EXECUTIVE SUMMARY OF THE HUMAN RIGHTS DUE DILIGENCE MEMORANDUM:

Assisting Business Leaders in Meeting the "Corporate Responsibility to Respect Human Rights"

The memorandum puts forward four main propositions:

1. Human Rights Due Diligence (HRDD) is swiftly becoming a requisite process for multinational firms in both conflict ridden and/or under developed countries, as well as in economically vibrant countries like India and China because of increased regulatory scrutiny and liability under the US Alien Tort Claims Act. Interestingly, foreign corporations doing business in the United States risk "human rights" criticism, i.e., BP, in addition to the evolution of soft law guidelines becoming hard law strictures; moreover, exposure to risk may spring from direct, indirect, and extraterritorial actions;
2. The potential liabilities from failure to respect humanitarian law can be bet-the-company risks involving reputational, brand and financial damage, and individual and corporate civil and criminal liability from direct and indirect actions;
    a. Among those risks, brand damage has the largest potential financial impact. As a result, HRDD is also a matter of asset management and the following examples illustrate this point:
        i. **Apple**: has a brand value[1] reported in the business news worldwide of $153 billion; an explosion and fire at a Foxconn plant (manufacturing Apple's iPad) in China killed 2 people and injured 16. According to the WSJ, "A spate of suicides at Foxconn's mega-plants in China last year generated intense scrutiny about its employment practices…" Apple's revenue over the past 12 months was $57 billion, net income $12 billion. Apple has faced strong criticism in connection with the fire.
        ii. **Hershey**: owns the largest market share in the US at 42.5%, revenues of $5.7 billion, and gets most of its chocolate from West Africa, known for the use of child labor, and is one of the only major chocolate brands that refuses to certify its chocolate as fair trade. On September 13, 2010, the Hershey Company released its first ever Corporate Social Responsibility (CSR) report, yet failed to offer any real solutions to issues of forced and child labor that persist in its supply chain. Shares of The Hershey Company (NYSE: HSY) are seeing pressure after the company announced that President and Chief Executive Officer David J. West is leaving Hershey to accept a position at another company.
        iii. Among the top ten brands by value, half are high tech companies that will face SEC scrutiny for Dodd-Frank Act requirements on supply chain management of conflict minerals. Compliance failures will likely result in

[1] Millward Brown Optimor released its annual "BrandZ: Top 100 Most Valuable Global Brands" study, which tabbed Apple as the most valuable brand in the world as reported in business publications May 9-10, 2011.

reputational damage. Those tech leaders, brand standing and brand value are: **Apple** (#1, $153 billion); **Google** (#2, $111 billion); **IBM** (#3, $101 billion); **Microsoft** (#5, $78 billion); **AT&T** (#7, $69 billion). Total brand value at risk: $512 billion.

iv. **Pfizer**: Nearly 15 years after its controversial drug trial on 200 children with meningitis in Nigeria, Pfizer Inc. and all plaintiffs in the cases related to the trial announced recently that they have reached a global settlement. The suit accused Pfizer of using the experimental drug without the consent of the parents, and of not telling the families that another acceptable drug was available and was being used by Doctors Without Borders in Nigeria to treat the epidemic. Pfizer denied their allegations. The families battled Pfizer all the way to the U.S. Supreme Court and back after U.S. District Judge William H. Pauley, III, had dismissed the suit in 2005.

v. **Anvil**: Anvil is an Australian Mining Company which is the largest copper producer in the DRC which supplies about 10% of the Copper market. On April 28, 2011, Canada's Quebec Superior Court ruled that a class action brought against Anvil by a coalition of NGO's in Canada, based on the company's activities in the DRC, could proceed in the Canadian court system. This follows a 2007 Court Martial in the DRC during which several of Anvil's non-Congolese employees were acquitted of charges of complicity in war crimes. The charge against the company stems from the use of Anvil vehicles during a massacre by the Army of the DRC. During the investigation of the circumstances surrounding the supplying of the vehicles, UN investigators claimed that Anvil CEO with making misleading statements.

3. The news is not all bad: HRDD and corporate social responsibility (CSR) are positively correlated with corporate financial performance and that virtuous circle has been shown to spin off financial benefits to all stakeholders. Succinctly put, when companies invest in CSR, human rights being one subset, they make more money because they enhance customer and employee loyalty for top and bottom line benefits, and they attract investment dollars at a rate higher than companies that do not invest in CSR programs. This virtual circle effect is comprehensively supported in research data.
4. Existing human rights due diligence assessment models provide merely a starting template for multinationals to follow in order to reduce their risks and to protect their reputations. Because of the unique circumstances every company and every business development investment faces, it is clear that executives must tailor human rights assessments to encompass the distinctive variables of each situation. Given the significant benefits and risks, executives are advised to seek highly qualified advice early in the decision making process regarding business development investments.

The Evolution of Soft Law Into Hard Law

This paper strongly suggests that a multinational's responsibility for human rights due diligence is at a tipping point that leans toward necessary compliance in the face of expanding soft (e.g., OECD Guidelines) and hard law requirements (e.g., the Dodd-Frank Act or DFA). The two "soft law" cases discussed in this paper, Das Air and Afrimex, illustrate that

corporations through direct or indirect action, can cause humanitarian harm. As well, failing to employ the due diligence requirements of the OECD Guidelines, can cause a business to fail (Das Air) and label a company as complicit in child labor (Afrimex). These cases involved lack of due diligence in the supply chain of conflict minerals in the Democratic Republic of Congo (DRC). Although these two examples stem from one industry in one region, it is abundantly clear that such potential negative consequences inhere to firms in all industry sectors, in any geography, and in both conflict areas and in highly developed countries.

As examples, China and India have been rated among *the* worst offenders regarding child labor. As a result, there is an equivalent human rights risk in those countries in potentially every facet of production, from raw materials to high tech products.

While the conflict in the DRC has supplied the Petri dish for these soft law cases to evolve into standards of compliance for humanitarian law, a hard law twin, the DFA, now vests in the SEC the responsibility for greater transparency by corporations in the supply chain of conflict minerals, and opens the door to criminal penalties for false reporting.

The DRC has spawned more cases than the other five situations at the International Criminal Court (ICC). A trend that seems likely to continue. These cases involve militia leaders, and while the ICC lacks jurisdiction to try corporations for criminal violations (for now), there is no bar to the trial of execs for violations of international humanitarian law at the ICC or elsewhere:

> It is beyond dispute that individuals, including corporate executives, face potential criminal liability before national and international courts for committing or aiding in the commission of human rights and humanitarian law violations. Although there has been only modest movement thus far in the direction of holding businesses and their executives accountable for such criminal violations, the "expanding web" is just over the horizon. (p. 8)

The HRDD dangers can involve potential criminal liability, entanglement with soft law regulatory schemes like those based on the OECD Guidelines, "hard" regulatory regimes like the SEC's future rules enforcing Dodd Frank's Conflict Minerals provisions and reputational harm. There is also a universe of potential civil liability lurking in foreign and US courts such as in actions under Alien Tort Claims Act (ATCA).

From Costs, Profits

At the same time that such increased due diligence responsibility incurs costs, there is clear, empirical evidence from comprehensive economic research studies, that socially responsible behavior is a determinant of positive financial performance. This valuable effect is a distinct competitive advantage spurring supplemental financial benefits for all stakeholders in the form of customer and employee retention (directly linked to enhanced profitability by Reicheld as footnoted in the Memorandum), increased investor interest and competitive rates of return from socially responsible investment funds (documented by groups such as socialinvest.org), and economic development benefits to surrounding communities.

Due Diligence Template: No Silver Bullet

There are a number of existing due diligence templates that provide a preliminary amount of guidance. Among them are the OECD Guidelines and the SRSG's Draft Guiding Principles, as well as a number of risk assessment tools developed by human rights groups around the world. While extant templates provide a measure assistance, multinationals should consider a more comprehensive and finer grained analysis of the dimensions of risk, including focused efforts by in house and outside experts of many stripes, both legal and non-legal. Given the multiple threads to liability and the number of parties that can allege violations, a risk awareness assessment must include all of the human rights elements relevant to a business operation, including supply chain partners, business partners, government representatives and any other actors implicated, directly or not, in the business operation.

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M E M O R A N D U M

TO:

FROM: Raymond M. Brown[*] with Chris Filip and with additional research by Gregg Hilzer

DATE: July 5, 2011

RE: **Assisting Business Leaders In Meeting The "Corporate Responsibility To Respect Human Rights"**[1]

1. "Compliance, Conscience and Cost" plus Profits: Towards the "Virtuous Circle"

It is said that the young man's purpose was to obtain the Emperor's assistance with a business venture, perhaps in Algeria. The Emperor was, of course, too busy to indulge the young man as his Highness was on the eve of an enterprise of his own -- a great battle against another Emperor.

In fact this was to be the last battle between forces under direct Imperial Command. The confrontation would be the Battle of Solferino, June 24, 1859, fought between the armies of Franz Joseph and Napolean III. The young businessman in pursuit of Napolean III was Henry Dunant of Switzerland.

Instead of opportunity, Dunant discovered the horrors of war as he stumbled upon thousands of dead and dying soldiers at Solferino. His response was to organize bystanders of many nationalities (*tutti fratelli)*[2] to tend to the wounded. He subsequently authored A Memoir of Solferino[3] which inspired the founding of the International Committee of the Red Cross and was a catalyst for the first Geneva Convention, both seminal developments in modern international humanitarian law[4] "IHL". Toward the end of his life, Dunant was the recipient of the first Nobel Prize for Peace for his response to Solferino and to the conditions of 19th century warfare.

Dunant would not have understood the term "human rights due diligence,"[5] or, in contemporary parlance, "HRDD," "a comprehensive, proactive attempt to uncover human rights

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risks."[6] Nonetheless, Dunant recognized the ethical need to cease conducting business as usual in the midst of a humanitarian crisis and respond to the suffering around him.

Modern business leaders, even those with strong ethical sensibilities, inhabit a more complex environment. They are "caught between compliance, conscience and cost"[7] observes a business publication, Supply and Demand Chain Executive. This contemporary corporate conundrum reflects profound changes since Dunant's day, in humanitarian norms and in the negative consequences faced by those who ignore or violate them in the 21st century.

This Memorandum is intended to introduce business leaders to these changes and to suggest ways in which they may navigate this rapidly changing and important arena. It is necessary for the leadership of virtually every business affected in any way by globalization to understand the dynamics of the human rights challenges it will inevitably face. From the importation of farm produce and extractive materials to finished products manufactured abroad, very few large or midsized businesses are untouched by international commerce and its supply chains. Obviously, domestic businesses exporting products and services abroad are similarly situated.

In virtually every nation, from conflict and weak governance zones to authoritarian and totalitarian regimes, potential human rights violations are present. While basic human rights norms are universal (no nation openly espouses forced labor or torture for example), enforcement is inconsistent. However, the principle that businesses have a "responsibility to protect" human rights has been rapidly evolving for the last two decades in the eyes of international civil society, the international legal system, as well as in some national legal systems.

This evolution of standards governing business conduct has been uneven, inconsistent, and at times erratic. Nonetheless, the consequences for business leaders who fail to grasp the specific challenges faced by their enterprise and who fail to take proactive measures to protect themselves and their companies, can be disastrous. Our practice group has the ability to assist decision makers by helping them to assess risks on the ground and to fashion HRDD solutions to cope with these consequences and to understand the constantly evolving regulatory landscape.

