

ENFORCING INTERNATIONAL HUMANITARIAN LAW
THROUGH THE BUSINESS RESPONSIBILITY TO RESPECT
HUMAN RIGHTS

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ABSTRACT

Insulation produced by the Danish company Rockwool—or its Russian subsidiary—lines thirty-one Russian Navy warships. Though not a weapon, this material is essential to the vessels' operation. Did Rockwool have a responsibility under international law to stop the transfer of the insulation to the Russian Navy before Russia's 2022 invasion of Ukraine? This article examines the business responsibilities under the 2011 United Nations Guiding Principles on Business and Human Rights ("UNGPs"). In doing so, the article finds that the business responsibility to respect human rights in the UNGPs provides a strong mechanism for enforcing international humanitarian law ("IHL"). However, requires additional clarification from the United Nations body responsible for overseeing implementation of the UNGPs, and stronger efforts by States who retain the primary obligations under international law to regulate businesses. The article also raises concerns about entrusting businesses with the responsibility to implement and enforce IHL when they may be ill-equipped for such a role.

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I. INTRODUCTION

Insulation produced by the Danish company Rockwool—or its Russian subsidiary—lines thirty-one Russian Navy warships.² Some of those warships are part of the Black Sea fleet,³ which has been credibly accused of war crimes during Russia's unlawful war of aggression in Ukraine.⁴ Rockwool's insulation is not a weapon nor the direct cause of Russia's war crimes,⁵ but it is a necessary component of Navy ships, used to regulate the ship's climate.⁶ Rockwool asserts that, "Since the 2014 annexation of Crimea through the present, Rockwool has not had and does not have a customer relationship with the Russian government or military."⁷ Yet, the Russian Navy is the primary client of Marine Complex Systems (MKS), a regular distributor for Rockwool's Russian subsidiary.⁸

² Thomas Gösta Svensson, Mathias Glistrup, & Johan Seidenfaden, *How Systematic It Was: 31 Russian Warships Loaded with Rockwool*, DANWATCH (Sept. 1, 2023), <https://danwatch.dk/en/how-systematic-it-was-31-russian-warships-loaded-with-rockwool/> [<https://perma.cc/KDH3-TLG3>] (last accessed July 31, 2025) (reporting, according to investigative journalists).

³ *Id.*

⁴ The International Criminal Court ("ICC") issued an arrest warrant against Viktor Nikolayevich Sokolov, the Russian Navy Admiral who was in charge of the Black Sea fleet until his alleged death, for war crimes and crimes against humanity. *Situation in Ukraine, ICC-01/22*, INTERNATIONAL CRIMINAL COURT: INVESTIGATIONS, <https://www.icc-cpi.int/situations/ukraine> [<https://perma.cc/895J-CPCQ>] (last accessed July 31, 2025). The ICC has not released the details of the arrest warrant.

⁵ Svensson, et al., *supra* note 1 (reporting alleged war crimes).

⁶ *Marine Insulation*, ROCKAL: APPLICATIONS, <https://rockal.org/applications/marine-insulation> [<https://perma.cc/8A3N-VS7A>] (last accessed Aug. 1, 2025).

⁷ *Rockwool Reaction to Danish Business Authority Letter Regarding Activities in Russia*, ROCKWOOL (Mar. 1, 2023), <https://www.rockwool.com/group/about-us/news/2022/rockwool-reaction-to-danish-business-authority-letter-regarding-activities-in-russia/> [<https://perma.cc/7D7Z-R8WD>] (last accessed Aug. 1, 2025). Rockwool also claims that since Russia's invasion of Ukraine, the company has complied with sanctions imposed by the European Union ("E.U."), has not exported insulation to Russia, and has distanced the Danish parent company from its Russian subsidiary. See Press Release, Rockwool, Letter to the Danish Business Authority regarding Rockwool A/S' Activities in Russia, Case Number 2023-3672 (Mar. 6, 2023), <https://www.rockwool.com/globalassets/about-us/news/2023/2023-03-06-rockwool-response-to-crst-letter-2023-02-28.pdf> [<https://perma.cc/LQZ8-WP88>] (last accessed Aug. 1, 2025).

⁸ Svensson, et al., *supra* note 1; Thomas Gösta Svensson & Mathias Glistrup, *Putin's New Super-Frigates Equipped with Rockwool*, DANWATCH (May 30,

In this article, I question whether the Danish parent company should have stopped the transfer of marine insulation to the Russian Navy before or after Russia's 2022 invasion of Ukraine. To answer this question, I apply the 2011 United Nations Guiding Principles on Business and Human Rights ("UNGPs"), the leading international authority on businesses' responsibilities for international human rights law ("IHL") and international humanitarian law ("IHL"), the law governing the conduct of hostilities in armed conflicts.⁹

The arms trade plays a key role in facilitating wars and thereby facilitating violations of IHL.¹⁰ Over the past two decades, scholars have sought to define the responsibility of third-party actors, encompassing non-belligerent States and private sector entities, to restrict the supply of weapons to parties credibly accused of

2023), <https://danwatch.dk/putins-nye-super-fregatter-udstyret-med-rockwool-2/> [<https://perma.cc/D229-BBYP>] (last accessed July 31, 2025); Thomas Gösta Svensson & Mathias Glistrup, *Rockwool has made Millions Supplying Putin's War Machine*, DANWATCH (Feb. 24, 2023), <https://danwatch.dk/en/rockwool-in-rusland-have-made-millions-supplying-putins-war-machine/> [<https://perma.cc/5UAL-LDX6>] (last accessed Nov. 4, 2025) (hereinafter "Svensson & Glistrup, Millions").

⁹ U.N. Doc. A/HRC/17/31 (2011) ("UNGPs") https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_17_31.pdf [<https://perma.cc/8AD7-7WFF>]. In this article, I set aside international criminal law and the law on State responsibility for aiding and assisting in the commission of an internationally wrongful act. These legal areas are centered on negative obligations, meaning individuals or states are to refrain from intentionally facilitating violations of international law. This means that the fields are appropriate only for retroactive accountability rather than proactively preventing IHL violations. *See, e.g.*, Doc. A/RES/56/83 (2001) International Law Commission, Articles on States Responsibility for Internationally Wrongful Acts. ("ASRIWA") Article 16 (2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [<https://perma.cc/6EJR-BEJ6>]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, Merits, 26 February 2007, *I.C.J. Reports 2007*, p. 43, para 421-422, <https://www.icj-cij.org/case/91> [<https://perma.cc/4LVE-9L7H>]. Due to space constraints, I also set aside debates over States' extraterritorial international human rights law obligations in this area. *But see*, Marina Askenova, *Arms Trade and Weapons Export Control*, in Mark Gibney, et al., (eds.), *THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS* 379 (2022).

¹⁰ *See* Maya Brehm, *The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law*, 12 J. CONFLICT & SEC. L. 359, 359-360 (2007).

breaching IHL.¹¹ Historically, advocates have interpreted Common Article 1 of the 1949 Geneva Conventions—which obliges State Parties to “respect and ensure respect for” the treaties’ standards—as imposing a legal duty on third-party states to enforce IHL through the regulation of the arms trade.¹² This interpretation of Common Article 1 has proven to be controversial, with objections from major arms-exporting States, including the United States of America (“U.S.”), the United Kingdom (“U.K.”), and Canada.¹³ The UNGPs now offer an additional mechanism for enforcing IHL in the context of the arms trade by requiring businesses to account for their direct and indirect impacts on human rights and

¹¹ See generally Brehm, *supra* note 9, at 359-387; Odile Dua, *Arms Supply to Saudi Arabia: A Possible Implementation of Belgium’s State Responsibility?*, 52 REV. BELGE DE DROIT INT’L 531, 531-550 (2019); Luca Ferro, *Western Gun-runners, (Middle-)Eastern Causalities: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?*, 24 J. CONFLICT & SEC. L. 503, 503-535 (2019); Giovanna Maletta, *Seeking Responsible Arms Trade to Reduce Human Suffering in Yemen* 56 INTER’L SPECTATOR 73, 73-91 (2021); Silke Zwijsen, Machiko Kanetake & Cedric Ryngaert, *State Responsibility for Arms Transfers: The Law of State Responsibility and the Arms Trade Treaty*, ARS AEQUI 151, 151-160 (2020); Hiruni Alwishewa, *Arms Exports to Conflict Zones and the Two Hats of Arms Companies*, (2021) TRANSNATIONAL LEGAL THEORY 527, 545 (2021); Marina Aksenova, *Arms Trade and Weapons Export Control*, in Mark Gibney, et al., THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS 379, 385 (2021); Mark B. Taylor, *Regulating Illicit Flows to and from War in Companies in Conflict Situations: Building a Research Network on Business, Conflicts, and Human Rights* (ICIP Research, 2013), 15-35.

¹² See, e.g., Brehm, *supra* note 9; Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 895-896 INT’L REV. RED CROSS 707 (2014); Enrique Martinez, *State Responsibility for Authorizing Private Arms Exports: Expanding the Substantive Obligation under Common Article One to the Four Geneva Conventions*, 27 SW. J. INT’L L. 206 (2021); Verity Robson, *The Common Approach to Common Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions*, 25 J. CONFLICT & SEC. L. 101 (2020); Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to “Ensure Respect,”* 96 INT’L L. STUDIES 674 (2020); Marco Longobardo, *Alleged Violations of the Duty to Ensure Respect for IHL and the Monetary Gold Principle*, EJIL:TALK! (Mar. 11, 2024). <https://www.ejiltalk.org/alleged-violations-of-the-duty-to-ensure-respect-for-ihl-and-the-monetary-gold-principle/> [<https://perma.cc/CGQ6-BR87>] (last accessed Aug. 8, 2025).

¹³ For a comprehensive overview of these objections see, Robson, *supra* note 11; Schmitt & Watts, *supra* note 11.

humanitarian law.

According to the UNGPs, all businesses have a responsibility to respect all human rights at all times throughout their value chain — including monitoring the actions of their clients or third-party buyers.¹⁴ This responsibility extends to companies operating in the arms industry,¹⁵ including those like Rockwool that produce component parts not captured by international or domestic arms trade regulations.¹⁶ Businesses are expected to realize this responsibility through “human rights due diligence” (“HRDD”), a process designed to identify and address ways in which they may cause, contribute to, or be linked to adverse human rights impacts.¹⁷ In conflict-affected areas, businesses are expected to engage in “heightened human rights due diligence” (hHRDD).¹⁸ According to the United Nations (“U.N.”) Working Group on Business and Human Rights¹⁹ and the U.N. Development Program, an appropriate hHRDD analysis requires integrating IHL and accounting for the business’s impacts on the conflict’s dynamics, including through its direct and indirect

¹⁴ UNGPs, *supra* note 8 at Principle 14.

¹⁵ *Id.*; John Sherman III, *Beyond CSR: The story of the UN Guiding Principles on Business and Human Rights*, HARVARD BUSINESS RESPONSIBILITY INITIATIVE, WORKING PAPER NO. 71 (2020). https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf [<https://perma.cc/88BV-QSND>] (last accessed August 8, 2025).

¹⁶ *See, e.g.*, 15 CFR §§ 730.3-730.7, 734.3; COUNCIL COMMON POSITION 2008/944/CFSP (December 8, 2008). <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008E0944> [<https://perma.cc/N3EK-U75P>]; *Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine*, 2014 O.J. (L 229) 1 (EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0833> [<https://perma.cc/BLR9-RHUV>].

¹⁷ UNGPs, *supra* note 8 at Principles 17, 22, and accompanying Commentaries.

