer with the Australian Red Cross IHL program.

Out of sight, out of mind, out of reach?

Plainclothes contractors working for Blackwater USA take part in a firefight, *Photo: AP Photo/Gervasio Sanchez*

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Conflict is serious business – in the economic sense of the word. Apart from spending billions of dollars every year on military hardware, governments around the world have for several decades relied heavily on the services of private military and security contractors. In conflict zones or areas of instability, contractors can do all kinds of things, from operating chow halls, to maintaining military equipment, to providing armed security.

The overseas contractors of the Australian Defence Force (ADF) have so far mainly provided logistical and technical support. But, at the time of writing, armed private contractors are responsible for the safety of Australian diplomats in Baghdad and Kabul, and contractor personnel operate immigration detention facilities on Manus Island and Nauru.

Any government contracting raises questions about ensuring transparency and obtaining value for money. The use of armed security contractors, however, creates concerns in light of the risk that those contractors can pose to the public. In this respect, an incident in 2006, where armed guards from a US company called Blackwater shot and killed 17 civilians in central Baghdad in broad daylight, has been emblematic. The drawn-out struggle of the US authorities to bring the perpetrators to justice – four of the guards were sentenced to lengthy prison terms only last year – has also highlighted difficulties faced by law enforcement authorities in dealing with the conduct of contractors overseas.

Much of the contractor misconduct has been due to literal lawlessness. In particular, the application of US law to government contractors overseas has been uncertain, which is one of the issues that the convicted Blackwater guards have now raised on appeal.

So, how does Australian law fare?

First of all, certain provisions of the Commonwealth Criminal Code – including those dealing with genocide, crimes against humanity, war crimes, slavery and torture – apply to anyone anywhere. All Australian citizens and residents can also be prosecuted domestically for a number of other serious crimes committed overseas, for example human trafficking and particular drug offences.

As regards 'ordinary' crimes like murder, manslaughter, causing bodily harm, assault, rape, theft and so forth, Australian law generally does not apply overseas. Government contractors, however, may come within the reach of Australian law and courts for these sorts of crimes through two mechanisms.

> In conflict zones or areas of instability, contractors can do all kinds of things, from operating chow halls, to maintaining military equipment, to providing armed security.

The first is the *Defence Force Discipline Act 1982* (Cth). The main purpose of this Act is to deal, by means of military tribunals, with offences committed by members of the ADF. But the Act allows for persons accompanying the ADF to be designated 'Defence civilians', placing them on a roughly equal footing with ADF members.

Contractors who refuse to be designated Defence civilians, or who do not work for the ADF in the first place, escape the reach of the Defence Force Discipline Act. With respect to these people, the second mechanism becomes relevant. This is the *Crimes (Overseas) Act 1964* (Cth), which as a result of substantial amendments made in 2003, extends ACT criminal law to all Commonwealth contractors in 'designated countries'. The countries currently so designated are Iraq, Afghanistan, Solomon Islands, Papua New Guinea and Nauru.

The Crimes Overseas Act has, however, a significant limitation: it only applies to Australian citizens and permanent residents. Yet, a significant number of the security guards in Iraq and Afghanistan contracted by the Department of Foreign Affairs and Trade are reportedly foreigners without any other ties to Australia. They would remain beyond the reach of the Act and, for the most part, Australian criminal law. Why should that be so?

First, as the Attorney-General explained in Parliament in 2003, the original purpose of the Act was to ensure that Australian civilian personnel deployed overseas could be prosecuted before Australian courts rather than in local criminal justice systems that may 'fall short of Australian standards'. To put this in less generous terms, the Act was not meant to protect vulnerable populations from the criminal misconduct of Australians, but rather to protect Australians from brutish foreign law. This attitude may have shifted somewhat in 2012 when the Attorney-General acknowledged that making Nauru a designated country ensured that individuals were 'not shielded from criminal sanctions' for acts committed there.