Of course not all of the consequences for businesses confronting human rights challenges are negative and our assistance can simultaneously help businesses avoid catastrophe and help them increase profits. There is strong empirical evidence that "business social performance is positively correlated with business financial performance" in what has been called a "virtuous circle…"[8] Comprehensive economic research has demonstrated the financial benefit of this "virtuous circle," proving that "reputation" correlates more highly than other social responsibility measures with financial rates of return for all stakeholders.

This correlation exists because reputation "matters to investors, analysts, researchers, educators, consumers, current/prospective employees, and other stakeholders." These positive results are likely to surface quickly as "a firm's good reputation may pay off without delay, especially in a country where people tend to be well-informed about social and environmental issues."[9]

HRDD is a concern for other elements of civil society outside the business community. John Ruggie, the United Nations Secretary General's Senior Representative for Business and Human Rights (SRSG),[10] has observed that "[B]usiness enterprises, can infringe" human rights and "those rights are the core standards against which other social actors hold enterprises to account for their adverse impacts"[11] (emphasis added). Furthermore, HRDD behavior is more than a marginal factor in the corporate context. Globalization and the universal legal and rhetorical[12] commitment of the international community to human rights since its post World War II inception has increasingly ensured that multinationals must comply with human rights norms or risk reputational harm.

In addition to ill repute, however, HRDD failures also expose multinationals to regulatory sanctions, litigation and, as the SRSG has observed, to the "expanding web of potential corporate liability for international crimes."[13] (emphasis added).

Few situations illustrate contemporary HRDD challenges more starkly than the question of the integrity of the supply chains that move goods, produce or minerals from source to retailer. This issue potentially effects every segment of the global economy.[14] Developments in the Democratic Republic of the Congo, "DRC" have dramatically highlighted these supply chain issues drawing important responses from a wide variety of institutions including the United Nations, the US Congress, the Organization on Economic Cooperation and Development "OECD" and a broad array of civil society stakeholders.

2. Raid v. DAS Air: Businesses seen as "Engines" of conflict

A "prominent carrier in Africa"[15] faces sanctions for violating HRDD requirements. Can the carrier be brought to account for violating due diligence provisions contained in "multinational guidelines"[16] that are non-binding, soft law[17] instruments? Can sanctions be applied if the challenged conduct occurred with the full cooperation of the lawfully constituted governments of sovereign nations?

The answers in the case of DAS Air are "yes!"

DAS Air was a "long established UK based air freight services business."[18] In October 2007 it was liquidated.[19] Its demise followed a year long "ban on flights operating into and out of [the] European Community."[20] The ban was imposed after a non-governmental organization, "NGO", called RAID[21] filed a complaint about DAS Air's due diligence violations before an OECD quasi-judicial body called a National Contact Point, "NCP."[22] By the time the NCP determined that DAS Air had violated OECD Guidelines for Multinational Corporations, the business had collapsed.

The NCP found that DAS Air violated the OECD Guidelines' "due diligence" requirements by failing to assess the "supply chain" of the mineral coltan it was hauling in the Great Lakes Region of Africa.[23] Das Air also violated OECD Guidelines by collaborating with the Ugandan Army[24] to mischaracterize as "military"[25] flights in and out of an area of the DRC illegally occupied by Ugandan troops. (It similarly found a violation where DAS Air transported coltan from Kigali, Rwanda, to Johannesburg, South Africa, without performing due diligence on the cargo's provenance.)

The DAS Air case is not an outlier despite the unique, decades long[26] turmoil in the DRC and the special problems that beset extractive industries. As discussed later, there is intense debate over whether conflict zone issues are generically different from those in non conflict areas. At the moment, DRC is serving unwittingly as a laboratory for corporate human rights obligations with the violence in Eastern Congo, in particular, crystallizing the great issue of whether HRDD standards should be mandatory and what consequences will flow from their violation.

3. Africa's First World War

How DAS Air and the DRC became enmeshed in the development of HRDD is instructive to all multinationals. The context is what former Undersecretary of State for African Affairs Susan Rice famously called Africa's "First World War," which consisted of two conflicts, the "First" and "Second Congo War[s]." The "First" lasted from 1996 to 1998. The "Second" from 1998 until 2001. Together, these conflicts involved the armies of "at least 8 nations in addition to 21 irregular armed groups."[27] The UN's Special Rapporteur informed the General Assembly in 2000 that "the country ha[d] been destroyed."[28] He noted that there were more than 1.3 million internally displaced persons existing "without assistance."[29] Throughout the DRC, but especially in the Eastern Congo, murder, assassination, torture, forced disappearances, gender based violence "GBV" and executions were widespread.[30] The dispute over the total number of war related deaths continues to the present but estimates range from 2.5 to 5.6 million.

The causus belli of this great human conflagration are too complex to be comprehensively addressed here. However, two fundamental reasons are commonly agreed upon, border security and the desire to exploit the DRC's mineral wealth.

The mineral wealth impetus is easily understood. As one post Congo War study notes:

> The DRC has huge economic potential: it accounts for around 17% of global production of rough diamonds, for example. The copper belt that runs through Katanga and Zambia contains 34% of the world's cobalt and 10% of the world's copper. Moreover, 60% - 80% of global coltan reserves, used in the manufacture of mobile phones, computers and other electronic equipment, can be found in North and South Kivu.[31]

Supply chain industry sources estimate DRC's potential wealth at approximately $24 trillion dollars.[32]

The border insecurity issue is more subtle but ultimately dovetails with economic incentive. The Rwandan Genocide of 1994 resulted in the deaths of approximately 800,000 Tutsis and sympathetic Hutus. Its aftermath triggered[33] the westward flight into Eastern Congo of many Hutus, including, genocidaires and members of the *interahamwe.*[34] Their presence destabilized the border region, causing Congolese Tutsi to flea eastward into Rwanda and causing many other Congolese to take up arms.

In October of 1996, the First Congo War began when Rwanda, Uganda, and Burundi, backing Laurent Kabila and his AFDL[35] launched a "lightning offensive"[36] that ultimately reached Kinshasa and overthrew Zairian President Sese Seku Mobutu in May 1997. Initially, Kabila maintained friendly ties with Rwanda and Uganda. Eventually, that relationship frayed. However, Rwanda and Uganda continued to exploit the DRC's natural resources long after Kabila became disenchanted with them.

In 1998 Kabila called upon Zimbabwe, Angola, Chad, Sudan and Namibia to assist him in expelling his erstwhile allies. The ensuing conflict became known as the Second Congo War. All of these national armies and the various militias and armed groups involved participated extensively in mining and other extractive operations both with and without the permission of the regime in Kinshasa. These activities were abetted considerably, however, by outside business and corporations. A frequently quoted UN Experts report[37] describes "Companies trading minerals, [as]…'the engine of the conflict in the Democratic Republic of the Congo.'"

4. Articulating Sovereign Responsibilities for Businesses

The NCP in the DAS Air case embraced this "engine" metaphor[38] and endorsed the Experts report's finding that "the role of the private sector in the exploitation of natural resources in the continuation of the war has been vital…"[39] The conclusion drawn by the NCP was that,

> Heightened care is required by companies when investing and trading in weak governance zones. There is no evidence that DAS Air made any concessions to the conflict occurring in the region. DAS Air transported minerals from Kigali, which had a reasonable probability of having been sourced from the conflict zone in the DRC, on behalf of its customers.[40]

From a commonsense perspective, the validity of the ruling against DAS Air seems self-evident. Given the chaos in the DRC, how could a seasoned air carrier "with good regional knowledge"[41] not know that flying coltan between the DRC and Entebbe, Uganda, involved moving illegally exploited minerals obtained by an illegal army of occupation that had committed "documented human rights abuses on the local population?"[42]

However, from the HRDD perspective, the "heightened care" expected of DAS Air meant that it should have investigated the legality of Ugandan (and Rwandan) occupation of parts of the DRC as well as the circumstances under which these nations, their armies and proxies obtained coltan. Essentially, this would have required DAS Air to address a Uganda "occupation" issue before that matter was adjudicated by the International Court of Justice[43] and a Rwanda "occupation" issue that was never taken up by the court.

Notwithstanding the challenges facing international businesses, the imposition of sanctions for violating due diligence standards is a trend, even though one observer (friendly to the OECD process) has described it as requiring "enterprises to undertake sovereign responsibilities"[44] (emphasis added). This development was inevitable since international actors believe that corporations drive some of the conflicts from which they profit. The NCP did offer some comfort to companies anxious to avoid DAS Air's fate, noting in its opinion that "[t]he UK

Government draws attention to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones."[45]

The OECD is not the only source of increased regulatory attention inspired by the DRC conflict. The U.S. Congress has vested the Securities Exchange Commission with the responsibility to require greater transparency by corporations in the supply chain of "conflict minerals." Without much debate, the Congress added the Conflict Minerals Section to the Dodd-Frank Act.[46] In doing so Congress expressed a concern that:

> …the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern [DRC], particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein…[47]

The Conflict Minerals Section requires companies filing SEC reports to disclose any "conflict minerals" utilized by them if the minerals are "necessary to the functionality or production" of their products. Additionally, companies must conduct due diligence inquiries throughout their supply chains, submit reports[48] on their efforts and post relevant findings in their SEC annual reports and on their "internet websites."

The SEC Proposed Rule governing the reporting requirements imposed by the Conflict Minerals Section shies away from "proposing any particular conduct requirements"[49] for the issuers of Conflict Mineral Reports. However, it "expects issuers…to conform […] to nationally or internationally recognized standards."[50] However as examples, the Proposed Rule suggests the OECD Draft Due Diligence Standards and the recommendations of the UN DRC Experts[51] be used as standards by reporting companies. These are essentially the standards advocated by the NCP in the DAS Air case. Thus, in a short time, OECD soft law norms have migrated to US "hard" law, enforced by the SEC.

Interestingly, it appears from the statute and the proposed SEC regulations that the principle enforcement tool here will be reputational impact. Naming, shaming, and praising appear to be the most likely potential sanctions for companies drawn into the Conflict Minerals scheme.[52] Serious non reputational sanctions seem likely only if regulated companies file false reports subjecting them to possible criminal penalties.[53]

On the other hand, international criminal charges have been lodged against militia leaders in the DRC which has received "robust" prosecutorial attention at the International Criminal Court[54] "ICC." The first case tried before the ICC involves the DRC.[55] Although there are six "situations"[56] before the ICC, only the DRC situation has four accused currently in custody and a fifth facing charges as a fugitive.[57] A sixth suspect, Jean-Pierre Bemba, a Congolese, was charged in connection with alleged crimes in neighboring Central African Republic, even though he had been a candidate opposing president Laurent Kabila's son, Joseph, in the 2006 DRC elections.

When the ICC investigation in the DRC which is still unfolding will touch the corporate world, will not be known for some time. The ICC lacks jurisdiction to try corporations for

criminal violations. This is not because corporations never exploit slave labor in violation of international law.[58] It is because nations vary greatly in whether and how they treat the problem of corporate criminal liability.[59] However, there is no bar to the trial of corporate executives for violations of IHL.

In private conversations, the current ICC prosecutor, Luis Moreno Ocampo, has told the principle author of this Memorandum that he would vigorously investigate corporate activity in Darfur if he had evidence that corporate conduct fell within the subject matter jurisdiction of the court. He has made similar representations concerning the DRC to representatives of states that have ratified the Rome Treaty for the ICC.[60] Such investigative efforts could unquestionably lead to charges against corporate executives and their subordinates.

For example, the Rome Statute's provision on Crimes Against Humanity prohibits "enslavement."[61] This offense is defined as:

> "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

The "deprivation of liberty" entailed in this offense "may, in some circumstances, include exacting forced labor…"[62] (emphasis added). Presence at the site of an offense is not necessary for complicity.