¹⁸ The U.N. Working Group on Business and Human Rights is the independent expert body entrusted with promoting and overseeing implementation of the UNGPs. *See* UNDP, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts* (2022), 10, <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide> [<https://perma.cc/ABS4-4FQ3>] (last accessed Aug. 8, 2025); Rachel Davis, *The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities*, 94 INT’L REV. RED CROSS 961 (2012) (explaining the responsibility to factor IHL into their hHRDD in this Article’s Section III).

¹⁹ *See* U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

relationships with parties to the conflict.²⁰ In Section II, I explain in greater detail the expectations for HRDD and hHRDD (collectively referred to as “(h)HRDD”).

Where a business has “caused or contributed to” an adverse impact on human rights, it owes remedies and reparations to the victims.²¹ Where a business is merely “directly linked to” a harm, it must effectively use its leverage to create change in the conduct of its business partners, or it risks “contributing to” the harm and incurring a responsibility to remediate those harms.²² The terms “cause, contributed, and directly linked to” are *sui generis* terms of art for the UNGPs that sit along a “continuum of responsibility.”²³ As I discuss in Section III, a business’ responsibility under the UNGPs can be determined by examining the following factors: the power and independence of the business; the predictability and severity of the harm; and the business’s efforts to mitigate harms arising from its relationships.²⁴ In this article, I examine the business

²⁰ UNDP, *supra* note 17, at 22-25. *See also*, Rachel Davis, *The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities*, 94 INT’L REV. RED CROSS 961, 973-975 (2012).

²¹ UNGPs, *supra* note 8 at Principle 22 and accompanying Commentaries; *see also* Tara Van Ho, *Defining the Relationships: ‘Cause, Contribute, and Directly Linked to’ in the UN Guiding Principles on Business and Human Rights*, 43 HUM. RTS. Q. 625, 630 (2021); John Gerard Ruggie & John F. Sherman, III, *The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT’L L. 921, 927-928 (2017); U.N. Doc. A/HRC/50/40/Add.40 (Jun 8, 2022).

²² UNGPs, *supra* note 8 at Principle 19. *See also*, OHCHR, *Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector*, at 6 (June 12, 2017), <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf> [<https://perma.cc/4E5V-TTWZ>]; Letter to from John Ruggie to Prof. Dr. Roel Nieuwenkamp (Mar. 6, 2017), https://media.business-humanrights.org/media/documents/files/documents/OECD_Workshop_Ruggie_letter_-_Mar_2017_0.pdf [<https://perma.cc/3QYT-E6Z6>].

²³ Working Group on the issue of human rights and transnational corporations and other business enterprises, *Implementing the third pillar: Lessons from Transnational Justice Guidance by the Working Group*, ¶ 8 U.N. Doc. A/HRC/50/40/Add.4 (2022); Van Ho, *supra* note 20, at 630. *See also*, UNGPs, *supra* note 8, at Principles 17, 22, and accompanying Commentaries; Ruggie & Sherman, *supra* note 20, at 927.

²⁴ *See infra* Section IV.

responsibility to respect human rights under the UNGPs and apply those responsibilities to Rockwool, a rather obscure actor in the arms trade whose products have not yet been subjected to European Union (“E.U.”) sanctions against Russia.²⁵

The article makes three contributions to scholarly and practical debates on Business and Human Rights (“BHR”) and the arms trade. First, it clarifies the international legal expectations on businesses in the arms trade by focusing on UNGPs — rather than the domestic and regional human rights standards that have been the focus of scholarship thus far.²⁶ This is important both theoretically and practically. Theoretically, it opens up debate for whether the standards are appropriate given the risks the industry poses as well as the appropriate relationship between States and businesses within the arms industry. Practically, the international community clearly has need for guidance on what BHR expects of businesses in the arms industry. In particular, when the Conference of States Parties to the 2013 Arms Trade Treaty (“CSP”)²⁷ welcomed the

²⁵ See generally Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, 2014 O.J. (L 229) 1 (EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0833> [<https://perma.cc/BLR9-RHUV>]; See also, Rockwool Calls Continued Russia Business ‘Least Bad Option’, GLOBAL INSULATION (Apr. 4, 2023), <https://www.globalinsulation.com/news/1872-rockwool-calls-continued-russia-business-least-bad-option> [<https://perma.cc/2PVH-58UR>] [hereinafter GLOBAL INSULATION].

²⁶ See, e.g., Alwishewa, *supra* note 10 at 545; Marina Aksenova, *Arms Trade and Weapons Export Control*, in Mark Gibney, et al., THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS 379, 385 (2021); Mark B. Taylor, *Regulating Illicit Flows to and from War in Companies in Conflict Situations: Building a Research Network on Business, Conflicts, and Human Rights* (ICIP Research, 2013), 15-35; see also, generally, Marina Askenova, *Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen*, 30 WASH. INT’L. L. J. 255 (2021) <https://digitalcommons.law.uw.edu/wilj/vol30/iss2/8> [<https://perma.cc/LZ5E-R68K>] (last accessed Aug. 9, 2025); Machiko Kanetake and Cedric Ryngaert, *Due Diligence and Corporate Liability of the Defence Industry: Arms Exports, End Use, and Business Responsibility* (2023), <https://vlaamsvredesinstituut.eu/wp-content/uploads/2023/05/VVI-Rapport-Due-Dilligence-WEB-new.pdf> [<https://perma.cc/L9MH-UPJY>].

²⁷ Arms Trade Treaty, 3013 U.N.T.S. 269 (entered into force Dec. 24, 2014). The Conference of States Parties (“CSP”) is made up of the States that have ratified the Arms Trade Treaty. They have an annual meeting aimed at sharing good

development of the UNGPs in 2023 (12 years after their endorsement by the Human Rights Council), it also noted the need to better understand the relationship between the UNGPs and the Arms Trade Treaty (“ATT”).²⁸ The Inter-American Court of Human Rights is also considering a request from Mexico for an Advisory Opinion on “the activities of private companies engaged in the firearms industry and their effects on human rights.”²⁹ That Advisory Opinion is pending. These developments indicate a willingness by the international community to tackle this complicated issue albeit an uncertainty in how to do so.

The second contribution I make stems from the first: using the UNGPs to examine the arms industry allows for reflections on both the *lex lata* and *lex ferenda* of BHR. While framed as non-binding, the UNGPs have significantly influenced the practice of both States and businesses,³⁰ and now represent minimum expectations for corporate conduct.³¹ Yet, they also require greater clarity, domestic implementation, and enforcement in industries such as the arms trade where States are both regulator and client and therefore remain reticent to regulate.

Finally, the third contribution stems from examining the implications of the international legal standards as they are. As I explain in Section V, international law now elevates businesses to the role of enforcers of IHL, which may be a role they are ill-equipped to perform. Section II provides additional details on the factual background of Rockwool. In Section III, I outline the due diligence expectations for businesses under the UNGPs; and in Section IV, I explain how responsibility is attributed to businesses under the UNGPs and identify mechanisms of enforcement. In Section V, I apply the UNGPs to the Rockwool case to demonstrate how even companies not normally considered within the arms industry may

practices and addressing outstanding challenges or questions related to the treaty’s implementation. In the absence of any mechanism for enforcing the treaty, the CSP remains the highest authority on the Arms Trade Treaty’s obligations and the manner in which States can support a clearer interpretation of the treaty.

²⁸ Arms Trade Treaty, Ninth CSP, Final Report (Aug. 25, 2023), U.N. Doc. ATT/CSP9/2023/SEC/773/Conf.FinRep.Rev2, at para 22(c).

²⁹ Request for an Advisory Opinion submitted by Mexico before the Inter-American Court of Human Rights of November 11, 2022, https://www.cor-teidh.or.cr/docs/opiniones/soc_1_2022_en.pdf [<https://perma.cc/SGQ8-UFMB>].

³⁰ See, Muchlinski, *infra* note 57 at 222-25.

³¹ *Id.*

nonetheless bear responsibility for compliance with IHL through their involvement in the arms trade. I suggest that these developments could turn businesses in the arms trade into new guardians of IHL, before raising for consideration an important question: should they be entrusted with this role? In Section VI, I conclude recognizing the potential of the UNGPs as a new means of enforcing IHL, while cautioning that relying on businesses to fulfill this role may be problematic, as they are often ill-equipped to do so.

II. ROCKWOOL'S INDIRECT RELATIONSHIPS WITH RUSSIA'S NAVY

Rockwool has had a local subsidiary operating in Russia since 1995,³² which continues operating today.³³ Rockwool reports that approximately 1,200 of its employees are based in Russia, representing about 10% of its global workforce.³⁴ In a March 2024 statement responding to public pressure to end its Russian operations, the company argued:

We understand that some people disagree with the decision to continue operating and we acknowledge the strong feelings that might create. But we are convinced it is the right thing to do. There are of course many considerations, above all else, our employees and their families. If we withdraw from Russia, it will first and foremost punish our own people and put at risk the livelihoods of their families. We do not want to do that.³⁵

The company made no reference to assessing its contribution to the loss of life in Ukraine or to recognizing any responsibility

³² *Regarding ROCKWOOL's continued presence in Russia*, ROCKWOOL (Nov. 28, 2022), https://media.business-humanrights.org/media/documents/Rockwool_response.pdf [<https://perma.cc/WGU2-FEAL>].

³³ National Agency on Corruption Prevention, *International Sponsors of War: Rockwool's Products used in the Construction and Repair of Russian Navy Ships* (Nov. 13, 2023), <https://nazk.gov.ua/en/news/international-sponsors-of-war-rockwool-s-products-used-in-the-construction-and-repair-of-russian-navy-ships/> *ROCKWOOL Statement on Continuing Business Operations in Russia*, ROCKWOOL (Mar. 4, 2022), <https://www.rockwool.com/group/about-us/news/2022/2022-03-04-ukraine/> [<https://perma.cc/9BFN-Y52E>].

³⁴ *Id.*

³⁵ *Id.*

toward Ukrainian employees.³⁶

While the company claims it has not had a relationship with the Russian Navy since the 2014 invasion of Ukraine,³⁷ investigative journalists at Danwatch found that Rockwool's Russian subsidiary and regular distributors entered into multiple contracts to supply marine insulation after the 2014 invasion of Crimea.³⁸ Russian language marketing materials also promote the suitability and benefits of the insulation for military purposes.³⁹ According to the journalists, "Russian partners have, in at least 21 cases, supplied Rockwool products worth a total of 123 million rubles (approximately 11.5 million kroner) [USD 1.6 million] to shipyards carrying out large orders on behalf of the Russian Ministry of Defense".⁴⁰ Danwatch's report led to an inquiry from the Danish Business Authority (which later determined Rockwool had not breached sanctions laws)⁴¹ and criticism from Ukraine's National Agency on Corruption.⁴² In response, Rockwool argued that it has done nothing wrong as its operations are complying with E.U. sanctions laws and export licensing regimes.⁴³ As I explain below, this approach does not address the business's responsibility to respect human rights under the UNGPs, which operates independently of the E.U. laws and licensing systems.⁴⁴

Following Russia's further invasion of Ukraine in 2022, the Danish parent company has attempted to distance itself from the Russian subsidiary and now asserts that it serves merely as a passive shareholder.⁴⁵ The company blames "the market" for its products ending up in the Russian Navy warships.⁴⁶ It asserts that as "a market leader

³⁶ *Id.*

³⁷ ROCKWOOL, *supra* note 6.

³⁸ Svensson & Glistrup, Millions, *supra* note 6.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Rockwool A/S, *Danish Business Authority Closes the Case: ROCKWOOL Did Not Violate Any Russia-Related Sanctions*, ROCKWOOL (Mar. 28, 2023), <https://www.rockwool.com/group/about-us/news/2023/2023-03-28-danish-business-authority-closes-the-case-rockwool-did-not-violate-any-russia-related-sanctions/> [<https://perma.cc/A23P-X7MU>]

⁴² National Agency on Corruption Prevention, *supra* note 32.