The second reason for the limited reach of the Act may be the uncertainty as to whether Australia could, as a matter of international law, apply its criminal law to overseas acts where the only connection to Australia is that the perpetrator was in some contractual relationship with the Commonwealth government. State practice in this respect is limited but nonetheless suggests there would be no inconsistency with international law. For example, the Defence Force Discipline Act, like the military disciplinary codes of many other countries, applies to service members and Defence civilians quite irrespective of their citizenship. Also, the much-discussed US *Military Extraterritorial Jurisdiction Act 2000*, which makes particular non-citizen Pentagon contractors subject to US federal criminal law, has not been met with any palpable international opposition.

From a global governance perspective, Australia may in fact be seen as neglecting its responsibilities by leaving, say, Nauru to sort out any mess caused by contractors whose only reason for being in the country is a contract with the Australian Government.

Despite this jurisdictional gap, the Australian legislation applicable to government contractors overseas may be regarded as fairly extensive. It is much less clear, however, how well it would work in practice. The Defence Force Discipline Act is perhaps the strongest card in the deck. Even though contractors have so far not been prosecuted under this Act, the ADF certainly has a deployable policing and investigative capacity that has allowed Australian military tribunals to deal effectively with overseas offences of uniformed personnel. The Crimes Overseas Act, in contrast, has never been used, and Australia's track record of prosecuting war criminals who have found their way here has been less than stellar.

Business, IHL and 'killer robots'

LTCOL Damian Copeland, Australian Army Legal Officer and Ph.D. candidate at the Australian National University

Corporations such as Google's recently acquired Boston Dynamics and the robotic divisions of Honda and Amazon are developing autonomous robots to fulfill a broad range of commercial roles. Autonomous weapons however, sometimes referred to as 'killer robots,' present International Humanitarian Law (IHL) with one of its greatest contemporary challenges. Can such corporations and their approaches to the technical, legal and ethical challenges faced by autonomous robots in the commercial world inform the IHL debate concerning the regulation of autonomous weapons in armed conflict?

With limited exceptions, such as the 1995 ban on blinding laser weapons, weapons law is traditionally reactive to the fielding of new weapons. This regulatory delay is partly attributable to States' desire to maintain national security over future weapon capabilities. Autonomous weapon development is no exception. There is scant information publically available concerning actual or proposed autonomous weapons and their capabilities to inform the IHL debate. The lack of information limits the IHL discussion to the hypothetical and the theoretical. Engaging business enterprise is not new. The US

> Autonomous weapons, sometimes referred to as 'killer robots', present international humanitarian law with one of its greatest contemporary challenges.

A U.S. army soldier manoeuvres "Hermes" the robot into a cave to detect mines, traps, and other unexploded ordinance.
Photo: AP Photo/Wally Santana

Department of Defense has, through the Defense Advanced Research Projects Agency (DARPA), long recognised the benefit of cooperating with businesses and researchers. DARPA regularly interacts with commercial enterprises and academic institutions through technical challenges to find solutions to their operational requirements. The experience of companies may help inform the IHL debate by providing examples of likely autonomous capabilities, their limitations and possible approaches to the regulatory challenges they present. For example, a review of the sensor capability of an autonomous car, which can sense other vehicles and pedestrians on the road, may be illustrative of the likely ability of an autonomous weapon to comply with the basic IHL rule of distinguishing between civilians and combatants.

This article considers some of the ways in which the existing IHL debate, regarding the regulation of autonomous weapons, can benefit from the experience and innovation of those business enterprises developing non-weapon autonomous systems.

Assisting with weapon review methodology

States party to Additional Protocol I of the Geneva Conventions of 1949 are obligated by Article 36 to determine the legality of new weapons, means and methods of warfare. A similar obligation exists in customary international law binding all States. In the absence of specific treaty law, States developing autonomous weapons are required to determine the legality of these weapons through the interpretation of existing IHL prohibitions and rules.

> The need for certainty or predictability in the actions of an autonomous weapon is a concern for all. Civil society needs reassurance that an autonomous weapon will not 'go rogue'.

In the case of autonomous weapons, their very nature requires the legal reviewer to consider the weapon's ability to comply with IHL rules, such as the requirement to take precautions in attack, as the absence of a human operator indicates a need for the weapon itself to be able to take precautionary measures. The analysis of autonomous compliance with IHL raises significant challenges for any State undertaking a legal review. For example, the State will need to determine the appropriate testing methodology and standards. By providing tools and techniques used in the commercial environment, business enterprises may assist States to develop or hone their methodology for assessing autonomous decision making against IHL requirements.