5. Tin Soldiers, Links and Complicity

Deeper understanding of complicity can be developed by examining another soft law opinion from an NCP in the United Kingdom. This case was brought by Global Witness against Afrimex, a UK registered company, which the NCP believed paid taxes to rebel groups in the DRC and utilized minerals from mines that used child and forced labor.[63] According to the NCP:

> … in June 2000 Afrimex applied insufficient due diligence on the supply chain and this remains the case. The UK NCP expects UK business to respect human rights and to take steps to ensure it does not contribute to human rights abuses. Afrimex did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use **child or forced labour** or with better health and safety. The assurances that Afrimex gained from their suppliers were too weak to fulfill the requirements of the Guidelines. Therefore the NCP found that Afrimex had failed to:
>
> IV.1.b "Contribute to the effective abolition of child labour."
>
> IV.1.c "Contribute to the elimination of all forms of forced or compulsory *labour."*

IV.4.b "Take adequate steps to ensure occupational health and safety in their operations.[64]" (emphasis added)

Afrimex's primary factual defense was that it only took possession of minerals at the DRC border.[65] Ultimately the NCP found that Afrimex was sufficiently linked (inter alia by overlapping directorates) that it was in a position to "significantly influence" the companies with which it dealt in the DRC.[66] The NCP was not satisfied with a letter that Afrimex had received from a supplier certifying that the supplier had paid competent authorities. (The letter was prompted by a story about Afrimex called "Congo's Tin Soldiers" produced by Global Witness and Britain's Channel 4.) The NCP concluded that Afrimex should have specifically asked its suppliers about payments to "political or military organizations."[67] Similarly, the NCP concluded that the fact that Afrimex's principle owner had never been to the DRC failed to insulate him from the claim of inadequate due diligence but rather confirmed the inadequacy of his efforts in determining labor conditions which produced minerals supplied to him.

> 56. Mr. Kotecha confirmed to the IDC that he had never visited a mine to determine whether forced labour occurred and that his business practices were based on the assurances provided by his suppliers. The NCP recognises that Eastern DRC is a dangerous place, FCO travel advice is not to travel to eastern and north eastern DRC, with the exception of Goma and Bukavu, where advice is against all but essential travel. This is due to continued insecurity and lawlessness in these areas. Instability and fighting between Congolese army and insurgents in North Kivu province have led to a very high number of civilians being displaced. The NCP fully understands why Mr. Kotecha would be unwilling to visit the mines to establish the conditions but that in itself illustrates the requirement for increased due diligence.
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> 57. The reliance on oral assurances from the suppliers and the subsequent written statements amount to insufficient due diligence for a company sourcing minerals in the conflict zone in Eastern DRC.[68]

Afrimex is not a criminal case and decisions by NCP's about an importer's responsibility to perform due diligence do not by themselves establish criminal liability. However, in any criminal investigation, the extent and nature of "due diligence" efforts would be relevant to determining an executive's mental state.[69] Furthermore, the Rome Statute for the ICC in particular contemplates joint and accessorial liability and does not require a person to be present at the scene of a crime in order to be held personally liable.[70]

In fact, the SRSG's Guiding Principles For The Implementation Of The United Nations 'Protect, Respect And Remedy' Framework,[71] released in March 2011, "Guiding Principles" takes the view that the test for complicity under such circumstances would be whether a person "knowingly provided practical assistance or encouragement"[72] to the principle perpetrator. Although there has been some debate about whether complicity requires "knowing" or 'purposeful" conduct,[73] the point here is that it is only a matter of time before executives are

directly implicated and/or charged in ICC proceedings and, at the moment, the DRC situation seems most likely to generate such charges. The only reliable buffer against such charges as we have already discussed in the context of opinions from the SRSG, is "proactive" HRDD.[74] (As discussed below, employees of Anvil, an Australian mining company, have already faced national charges in the form of court martial proceedings in DRC for alleged complicity in the conduct of DRC soldiers.)

This point warrants special emphasis since the first function of HRDD should be to reduce a business's risk of complicity in violations of international criminal law. The SRSG has previously emphasized that:

> "… the relationship between [criminal] complicity and due diligence is clear and compelling: companies can avoid complicity by employing the due diligence processes described above -which, as noted, apply not only to their own activities but also to the relationships connected with them."[75]

It is beyond dispute that individuals, including corporate executives, face potential criminal liability before national and international courts for committing or aiding in the commission of human rights and IHL violations. Even some business organizations have advocated an increase[76] in prosecutorial zeal. Although there has been only modest movement thus far in the direction of holding businesses and their executives accountable for such criminal violations, the "expanding web" is just over the horizon.

6. Acknowledging the Risks

This Memorandum explores some of the principle risks for those who fail to meet appropriate HRDD standards. These risks include potential criminal liability, sanctions in traditional municipal regulatory regimes like the SEC's upcoming Dodd Frank Conflict Minerals rules, entanglement with soft law transnational regulatory schemes like those based on the OECD Guidelines,[77] and reputational harm.

Additionally, there is considerable discussion about the risk presented by states seeking to regulate the conduct of their companies while acting abroad. (The Dodd Frank Conflict Minerals provision is a step in this direction.) The Guiding Principles and the preceding Draft Guiding Principles maintain that states are neither "required"[78] to regulate "extraterritorial activities of businesses domiciled in their territory and/or jurisdiction" nor are they "prohibited from doing so." However, the Draft Guiding Principles noted that such regulation is "exceptional and uneven…" in the human rights arena in marked contrast with more aggressive approaches taken with respect to other concerns like "child sex tourism."[79]

The Draft Guiding Principles pointed to the existence of "sound policy rationales"[80] for states to exercise such extraterritorial jurisdiction. However, there was significant criticism of the Draft Guiding Principles position in this area including, from the Joint Civil Society Statement, which opposed the Draft Guiding Principles "failure"[81] to provide more specific guidance. Some practitioners responded to this perceived weakness in the Draft Guiding Principles with a call for "clear, enforceable legal obligations"[82] to be imposed by states on

corporations. In a similar vein, NGOs urged that the Draft Guiding Principles call for states to "ensure" that business enterprises domiciled in their territory respect human rights abroad.[83] This criticism resulted in the Guiding Principles elevating the discussion of extraterritoriality from the introductory section of the document to the status of a separate Principle. It is likely, however, that the criticism will continue since the Principle only calls for states to generate the "expectation" that business "domiciled" in their countries will "respect human rights throughout their operations.[84]

One controversial, but significant risk for those with a nexus to the US, is the potential civil liability under the US Alien Tort Claims Act (ATCA). The ATCA is not restricted to companies domiciled in the US. However, under the ATCA as with the criminal arena, there is no dispute about the potential exposure of individuals for civil liability. At least 50 cases have been brought under the ATCA since 1993.[85] The ATCA has the potential to be among the most effective tools for seeking redress for foreign human rights violations in American courts.

There is, at the moment, some controversy about whether the ATCA provides jurisdiction for suits against corporations as opposed to individuals for human rights violations committed abroad.[86] This question arose in a January 2010 ruling by a US federal appeals court in a case arising from the long, bitter struggle between the Ogoni People in Nigeria and Dutch Shell and its corporate successors. This issue of whether corporations can be sued under the ATCA in federal courts may one day be resolved by the U.S. Supreme Court. (However, as this Memorandum was being drafted, a Quebec Superior Court in Canada ruled that the Anvil Mining Company mentioned above, could be sued in Canada for alleged violations committed in the DRC).

At the present time, whether you can sue a corporation in US federal courts for human rights violations committed abroad depends on where in the US such a case is filed as the Circuit Courts of Appeal are "split" on this issue. However, there is no dispute that individuals, including corporate executives, may be sued under the ATCA.

Finally, it is clear that non-legal risks face corporations in the human rights arena. As noted, HRDD requires understanding the speed and variety of ways that allegations of complicity in, or indifference to, [87] human rights violations can affect corporate brands or reputations. As the SRSG has observed (and as noted earlier), other "social actors... [hold] enterprises to account [for] adverse impacts" they may have on human rights.[88] In fact, the SRSG has warned

> In non-legal contexts, corporate complicity has become an important benchmark for **social actors**, including public and private investors, the Global Compact, campaigning organizations, and companies themselves. Claims of complicity can impose reputational costs and even lead to divestment, without legal liability being established. In this context, allegations of complicity have included indirect violations of the broad spectrum of human rights - political, civil, economic, social, and cultural.[89] (Emphasis added).

The SRSG further noted that HRDD is the primary prophylaxis for protecting corporations from these risks and that attempting to defeat lawsuits or "counter hostile campaigns" once they are underway is at best "optimistic risk management."[90]

7. Early stages of the Way Forward: No Tool Kits or Silver Bullets

Human rights and IHL took a quantum leap after World War II requiring states and the international community to protect human rights and enhance enforcement of IHL. However, only since the turn of the third millennium has there been a movement[91] to require business to shoulder the "corporate responsibility to respect human rights." As the SRSG noted in the Draft Guiding Principles,

> …[t]he international community is still in the early stages of this journey. In addition to it being a relatively new policy domain, business and human rights differs significantly from the traditional human rights agenda.[92]

The SRSG also cautioned in the Draft Guiding Principles that there was no "silver bullet solution"[93] to the human rights challenges faced by business. He continues to emphasize that even "the Guiding Principles are not a tool kit, simply to be taken off the shelf and plugged in… [w]hen it comes to means for implementation, therefore, one size does not fit all."[94]

In fact, the Draft Guiding Principles were not viewed as a panacea and were themselves subject to serious criticism and debate as recently as January 2011. For example, the Joint Civil Society Statement criticized the Draft Guiding Principles' failure to require mandatory[95] due diligence for businesses. The Joint Civil Society Statement also disagreed with the Draft Guiding Principles' frequent recourse to words like "where appropriate" and "encourage" which implied discretion not to take rigorous action in favor of human rights standards.

Other commentators went further and suggested that:

> ….beneath the rhetoric there is little suggestion as to what kind of legal framework is necessary to ensure that business enterprises comply with their international human rights obligations; nor is there any clear indication of how States can enforce such obligations.[96]

The final version of the Guiding Principles, released in March 2011, responded to this criticism in a manner unlikely to satisfy its critics. It refers in a comparatively lengthy introductory section to the failure of mandatory standards in an earlier UN driven effort.