⁴³ ROCKWOOL, *supra* note 6; GLOBAL INSULATION, *supra* note 24.

⁴⁴ *See infra*, Sections III.A, V.A.

⁴⁵ ROCKWOOL, *supra* note 31.

⁴⁶ ROCKWOOL, *supra* note 6.

... our products are widely available on the Russian market. ... [Rockwool] does not know or have any control over who all the end-users are. This is not specific to Russia, but rather how the market works in many other countries, too.”⁴⁷ Finally, Rockwool claims it should not be expected to leave because staying is the “least bad solution in a situation where we really only have bad solutions to choose from.”⁴⁸ Rockwool points⁴⁹ to a practice by Russia, increasingly applied since 2022,⁵⁰ of nationalizing foreign corporations that attempt to leave the State in response to Russia’s unlawful war of aggression against Ukraine.⁵¹ Addressing concerned shareholders, Rockwool’s Chair Thomas Kähler reportedly argued that, “[i]t will not benefit Ukraine to send value in the amount of between US\$722m and US\$877m into the hands of Russia.”⁵² Since then, its insulation now appears to have been incorporated into the “modernization of two high-profile nuclear weapons bases.”⁵³

This overview of the case may seem brief, but together with the opening paragraph, it contains the most pertinent facts for

⁴⁷ *Id.*

⁴⁸ Thomas Gösta Svensson & Mathias Glistrup, *Rockwool has Made Millions Supplying Putin’s War Machine*, at *Rockwool’s Full Response*, DANWATCH (Feb. 24, 2023), <https://danwatch.dk/en/rockwool-in-rusland-have-made-millions-supplying-putins-war-machine/> [<https://perma.cc/D3S2-JUFP>] (last accessed Aug. 9, 2025).

⁴⁹ Press Release, ROCKWOOL, *Regarding ROCKWOOL’s Continued Presence in Russia* (Nov. 28, 2022), https://media.business-humanrights.org/media/documents/Rockwool_response.pdf [<https://perma.cc/WGU2-FEAL>].

⁵⁰ Anastasia Stogney, *Cannot Sell, Liquidate: Foreigners Restricted from Exiting Russian Companies*, BBC NEWS RUSSIA (Sept. 12, 2022), <https://www.bbc.com/russian/news-62874792> [<https://perma.cc/EK6S-TRSN>] (last accessed Aug. 9, 2025); Simeon Djankov and Anastasiia Golovchenko, *Expropriation, Russian Style*, Centre for Economic Policy Research (Jan. 24, 2025), <https://cepr.org/voxeu/columns/expropriation-russian-style> [<https://perma.cc/38VC-FC83>] (last accessed November 4, 2025).

⁵¹ *See*, Decree of the President of the Russian Federation of September 8 2022 N 618, *On a Special Procedure for the Implementation (Execution) of Certain Types of Transactions (Operations) between certain persons*, (Sept. 11, 2022), <https://rg.ru/documents/2022/09/11/document-1662909997536401.html> [<https://perma.cc/V6V8-R833>].

⁵² GLOBAL INSULATION, *supra* note 24.

⁵³ Thomas Gösta Svensson & Mathias Glistrup, *Putin’s New Nuclear Bases are Packed with Danish Products*, (May 28, 2025) DANWATCH, <https://danwatch.dk/en/putins-new-nuclear-bases-are-packed-with-danish-products/> [<https://perma.cc/THJ2-ZE3R>] (last accessed Aug. 9, 2025).

determining the parent company's responsibility under the UNGPs, as the next two Sections demonstrate. Rockwool has an ongoing presence in Russia through its Russian subsidiary.⁵⁴ MKS, a regular distributor to that subsidiary, has supplied the Russian Navy with Rockwool's marine insulation before and during the current armed conflict between Russia and Ukraine.⁵⁵ Rather than pressure the subsidiary to terminate its relationship with MKS, or wind up operations in Russia, Rockwool has chosen to maintain its presence in Russia via subsidiary operations, which Rockwool now claims are operationally independent from the Danish parent company.⁵⁶ I now explain the demands of the UNGPs, against which these facts should and will be assessed.

III. THE BUSINESS RESPONSIBILITY TO RESPECT HUMAN RIGHTS

Unlike "Corporate Social Responsibility," which allows businesses to identify social areas in which they might wish to invest in, the field of BHR is focused on establishing accountability for businesses' adverse impacts on internationally recognized human rights.⁵⁷ The UNGPs were the culmination of more than four decades of work by the U.N. to identify the human rights responsibilities of transnational corporations.⁵⁸ International law is normally centered on the responsibility of states, who are the field's principal actors and duty-bearers.⁵⁹ As Kanetake and Ryngaert note,

⁵⁴ See *supra* note 6.

⁵⁵ *Id.*

⁵⁶ See *supra* notes 43-49.

⁵⁷ See Anita Ramasastry, *Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 240 (2015).

⁵⁸ *Id.*; Peter Muchlinski, *The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights*, 6 BUS. & HUM. RTS. J. 212, 213 (2021); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 902-903 (2003); Michael K. Addo, *Is Business and Human Rights Suitable for the Compliance Function?*, U. CHI. L.REV. ONLINE (2020), <https://lawreview.uchicago.edu/online-archive/business-and-human-rights-suitable-compliance-function> [<https://perma.cc/L8FU-6P3V>].

⁵⁹ See Dalia Palambo, *Transnational Business and Human Rights Litigation: An Imperialist Project?*, 22 HUM. RTS. L. REV. 1, 4 (2022); Tricia D. Olsen & Laura Bernal-Bermúdez, *Uncovering Economic Complicity: Explaining State-Led*

“[t]raditionally, international law has had limited relevance to the regulation of corporate conduct.”⁶⁰ Yet, states have often failed to adequately and effectively regulate businesses, particularly transnational corporations.⁶¹ This led “developing” states,⁶² activists, and scholars to consider whether powerful transnational corporations should have their own human rights responsibilities.⁶³

In 2003, a U.N. expert sub-commission on human rights attempted to identify “Draft Norms” on business responsibility for human rights.⁶⁴ Those Draft Norms would have required businesses to match states’ human rights obligations: to respect human rights, by refraining from interfering with their realization; to protect human rights, by preventing third-parties from interfering in their realization; and to fulfil human rights, by taking progressive steps toward their full realization.⁶⁵ The primary difference between the responsibilities of states and businesses would lie in their scope: states owe duties to individuals within their territory or under their jurisdiction;⁶⁶ while businesses would have been expected to respect,

Human Rights Abuses in the Corporate Context, 189 J. BUS. ETHICS 35, 37-38 (2024). For an earlier overview of criticisms of international law’s state-centrism, see Susan Marks, *State-Centrism, International Law, and Anxieties of Influence*, 19 LEIDEN J. INT’L L. 339 (2006).

⁶⁰ Kanetake & Ryngaert, *supra* note 25, at 7.

⁶¹ See Olsen & Bernal-Bermúdez *supra* note 58, at 37-38.

⁶² There is no good terminology for States that were formerly colonized, are now independent, have suffered from economic exploitation, and largely refused to align with either side of the Cold War.

⁶³ See generally Ramasastry, *supra* note 56; Weissbrodt & Kruger, *supra* note 57; John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 821-823 (2007).

⁶⁴ U.N. ECON. & SOC. COUNCIL, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), <https://digitallibrary.un.org/record/501576?v=pdf> [<https://perma.cc/K4VM-JE4C>]; See also, Weissbrodt & Kruger, *supra* note 57.

⁶⁵ See Responsibilities of Transnational Corporation, *supra* note 63; See also, Pini Pavel Miretski & Sascha-Dominik Bachmann, *The UN ‘Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’: A Requiem*, 17 DEAKIN L. REV. 5, 7-9 (2012). For an overview of the three obligations, see, Frédéric Mégret, *Nature of obligations*, in Daniel Moeckli, et al., (eds.) INTERNATIONAL HUMAN RIGHTS LAW 96 (4th edn., 2022).

⁶⁶ For an overview of this concept and the debates over this issue, see at Sarah Joseph & Barrie Sander, *Scope of Application*, in *Scope of Application*, in *International Human Rights Law* (Daniel Moeckli et al. eds., 4th ed. 2022).

protect, and fulfill human rights throughout their operations and value chains.⁶⁷ The Commission on Human Rights, the predecessor to the current U.N. Human Rights Council, recognized some utility in this approach, but found the Norms were without legal standing or impact.⁶⁸ Instead, the Commission requested the U.N. Secretary-General appoint an independent expert to “identify and clarify” international standards and policies on BHR.⁶⁹ John Ruggie, the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, was given a mandate to clarify international standards and expectations for businesses.⁷⁰

Through his tenure, Ruggie drafted the UNGPs.⁷¹ Unanimously endorsed by the U.N. Human Rights Council in 2011, the UNGPs are the leading authority on the responsibility of commercial actors for human rights.⁷² The UNGPs were born out of a realization that all businesses can impact all human rights, and accordingly reject distinctions between transnational corporations and domestic businesses.⁷³ Ruggie also recognized that many states remain reluctant to regulate or pursue corporate accountability for economic reasons. Consequently, the UNGPs acknowledge three complementary pillars of responsibilities for states and businesses.⁷⁴ The first pillar affirms states’ ongoing international legal obligation to protect human rights by effectively regulating and guiding businesses through a “smart mix” of mandatory and voluntary initiatives designed to bring about business respect for human rights.⁷⁵ Second,

⁶⁷ See, Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* In Philip Alston, ed., *NON-STATE ACTORS AND HUMAN RIGHTS* 3, 13-14 (2005).

⁶⁸ UN Commission on Human Rights, Res. 2004/116, U.N. Doc. E/CN.4/DEC/2004/116 (2004).

⁶⁹ UN Commission on Human Rights, Res. 2005/69, U.N. Doc. E/CN.4/2005/L.87, para 1 (2005).

⁷⁰ Ruggie, *supra* note 62 at 821-823.

⁷¹ UNGPs, *supra* note 8 at Preamble.

⁷² See, e.g., Elena Assenza, *From International “Soft” Law to Law in Business and Human Rights: The Role of the UNGPs in the Development of Formal Sources of International Law*, in Andreas R. Ziegler, et al., (eds.) *BUSINESS AND HUMAN RIGHTS: EMERGING CHALLENGES, ISSUES, AND TRENDS* 13, 13 (2024).

⁷³ UNGPs, *supra* note 8 at Principle 11 and Commentary.

⁷⁴ See, generally, UNGPs, *supra* note 8.

⁷⁵ *Id.* at 6-13. For more on the State responsibility to protect against business interference, see, e.g., Markus Krajewski, *The State Duty to Protect against Human Rights*

the UNGPs recognize the responsibility of businesses, in all industries and contexts, to respect human rights.⁷⁶ To do this, businesses should identify and prevent real or potential adverse human rights risks posed by their products, activities, and business relationships.⁷⁷ This business responsibility to respect human rights operates independently of any state's ability or willingness to meet its own obligations, or to regulate and hold the business accountable for the protection of human rights.⁷⁸ The third pillar acknowledges the rights of victims to secure remedies and provides guidance on the appropriate judicial and non-judicial mechanisms for securing them.⁷⁹

This section analyzes the business responsibility to respect human rights, as set forth in the UNGPs. It first outlines the expectations governing businesses' implementation of (h)HRDD; followed by an examination of the concrete efforts of arms companies to conduct (h)HRDD. The next Section, explains how the UNGPs attribute responsibility to corporations and discuss the growing enforceability of these obligations.