Helping to define the problem

Central to the IHL debate concerning autonomous weapons is the definition of autonomy and the level of human involvement. The scale of human interaction between human and machine in autonomous decision making requires both legal and ethical definition. The degree of autonomy is also important in business enterprises developing autonomous capabilities such as humanitarian care robots or autonomous cars. Their approach may inform future understandings and perhaps regulatory directions on autonomous weaponry, for which varying degrees of human operation may be required.

Understanding the limits of autonomy

Most killer robot debates inevitably provoke images of Hollywood's 'Terminator' as an illustration of a worst case scenario for uncontrolled autonomous weapons. Unfortunately, it is simply not clear whether or how such a scenario may ever eventuate. Business enterprises can help inform the debate by providing technical advice concerning the true capability and limitations of both artificial intelligence and algorithm based operating systems. Further, drawing from the lessons learned from the development of autonomous capabilities such as self-driving cars, business enterprise may illustrate how regulatory safeguards, such as road rules, can be built into systems to ensure compliance in all situations including those of doubt or uncertainty.

Autonomous predictability

The need for certainty or predictability in the actions of an autonomous weapon is a concern for all. Civil society needs reassurance that an autonomous weapon will not 'go rogue'. Military commanders responsible for the use of autonomous weapons must be able to employ them knowing with confidence what the weapon will do and what it is not capable of doing. The requirement for predictability is as true for an autonomous car as much as it is for an autonomous weapon.

Business enterprises can inform and contribute to the discussion of how the actions of autonomous systems can be limited to known and acceptable conduct while complying with international legal obligations. Their technical solutions may form the basis of technical compliance standards required of all autonomous weapons.

Conclusion

The IHL regulation of autonomous weapons in future armed conflict is an important issue. The expertise and experience of business enterprise in the field of autonomy may help inform the IHL debate by assisting in the understanding of their operation, their limits and the actual risks that they pose. Collaboration with business enterprise may also assist States to develop their weapon review methodology to ensure compliance with IHL.

Can businesses contribute to the prevention and alleviation of conflict?

James Wolfensohn, President of the World Bank, addressing the Security Council about the role of business in conflict prevention, peacekeeping and post-conflict peace-building.
UN Photo/Evan Schneider

Fauve Kurnadi, Queensland Coordinator – International Humanitarian Law, Australian Red Cross

A highly globalised economy and very real political and economic influence – whether at the local, regional or international level – has given corporations the reach and power to impact communities around the world in varying ways. In some instances, as history demonstrates, this impact may be negative – experienced through the extraction of natural resources or the manufacturing and provision of weapons used in the commission of war crimes. The knock-on effect of international business operations can, and often does, manifest in a capacity to cause and/or contribute to armed conflict and other situations of violence. However, given their reach and influence, do corporations not also have capacity to make positive contributions towards the prevention and alleviation of conflict?

Just as there are cases which illustrate the negative impact of business enterprises in these circumstances, there is also evidence to suggest that businesses can contribute to both the prevention and the alleviation of armed conflict. This article highlights some of these examples and seeks to energise the corporate world – from grass roots businesses to multinational corporations – to consider ways in which they might be able to contribute to a more peaceful environment in their respective regions.

Prevention of armed conflict

The Colombian Agency for Reintegration is a government initiative developed to handle the reintegration of the tens of thousands of men and women who have left the Revolutionary Armed Forces of Colombia (best known

as the FARC) and other paramilitary groups in order to integrate back into the community. The agency engages local businesses to assist in disarmament and demobilisation. Through this process, individuals are given access to healthcare, training and upskilling and financial support to help them prepare for social and economic reintegration. This is done in an effort to prevent demobilised combatants from returning to conflict or engaging in criminal activity, and evidence shows that it is working.