> One early United Nations-based initiative was called the Norms on Transnational Corporations and Other Business Enterprises; it was drafted by an expert subsidiary body of what was then the Commission on Human Rights. Essentially, this sought to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves under

> treaties they have ratified: "to promote, secure the fulfillment of, respect, ensure respect of and protect human rights".
>
> This proposal triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments. The Commission declined to act on the proposal. Instead, in 2005 it established a mandate for a Special Representative of the Secretary-General "on the issue of human rights and transnational corporations and other business enterprises" to undertake a new process, and requested the Secretary-General to appoint the mandate holder. This is the final report of the Special Representative.[97]

Additionally, in a subtle but unmistakable textual signal, the Guiding Principles clarified and elevated the assertion that "Nothing in these Guiding Principles should be read as creating new international law obligations." This caveat is now in a prominent location in the prefatory language immediately preceding Principle 1.[98]

Between November 2010 and March 2011 there was another set of challenges to the Draft Guiding Principles as profound as the foundational question of whether they called for mandatory duties. That challenge was the threshold practical issue of whether HRDD should be different in "conflict areas" or "weak governance zones" than in other regions or nations. Some of the sharpest criticism was directed to the Draft Guiding Principles' assertion that the "worst corporate related human rights abuses including acts that amount to international crime take place in conflict affected areas."[99] To an executive making an important decision concerning his business and human rights, this criticism might seem like "inside ball" interesting to a few intellectuals but not of practical import. However, this debate reflected a deeper concern about the need to articulate and adapt rigorous standards for non-conflict areas. An NGO called Business in the Community Ireland observed in this regard, "… sometimes we also witness Human Rights violations in societies that have strong legal systems and institutions."[100]

CEDHA, an Argentine NGO whose mission involves human rights and the environment, noted in its Commentary on the Draft Guiding Principles that

> …while conflict zones are indeed places where many human rights violations can and do take place, many human rights violations perpetrated by corporations happen in not so conflictive countries, and to overemphasize conflict zone as the place of the "worst" business related human rights abuses may not be warranted.[101]

Evidence that in this "early stage" of our understanding of the intersection of human rights and business there is no consensus on this issue, is reflected in the OECD decisions already discussed. In DAS Air, the company was found wanting for not performing a political, military and legal analysis of whether occupying armies had a right to mine in foreign countries. Afrimex was criticized for failing to judge for itself whether or not its produce was being mined by forced and child labor. In those cases, the NCPs articulated a "heightened" standard of care for conflict ravaged areas like the DRC. In the DAS Air opinion, the NCP "noted" the existence

of the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.[102] The Risk Awareness Tool provides a definition of "weak governance zones" as "an investment environment in which governments are unable or unwilling to assume their responsibilities."[103]

The focus on the "governance gap" coupled with the fact that no universally accepted typology has emerged connecting HRDD standards to varying country contexts, reinforces the SRSG's disclaimer that there are no silver bullets. Given the wide variety of country conditions, business models and human rights challenges, there may never be a single template matching standards to contexts. The lack of a "one size fits all" solution, however, does not prevent creative solutions to the problem. The importance of refining an approach to the "governance gap" was previously described by the SRSG who believes that,

> "The root cause of the business and human rights predicament today lies in the governance gaps created by globalization -- between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge."[104]

One possible solution was CEDHA's proposal urging the removal of all "weak governance zone" references in the Draft Guiding Principles section which addressed "Issues of Context." As if to emphasize the uncertainty in arriving at agreement on this important threshold question, CIDSE utilized the Risk Awareness Tool's definition of "weak governance zones" in its commentary on the Draft Guiding Principles but considerably broadened the terms' meaning,

> The key challenge for the international debate on business and human rights and for the local organisations with whom we work is how to address situations where businesses harm communities but states are unable or unwilling to take action to protect their citizens from corporate abuses. It is important to emphasise that this situation is by no means limited only to conflict affected areas.[105]

CIDSE's proposed approach would ensure that higher levels of care were invoked in areas like China and India, where strong central governments have permitted labor based human rights violations where there are neither "conflicts" nor weak governance zones.

A voice from the world of business, that of a UK asset managing service, suggested avoiding the challenge of refined definitions in its response to the Draft Guiding Principles, simply referring to countries that do not or cannot uphold human rights and listing DRC, Myanmar, Zimbabwe, Sudan and Iran as examples.[106]

This "governance gap" issue is one area where the Guiding Principles did not yield in the face of significant criticism of the Draft Guiding Principles. The final document insisted that the

"risk" of human rights abuses was "heightened in conflict affected areas."[107] It also persisted in the view that many of the "worst" human rights offenses occur in these areas.[108]

In the midst of these substantive and methodological debates, there is a limited agreement that all companies whose activities have a potential human rights affect should conduct human rights impact assessments "HRIAs". However, even here the agreement is thin. CEDHA has observed that "[b]usiness is being swarmed by human rights issues with pressure to conduct what are coming to be known as *human rights impact assessments…*which are essentially a management tool to map out the relevance of human rights to a particular business."[109]

Equally trenchant is the International Business Leaders Forum's view that there is little "clarity" on HRIA's, and that business leaders will "continue to grapple with the diverse tools on the market, which fall under the umbrella of 'human rights impact assessments' but all have different objectives."[110] It can be a daunting challenge for business leaders to sift, for example, between the "eight step methodology" of the Scottish Human Rights Commission and the "seven stage framework" associated with the extractive industry's Voluntary Principles on Security and Human Rights Assessment.

8. Toward an innovative approach to "Human Rights" and business

I have prepared this Memorandum to introduce business leaders to the great risks and the rewards they face in making human rights decisions. Those decisions will be focused on a comparatively new area of human concern with rapidly changing standards and an infinite variety of country conditions to analyze and human rights challenges to assess.

This Memorandum also introduces our practice group as an indispensable advisor in this decision making processes. We have engaged the language, principles, and conduct underlying HRDD in many courtrooms, classrooms, boardrooms and countries. Our contacts encompass many potential stakeholders whose participation will be essential to solving human rights challenges. In short, we have the ability to assist progressive decision-makers in maximizing profits and minimizing risks.

The SRSG in his initial 2008 report suggested an approach to this decision making process that centers on "three factors," i.e., country contexts, the nature of the business concerned, and the development of an HRDD plan.

> If companies are to carry out due diligence, what is its scope? The process inevitably will be inductive and fact-based, but the principles guiding it can be stated succinctly. Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context -for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State

> agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances.[111]

When examining the first factor, the "county context," the methodologies of those who monitor human rights conditions include better tools for forecasting stability and anticipating human rights challenges than the approaches of intelligence analysts and diplomatic risk managers. This is because human rights observers focus on "suppressed" or "hidden" risks[112] the yearning for freedom that topple seemingly "stable' regimes like Hosni Mubarak's in Egypt and Zine al-Abidine Ben Ali's in Tunisia.

For example, while many analysts including U.S. Government observers seem to have been completely caught off guard[113] by the recent fearless pursuit of freedom by ordinary citizens in Tunisia, Egypt, Libya, Syria and elsewhere in the Arab world, readers of the United Nations Development Program, or "UNDP" reports, could note that as early as 2002 the first Arab Human Development Report warned about the explosive mix in the Arab world of a "freedom deficit," the "scourge of joblessness," and the largest Arab demographic bulge in history.[114] The 2009 report reiterated the warning that these factors had not been taken seriously by Arab governments and that serious consequences would ensue.[115] Much of the commentary in the Arab world since January 25, 2011, confirms the view that the key to the present, past and future, in much of the Arab world is this linkage of human rights and development. As a longtime observer of the west and the Arab world noted during the events in Cairo's Tahrir Square,

> Western countries should prepare for the challenge of engaging with a born-again Arab world….What the Arabs will need to focus on is development, building democratic institutions and practices, the transfer of technology, mastery of the implements of knowledge and scientific empowerment. [116]

Observers like the scholars who authored successive UNDP reports, and their audiences in the human rights world went much farther in anticipating the "Arab Awakening" than many governments, inside and outside the region. The practice group can bring this level of awareness to assist corporate decision makers in evaluating country contexts.

Similarly, the practice group would be a catalyst for early analysis of the SRSG's second factor, internal review of the nature of a businesses specific connection to the human rights conditions in a country. As earlier noted in this Memorandum, the SRSG has observed that a prophylactic approach to risk management is important. In what may be one of John Ruggie's last comments as SRSG he recently blogged:

> Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.[117]

Another UN center for concern with business and human rights, the Global Compact privileges "raising awareness" of human rights among business leaders as part of its "two pronged practical approach to business and human rights."[118]

More specifically, turning to the OECD decisions in the DRC discussed earlier, if DAS Air had sought the practice group's advice on the risk of continuing its Great Lakes Region operations, we would have been prepared to consult with our civil society contacts in Uganda and the DRC to learn more about conditions on the ground. We would have the expertise to assess the impacts of military flights and identify for counsel the need to resolve the "occupation" issues. In short, we could have guided them with imagination and facility through the due diligence process. Had DAS Air sought our advice more recently, we would have been able to provide information on both the implications of the Dodd Frank provisions and the increasing desire of DRC civil society groups to embarrass companies which are indifferent to HRDD concerns in DRC.

We would similarly have been able to assist Afrimex. Again our contacts among DRC and other Great Lakes civil society elements including local lawyers, activists and intermediaries would have made it possible for us to determine conditions on the ground without the need for "Mr Kotecha" to personally journey to Eastern Congo. We would also have been able to consult with responsible stakeholders in the areas of forced and child labor to determine applicable standards.

Addressing the third factor, the practice group can assist in the development of approaches to the human rights challenges facing the company after a corporation's leadership has reviewed the country context and examined its own interaction with local human rights challenges. The SRSG's Draft Guiding Principles recommended that companies develop "Policies and Processes" to "prevent, mitigate and remediate any adverse human rights impacts they cause or contribute to...".[119] The Guiding Principles advise that these "policies" be "approved at the most senior levels"[120] and developed in consultation with "recognized experts."[121]

This Memorandum earlier referred to the current challenges facing the Anvil Mining Corporation of Australia. On April 28, 2011, Canada's Quebec Superior Court ruled that a class action brought against Anvil by a coalition of NGO's in Canada, based on the company's activities in the DRC, could proceed in the Canadian court system. In fact, the trial judge concluded that "…it is impossible to determine that the authorities of the Congo or of Australia would be more appropriate for hearing the case" and that if the Canadian Courts declined to exercise jurisdiction "there would be no other possibility for the victim's civil claim to be heard."

The underlying allegations against Anvil were that its employees provided trucks and other logistical support to the DRC army, the "FARDC" in Eastern Congo which were then used to kill 70 civilians near the town of Kilwa in Katanga Province in 2004. A Canadian and two South African employees of Anvil were tried before a controversial Court Martial in the DRC and acquitted of charges that they "knowingly facilitated the commission of war crimes" by FARDC elements.

Both the criminal and civil cases against Anvil turn to a large extent on the issue of whether Anvil supplies were "requisitioned" by the FARDC or voluntarily given because a small rebel band was blocking an access road needed by Anvil. Investigators for MONUC, the UN Peacekeeping force in the DRC and staffers for several NGO's investigating the matter allege that Anvil CEO Bill Turner, and other senior executives have made misleading statements about Anvil's role in the Kilwa killings. Turner has also declined to discuss the details of a 2006 meeting he held with President Kabila in Kinshasa. Anvil has denied wrongdoing in connection with the Kilwa incident. Nonetheless, seven years later it is the target of unrelenting criticisms by NGO's, has had key employees held for a Court Martial, and is currently facing a class action suit in Canada.

One of the questions that arises from a review of Anvil's role is whether key decisions about Anvil's relationship with FARDC elements were taken by senior executives or left to Anvil's security personnel on the ground. Although the Kilwa attack was carried out by elements of the FARDC's 65th Infantry Brigade, another FARDC Brigade in Katanga, the 95th had faced allegations of brutality and law of war violations long before the Kilwa incident. The Commander of the 65th was convicted of war crimes committed in another village during the same Court Martial proceeding that involved Anvil's employees. This suggests that great care should have been exercised by any company dealing with the FARDC in Katanga.[122]

Anvil's circumstances highlight the same dilemma faced by DAS Air and Afrimex, that their due diligence efforts failed to bring adequate intelligence to the attention of senior managers, and that high ranking executives were not in a position to make readily defensible decisions quickly. The striking element for all three companies is that fact that they were subject to potential sanctions for censure for failing to adequately assess the risk of dealing with persons they believed to be in positions of authority on the ground.

In retrospect, assuming, arguendo, that none of the three companies were in fact complicit in wrongdoing, all would have been well served by rigourous development of HRDD plans, based on sound intelligence, shared with NGO's and other stakeholders in the context of a system that allowed well informed and advised senior managers to make sound decisions.

Of course, the examples discussed above have to a large extent been focused on the DRC. It will be tempting for some business leaders to believe that the lessons learned there are of little value to those not engaged in mining activity in a conflict zone. Such a conclusion would be seriously mistaken.