A. *The Business Responsibility to Respect Human Rights*

The independence of the responsibility to respect human rights is significant for BHR, aimed at trying to prevent companies and States accused of collectively abusing human rights from passing the blame.⁸⁰ In the 1990s and early 2000s, multinational corporations were

Violations through Transnational Business Activities, 23 DEAKIN L. REV. 13 (2018); Daniel Augenstein & David Kinley, *When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271 (Surya Deva & Davic Bilchitz eds., 2013); Robert Mccorquodale, *International Regulation of Business Concerning Human Rights Issues*, in BUSINESS AND HUMAN RIGHTS (2023); Markus Krajewski, *Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Business Responsibility to Respect?*, 41 NORDIC J. HUM. RTS. 265 (2023); Sara L. Seck, *Conceptualizing the Home State Duty to Protect Human Rights*, in CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES 25 (Karin Buhman, Mette Morsing, & Lynn Roseberry eds., 2011).

⁷⁶ UNGPs, *supra* note 8 at Principle 11.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at Principles 26-31.

⁸⁰ Ruggie cited concerns about "endless strategic gaming on the ground about who is responsible for what" as one of the reasons for an independent business responsibility to respect human rights. *See*, John Ruggie, *Protect, Respect and*

accused of benefitting from states' human rights abuses as well as pressuring or conspiring with states to breach human rights, including through the forceful displacement and pollution of indigenous peoples, torture, rape, and murder.⁸¹ When these kinds of cases attracted litigation or international attention, States often argued that asymmetrical power dynamics prevented them from regulating or holding abusive businesses accountable.⁸² In turn, corporations claimed that ensuring compliance with IHL was the state's responsibility, and that they were merely following domestic legal requirements.⁸³ This hot potato blame game⁸⁴ left victims vulnerable to abuses and without recourse to remedies.⁸⁵ To counteract that reality, the UNGPs identify the business responsibility to respect human rights as autonomous and independent from states' obligations.⁸⁶ This means that a state's approval or acquiescence—including through licenses—does not excuse the business from its responsibility to independently assess, identify, mitigate, and remediate actual or potential adverse impacts on human rights.

Businesses are expected to respect all human rights, which are

Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/8/5, ¶ 55 (2008).

⁸¹ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Aguinta v. Texaco, Inc.*, 142 F.Supp. 2d 534 (S.D.N.Y. 2001); *Doe v. Unocal Corp.*, 395 F.3d 932, at 974 (9th Cir. 2002).

⁸² See, e.g., Ramasastry, *supra* note 56 at 240-41; David Graham & Ngaire Woods, *Making Corporate Self-Governance Effective in Developing Countries*, 34 *WORLD DEVELOPMENT* 868, 868-69 (2006); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L. J.* 443, 461-75 (2001). For an overview of these kinds of cases and their impact, see *WHEN BUSINESS HARMS HUMAN RIGHTS: AFFECTED COMMUNITIES THAT ARE DYING TO BE HEARD* (Jena Martin, Karen E. Bravo, & Tara Van Ho eds., 2020). *But see* Ioannis Kampourakis & Lottie Lane, *The Law and Political Economy of Business and Human Rights: From Governance Gaps to Root Causes*, *LEIDEN J. INT'L L.* 1 (2005).

⁸³ *Id.*

⁸⁴ For the uninitiated, "hot potato" is a children's game that involves passing a small object while music plays. The child holding the object when the music stops is eliminated from the game. Players therefore often attempt to pass the object as quickly as possible. See, PATTY SHUKLA KIDS TV – CHILDREN'S SONGS, *Hot Potato Song for Children Official Video by Patty Shukla Freeze Game New Version* (YouTube, Oct. 21, 2024), <https://www.youtube.com/watch?v=kVLZGnGUFk4>.

⁸⁵ See, e.g., Graham & Woods, *supra* note 81.

⁸⁶ See, UNGPs *supra* note 8 at Principle 11.

“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.”⁸⁷ Businesses that “cause” or “contribute” to adverse impacts⁸⁸ on human rights, either directly or indirectly through their products or business operations, owe remedies as part of their (h)HRDD responsibilities.⁸⁹ Where a business is *directly linked to* a harm — as opposed to *causing or contributing* to the harm itself — it must use its “leverage” to affect change in its business partners.⁹⁰ For a more in-depth discussion on the meaning and application of those terms see Section IV below.⁹¹

The responsibility to respect reflects a precautionary approach that combines a duty of effort with a duty of outcome.⁹² Businesses must seek to prevent adverse IHL impacts— whether arising directly from their operations or indirectly through their products or business relationships—across their entire global value chains, including subsidiaries, suppliers, investees, and clients.⁹³ To meet this responsibility, businesses are expected to adopt policy commitments to respect human rights and to undertake HRDD through consultation with affected stakeholders.⁹⁴ An iterative, dynamic assessment—rather than a one-off risk assessment—HRDD should be used to identify, prevent, mitigate, track, and transparently report real and potential adverse impacts.⁹⁵ The results are to be communicated

⁸⁷ UNGPs, *supra* note 8 at Principle 12. The International Bill of Human Rights includes the Universal Declaration of Human Rights (U.N. Gen. Assembly, 217 A (III), 10 December 1948), the International Covenant on Civil and Political Rights (999 U.N.T.S. 171, entered into force 1973) (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (993 U.N.T.S. 3, entered into force 1976).

⁸⁸ For more on the potentially expansive nature of the UNGPs’ approach to harms, see David Birchall, *Any Act, Any Harm, to Anyone: The Transformative Potential of “Human Rights Impacts” under the UN Guiding Principles on Business and Human Rights*, 1 U. OX. HUM. RTS. HUB 120 (2019).

⁸⁹ UNGPs, *supra* note 8 at Principle 22.

⁹⁰ UNGPs, *supra* note 8 at Principle 19.

⁹¹ See *infra* Part IV.

⁹² UNGPs, *supra* note 8 at Principles 11, 19, and 22.

⁹³ UNGPs, *supra* note 8 at Principle 11.

⁹⁴ See Ruggie & Sherman, *supra* note 20, at 924.

⁹⁵ See generally UNGPs, *supra* note 8 at Principles 11–22; Justine Nolan & Nana Frishling, *Human Rights Due Diligence and the (Over) Reliance on Social Auditing in Supply Chains*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND

transparently, and businesses should begin mitigating or remedying adverse impacts as part of the HRDD process.

The UNGPs are clear that businesses are responsible for both direct and indirect impacts, including those arising from subsidiaries and supply chains—another major step forward in BHR.⁹⁶ In the decades preceding the UNGPs, corporations structured their operations through complex corporate groups and supply chains that insulated parent or lead companies from human rights liability.⁹⁷ Under the UNGPs, a business may contribute to, or be directly linked to, human rights harms through their operations, supply chains, or other business relationships.⁹⁸ A business that is only “directly linked to” a harm through its business operations is expected to exercise its “leverage” over business partners to encourage those partners to respect human rights.⁹⁹ The terms “cause, contribute, and directly linked to” are *sui generis* terms of art for BHR, setting a universal standard not tied to existing domestic tort or civil delict standards.¹⁰⁰ The three terms also sit on a continuum, and where a business that is *directly linked to* a harm fails to effectively use its leverage, the business can move along that continuum from “directly linked to” to “contribution,” incurring a responsibility to provide remedies.¹⁰¹

The UNGPs also recognize that conflict-affected areas carry an inherent, heightened risk of human rights violations.¹⁰² Guidance from the U.N. Working Group, the Office of the High Commissioner for Human Rights, and the United Nations Development Program (“UNDP”) identifies two distinctive features of conflict-affected and high-risk areas.¹⁰³ The first is that “conflict will always

BUSINESSES 108, 109 (Surya Deva & David Birchall eds., 2020).

⁹⁶ See generally UNGPs, *supra* note 8 at Principles 11-22.

⁹⁷ See, e.g., *Okpabi v. Royal Dutch Shell Plc*, [2021] UKSC 3; *Vedanta Res. Plc v. Lungowe*, [2019] UKSC 20.

⁹⁸ UNGPs, *supra* note 8 at Principle 19 & Comment.

⁹⁹ *Id.*

¹⁰⁰ Van Ho, *supra* note 20, at 627.

¹⁰¹ See, e.g., OHCHR, Response to Request from BankTrack, *supra* note 21 at 5-6. For more on these terms and the continuum, see *infra* Section IV.A.

¹⁰² UNGPs, *supra* note 8 at Principle 23 & Comment.

¹⁰³ U.N. Dev. Programme, *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide* (Jun. 16, 2022), <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide> [<https://perma.cc/4SWJ-DZ7G>].

create adverse negative impacts on human rights.”¹⁰⁴ Second, actions that foster or exacerbate conflict breach the business responsibility to respect IHL.¹⁰⁵ As OHCHR and the UNDP explain, “causing, contributing or being directly linked to armed conflict or widespread violence always means causing, contributing or being directly linked to human rights abuses.”¹⁰⁶ Adhering to hHRDD standards means assessing how business activities and relationships shape conflict dynamics beyond the direct value chain.¹⁰⁷ In conflict-affected areas, businesses are expected to abide by IHL where that regime is applicable and to conduct hHRDD.¹⁰⁸ Assessing the responsibility of arms industry actors to respect and uphold IHL entails first identifying what constitutes a salient risk and then examining how responsibility for violations of IHL or human rights are attributed.

1. *Identifying Salient Risks and the Broad Nature of the “Arms Industry”*

The expansion of responsibility in the UNGPs to indirect impacts via subsidiaries, suppliers, clients, and investees can be complicated in industries with intricate supply chains. Rockwool, for example, notes that it has no direct relationship with the Russian Navy and that it “does not know or have any control over who all the end-users [of its products] are.”¹⁰⁹ Requiring Rockwool to proactively identify all of its end-users would be unreasonable, but the UNGPs do not require this. While all businesses need to undertake HRDD, “the scale and complexity of these processes will vary according to the size of the enterprise, as well as its sector, operational context, ownership and structure.”¹¹⁰ As the U.N. Working Group on Business and Human Rights explained, the UNGPs “are built around a concept of proportionality: the higher the risk, the more

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *Id.*; U.N. Working Grp. On Bus. & Hum. Rts., Rep. on Business, Human Right and Conflict-Affected Regions: Towards Heightened Action, ¶ 42, U.N. Doc. A/75/21 (July 21, 2020).

¹⁰⁶ U.N. Dev. Programme, *supra* note 102, at 10.

¹⁰⁷ *Id.*

¹⁰⁸ UNGPs, *supra* note 8 at Principle 23 & Commentary.

¹⁰⁹ ROCKWOOL, *supra* note 6.

¹¹⁰ OFF. HIGH COMM’R HUM. RTS., HUMAN RIGHTS DUE DILIGENCE: AN INTERPRETIVE GUIDE, at 2 (2021), https://www.undp.org/sites/g/files/zskgke326/files/2022-10/HRDD%20Interpretive%20Guide_ENG_Sep%202021.pdf [<https://perma.cc/5QL4-88MT>].

complex the processes.”¹¹¹

The aim of HRDD is to “prevent and mitigate potential human rights impacts.”¹¹² The business may tailor its HRDD processes around the risks that can be reasonably anticipated in light of their products, operations, and value chains.¹¹³ The iterative nature of the process means that as the business undertakes HRDD it will learn, identify and adapt to new information in order to integrate the knowledge into the dynamic HRDD process to respond appropriately.¹¹⁴ If a business becomes aware of actual risks or harms (even if it was not identified as a risk in the HRDD process) it must act on that knowledge.¹¹⁵ What constitutes an appropriate response depends on the circumstances and the business’s relationship to the harm—whether it has *caused*, *contributed to*, or is merely *directly linked to* the harm.¹¹⁶

Where a business’s operations or value chains make it impracticable to address every human rights issue simultaneously, it may prioritize “salient risks.”¹¹⁷ Under the UNGPs, such risks are identified by their “scale, scope and irremediable character.”¹¹⁸ While a business can prioritize salient risks, this choice does not mean the business can *only* focus on those risks for an extended time. The expectation is that the business will progressively broaden its considerations and actions to address all risks until it can adequately and appropriately implement the full responsibility to respect human rights.¹¹⁹ The business nevertheless remains responsible for remedying other human rights harms arising from less salient risks

¹¹¹ U.N. Working Grp. On Bus. & Hum. Rts., Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 13, U.N. Doc. A/75/212 (July 21, 2020).