This initiative, which focuses on empowering populations seen as vulnerable to conflict, is just one example of an approach to conflict prevention. Another broader approach seeks to improve the socio-economic conditions of a particular region in an attempt to create a stable and secure environment – a less likely breeding ground for conflict. For instance, Netherlands-based telecommunications company Celtel International operated in 14 countries across sub-Saharan Africa including DRC, Sierra Leone and Sudan during the period between its establishment in 1998 and its sale in 2005. Its founder Dr Mohammed Ibrahim, reflecting on the potential influence of his company, said 'where you have good telecommunications you usually have democracy. If you have a phone in your hand, then you have a voice'. Beyond this, the company also invested millions of dollars into each country. Investments included wheelchairs for war victims, dustbins, building materials and deep water wells. The business model also included building up small businesses and providing telecommunications capabilities to rural communities.

Alleviation of armed conflict

The post-conflict transitional justice process is key to healing residual wounds created by violence and war. Peacekeeping, development projects, criminal prosecution or truth commissions and innovative business practices can all assist in facilitating reconciliation and promoting peace.

The island of Mindanao in the Philippines has been affected by decades of inter-clan feuds and ethno-religious conflict between Muslim separatists and the Christian majority government. Before the turn of the century, La Frutera Inc. and Paglas Corporation established a banana plantation in Datu Paglas, Maguindanao in an effort to facilitate conflict resolution at the local community level. The companies hired both Christians and Muslims, including ex-combatants, and incorporated both Christian and Muslim traditions and practices into the business model to promote religious tolerance and cultural sensitivity within the community. Today, the plantation is not only one of the most profitable in the country, but its effects on the town of Datu Paglas has also been positive, with violence and crime in the area having diminished and former combatant employees choosing not to reengage in hostilities, such as when fighting again broke out in 2000.

Case studies from Sri Lanka also highlight the potential of businesses to play positive roles in conflict alleviation. After decades of conflict and the bombing of Colombo International Airport in 2001 the Colombo private sector was motivated to unite as agents of peace. Sri Lanka First (SLF), comprising trade associations in the garment, tea, tourism and freight sectors, was the first high-profile corporate group to publically advocate for conflict resolution. The group implemented a movement of public and political awareness campaigns, demonstrations and lobbying to encourage voters to support a pro-peace government, which came into power at the end of 2001 and led to the signing of a ceasefire agreement in early 2002.

The transformations enabled by companies such as Celtel and La Frutera/Paglas and business initiatives like the Colombian Agency for Reintegration and SLF are just several examples of the private sector's ability to play a positive and strategic role in the alleviation of conflict and the creation of peace. Not only can business enterprises contribute to prevention and alleviation practices, as the above examples demonstrate, but they should contribute – not just on account of corporate social responsibility and the impact this has on conflict prone environments but because industries and economic growth thrive in peaceful conditions, so it makes good business sense to do so.

Community members in Pariak, South Sudan are engaged in brick-making as part of the country's Disarmament, Demobilization and Reintegration Program. *UN Photo/Martine Perret*

International Humanitarian Law (IHL) Program

Australian Red Cross is part of the International Red Cross and Red Crescent Movement (Movement), the largest humanitarian network in the world.

The International Red Cross Red Crescent Movement has a special role around the globe to promote IHL and humanitarian principles. In Australia, Australian Red Cross has an IHL Program that provides targeted training and education on IHL issues to key groups identified as having a role to play in situations of armed conflict.

Former WA IHL Officer Viv Ryan teaches a group at HMAS Stirling, Western Australia.
© Australian Red Cross

Australian Red Cross has a mandate to promote understanding and respect for international humanitarian law (IHL), also known as the laws of armed conflict.

The IHL Program focuses on the following groups:

- Australian Defence Force
- Australian Federal Police
- Non-government organisations
- Commonwealth Government agencies
- Key professions (eg. legal, health, media)
- Tertiary sector and academia
- Wider community

The IHL Program offers training, courses and advice to a wide range of Australians. For example, we provide training to military medics and chaplains, in addition to being invited to participate in Australian Defence Force training exercises. More broadly, we run events and training seminars for key groups whose work is affected by the application of IHL and for members of the general community who have an interest in humanitarian issues.

For more information on the IHL Program visit:
www.redcross.org.au/ihl

Our Fundamental Principles

In all activities our volunteers and staff are guided by the Fundamental Principles of the Red Cross and Red Crescent Movement.

Humanity

The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all people.

Impartiality

It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

Neutrality

In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence

The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

Voluntary Service

It is a voluntary relief movement not prompted in any manner by desire for gain.