As the UN, the US Congress, the OECD and other participants in the business and human rights debate have demonstrated, lessons being learned in the DRC are profoundly affecting the evolution of soft law, hard law and reputational human rights standards. This is as it should be because almost every conceivable human rights dilemma that could arise is taking place in the DRC which is now under the close watch of the entire international community. A subtle but important indicator of this universal applicability of the DRC's experience can be seen in certain linguistic conventions that have gained currency along with in some debates about terminology and nomenclature in the same arena.

Throughout this Memorandum we have used the term "human rights" to refer to both IHL and the law of human rights. We did not originate this convention but it reflects a need on the part of participants in the field to make this potentially complex area accessible to decision makers. This usage, if it evolves creatively, can serve as the template for streamlining the evolution of HHRD by focusing attention away from technical legal distinctions that do not assist business leaders in making tough choices.[123]

Some behavior violates both human rights and IHL norms because the two fields are simultaneously separate and interwoven. IHL is *the law of war*, or in its modern usage, *the law of armed conflict.* It has ancient roots and a sound basis in treaty and customary law. A turning point in the development of IHL occurred midway through the last century when violations were so widespread and heinous during World War II that the Nuremberg trials and the negotiation of the Geneva Conventions of 1949 resulted in a stronger role for the international community in enforcement and ensured that states could not justify violating IHL Norms.

These same violations coupled with persecutions of civilians by the German Third Reich and the Empire of Japan are referred to as "barbarous acts" in the preamble to the Universal Declaration of Human Rights. The delegates who drafted the Declaration felt that pre-war violations of individual rights facilitated aggression and spawned subsequent IHL violations.

The Declaration calls for the protection of all persons against violations of basic civil, political, cultural and economic rights as a matter of international law, even against violations committed by their own governments. One of the consequences of the simultaneous birth of human rights and the expansion of humanitarian law has been that acts such as torture, GBV, and the use of slave labor violate both human rights and humanitarian law norms.

Technical distinctions between the two related fields serve little practical purpose when discussing business challenges. The Guiding Principles use the term "human rights" throughout and asserts in its "Foundational Principles" Section (Principle 12[124]**)** that the norms it advocates are based on the International Bill of Rights and the "International Labor Organization's core conventions." The Section is so dramatically bereft of direct invocation of IHL that France suggested in its response to the Draft Guiding Principles that international humanitarian law should be mentioned directly in the "Foundational Principles.")[125] The SRSG did not adopt that suggestion.

In any event, IHL is clearly within the ambit of the evolving business and human rights norms and is addressed in the Guiding Principles. The Commentary to Principle 12 notes that "in situations of armed conflict enterprises should respect the standards of international humanitarian law." Additionally, the Guiding Principles contain Principle 7, "Human Rights in Conflict-Affected Areas" which necessarily incorporates humanitarian law principles.…" Finally, The Global Compact Business Guide for Conflict Impact Assessment and Risk Management" 2002 observes correctly that "international humanitarian law and human rights are complementary."[126]

Unfortunately, the Guiding Principles yielded to the request that it should pretend that "international crime" is not a phrase to be embraced by the SRSG. It simply dropped the Draft Guiding Principles' section on "Issues of Context" (Principle 21) which reminded corporations

that "operating … [in] conflict affected areas may increase risks of enterprises contributing to or being complicit in international crimes committed by other actors (for example war crimes committed by security forces.)" It also dispensed with the language in the Commentary to former Principle 21 which advised corporations to consider law of war "risk[s] as a legal compliance issue…"[127]

In its place it has substituted Commentary on a new "Issues of Context" Section (Principle 23**)** which offers the following bromide:

> Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

This total abandonment of direct acknowledgment of the problem of international enforcement of international crime violations does a tremendous disservice to businesses concerned about HRDD. The post cold war movement towards more aggressive use of international justice mechanisms is a response to the inability or unwillingness of municipal law to satisfy its obligations to prosecute IHL violations. (The widespread criticism of the conduct of the Kilwa Court Martial, in which the prosecutor was sacked during the trial is an example of the low esteem in which municipal law prosecutions of international crime are held).

The Guiding Principles abandonment of the candor of the Draft Guiding Principles on this issue is directly attributable to pleas like that of Earth Rights International (ERI) which urged the dropping of the term "international crimes" (usually in our context tied to IHL offenses) from the Draft Guiding Principles and the substitution of "gross human rights abuses." ERI conceded that it was advocating a term that was not a "precise term of art." (It is defined as conduct "particularly shocking because of the importance of the right or the gravity of the violation." Drawn from Restatement (3rd) of the Foreign Relations Law of the United States § 702 cmt. m.)[128]

Eliminating "international crimes" from the Guiding Principles and presumably from the lexicon of business and human rights, encourages business leaders to adopt an ostrich like posture towards the single most important function of the business and human rights project - helping businesses avoid complicity in criminal activity. In contrast with the useful convention of using the term "human rights" broadly, this omission could have serious consequences if it lulls business leaders into a false sense of security about the level of personal risk to which they are exposed.

Cutting through this linguistic and conceptual morass brings us to the basic reason for this Memorandum. There exists a need to make a complex subject accessible to the corporate leaders who will make the ultimate decisions about business practices that affect human rights. This is as it should be, not because business executives or NGO leaders have a special status. It is because human rights and IHL were never conceived as the special province of lawyers, scholars or soldiers. Human rights and IHL are the creature and the domain of civil society,[129] or as just war theorist Michael Walzer notes, they are the product of "the moral convictions of ordinary men and women, acquired in the course of their everyday activities."[130]

The preamble to the Declaration of Human Rights explains that articulating human rights norms is a response to the fact that "the disregard for human rights have resulted in barbarous acts which have outraged the conscience of mankind." A critical prewar IHL document, the preamble to the Hague Convention of 1899 and 1907, refers to the foundation of IHL in the "laws of humanity and the dictates of the public conscience." The Rome Statute for the ICC notes that the states subscribing to that treaty are "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." The entire set of values underlying human rights and IHL derive their existence from the idea that certain conduct is shocking to the shared values of humanity. This is more than rhetoric.

The important drafting committee for the Declaration was chaired by a non-lawyer, Eleanor Roosevelt, and eight of its ten members were non lawyers. The Rome Treaty process for the ICC was driven by NGO's and other civil society elements that essentially compelled states to put aside their diplomatic and legal differences and create the ICC.

With the specialized terminology of law and military science and diplomacy lurking about, it is important not to be lured into regarding human rights as the realm of an international elite rather than the creative arena of all socially conscious "actors." Amartya Sen, Noble Prize winner and leading thinker on the relationship of development to rights, has observed with reference to first generation rights (the "rights of man" of the French and American Revolutions) and the second generation rights of the Universal Declaration of Human Rights and its progeny that "…what is being articulated or ratified is an ethical assertion – not a proposition about what is already legally guaranteed."[131]

This emphasizes the idea that, at their core, the values underlying human rights and IHL are ethical ones. Henry Dunant attributed his conduct at Solferino and afterwards to a recognition of "The moral sense of the importance of human life…"[132]

This returns us to where we started (hopefully via a virtuous circle). Ethical awareness is the key to international business success in a world where the public conscience demands respect for human rights. Competent, forward thinking business leaders have the capacity to make sound decision in this area despite its complexities. Our practice group can advise corporate leaders in how to take that awareness and shape HRDD programs that minimize risk and maximize gains in reputation and at the bottom line.

[1] This "**corporate responsibility to respect human rights**" is one of the "**Three Pillars**" of the Framework for Business and Human Rights (hereafter "Framework") articulated by John Ruggie, the "Special Representative of the UN Secretary General on human rights and transnational corporations and other business enterprises," John Ruggie (hereafter "SRSG"). The SRSG has observed that **corporate responsibility to respect human rights "…is the basic expectation society has of business"** Framework A/HRC/8/5, 7 April 2008 paragraphs 10 and 24. For more on the SRSG, see **endnote 10 below**. In 2008, the SRSG submitted a single recommendation to the Human Rights Council. That document was the Framework. The Council endorsed the Framework but asked that the SRSG "operationalize" it. Consequently, in November 2010, the SRSG released the Draft Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework. In March 2011, the SRSG released the Advanced Edited Version of Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework A/HRC/17/31 (hereafter Guiding Principles.) In June 2011, the SRSG will submit the final version of the Guiding Principles to the Human Rights Council as his term ends.

In April 2009, in the interval between the Framework and the Draft Guiding Principles, the SRSG released Business and human rights: Towards operationalizing the "protect, respect and remedy" framework Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/11/13 22 (Hereafter, Operationalizing Report).

[2] "But the women of Castiglione, seeing that I made no distinction between nationalities, followed my example, showing the same kindness to all these men whose origins were so different, and all of whom were foreigners to them. "*Tutti fratelli*," they repeated feelingly. All honour to these compassionate women, to these girls of Castiglione! Imperturbable, unwearying, unfaltering, their quiet self-sacrifice made little of fatigue and horrors, and of their own devotion." (emphasis added Memoir of Solferino, Henry Dunant, (1862) pages 11-12, http://www.icrc.org/eng/resources/documents/publication/p0361.htm). (Hereafter, Memoir)

[3]In his Memoir, Dunant offered vivid descriptions of the suffering of wounded and dying soldiers of both armies while posing questions like, "Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?"

[4] For purposes of this Memorandum, the term "human rights" designates both IHL and human rights. IHL and the law of human rights are separate but interwoven areas. Humanitarian law is *the law of war*, or in its modern usage, *the law of armed conflict.* "Human Rights" are a post World War II idea, a response to the "barbarous acts" of the German Third Reich and the Empire of Japan. These rights were initially enshrined in The Universal Declaration of Human Rights (1948). GA res. 217A (III), UN Doc A/810 at 71 (1948). For a further discussion of the use of the term "human rights" and of the evolving convention of using it to signal both human rights and IHL, see Section 8 below.

[5] The SRSG has offered the following commentary on the meaning of due diligence: "Due diligence is commonly defined as 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation'. Some have viewed this in strictly transactional terms - what an investor or buyer does to assess a target asset or venture. The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks." Framework paragraph 71 [included quotation is from Blacks Law Dictionary, 8th edition (2006)]

[6] Id.

[7] "Regulating Conflict Minerals: A Supply Chain Perspective," Supply & Demand Chain Executive, Editorial Staff, Special Edition/December 2010-January 2011 p 18. (Hereafter, Supply Chain Executive) This editorial analyzes the "Conflict Minerals" provisions of the Dodd-Frank Wall Street Reform and Consumer Act of 2010.

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[8] Social responsibility and Financial performance: Trade-off or virtuous circle?, Marc Orlitzky, University of Auckland Business Review, p 39 Autumn 2005. (Hereafter, Trade-off or virtuous circle)

[9] Trade-off or virtuous circle p 38. The importance of reputation and the speed with which it can change is widely recognized by those who monitor developments in human rights and business. Business in the Community Ireland commented on this issue its response to the Draft Guiding Principles. "Business are also sensible (sic) to reputation pressures, which come from the bottom upwards. In this not only have consumers been instrumental but courts, the media, civil society organizations and NGO's also have helped shape the change. The power of companies and business organizations to react can sometimes exceed the institutional apparatus timeframes to enact a law." Business in the Community Ireland Consultation, January 31, 2011. Reputation, however, is a multifaceted construct stemming from a company's management of risk through HRDD as one means, and the generation of consistent results/benefits for investors, customers, employees and the surrounding community through Corporate Social Responsibility (CSR). Numerous studies have shown that CSR, which one might call 'human rights in the workplace and community', is the insider twin to HRDD, and both are determinants of positive financial performance when viewed as two sides of a coin. This valuable financial effect is a distinct competitive advantage spurring secondary financial benefits for all stakeholders in the form of customer and employee retention[9], increased investor interest and competitive rates of return[9] from socially responsible investment funds[9], and benefits to surrounding communities. In sum, these are the underpinnings of reputation.