¹¹² U.N. DEV. PROGRAMME, HEIGHTENED HUMAN RIGHTS DUE DILIGENCE FOR BUSINESS IN CONFLICT-AFFECTED CONTEXTS: A GUIDE, at 14 (2022), https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf [<https://perma.cc/Y8GJ-HF8K>].

¹¹³ UNGPs, *supra* note 8 at Principles 17-19.

¹¹⁴ Ruggie & Sherman, *supra* note 20, at 927.

¹¹⁵ *Id.*

¹¹⁶ UNGPs, *supra* note 8 at Principle 13; for more information about the issue of relationships, and their consequences, *see infra* Section III.D.

¹¹⁷ *Id.*, at Principle 19.

¹¹⁸ *Id.*, at Principle 14 & Commentary.

¹¹⁹ *Id.* ¶ 19 & Commentary.

when it *causes* or *contributes* to them.¹²⁰

Weapons are inherently risky and their abuse can result in serious and irremediable harms, including breaches of the fundamental and non-derogable rights to life and freedom from torture.¹²¹ The products, by their nature, demand a more complex process than other products.¹²² When deployed to a conflict-affected area, arms carry a duality of risks: the inherent risk of the weapons, and the heightened risk of adverse impacts inherent in conflict-affected areas.¹²³ This duality requires particular attention to the likelihood that the weapons or a particular client/purchaser will *cause* or *contribute* to severe or salient risks.¹²⁴ In an “Information Note,” the U.N. Working Group on Business and Human Rights affirmed the application of the UNGPs to the arms sector, which it recognized includes “the full value chain of actors producing or being directly linked to the research, development, design, production, delivery, maintenance, repair and overhaul of military weapons systems, subsystems, parts, components, and ancillary equipment.”¹²⁵ As such, the UNGPs apply not only to the conventional weapons, but also to dual-use items and new technologies—including cyber and Artificial Intelligence, as well as the subsidiaries and suppliers of branded manufacturers, like Rockwool.¹²⁶ This broader interpretation of the arms sector was reinforced by the U.N. Working Group on Business and Human Rights, which examined corporate practices related to Israel’s conflict with Gaza beginning in 2023.¹²⁷

¹²⁰ *Id.* ¶ 22.

¹²¹ See U.N. WORKING GRP. ON BUS. & HUM. RTS., RESPONSIBLE BUSINESS CONDUCT IN THE ARMS SECTOR: ENSURING BUSINESS PRACTICE IN LINE WITH THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS § 2.1 (2022), <https://media.business-humanrights.org/media/documents/BHR-Arms-sector-info-note.pdf> [<https://perma.cc/G5GA-GA9V>].

¹²² *Id.* § 2.

¹²³ *Id.* § 3.

¹²⁴ *Id.*

¹²⁵ *Id.* § 1.2.

¹²⁶ U.N. WORKING GRP. ON BUS. & HUM. RTS., RESPONSIBLE BUSINESS CONDUCT IN THE ARMS SECTOR: ENSURING BUSINESS PRACTICE IN LINE WITH THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS § 2.1 (2022), <https://media.business-humanrights.org/media/documents/BHR-Arms-sector-info-note.pdf> [<https://perma.cc/G5GA-GA9V>].

¹²⁷ Letter from the UN Working Group on Business and Human Rights to Catpillar, U.N. Doc. JAL OTH 76/2024 (17 May 2024). Available at

Alongside companies such as Boeing and Lockheed Martin, the U.N. Working Group on Business and Human Rights also addressed a letter to Caterpillar, whose heavy machinery has been used to demolish homes and other presumed civilian infrastructures in Gaza.¹²⁸ The Working Group observed that this use effectively transformed Caterpillar's equipment from civilian machinery into a weapon of war, even though the equipment would not qualify as a conventional weapon in international law or necessarily meet the definition of a dual use item in domestic regulations.¹²⁹

As noted above, weapons—and their component parts, munitions, supply chains, marketing, and transport—pose significant human rights risks. In armed conflicts, businesses must differentiate between actors who use weapons lawfully, consistent with IHRL or IHL, and those whose conduct breaches international law. This differentiation requires understanding not only the relationship between IHRL and IHL, but also how IHRL interacts with *jus ad bellum*. This governs the lawful use of force under international law and a business can only assess whether its products, operations, or suppliers pose human rights risks in a conflict-affected area if it understands how these fields operate in relation to one another. For companies in the arms industry, including suppliers like Rockwool, grasping these intersections helps identify salient risks and determine when a business may need to terminate or adjust certain relationships or activities. Accordingly, it is necessary to briefly outline these legal frameworks and their points of overlap.

2. *The Relationship between International Human Rights, Jus Ad Bellum, and Humanitarian Law*

This section briefly sets out the relationship between these three distinct fields of international law¹³⁰ as established in the

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunication-File?gId=29077> [<https://perma.cc/9HRG-5XSF>]

¹²⁸ *Id.*

¹²⁹ *Id.* See also, Arms Trade Treaty, *supra* note 27. For definitions of “dual use items” see 15 C.F.R. §§ 730.3-730.7, 734.3; Council Common Position 2008/944/CFSP (December 8, 2008); E.U. Consolidated Text, *supra* note 15.

¹³⁰ The relationship between IHRL and IHL has been a source of extensive debate, scholarship and practical development, as has the relationship between *jus ad bellum* and IHRL. Most of this debate is irrelevant for this article, leading to a much narrower focus of discussion. On the relationship between IHRL and IHL, see, e.g., Human

jurisprudence of the two most relevant, international adjudicatory bodies: the International Court of Justice (“ICJ”); and the U.N. Human Rights Committee.¹³¹ The discussion below first addresses the

Rights Committee, “General Comment No. 36: Article 6: right to life,” U.N. Doc. CCPR/C/GC/36 (2019), ¶ 64; Françoise J. Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT’L REV. RED CROSS 549 (2008); Françoise J. Hampson, *The Relationship between International Humanitarian Law and International Human Rights Law*, in Scott Sheeran & Nigel Rodley (eds.), ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW (2013); Janina Dill, *Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities*, in Ziv Bohrer, et al., LAW APPLICABLE TO ARMED CONFLICT 197 (2020); Anthony E. Cassimatis, *International Humanitarian Law, International Human Rights Law, and the Fragmentation of International Law*, 56 INT’L & COMP. L. Q. 623 (2007); HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW*, 2d ed. (2015); Larissa van den Herik & Helen Duffy, *Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches*, in Carla M. Buckley, et al., (eds.), TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW 366 (2017); Oona A. Hathaway, et al., *Which Law Governs During Armed Conflict The Relationship between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012); Heike Krieger, *A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SEC’Y L. 265 (2006); Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISR. L. REV. 648 (2007). On the relationship between IHRL and *jus ad bellum*, see, e.g., Eliav Lieblich, *The Humanization of Jus ad Bellum: Prospects and Perils*, 32 EUR. J. INT’L L. 579 (2021).

¹³¹ ICCPR, *supra* note 86. The Human Rights committee is the independent, expert body elected by States Parties to the International Covenant on Civil and Political Rights (“ICCPR”) to oversee and review their implementation of that treaty, which is the universal IHRL treaty addressing the right to life. On the authority of the Human Rights Committee in interpreting the ICCPR, see e.g., Geir Ulfstein, *The Human Rights Treaty Bodies and Legitimacy Challenges*, in Nienke Grossman, et al., (eds.), LEGITIMACY AND INTERNATIONAL COURTS 284 (2018); Helen Keller and Leena Grover, *General Comments of the Human Rights Committee and their Legitimacy*, in Helen Keller and Geir Ulfstein (eds.), UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116 (2012); Hinako Takata and Shotaro Hamamoto, *Human Rights, Treaty Bodies, General Comments/Recommendations*, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (2023), Available at: <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1730>; Lutz Oette, *The UN Human Rights Treaty Bodies: Impact and Future*, in Gerd Oberleitner (ed.), INTERNATIONAL HUMAN RIGHTS INSTITUTIONS, TRIBUNALS, AND COURTS 95 (2018). See also, Danae Azaria, *The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties*, 22 INT’L COMMUNITY L. REV. 33 (2020). See also, Human Rights Committee, *General Comment No. 33: Obligations of States parties under the Optional Protocol*

relationship between *jus ad bellum* and IHRL, which is most relevant at the start of a conflict; and then the relationships between IHL and both *jus ad bellum* and IHRL, which are more relevant for the remainder of the conflict.

a. *Jus Ad Bellum and Human Rights Law*

Jus ad bellum determines when it is lawful for a State to engage in the use of force against another State.¹³² The primary rules governing the use of force, set out in the U.N. Charter, require Member States to refrain from intervening in the internal affairs of another state and from threatening or using force against another sovereign state except in self-defense.¹³³ The Charter also obliges States to settle international disputes by peaceful means,¹³⁴ while affirming their inherent right to individual or collective self-defense when territorial sovereignty is under threat.¹³⁵ Together, these principles are now understood to be customary international law applicable to all states,¹³⁶ and define the content of the international crime of aggression under the Rome Statute of the International Criminal Court.¹³⁷ Traditionally, the obligation to provide reparations for violations of *jus ad bellum* was owed to the aggrieved state, rather than to individual victims.¹³⁸ Linking violations of *jus ad bellum* to IHRL violations is a recent development in international law.¹³⁹

to the International Covenant on Civil and Political Rights, U.N. Docs. CCPR/C/GC/33 (2009), ¶¶11-13. *But see*, Jasper Krommendijk, *The (In)effectiveness of UN Human Rights Treaty Body Recommendations*, 33 NETH. Q. HUM. RTS. 194 (2015).

¹³² See, Lieblich, *supra* note 129.

¹³³ U.N. Charter art. 2 ¶¶ 4, 7.

¹³⁴ *Id.* ¶ 3.

¹³⁵ *Id.* at art. 51.

¹³⁶ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27).

¹³⁷ Rome Statute of the International Criminal Court (amended 2010), UN General Assembly, art. 8bis, 17 July 1998.

¹³⁸ Luke Moffett, *Sanctions for War, Reparations for Peace?*, OPINIO JURIS (April 1, 2022), <https://opiniojuris.org/2022/04/01/sanctions-for-war-reparations-for-peace/> [https://perma.cc/WY4Q-3YRF]. See also, generally, Erin Pobjie, *Victims of the Crime of Aggression*, in *The Crime of Aggression: A Commentary* 816–60 (Claus Kreß & Stefan Barriga eds., Cambridge Univ. Press 2016) (Cambridge Univ. Press 2017) (challenging the view that victims of the international crime of aggression are not entitled to reparations under the Rome Statute of the International Criminal Court).