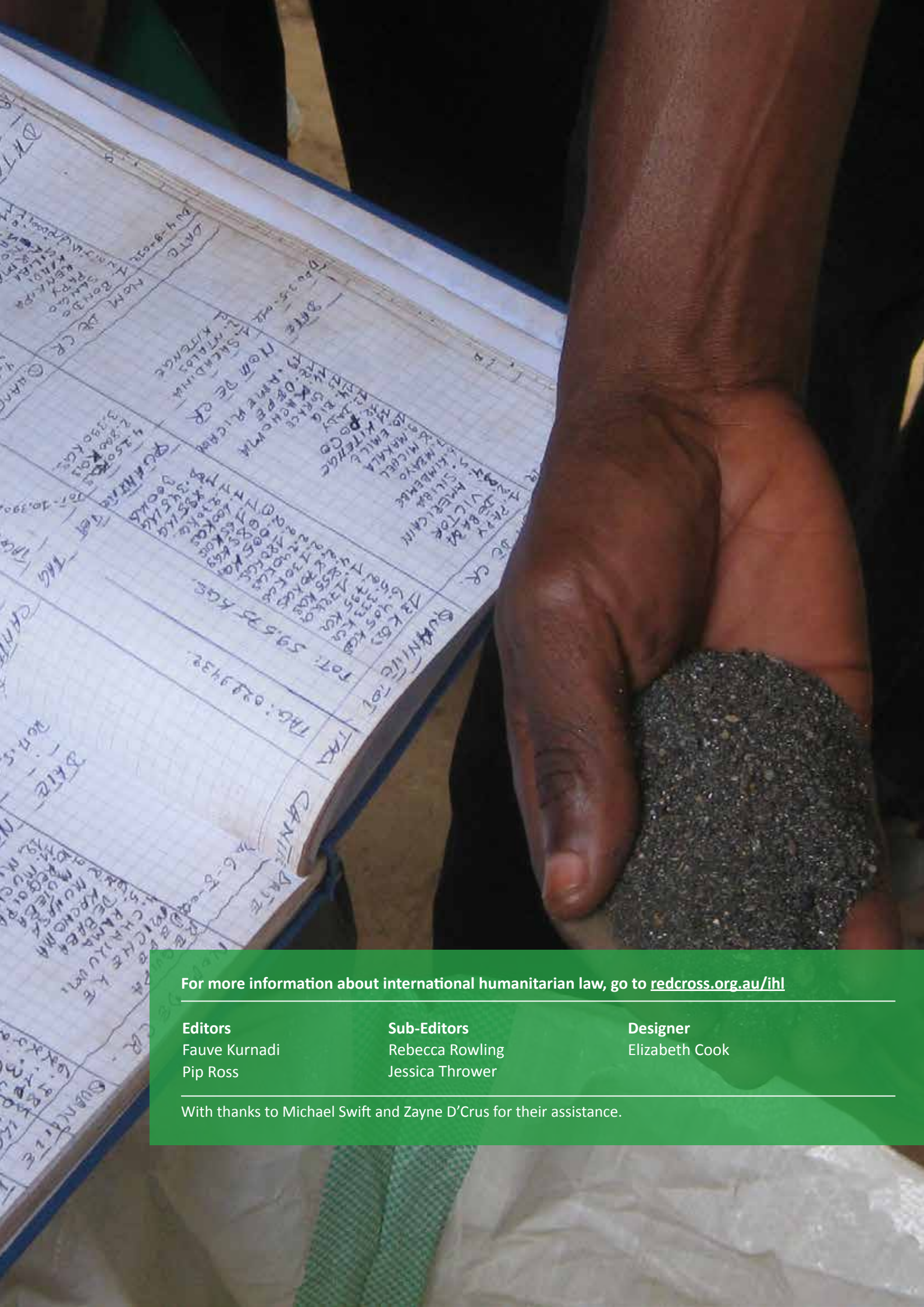
Unity

There can be only one Red Cross or Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality

The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.

Universality: Giving the Fundamental Principles local context on the Tiwi Islands.



For more information about international humanitarian law, go to redcross.org.au/ihl

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