The financial connection or link among stakeholder groups requires piecing together research that, when viewed as a whole, articulates a business rationale for moving HRDD and CSR to the front burner, implementing or moving to the front burner, both HRDD and CSR. The link is trust.

Respect for human rights as demonstrated through HRDD and its operational twin, CSR, require a company to build non-exploitative, trust based (also called loyalty or retention based management) relationships with stakeholders: investors, customers, employees, and members of surrounding communities. Such behavior (CSR) in a corporate culture has multiple, positive financial effects which contributes to a company's good reputation.

[10] In 2005, the then United Nations Commission on Human Rights requested that the Secretary General appoint an SRSG. The Secretary General appointed John Ruggie, Berthold Beitz Professor in Human Rights and International Affairs at the Kennedy School of Government and an Affiliated Professor in International Legal Studies at Harvard Law School. Ruggie's term expires in June 2011.

[11] Draft Guiding Principles, **Principle 12**, Commentary. The Framework defines **"social actors"** as **"States, businesses, and civil society"** see paragraphs 7 and 75. The language of this idea changed subtly in the Final Guiding Principles shifting this commentary to **Principle 11**, and dropping the language of "infringement." The concept remains intact and I prefer the language of the Draft Guiding Principles.

[12] Some critics have concluded that the benefits of this regime are not truly universal, "The great legal reforms of the modern human rights movement often deliver only empty parchment promises to the poor" Gary Haugen and Victor Boutros, And Justice for All: Enforcing Human Rights for the World's Poor, Foreign Affairs, Volume 89 No. 3 May / June 2010 at 53.

> Others have argued that the "compliance gap" between state practices and state acceptance of human rights instruments is not intrinsically useful but does embolden civil society.
>
> "Our empirical analyses confirm this paradox of the empty promises thesis. There is no systematic evidence to suggest that ratification of human rights treaties in the UN system itself improves human rights practices, but the growing legitimacy of human rights ideas in international society, which the legal regime helped establish, provides much leverage for nongovernmental actors to pressure rights-violating governments to change their behavior."

Emilie M. Hafner-Burton and Kiyoteru Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, AJS Volume 110 Number 5 (March 2005): 1373–1411, 1401. (Hereafter, The Paradox of Empty Promises) For further discussion of the importance of civil society in advancing human rights see **Section 8** and this Memorandum generally.

[13] Framework V Conclusion, paragraph 105. In the final Guiding Principles, the SRSG has yielded to the pressure to eliminate references to international crimes, although references to them were still prominent in the Draft Guiding Principles. See **Section 8** One curious sidenote to this controversy has been the fact that despite an invitation to visit the DRC issued by DRC NGO's, the SRSG did not make a visit.

[14] The SRSG has observed that "Supply chains pose their own issues. It is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business. The challenge for buyers is to ensure they are not complicit in violations by their suppliers. How far down the supply chain a buyer's responsibility extends depends on what a proper due diligence process reveals about prevailing country and sector conditions, and about potential business partners and their sourcing practices. A growing number of global buyers are finding it necessary to engage in human rights capacity-building with suppliers in order to sustain the relationship." Operationalizing Report, paragraph 75.

[15] Statement by the United Kingdom National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises (NCP) : DAS Air , 17 July 2008 (Hereafter (NCP) : DAS Air) paragraph 44. For an explanation of the function of the OECD's NCP's , see endnote 22 below.

[16] The 'guidelines' referenced here are The OECD Guidelines for Multinational Enterprises (hereafter OECD Guidelines). They **"**are …**recommended** by Adhering Governments 'to multinational enterprises operating in or from their territories.'" [Declaration on International Investment and Multinational Enterprises]. "They provide **voluntary** principles and standards for responsible business conduct consistent with applicable laws." Preface, OECD Guidelines. 'They provide principles and standards of good practice consistent with applicable laws. Observance of the *Guidelines* by enterprises is **voluntary and not legally enforceable.'** Concepts and Principles 1. (bold emphases added). "The Guidelines are not legally binding,…" (NCP) : DAS Air) paragraph 3.

[17] The term "soft law" is used here to describe non binding codes which are not the creature of enforceable municipal or international law schemes. For an interesting analysis of the evolution of the soft law system of OECD Guidelines and drawing on NCP decisions on DAS Air and Afrimex, see Larry Cata Backer, The OECD Guidelines for Multinational Corporations : Using Soft Law to Operationalize a Transnational System of Governance Law, Law at the End of the Day, March 5, 2009 http://lcbackerblog.blogspot.com/2009/03/oecd-guidelines-for-multinational.html (Hereafter, Backer Soft Law). Some observers have compared the soft law characteristics of the OECD Guidelines with The International Labor Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the UN Global Compact. See for instance, David Kinley and Junko Tadaki, Emergence of Human Rights Responsibilities for Corporations at International Law. 44 Virginia Journal of International Law, (2003) 931, 949 et seq.

[18] (NCP) : DAS Air, paragraph 7. DAS Air "operat[ed] routes between Europe and West Africa, and between East Africa and the Middle East."

[19] Status re liquidation, (NCP) : DAS Air, paragraph 8.

[20] (NCP) : DAS Air), paragraph 8.

[21] RAID, Rights and Accountability in Development, (NCP): DAS Air) paragraph 1.

[22] In DAS Air, the National Contact Point (NCP) rendered the judgement, called a "statement." The Implementation Procedures Section of The OECD Guidelines contain *inter alia*, the following description of NCP duties: "Adhering countries shall set up National Contact Points for undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters covered by the Guidelines so that they can

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contribute to the solution of problems which may arise in this connection, taking due account of the attached procedural guidance. The business community, employee organizations, and other interested parties shall be informed of the availability of such facilities." Part II Implementation Procedures, National Contact Points I.1.

[23] (NCP) : DAS Air). paragraph 50.

[24] Ugandan Peoples Defense Force (UPDF).

[25] See allegation (NCP) : DAS Air), paragraphs 10 and 28.

[26] As we note in Section 3, the current conflict in the DRC began in the aftermath of the Rwandan Genocide. We do not deal here with the history of repression in "Zaire" under Sese Seku Mobutu, the post decolonization struggle including the assassinations of Patrice Lumumba and the death of Dag Hammarosjold, or the long brutal history of Belgian colonialism. We therefore offer no opinion about any connection between those events and the current conflicts. However, we deal throughout this Memorandum with the impact of this conflict on a number of HRDD issues at the forefront of the challenges in the field of business and human rights.

[27] *Report of the Special Rapporteur on the situation of human rights in the DRC* (A/55/403) 2000, para. 15.

[28] Id., paragraph 32.

[29] Id., paragraph 34.

[30] The human rights and humanitarian law violations in the DRC during this period have been extraordinarily well documented. See *inter alia* the Report of the Special Rapporteur generally, see also Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (Hereafter Mapping Exercise) August 2010; Judicial Commission of Inquiry – Republic of Uganda, Final Report on Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC 2001, November 2002; ICJ, Armed activities on the territory of the Congo (*DRC* v. *Uganda*), 19 December 2005 (International Court of Justice holding that Uganda was required to pay reparations to DRC.)

[31] Mapping Exercise, paragraph 729. The report goes on to observe however, … the successive governments of the last few decades have not exploited this potential to the benefit of the Congolese people. Very little of the revenue from natural resource exploitation has been ploughed back into the country to contribute to its development or to raise living standards. In 2003, the DRC ranked 167th out of 177 countries in the UN Human Development Index, with a life expectancy of no more than 43 years."

[32] Supply Chain Executive, 19.

[33] Jason Stearns, Coordinator of the UN Experts calls the Rwandan Genocide the "trigger" for the Great Wars in the Congo. Introduction, Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa, (2011).

[34] The interahamwe (Kinyarwanda meaning "those who fight together") was a Hutu militia generally held responsible for killing thousands of Tutsi during the Rwandan genocide. They have continued to participate in the conflict in the Eastern Congo and are also considered among those responsible for bringing mountain gorillas to the brink of extinction. This is because an interahamwe faction known as the **FDLR** (Democratic forces for the Liberation of Rwanda) were until recently fighting a three sided war with Congolese soldiers and the Laurent Nkunda's Rwanda backed **CNDP** (National Congress for the Defense of the People) in Congo. See Who Murdered the Virunga Gorillas? National Geographic, April 2008, http://ngm.nationalgeographic.com/2008/07/virunga/jenkins-text/1 (Nkunda is under house arrest in Rwanda)

[35]Alliance of Democratic Forces for the Liberation of Congo (Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre).

[36] Mapping Exercise, paragraph 175.

[37] Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (2001). (Hereafter Exploitation Report).

[38] (NCP) : DAS Air), paragraph 42.

[39] Id.

[40] We have focused on DAS Air's movement of goods between DRC and Congo. However, in an additional set of more subtle findings, the NCP concluded that DAS Air improperly transported Coltan from Kigali Rwanda to Johannesburg, South Africa, (NCP) : DAS Air), paragraphs 41 and 43. This means however, that the "heightened care" standard would have required DAS Air to investigate whether the coltan it was flying between Kigali and Johannesburg had originated in DRC.

[41] (NCP) : DAS Air), paragraph 43.

[42] (NCP) : DAS Air), paragraph 38.

[43] The DAS Air complaint was filed 28 April 2005, (NCP) : DAS Air), paragraph 38. The ICJ decision in DRC v Uganda was rendered in December 2005.

[44] Backer Soft Law page 147. In fact Professor Backer has argued that the DAS Air ruling and another from the UK NCP, Global Witness v Afrimex (See Section 5) "can be understood not so much as efforts to develop systems of transnational regulation of multinational corporations, but as efforts to comprehensively regulate the rules for warfare and violence among state and non-state actors." Id at 169.

[45] NCP) : DAS Air), paragraph 54.

[46] §1502 of the Dodd-Frank Wall Street Reform and Consumer Act of 2010. See also The California Transparency in Supply Chains Act, Section 23101 of the Revenue and Tax Code which just passed the California Senate.

[47] Id., at Sense of Congress.

[48] Although the SEC is expected to promulgate regulations on §1502 shortly, its Proposed Rule would require disclosure on the current Form 10k, and "under a separate heading entitled 'Conflict Minerals Disclosure'" in addition to a separate exhibit "if required." P 29. The Website report contemplates detailed descriptions of the Conflict Minerals Reports to be utilized on the Website. p31 SEC 17 CFR PARTS 229 and 249 (Hereafter, Proposed Rule).

[49] SEC Proposed Rule at 56.

[50] Id.

[51] "For instance, the Organisation for Economic Cooperation and Development (the "OECD") is developing due diligence guidance for conflict mineral supply chains. See Organisation for Economic Cooperation and Development (the "OECD"), Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2010), available at, http://www.oecd.org/dataoecd/13/18/46068574.pdf. Also, on November 30, 2009, the United Nations Security Council adopted Resolution 1896 that, among other matters, extended and expanded the mandate of the United Nations Group of Experts for the Democratic Republic of

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the Congo to create recommendations on due diligence guidelines for minerals originating in the DRC. See United Nations Security Council Resolution 1896 (2009) [S/RES/1896 (2009)]." Proposed Rule, Footnote 145, p 56.

[52] Most of the 200 companies in a recent survey anticipate being affected by the Conflict Minerals Act. (Supply Chain n Executive).