¹³⁹ *Id.*

Absent this development, businesses adhering to the UNGPs might not need to consider whether their business partners are or are likely to be engaged in violations of *jus ad bellum*.¹⁴⁰ Yet, jurisprudence from the ICJ and the Human Rights Committee appears to confirm that a breach of *jus ad bellum* resulting in the loss of human life constitutes a violation of IHRL. In its 2024 *Israeli Policies and Practices in Palestine* Advisory Opinion, the ICJ found Israel had breached *jus ad bellum* through a series of ongoing policies that allowed and encouraged Israelis to establish settlements in Palestinian territory.¹⁴¹ According to the Court, the settlements were established in breach of IHL and were used to unlawfully annex Palestinian territory.¹⁴² The unlawful annexation of Palestinian territory breached *jus ad bellum*.¹⁴³ The ICJ determined that this violation also infringed the Palestinian people's right to self-determination under IHRL, linking violations of *jus ad bellum* with at least one human right.¹⁴⁴ The ICJ did not, however, elaborate on the relationship between *jus ad bellum* and IHRL.

The Human Rights Committee has also found that breaching *jus ad bellum* necessarily gives rise to a violation of IHRL.¹⁴⁵ In its General Comment No. 36, the Committee concluded that “States parties engaged in acts of aggression as defined by international law”—that is, those breaching *jus ad bellum*—“resulting in deprivation of life” ipso facto violate the International Covenant on Civil and Political Rights’ protection of the right to life.¹⁴⁶ The Committee also

¹⁴⁰ Galia Rivlin argues that businesses operating in “disputed territories” should not be held to the same BHR standards as other businesses specifically because these questions are ones of “geopolitics” and could result in businesses being “categorically discouraged from operating in disputed territories.” Galia Rivlin, *ESG, Geopolitics, and Human Rights in Disputed Territories*, 44 NW J INT’L L & BUS. 69, 125 (2024). This approach would necessarily require businesses to avoid questions of *jus ad bellum* or to treat them as unrelated to IHRL considerations simply because a State asserts a claim, no matter how dubious, that its aggressive use of force is lawful.

¹⁴¹ ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion*, 2024 I.C.J. (July 19, 2024) ¶¶ 251- 64.

¹⁴² *Id.*

¹⁴³ *Id.* at ¶ 251.

¹⁴⁴ *Id.*

¹⁴⁵ Human Rights Committee, General Comment No. 36, *supra* note 130, at ¶ 70.

¹⁴⁶ *Id.*

asserts that states have an obligation under the right to life to oppose aggression and to take steps to stop it.¹⁴⁷ The Committee concludes that “States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.”¹⁴⁸ In analyzing the Human Rights Committee’s General Comment No. 36 on the right to life, Eliav Lieblich rightly explains that “all killings resulting from the aggression would be considered arbitrary.”¹⁴⁹ This approach to the relationship between *jus ad bellum* and IHRL has found explicit and implicit support among scholars, both before and after its adoption by the Human Rights Council.¹⁵⁰

In light of these findings of the ICJ and the Human Rights Committee, a state that breaches *jus ad bellum* has also breached IHRL. The consequence for BHR is that businesses must account for *jus ad bellum* in their hHRDD assessments on the right to life. Relationships with parties that have breached, or are likely to breach, *jus ad bellum* create a risk of being *directly linked to*, or *contributing to*, violations of the rights to self-determination and life (at the very least). This risk is significant for all businesses, but particularly for those engaged in the arms trade, which may be supplying the means by which the state is carrying out the violations.

b. *IHL, Jus Ad Bellum, and Human Rights Law*

In addition to violations stemming from the start of a conflict, there is a potential for states to violate IHRL through their conduct during the conflict.¹⁵¹ International law recognizes an “equality of belligerency” under which considerations of *jus ad bellum* do not affect the

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Lieblich, *supra* note 129, at 589.

¹⁵⁰ See, e.g. William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, 40 *ISR. L. REV.* 592, 612 (2007); Erin Pobjie, *Victims of the Crime of Aggression*, (C. Kreß and S. Barriga eds., Cambridge University Press 2017); *The Crime of Aggression: A commentary* 816 (C. Kreß and S. Barriga eds., Cambridge University Press 2016); Tom Dannenbaum, *THE CRIME OF AGGRESSION, HUMANITY AND THE SOLDIER* (Cambridge University Press 2018); Schabas, at 592, 607-12.

¹⁵¹ See, Human Rights Committee, General Comment No. 36, *supra* note 130 at ¶¶ 10, 12.

rules and responsibilities that apply during an armed conflict,¹⁵² which are solely the remit of IHL.¹⁵³ The relationship between IHL and IHRL—two distinct subfields of international law that overlap to protect specific rights in conflict—is more complicated.¹⁵⁴ At times, the fields appear to diverge, as is the case with the right to life. IHRL prohibits the *arbitrary deprivation* of life, a non-derogable right under the ICCPR.¹⁵⁵ Human rights law does not prohibit all takings of life, only those deemed arbitrary, meaning those that are illegal under domestic or international law.¹⁵⁶ Such deprivations may also be arbitrary where they display “elements of inappropriateness, injustice, lack of predictability and due process of law.”¹⁵⁷ Under IHRL, law enforcement officers can only intentionally use lethal force “when strictly unavoidable in order to protect life.”¹⁵⁸ Outside situations of armed conflict, law enforcement is required to limit the use of firearms to the following situations: self-defense and the protection of others from “the imminent threat of death or serious injury,” to prevent serious crimes involving “grave threat to life,” or to stop the escape of an individual presenting a grave threat to life or serious injury who is resisting the law enforcement officer’s authority.¹⁵⁹ Even then, law enforcement can lawfully employ firearms “only when less extreme means are insufficient to

¹⁵² See, Kubo Mačák, *In Honor of Yoram Dinstein – The Separation between the Jus In Bello and the Jus Ad Bellum*, Articles of War (May 20, 2024), <https://lieber.westpoint.edu/separation-between-jus-in-bello-jus-ad-bellum/> [https://perma.cc/45B3-UDUZ] (last accessed August 9, 2025).

¹⁵³ But see Thomas Wheatley, *The Myth of Jus ad Bellum–Jus In Bello Purity*, Articles of War (July 2, 2025), <https://lieber.westpoint.edu/myth-jus-ad-bellum-jus-in-bello-purity/> [https://perma.cc/DVB8-23LQ] (last accessed August 9, 2025).

¹⁵⁴ See generally Dill, *supra* note 129.

¹⁵⁵ ICCPR, *supra* note 86 at Arts. 4(2), 6. See also, Human Rights Committee, General Comment No. 36, *supra* note 129.

¹⁵⁶ Human Rights Committee, General Comment No. 36, *supra* note 129 at ¶¶ 10, 12.

¹⁵⁷ *Id.* at ¶ 12.

¹⁵⁸ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27–Sept. 7, 1990, ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1, at 112 (1990). See Human Rights Committee, General Comment No. 36, *supra* note 129 at ¶ 13.

¹⁵⁹ *Id.* at ¶ 9.

achieve these objectives.”¹⁶⁰

Under IHL, however, combatants are allowed to kill civilians if the attack is otherwise lawful.¹⁶¹ To be lawful, an attack must target a military objective,¹⁶² a belligerent combatant (meaning someone fighting for another state), or a civilian directly participating in hostilities,¹⁶³ and the latter two must not have been rendered *hors de combat*.¹⁶⁴ Once a legitimate military target has been identified, it can

¹⁶⁰ *Id.*

¹⁶¹ See PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), 1125 U.N.T.S. 3, 8 June 1977 (“Additional Protocol I”), Art. 51(5)(b); See generally Charles P. Trumbull IV, *Proportionality, Double Effects, and the Innocent Bystander Problem in War*, 59 STAN. J. INT’L L. 35 (2023). (What follows is, admittedly, a simplified but legally accurate explanation of targeting in the laws of armed conflict appropriate for the purpose of this article).

¹⁶² Military objectives are those “objects which by nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definitive military advantage.” See Additional Protocol I, *supra* note 160, at Article 52(2).

¹⁶³ The concept of a civilian “directly participating in hostilities is identified in the law but not well-defined and has been the subject of extensive scholarship and authoritative guidance. See *id.* at Article 51(3); PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), Art. 13(3), 8 June 1977, 1125 U.N.T.S. 609; GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 1949, (1950) 75 U.N.T.S. 287, Art. 3, 12 August 1949, 75 U.N.T.S. 287 (this article is common to all Four Geneva Conventions of 1949). See also, International Committee of the Red Cross (“ICRC”), *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (May 2009); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 INT’L L & POL. 697 (2010); Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 FSU J. TRANSNAT’L L & POL’Y 281 (2010); Dapo Akande, *Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities*, 59 INT’L & COMP. L. Q. 180 (2010); David Wallace, et al., *Direct Participation in Hostilities in the Age of Cyber: Exploring the Fault Lines*, 12 HARV. NAT’L SEC. J. 164 (2021); Ryan Kresbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 J. NAT’L SEC. L. & POL’Y 125 (2017).

¹⁶⁴ *Hors de combat* refers to someone who has surrendered or has been rendered incapable of fighting through injury or unconsciousness. They may not be subjected to an attack. See Rule 47, ICRC, Customary International Law Database: (last visited Aug. 10, 2025), <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule47> [<https://perma.cc/CGX2-UG2E>]; *Hors de combat*, ICRC: HOW DOES LAW PROTECT

only be attacked when it satisfies the principles of military necessity, distinction, and proportionality.¹⁶⁵ The principle of distinction requires the employment of weapons that are capable of distinguishing between legitimate targets and civilians or civilian objects.¹⁶⁶ Attacks are disproportionate under IHL where the “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof ... would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁶⁷ These rules have been recognized as customary international law in both international and non-international armed conflicts,¹⁶⁸ and the failure to apply these targeting rules constitutes a grave breach¹⁶⁹ and a war crime under international criminal law.¹⁷⁰

Both the ICJ and the Human Rights Committee¹⁷¹ have

IN WAR? (last visited August 9, 2025). https://casebook.icrc.org/a_to_z/glossary/hors-de-combat [<https://perma.cc/386S-JTKE>].

¹⁶⁵ *Military necessity*, ICRC: HOW DOES LAW PROTECT IN WAR? (last visited August 9, 2025), https://casebook.icrc.org/a_to_z/glossary/military-necessity [<https://perma.cc/ER74-USS9>]; *Proportionality*, ICRC: HOW DOES LAW PROTECT IN WAR? (last visited August 9, 2025), https://casebook.icrc.org/a_to_z/glossary/proportionality [<https://perma.cc/4U4U-KL9Q>]; *Distinction*, ICRC: HOW DOES LAW PROTECT IN WAR? (last visited August 9, 2025) https://casebook.icrc.org/a_to_z/glossary/distinction [<https://perma.cc/637C-ADKK>].

¹⁶⁶ Additional Protocol I, *supra* note 160, Art.51(4)-(5); *Distinction*, ICRC, *supra* note 164.

¹⁶⁷ Additional Protocol I, *supra* note 160, art. 51(5)(b).

¹⁶⁸ ICRC, *Customary International Humanitarian Law Database*, Rules 1, 3-24.

¹⁶⁹ Additional Protocol I, *supra* note 160, Article 85(3).

¹⁷⁰ Rome Statute of the International Criminal Court, Article 8(a)(i), (b)(i)-(vi), July 17, 1998, 187 U.N.T.S. 3.