[53] Several statutes may provide for criminal penalties when false information is filed with the SEC. Pursuant to 18 U.S.C. 1001, a person who knowingly and willfully makes a false or fraudulent statement in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States shall be subject to a fine and imprisonment of not more than 5 years. See 18 U.S.C. 1001(a). Additionally, a person can be fined up to $5,000,000 and imprisoned for up to 20 years for willful violations of the Securities Exchange Act of 1934, including the submission of false information in a 10k filing. See 15 U.S.C. 78ff(a) (which also provides that entities may be fined up to $25,000,000 for such violations). Willful violations of the Securities Act of 1933 may result in a fine of up to $10,000 and/or imprisonment of up to 5 years. See 15 U.S.C. 77x. Willful violations of the Investment Company Act of 1940 and the Investment Advisors Act of 1940 similarly provide for fines of up to $10,000 and/or imprisonment of up to 5 years. See 15 U.S.C. 80a-48; 15 U.S.C. 80b-17. Section 1350 of the Sarbanes-Oxley Act of 2002 sets forth that any person who knowingly provides a false certification as to information required to be reported under the Act may be fined up to $1,000,000 and/or imprisoned for up to 10 years. See 18 U.S.C. 1350(c)(1). Additionally, any person who willfully provides a false certification in violation of the Sarbanes-Oxley Act faces fines up to $5,000,000 and imprisonment for up to 20 years. See 18 U.S.C. 1350(c)(2). Submitting false statements to the SEC may also result in a perjury charge that carries penalties of a fine and/or up to 5 years imprisonment. See 18 U.S.C. 1621(2).

[54] Professor Severine Autessere offered the following succinct description of the "robust" international response to conditions in the DRC as a "UN mission in the Congo [which] became the largest and most expensive peacekeeping operation in the world. The European (EU) sent the first ever European led peacekeeping force. The International Criminal Court chose the Congo as its historic first case, by prosecuting several militia leaders from the northeastern district of Iturri." The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding 2010 p3. Interestingly, I have heard Autessere's book recommended by one of the high ranking UN officials responsible for the peacebuilding effort criticized in her book.

[55] The trial of Thomas Lubanga Dyilo, alleged founder of **UPC** (Union des Patriotes Congolais) and Commander in Chief of **FPLC** (Forces patriotiques pour la libération du Congo), began on January 26, 2009. Lubanga is charged primarily with the unlawful use of child soldiers.

[56] Darfur [Sudan], Central African Republic, Uganda, Kenya, Libya, DRC.

[57] Germain Katanga, Alleged Commander of **FRPI** (Forced des résistance patriotique en Ituri), whose trial began on December 26 is charged with co-accused Mathiew Ngudjolo Chui, alleged leader of the **FNI** (Front des nationalists et integrationanistes), with various War Crimes and Crimes Against Humanity. Bosco Ntaganda, the alleged Deputy Chief of Staff of **FPLC**, is the subject of an arrest warrant and charged with the enlistment and use of child soldiers. The most recent DRC arrest was the November 2010 from France of Calixte Mbarushimana, alleged former Executive Director of the **FDLR** and **FDLR-FCA** (Force Democratique pour la liberation du Rwanda – Forces Combattantes Abacunguzi). Mbarushimana). He is charged with War Crimes and Crimes Against Humanity.

[58] "Among the focuses of the Nuremberg trials was the exploitation of slave labor by the I.G. Farbenindustrie Aktiengesellschaft ("Farben") and other German companies. The Farben corporation itself was not on trial, as the proceeding was brought solely against its executives for their complicity in the offenses committed by the corporation. Nevertheless, the tribunal found that Farben's program of exploitation of slave labor violated the standards of international law." Kiobel et al v. Royal Dutch Petroleum, 621 F3d 111 (2d. Cir. 2010) (Leval dissenting at 621 F3d at 114). (Hereafter, Kiobel). Accompanying this text in Judge Leval's dissent was an instructive footnote[6]: "VIII *Trials of War Criminals Before the Nuernberg Military Tribunals* 1173-74 (1952) (the "Farben Trial") ("Charged with the responsibility of meeting fixed production quotas, Farben yielded to the pressure

of the Reich Labor Office and utilized involuntary foreign workers in many of its plants. It is enough to say here that the utilization of forced labor, unless done under such circumstances as to relieve the employer [the Farben company] of responsibility, constitutes a violation of [international law].”); *see also* IX *Trials of War Criminals Before the Nuernberg Military Tribunals* 1375-76 (1950) (the “Krupp Trial”) (“[T]hroughout German industry in general, and the firm of Krupp and its subsidiaries in particular, prisoners of war of several nations including French, Belgian, Dutch, Polish, Yugoslav, Russian, and Italian military internees were employed in armament production in violation of the laws and customs of war.”).”

[59] Significantly, a proposal to grant the ICC jurisdiction over corporations and other “juridical” persons was advanced by the French delegation to the Rome Treaty Conference but the proposal was rejected. As commentators have explained, the French proposal was rejected in part because “criminal liability of corporations is still rejected in many national legal orders” and thus would pose challenges for the ICC’s principle of “complementarity.” 39 *Id.*; *see also Draft Report of the Intersessional Meeting from 19 to 30 January 1998* [*Held*] *in Zuthphen, The Netherlands*, *in The Statute of the International Criminal Court: A Documentary History* 221, 245 n.79 (M. Cherif Bassiouni ed., 1998) Kiobel at 114. Leval Dissenting. Also see generally a report on this subject prepared for the SRSG, Corporate Culture as a Basis for the Liability of Corporations, Allens Arthur Robinson, 2008. See also the work of Robert C. Thompson who participated in a survey of nations designed to determine the extent to which they have engrafted international criminal law principles in their municipal codes, Translating *Unocal*: The Expanding Web Of Liability For Business Entities Implicated In International Crime Robert C. Thompson, Anita Ramasastry, And Mark B. Taylor, The Geo. Wash. Int’l L. Rev. 40: 842 at 845, 852 (2009) (Hereafter Thompson Expanding Web) Note also Thompson’s comments on “complicity” (see endnote 73 below)

[60] This private conversation [relating to the Darfur situation] has been mirrored in a report delivered by Ocampo to the ICC Assembly of States Parties on the DRC,

> According to information received, crimes reportedly committed in Ituri appear to be directly linked to the control of resource extraction sites. Those who direct mining operations, sell diamonds or gold extracted in these conditions, launder the dirty money or provide weapons could also be authors of the crimes, even if they are based in other countries. Luis Moreno-Ocampo, Second Assembly Of States Parties To The Rome Statute Of The International Criminal Court, Report Of The Prosecutor Of The ICC 4 (2003), *available at* http://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/ LMO_20030908_En.pdf. Thompson Expanding Web footnote 150 and text accompanying.

[61] Rome Statute for the International Criminal Court Article 7 (1) (c), 7 (2) (c). “Enslavement.”

[62] Elements of Crimes footnote 11 and text accompanying.

[63] Final Statement By The Uk National Contact Point For The OECD Guidelines For Multinational Enterprises: Afrimex (Uk) Ltd 28 August 2008 paragraph 6 (Hereafter, Afrimex)

[64] Afrimex paragraph 62

[65] Afrimex, paragraph 15

[66] Afrimex, paragraph 27

[67] Afrimex, paragraph 49-50

[68] “FCO travel” advice refers to recommendations for travel from the Foreign and Commonwealth Office of the United Kingdom. IDC, International Development Committee is a parliamentary committee.

[69] The Guiding Principles articulate this notion as it applies to civil liability as well:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

Commentary to **Principle 17 Human Rights Due Diligence**

[70]Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) **For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission**;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime; emphasis added

[71] See note above

[72] Guiding Principles, Commentary to **Principle 17 "Human Rights Due Diligence."**

[73] In response to the Draft Guiding Principles, (released in November 2010) there was a debate about whether the test should be whether the aider and abettor acted "for the purpose of facilitating the crime." The real dispute here, is whether, in the absence of a ruling from the ICC on the "intent" versus "knowledge" standard issue the Guiding Principles should express an opinion on the which is favored by "the weight of international opinion." Comments on the Draft Guiding Principles January 31, 2011 by Robert C Thompson and Dr. Daniel Schydlowsky. These and other commentaries on the Draft Guiding Principles are available on the cite of Business and Human Rights, http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions. For a more general discussion of Thompsons' view and on accessorial liability in

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international law see Thompson Expanding Web 861-9. Despite the release of the Guiding Principles, I have continued to include references to the Draft Guiding Principles where changes between the drafts are significant or when commentaries to the Draft Guiding Principles enhance our understanding of the subject.

[74] One of the ironies of the final Guiding Principles is that the SRSG has abandoned any mention of international crimes while declining to alter his position on the ICC's view of complicity.

[75] Framework, Paragraph 81. The NPC's holding in Afrimex also supports this view but see the Comments by the Commission on Multinational Enterprises of the Confederation of Netherlands' Industry and Employers VNO-NCW on the Draft UN Guiding Principles for the implementation of the UN 'Protect, Respect and Remedy' framework**:**

> The Commentary recognizes that when companies have large numbers of suppliers it is **not possible to review all suppliers** and that priority should be given to areas of **heightened human rights risk**. As already mentioned above (under DGP 12) it should be acknowledged that companies, including suppliers, each have their own responsibility and that companies are responsible for their own actions, but are not responsible for the actions of others. Emphases added.

[76] "…[S]tates should increase inter-policy cooperation to increase the chances of prosecution in different counties…" Business In the Community Ireland Consultation, 3.

[77] This would include regimes based on ILO standards.

[78] Draft Guiding Principles dealt with this issue in an introductory Paragraph 7:

> At present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. But nor are they prohibited from doing so provided there is a recognized jurisdictional basis and that the exercise of jurisdiction is reasonable. Nevertheless, within this permissible space, States have chosen to act only in exceptional cases, and unevenly. *This is in contrast to the approaches adopted in other areas related to business, such as anti-corruption, money-laundering, some environmental regimes, and child sex tourism, many of which are today the subject of multilateral agreements*. (*emphasis added)*

[79] This italicized language in fn 78 above on contrasting multilateral agreements on extraterritoriality was dropped from the Guiding Principles to wit:

[80] Draft Guiding Principles, Introduction at paragraph 8

[81] See the Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights (2011) (RAID is one of the civil society elements issuing this statement)/

> The Guiding Principles should make recommendations on how the conduct of transnational business operations that cause or contribute to human rights violations in other countries should be regulated and remediated. They should more specifically provide guidance for States to ensure that companies under their jurisdiction do not contribute to human rights abuses at home or abroad. In addition to urging that States maintain policy coherence domestically (**Principle 4**), the Guiding Principles should also articulate measures that States should undertake to ensure the primacy of international human rights law, particularly when engaging in international trade and investment agreement negotiations.

[82] Catherine Tyler and Rachel Chambers are two UK practioners (hereafter Tyler and Chambers). Tyler is an advisor to Global Witness. They embraced the "lack of specificity" critique of the Draft Guiding Principles. Their Commentary noted favorably the development of the Dodd Frank Conflict Minersals Provisions and a

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comparable UK scheme and compared the Dodd Frank scheme's focus on providing information to the UK's The Consumer Protection from Unfair Trading Regulations of 2008, as well as the Kimberly Process and the Fair Trade Movement. **Rachel Chambers**, Barrister, **Cloisters**, and **Katherine Tyler**, Barrister, **9-12 Bell Yard** (UK): "Response and comments on John Ruggie's Guiding Principles" [DOC], 31 Jan 2011, http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions

[83] Comments of EarthRights International on the Draft Guiding Principles for the Implementation of the United Nations "Protect, Respect, and Remedy" Framework January 31, 2011 p 2 et seq.