¹⁷¹ The Human Rights Committee is the body responsible for overseeing implementation of the International Covenant on Civil and Political Rights, the universal IHRL treaty addressing the right to life. See International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 7. On the authority of the Human Rights Committee in interpreting the ICCPR, *see* Geir Ulfstein, *The Human Rights Treaty Bodies and Legitimacy Challenges* in Nienke Grossman, et al., (eds.), Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman, Geir Ulfstein, *LEGITIMACY AND INTERNATIONAL COURTS* 284 (Harlan Grant Cohen et al. eds. 2018 Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and their Legitimacy*, in Helen Keller and Geir Ulfstein (eds.), *UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY* 116-198 (2012); Hinako Takata & Shotaro Hamamoto, *Human Rights, Treaty Bodies, General comments/Recommendations*, *MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* (2023), <https://opi>

determined that the two fields of IHRL and IHL do not conflict. Instead, IHRL continues to operate, protecting the right to life,¹⁷² but the substantive definition of an “arbitrary” deprivation of life derives its content from IHL as *lex specialis* (the specialized law).¹⁷³ As the Human Rights Committee explained, the “[u]se of lethal force consistent with [IHL] and other applicable international law norms is, in general, not arbitrary” and therefore cannot breach the IHRL protections.¹⁷⁴ “By contrast, practices inconsistent with international humanitarian law, ... would also violate” the ICCPR (or, seemingly, other relevant IHRL treaties).¹⁷⁵

B. Implementation by Businesses in the Arms Sector

Businesses in the arms sector have started to comply with the UNGPs, although, “there has been a distinct lack of political will

Louplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1730; Lutz Oette, *The UN Human Rights Treaty Bodies: Impact and Future*, in Gerd Oberleitner (ed.), *INTERNATIONAL HUMAN RIGHTS INSTITUTIONS, TRIBUNALS, AND COURTS* 95 (2018). See also, Danae Azaria, *The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties*, 22 INT'L COMMUNITY L. REV. 33 (2020). See also, Human Rights Committee, *General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/GC/33 (2009), ¶¶11-13. But see, Jasper Krommendijk, *The (In)effectiveness of UN Human Rights Treaty Body Recommendations*, 33 NQHR 194 (2015).

¹⁷² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 131 (July 9) ¶ 136.

¹⁷³ See, e.g., ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ (July 8), ¶ 25; Human Rights Committee, *General Comment No. 36*, *supra* note 129 at ¶ 64. The nuance of this debate is unnecessary for the purpose of this article. For a more complex overview of the history and debate on this issue, see, e.g., Françoise J. Hampson, *The Relationship between International Humanitarian Law and International Human Rights Law*, in Nigel Rodley and Scott Sheeran (eds.), *ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 3, 185-213 (2013); Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISRAEL LAW REVIEW 648 (2007); Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAEL LAW REVIEW 310 (2007); Katharine Fortin, *The Relationship between International Human Rights Law and International Humanitarian Law: Taking Stock at the end of 2022?*, 40 NQHR 343 (2022).

¹⁷⁴ Human Rights Committee, *General Comment No 36*, *supra* note 129, at ¶ 64.

¹⁷⁵ *Id.*

across jurisdictions to update domestic export control regimes or adopt sector-specific HRDD legislation.”¹⁷⁶ Additionally, the American Bar Association’s Center for Human Rights has issued strong sector-specific HRDD guidance for the defense industry.¹⁷⁷ The ABA’s guidance thoroughly aligns with the UNGPs and breaks the process into four stages: (1) risk assessments; (2) prevention and mitigation measures; (3) end-use monitoring; and (4) investigation and remediation.¹⁷⁸ Through these stages, the ABA calls on businesses to understand the risks arising from the industry as a whole, their specific operating context, and their individual clients. It is this final component that is most relevant for this article. According to the ABA, a client risk assessment “should be conducted prior to forming a new business relationship and revisited prior to each new transaction.”¹⁷⁹ The purpose of the client-focused assessment is to “apprehend the potential client’s capacity and intent to utilize the articles and services in compliance with all applicable laws and regulations.”¹⁸⁰ Accordingly, businesses should evaluate whether clients have clear policies and training on the use of weapons, assess the “intended use of defense articles and services,” review any prior unlawful uses, and consider the client’s cooperation with end-use monitoring and accountability measures.¹⁸¹ When developing prevention and mitigation measures, the ABA calls on businesses to develop a “red-flag system” that would “trigger intensified scrutiny.”¹⁸² Amongst the red-flag triggers for clients, the ABA lists involvement in ongoing armed conflicts or “in a past armed conflict with a reasonable likelihood of recurrence based on observable indicators,” such as continuing violence and “[a] failure to address the root causes of conflict.”¹⁸³

¹⁷⁶ Hiruni Alwishewa, *Human Rights Due Diligence for Arms Companies: Lessons from Supply Chain Regulations*, 16 EUR. J. RISK REGULATION 704, 706 (2025).

¹⁷⁷ American Bar Association (“ABA”), “Defense Industry Human Rights Due Diligence Guidance,” (July 2022). https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/chr-due-diligence-guidance-2022.pdf [<https://perma.cc/F6L4-CDZ4>] (last accessed August 1, 2025).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 15.

¹⁸⁰ *Id.* at 15.

¹⁸¹ *Id.*

¹⁸² ABA, *supra* note 176 at 17.

¹⁸³ *Id.* at 17-18.

Additional red flag triggers include societal militarization, high or increasing levels of armed violence, poor levels of command control over the military, credible allegations of breaches of IHL or IHRL, and “[t]hreatening, vilifying, or dehumanizing statements made by the client or its agents toward a disfavored group that may be suggestive of an intent to misuse defense articles or services.”¹⁸⁴ Beyond that, the ABA calls for end-use monitoring, which involves audits and site inspections to prevent diversion or maintenance issues, along with client reporting obligations, open-source information gathering, and stakeholder engagements.¹⁸⁵ The ABA calls on businesses to “form relationships with” journalists, non-governmental organizations, and community leaders for the purpose of ascertaining information on the misuse of goods.¹⁸⁶ This information should be used in communications with the recipient State.

Finally, the ABA calls for an investigation and remediation stage.¹⁸⁷ As the ABA explains, “[a]n investigation should be opened as soon as the exporter actually develops or reasonably should have developed a reasonable suspicion of potential misuse.”¹⁸⁸ This expectation of an immediate response to the potential misuse relates to the proactive nature of HRDD. The investigation and remediation stage should prevent businesses from causing or contributing to any further harm. It should also help restore victims’ rights through policy reforms and cooperation with external investigations by international organizations or tribunals. As the ABA explained, “through-life contact points with the client for additional transfers, upgrades, or maintenance present openings for review and discussion of human rights issues. Exporters should make use of these opportunities to raise any due diligence issues with the client.”¹⁸⁹ Where the client is not receptive to this conversation, or where necessary reforms do not seem forthcoming, the business may need to “withhold goods and services until compliance is restored.”¹⁹⁰ The ABA also calls on the business to impose contractual penalties on clients where there

¹⁸⁴ *Id.* at 17-18.

¹⁸⁵ *Id.* at 19-20.

¹⁸⁶ ABA, *supra* note 176

¹⁸⁷ *Id.* at 20-21.

¹⁸⁸ *Id.* at 20.

¹⁸⁹ *Id.* at 20.

¹⁹⁰ *Id.*

is a “reasonable likelihood that misuse has occurred,” unless the client can provide “exculpatory evidence within a reasonable time period.”¹⁹¹ The results of all investigations should be made public, ensuring transparency and buttressing international or domestic investigations into war crimes or violations of international human rights law.¹⁹²

While the ABA guidance is non-binding, it does align with the expectations contained in the UNGPs. The ABA recognizes that “not all of these steps will be feasible for all sales.”¹⁹³ Governments may take steps that make it impossible for a business in the arms trade to conduct or respond to hHRDD.¹⁹⁴ In these situations, businesses are to strive for completing due diligence as extensively as possible.¹⁹⁵

Businesses in the arms industry indicate some willingness to complete HRDD, although they do not appear to be putting in the effort the ABA proposes.¹⁹⁶ Hiruni Alwishewa examined the human rights approaches of ten major arms companies and detailed some of her findings, which suggest a very imperfect effort by arms companies to comply with the UNGPs. She found that all ten companies had adopted at least one relevant policy, and all of them had a stand-alone human rights policy.¹⁹⁷ Unfortunately, not all of these are publicly available, and some were simply referenced in other documents.¹⁹⁸ Additionally, while some companies noted that human rights considerations were incorporated into their risk assessment and mitigation measures, only a few detailed criteria and processes were used in risk assessments.¹⁹⁹

Despite some progress, businesses in the arms trade seem reticent to address the UNGPs or to incorporate HRDD into their arms trade supply. As noted above, the UN Working Group on Business and Human Rights asked several companies engaged in the arms trade to explain their application of hHRDD to the supply of arms

¹⁹¹ ABA, *supra* note 176 at 21.

¹⁹² *Id.* at 21.

¹⁹³ *Id.* at 12.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *See, generally*, Alwishewa, *supra* note 175.

¹⁹⁷ *Id.* at 708, 710.

¹⁹⁸ *Id.* at 709.

¹⁹⁹ *Id.* at 710.

and weaponry to Israel.²⁰⁰ Most arms manufacturers did not respond to the inquiry at all. German manufacturer thyssenkrupp²⁰¹ responded curtly:

For thyssenkrupp, the laws and regulations of the Federal Republic of Germany are the decisive basis and benchmark for all economic activities. In compliance with these laws and regulations and applied by the German Government [*sic*] thyssenkrupp handles all export projects in the field of naval equipment.²⁰²

This was an implicit but obvious means of laying blame on Germany for thyssenkrupp's own failure to abide by the UNGPs.

Other businesses complain that the UNGPs are difficult to implement in the arms industry. At a side event at the 10th CSP to the ATT, a representative from a company with a robust commercial HRDD process indicated it was difficult to transfer that process to the arms industry because of the nature of the relationship between the state and businesses.²⁰³ The state functions as the primary client and regulator, and the state is often privy to information the business cannot obtain from military partners. Consequently, the representative argued, businesses should be able to rely on the state's assessment of the IHL and IHRL risks.²⁰⁴ This is not a persuasive argument for BHR as many fields also have dual relationships with States.²⁰⁵ According to Alwishewa, the arms industry trails these

²⁰⁰ See Letter from the UN working group on business and human rights to Caterpillar, *supra* note 126.

²⁰¹ thyssenkrupp's brand name includes the lower-case 't' to make it 'thyssenkrupp.' It is obnoxious but not as obnoxious as Rockwool's decision to put its name in all-caps, so I have chosen to honor thyssenkrupp's weird branding choices.

²⁰² Letter from thyssenkrupp to the Off. Of the U.N. High Comm'r for Hum. Rts. (18 July 2024), <https://spcommreports.ohchr.org/TMResultsBase/Download-File?gId=38545> [<https://perma.cc/Q4CQ-F3EQ>].

²⁰³ See Comments at an ATT side event titled "The Interdependent Resps. Of Gov. and Indus. In Arms Transfer Decisions" (20 August 2024) (on file with author).

²⁰⁴ *Id.*

²⁰⁵ See *The Code*, INT'L CODE OF CONDUCT ASS'N, <https://icoca.ch/the-code/> [<https://perma.cc/9ZBS-8UNH>]; Suerie Moon, *Respecting the Right to Access to Medicines: Implications of the UN Guiding Principles on Business and Human Rights for the Pharmaceutical Industry*, 15 HEALTH & HUM. RTS. 32 (2013).

other industries in complying with the UNGPs.²⁰⁶ The study suggests that the arms industry could borrow lessons from the mining sector, which has developed policies and practices in relation to “conflict minerals.”²⁰⁷ She notes that the two “high risk industries ... evoke analogous moral dilemmas about their exploitation of conflict-affected regions and communities that are often very far removed from the decision-making arenas.”²⁰⁸ She calls on businesses in the extractive sectors to consider the guidance provided by the Organization for Economic Cooperation and Development (“OECD”) to the extractive sectors for conflict-minerals²⁰⁹ as well as a regulation from the E.U. on Conflict Minerals.²¹⁰ As Alwishewa rightly explains, the OECD Guidance provides a five-step framework for businesses to evaluate and respond to risks: “(1) adopt an HRDD policy that is publicly communicated; (2) identify and assess risks; (3) design and implement a strategy for managing risks; (4) carry out third-party audits of the HRDD practices; and (5) publicly report HRDD policies and practices.”²¹¹ These standards align with the guidance issued by the ABA for arms companies. The E.U. Conflict Minerals Regulation incorporates the OECD supply chain guidance and identifies additional processes businesses can and should use, such as risk assessments, traceability standards, and oversight mechanisms.²¹² These laws provide the standard of conduct expected for businesses engaged in (h)HRDD, alongside elements such as “risk management

²⁰⁶ See generally, Alwishewa, *supra* note 175 at 710. See also INT’L CODE OF CONDUCT ASS’N, *supra* note 204; Novartis, *Human Rights Commitment Statement* (2022) https://www.novartis.com/sites/novartis_com/files/novartis-human-rights-commitment-statement.pdf [<https://perma.cc/8KZN-RN78>].