[84] The Guiding Principles elevated the importance of this subject by moving this issue to **Principle : 2 States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.** The Commentary in the new version addressed the issue of the extraterritorial reach of states' criminal jurisdiction. Additionally, there is an apparent acknowledgment of the decision of the Afrimex NCP in its reference to the responsibilities of "parent" companies in relationship to the OECD Guidelines.

[85] As the SRSG has observed, "In the United States, Federal statutes require publicly listed companies to have robust programmes to assess, manage and report on material risks. None refers to human rights explicitly, but material risks clearly do encompass human rights issues: since the path-breaking *Doe v. Unocal* litigation in 1997, more than 50 cases have been brought against companies under the Alien Tort Statute alleging corporate involvement in human rights abuse abroad Reputational damage and operational disruptions pose additional risks." Operationalizing Report 26.

[86] See the recent Second Circuit Decision in Kiobel et al v. Royal Dutch Petroleum, 621 F3d 111 (2d. Cir. 2010), in which a divided second circuit panel held that corporations cannot be sued under the Alien Tort Act for violations of customary law. The dissent from the panel decision was mirrored by the dissents in a 5-5 affirmance by an en banc panel, who noted the existence of a circuit split, see Romero v Drummond, 552 F 3d 1303 (11th. Cir. 2008). For a succinct critique of the reasoning of Kiobel, see Wrong Decision on International Law, Editorial New Jersey Law Journal, February 25, 2011.

[87] The speed with which a diverse group of entertainers including Beyoncé, Nellie Furtado, and Mariah Carey divested themselves of millions of dollars earned performing for Muammar Gaddafi's sons since 2006 suggested both the lack of "HRDD" in their booking processes and the extent to which they perceived reputational damage from their association with the Libyan regime after it was no longer possible to ignore Gaddafi's flagrant abuses of human rights and IHL. See for example Furtado's tweet, promising to "donate" the $1 million dollars earned in 2007, Feb 28, 2011 from Twitter for BlackBerry® http://mobile.twitter.com/ NellyFurtado/ status/42276470231543808. See, generally Keeping up with the Gaddafi's, 2-28-11, http://english. aljazeera.net/indepth/features/ 2011/02/201122852348175589.html

[88] Draft Guiding Principles, paragraph 12, Commentary.

[89] Framework paragraph 75. "*The United Nations Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of* ***human rights****, labour, environment and anti-corruption.*" (emphasis added). The first two principles of the UN Global Compact, which are derived from the Universal Declaration of Human Rights, are: Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: Business should make sure that they are not complicit in human rights abuses.

See http://www.unglobalcompact.org/Issues/human_rights/

[90] Framework, paragraph 93

[91] One could say the journey formally began with the promulgation in 2003 of the UN Norms on Human Rights and Transnational Corporations (the UN Norms). As CEDHA notes in its Commentary on the Draft Guiding Principles,

> We recall the very unfortunate experience the Human Rights Commission went through with the laborious and highly controversial production of the UN Norms on Human Rights and Transnational Corporations (the UN Norms), which while approved by the UN Sub Commission on Human Rights in 2003, never had widespread approval from key stakeholder communities, including States, business and civil society. In fact, the UN Norms served to create conflict and tension between stakeholders practically making any further discussion on the issue of human rights and business impossible. We were one of the several Non Governmental Organizations which worked on the evolution of the UN Norms, and were sorry to see their substantive failure to harness global consensus and very much less, approval. But fortunately, times have changed, and we wish especially to recognize the effort of the UN Special Representative to have achieved opening a new and constructive chapter in this evolving and very critical policy discussion. Paragraph 2
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> Note that the Guiding Principles inserted a description of the role of the UN Norms in its Introduction paragraphs 1-3, see endnote 97 below

[92] Draft Guiding Principles, preliminary paragraph 4. The Guiding Principles dropped this language in favor of a detailed description of the SRSG's consultative process. The fact that 4 months elapsed between the Draft Guiding Principles and the Guiding Principles suggests that it is still a valid observation.

[93] Draft Guiding Principles, preliminary paragraph 3. The "silver bullet" metaphor disappeared from the final version.

[94] Draft Guiding Principles, preliminary paragraph 14. Guiding Principles Introductory paragraph 15.

[95] Joint Civil Society Statement Point 1, page 2. See also Danish 92's Statement on the Draft Guiding Principles.

[96] Tyler and Chambers paragraph 1, introduction

[97] Guiding Principles paragraphs 2 and 3. See CEDHA comment on this issue fn 91 above

[98] Responding the this treatment of the "new law" issue by the Guiding Principles, Robert Grabosch blogged,:

> A new General Principle stipulates that "nothing in these Guiding Principles should be read as creating new international law obligations". This clause pre-empts the interpretation of Council endorsement of the Guiding Principles as an expression of opinio juris regarding international customs that are not yet widely recognised as reflections of a legal obligation. http://internationallawnotepad.wordpress.com/2011/04/07/ruggie-guiding-principles-business-humanrights-predictions/ . Grabosch is the author of the ECCHR Paper see fn below. The "Council he refers to is the United Nations Human Rights Council which requested that the Guiding Principles be drafted to "operationalize" the earlier

Framework. *Opinio Juris* (*opinio juris sive necessitatis*) refers to the belief by states that they must act in a certain fashion as a matter of law. The concept becomes very nuanced when the *opnion juris* concerns an evolving norm.

[99] Draft Guiding Principles, preliminary paragraph 2. This section is generally read *in pari materia* with **Principle 10**, concerning "Conflict Affected Areas" and **Principle 21** in the "Issues of Context" Section.

[100] Submission: Public Consultation:"Guiding Principles for the Implementation of the United Nations *Protect, Respect and Remedy* Framework" Business in the Community Ireland. See also on the subject of human rights violations outside of conflict zones BP Executives' Human-Rights Miscalculations: Have They Bet the Company? written by the principle author of this Memorandum on July 27, 2010, http://**DiversityInc.com**.)

[101] CEDHA Commentary paragraph 28

[102] See note y above and text accompanied

[103] Risk Awareness Tool, Preface, p 9.

[104] Framework paragraph 3

[105] CIDSE describes itself as "an international alliance of Catholic development agencies working together for global justice." http://www.cidse.org/aboutus/?id=31

[106] Letter January 31, 2011 to the SRSG from Hermes Equity Ownership Group

[107] Guiding Principles **Principle 7 Supporting Business Respect for Human Rights in Conflict-Affected Areas.**

[108] Commentary to **Principle 7**

[109] Comments to the Draft Guiding Principles, CEDHA, January 31, 2011 paragraph 9. See, for example, the "**eight step methodology**" of the Scottish Human Rights Commision, http://scottishhumanrights.com/ourwork/publications/article/HRIAresearchreport and see the Draft Guiding Principles on the need to "integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action" Principle 17. See also the methodology of the Voluntary Principles on Security and Human Rights Risk Assessment (focused on extractive industries) http://www.voluntaryprinciples.org/principles/risk_assessment. See as well the **seven stage framwork** of the Guide to Human Rights Impact Assessment and Management (HRIAM) online tool http://www.guidetohriam.org/welcome

Some current thinking about HRIA's is reflected in this language from the Framework, paragraph 61:

> Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of human rights impact assessments will depend on the industry and national and local context. While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis.

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[110] IBLF's submission to the Special Representative on the Guiding Principles for the implementation of the United Nations 'Protect, Respect and Remedy' Framework January 31, 2011 pp 2-3

[111] Framework, paragraph 50.

[112] Writing in Foreign Affiars, Nassim Nicholas Taleb a Risk Engineer has co-authored an analysis of the failure of traditional risk analysts to predict the recent Arab Awakening and the economic recession of 2007-8. He argues that in complex circumstances, traditional observers overlook "tail risks," "hidden risks," or "suppressed risks" that may seem unlikely to profoundly affect events, but can be "high impact" if they occur. In essence, the article argues that analyses which "suppress volatility" ignore the powerful affect of repressing human freedom. The Black Swan of Cairo How Suppressing Volatility Makes the World Less Predictable and More Dangerous, Nassim Nicholas Taleb and Mark Blyth, Foreign Affairs May/June 2011.

[113] See Gaming Possibilities: "U.S. officials say that while they may not have predicted the fast-changing events in the Mideast, they are gaming out all possibilities. "We are planning for a full range of scenarios," White House spokesman Robert Gibbs said yesterday. "It is hard to even imagine several days ago the events that happened yesterday. And so events across this landscape are happening very quickly. We're watching those events. We're planning for those events." http://www.bloomberg.com/news/ 2011-02-02/mubarak-s-exit-to-upend-decades-of-predictable-u-s-policy-in-arabworld.html

[114] The Arab Human Development Report 2002, Creating Opportunities for Future Generations, iii, vii, 2

[115] Arab Human Development Report 2009, Challenges to Human Security in the Arab Countries, Forward.

[116] Great Arab Expectations, Ayman El-Amir Al-Ahram 10-16 March 2011 http:// weekly.ahram.org.eg/2011/1038/op191.htm . El-Amir is a former Al-Ahram Washington Correspondant and former Director of United Nations Radio and Television in New York.

[117] http://blogs.law.harvard.edu/corpgov/2011/04/09/un-guiding-principles-for-business-human-rights/

[118] See Global Compact Note on the United Nations Global Compact and Business and Human Rights, 13 Jan. 2009.

[119] Draft Guiding Principles, paragraph 13

[120] **Principle 16a**

[121] Commentary to **Principle 16**

[122] The NGO version of the underlying events is available in a monograph entitle Kilwa Trial: A Denial of Justice http://raid-uk.org/docs/Kilwa_Trial/Kilwa-chron-EN-170707.pdf. It is sponsored by Global Witness, RAID and two DRC NGOs. Some information from Anvil Mining's perspective is available from newreleases on its website http://www.anvilmining.com/. The Ruling in Association canadienne contre l'impunité (ACCI) c. Anvil Mining Ltd**.** Is available at the Quebec Superior Court website http://www.canlii.org/fr/qc/qccs/doc/ 2011/2011qccs1966/2011qccs1966.pdf ; (French only)

[123] For example, the controversy discussed earlier in this Memorandum about whether "conflict zones" necessitate different standards than other areas is in part about whether violations of the law of armed conflict are more severe than peacetime violations of human rights. In extreme circumstances the answer to this question may be obvious. On the other hand, to a victim of GBV, torture or forced labor or a company facing a choice about whether to utilize a supply chain vulnerable to criticism, the difference may be academic). The victim needs relief, the business needs to avoid complicity in wrongful conduct. This threshold question of how to describe and characterize the human rights terrain in which a business is trying to function will ultimately have to spawn its own

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simplified lexicon. In the meantime significant expertise will be required to guide decision makers in adapting HRDD to different circumstances.

[124]**Principle 12**. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning **fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.**

[125] Written contribution of France regarding the final recommendations of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises in addition to its representative's contribution to the consultation of States held on 17 January in Geneva 31 Jan 2011

[126] Page 9

[127] A lacuna in the Draft Guidelines, not remedied in the final version is that "Responsibilities of corporate directors are entirely ignored." This criticism was addressed to both criminal and civil duties. Paper *of the* European Center for Constitutional and Human Rights (ECCHR Paper) (author: Robert Grabosch, Business Human Rights Programme) 27 January 2011, page 8. For a Grabosch response to the final Guiding Principles' assertion that it creates no new law, see Endnote 108 above

[128] Comments of Earth Rights International on the Draft Guiding Principles for the Implementation of the United Nations "Protect, Respect, and Remedy" Framework January 31, 2011 p 5

[129] See The Paradox of Empty Promises note 12 above

[130] Just and Unjust Wars

[131] The Idea of Justice, Amartya Sen (2009).

[132] Memoire of Solferino page 12