²⁰⁷ Alwishewa, *Lessons*, *supra* note 175 at 711.

²⁰⁸ *Id.* at 711.

²⁰⁹ *Id.* at 712 (citing OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, at 9 (3d ed. 2016) (last accessed August 9, 2025), https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/04/oecd-due-diligence-guidance-for-responsible-supply-chains-of-minerals-from-conflict-affected-and-high-risk-areas_g1g65996/9789264252479-en.pdf [<https://perma.cc/QKM6-P94B>]).

²¹⁰ Alwishewa, *supra* note 175 at 712, *citing* OECD Due Diligence Guidance, *supra* note 208

²¹¹ *Id.*

²¹² *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas*, 2017 O.J. (L130/1), art. 4.

plans, traceability measures, and oversight mechanisms” that are “integral to the effective management of human rights risks.”²¹³ Businesses in the arms industry that utilize these tools will meet the standard of conduct expected of the industry to proactively identify, mitigate, and remediate harms although they may not always avoid causing, contributing to, or being directly linked to a harm. The natural next question is how one identifies the responsibility of businesses to prevent adverse impacts on human rights.

IV. ASCRIBING RESPONSIBILITY UNDER THE UNGPS

As explained above, the UNGPs utilize the *sui generis*²¹⁴ terms “cause, contribute, or directly linked to” to identify and delineate businesses’ responsibility for adverse impacts on human rights.²¹⁵ Where a business causes or contributes to a harm, it owes reparations; where it is only directly linked to a harm, it should use its leverage to affect change in its business partners.²¹⁶ Previously, I reviewed the existing guidance to identify five factors that determine a business’s responsibility for an adverse impact on human rights.²¹⁷ This Section explains those five factors and considers the responsibility of businesses—that are only “directly linked to” a harm—to terminate a relationship or responsibly exit a jurisdiction/territory when such an action is the only available means to mitigate a harm and remain “directly linked to” level of responsibility.

A. Five Factors for Responsibility

When it comes to identifying whether a business has “caused or contributed” to a harm or is only “directly linked to” a harm, five factors matter: (1) the power of the business, either directly over the harm, in relation to another actor that directly causes the harm, or over the environmental conditions that give rise to the harm; (2) the business’s independence to either create or mitigate the harm or to

²¹³ Alwishewa, *supra* note 175 at 713.

²¹⁴ See Van Ho, *supra* note 20, at 634.

²¹⁵ See *supra* notes 85-86 and accompanying text.

²¹⁶ See *The Responsible Contracting Project*, RESPONSIBLE CONTRACTING PROJECT, <https://www.responsiblecontracting.org/>, [<https://perma.cc/VU6F-LPTC>].

²¹⁷ Van Ho, *supra* note 20, at 647-652.

terminate its participation in the harm; (3) the predictability of the harm; (4) the severity of the harm; and (5) the mitigatory measures the business has undertaken.²¹⁸ These factors do not carry equal weight.²¹⁹ A business's power and independence will result in an initial assessment of responsibility.²²⁰ If that assessment indicates that the business has caused or clearly contributed to the harm, it owes a responsibility to cease, mitigate, and remediate the harm.²²¹ However, if the business's responsibility is uncertain or it is initially only "directly linked to" the harm, the other three factors become relevant to determining its responsibility.²²²

The first factor is the power of the business, either directly over the harm, over the environmental conditions that lead to the harm, or via the relational power it has compared to another actor engaged in the harm.²²³ The second factor is the independence of the business in either creating the harm, in terminating the harm, or in its ability to control its relationship with the harm.²²⁴ These factors sit on their own continuum from strong to weak.²²⁵ For example, if a business is engaged in forced labor, it would have strong power over the existence of the harm as it is directly engaged in the violation.²²⁶ Yet, a business's degree of independence may vary, depending on whether the use of forced labor is legally required by the State on whose territory the violation occurs.²²⁷ The UNGPs do not require a business to breach the law, but a business may need to terminate a relationship if it is contributing to human rights harms via the relationship and their efforts to mitigate or change the underpinning conditions of the harm prove fruitless.²²⁸ A business with strong power and independence—such as a transnational corporation that elects to continue operations despite a legal requirement to use forced labor—would be contributing to the harm.²²⁹ By contrast, a business with

²¹⁸ *Id.* at 647-652.

²¹⁹ *Id.* at 653.

²²⁰ *Id.* at 647.

²²¹ *Id.* at 635.

²²² Van Ho, *supra* note 20 at 635.

²²³ *See, id.* at 648-649.

²²⁴ *See, id.* at 648-649.

²²⁵ *Id.*

²²⁶ *Id.* at 648-649.

²²⁷ *See, Van Ho, supra* note 20 at 649.

²²⁸ *See, id.* at 648-649.

²²⁹ *See, Van Ho, supra* note 20.

strong power but weak independence—such as one that is indigenous to a territory—may be only *directly linked* to the harm if it merely complies with the law, avoids exploiting the situation, and takes mitigatory measures to limit its impact and relationship to the harm.²³⁰

When an initial assessment concludes that the business has *caused* the harm, it bears direct responsibility for remedying it.²³¹ However, if the business is either directly linked to, or contributing to, the harm, the three additional factors of *severity*, *predictability*, and *mitigation* can matter.²³² As noted above, the UNGPs clarify that the *severity* of a harm should inform the priority the business gives to preventing, mitigating, and remediating the harm.²³³ Additionally, the more severe the harm, the more it can be presumed that adequate due diligence would have identified a risk and led to mitigation measures. This makes the harm more *predictable*.²³⁴ Predictability, it must be noted, is not the same thing as foreseeability in U.S. tort law, which requires a proximate relationship between the tortfeasor and the harm.²³⁵ Here, the focus is on whether adequate (h)HRDD would have resulted in an appropriate plan of action.²³⁶ The greater the *severity* and *predictability* of a harm, the more significant the business's intervention needs to be for the business to avoid contributing to it.

Finally, a business's *mitigation* measures can impact its responsibility.²³⁷ If a business lacks the *power* and *independence* to have *caused* the harm, its involvement depends on what other actors do. The business should adopt mitigation measures appropriate to the harm and the context of the violation,²³⁸ such as the effective use of leverage against a business partner, capacity-building measures, remediation measures, or changes in its conduct and operations to ensure better compliance with IHRL and IHL. If the measures effectively reduce the harm, the business may remain only *directly linked*

²³⁰ *Id.*

²³¹ Van Ho, *supra* note 20, at 651; UNGPs, *supra* note 8, at Principle 22.

²³² Van Ho, *supra*, *supra* note 20, at 651.

²³³ *See, supra* notes 107-112 and accompanying text.

²³⁴ Van Ho, *supra* note 20, at 651.

²³⁵ *Id.* at 651, n. 187.

²³⁶ *Id.* at 651-652

²³⁷ *Id.* at 652.

²³⁸ *Id.* at 652

to it.²³⁹ If the measures are ineffective or insufficient, then the business may need to terminate its relationship or risk contributing to the harm.²⁴⁰ These final three factors combine to indicate whether a business is responsible for contributing to the harm.²⁴¹

If a business attempts to exercise leverage but is ineffective, the business may need to consider whether it should terminate pertinent relationships or suspend operations.²⁴² Several factors determine whether such actions are necessary, with the most prominent being the *severity* of the harms suffered by the victims.²⁴³ If the business does not terminate a relationship when it should have, it may move along the *responsibility continuum* so that it begins to contribute to a harm rather than merely be *directly linked to it*.²⁴⁴ This change incurs a responsibility to remediate the harm.

B. Responsible Exits and Managing Conflicts of Rights

Where a business *causes* or *contributes to* a harm, it must cease the harmful conduct; where it is only *directly linked to* the harm, it must exercise leverage to affect change.²⁴⁵ At times, both of these consequences may require a business to terminate a relationship or to responsibly exit a territory so that it no longer causes or contributes to the adverse impacts on human rights. The call for a responsible exit raises complex problems around the relationship of rights between individuals affected by the conflict, or by the business's decision to leave a territory. In defending its decision to maintain its subsidiary's operations in Russia, Rockwool referred to its employees—and, implicitly, to their right to an adequate standard of living.²⁴⁶ Rockwool's choice to invoke its employees, raises an

²³⁹ Van Ho, *supra* note 20, at 652.

²⁴⁰ Van Ho, *supra* note 20, at 649.

²⁴¹ OHCHR, BankTrack Response, *supra* note 21; Letter from John Ruggie *supra* note 21. I argue in the earlier piece that a business can move fully along the continuum, all the way to causation, based on its conduct. This is not yet a settled position in BHR. It is also largely a normative point rather than a practical one: businesses incur the responsibility to provide remedies even at the “contribution” phase. See Van Ho, Defining the Relationships, *supra* note 20, at 650.

²⁴² UNGPs, *supra* note 8, Principle 19 and Commentary.

²⁴³ *Id.* See also Van Ho, *supra* note 20, at 635.

²⁴⁴ OHCHR, BankTrack Response, *supra* note 21; Letter from John Ruggie, *supra* note 21.

²⁴⁵ UNGPs, *supra* note 8, Principle 19, and Commentary.

²⁴⁶ See, *supra* note 32 and accompanying text.

important question for BHR: can respecting and protecting some human rights justify harming others? Or, in the application to Rockwool: do the rights of Rockwool's employees in Russia diminish its responsibility?

The UNGPs do not require businesses to terminate a relationship with a business partner every time the partner fails to meet its own IHRL or IHL responsibilities.²⁴⁷ In fact, doing so can be counter-productive for human rights as the business would lose its ability to influence the partner.²⁴⁸ Yet, where the business has no leverage and cannot develop it, it may need to terminate a partnership or withdraw from a territory if remaining would effectively facilitate the wrongful conduct.²⁴⁹ When considering whether to disengage or terminate a relationship, the business needs to conduct HRDD on the exit process and identify any impacts that could arise from its decision.²⁵⁰ In doing so, it must weigh the potential harms of staying against those that could arise from departing.

The UNGPs clarify that human rights do not “offset.” This means that a business cannot be relieved of its responsibility to respect human rights for one potential victim simply because it benefits the human rights of another victim.²⁵¹ Despite this, and as Anil Yilmaz Vastardis and I discuss elsewhere, situations of conflict can often create tension among rightsholders that cannot be easily addressed through a prohibition on “offsets.”²⁵² For example, if a business supplies pharmaceuticals to Russians, respecting their right to health, its financial contributions to the Russian war economy may be harming the rights of Ukrainians.²⁵³ Does the pharmaceutical company incur a responsibility to remediate for staying in Russia? Unsurprisingly, the answer to that question is complex and requires nuance.

²⁴⁷ UNGPs, *supra* note 8, Principle 19 and Commentary.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at Principle 11 and Commentary.

²⁵² Tara Van Ho & Anil Yilmaz Vastardis, *Which Businesses Owe Reparations for Staying in Russia? A Policy Report on Business and Human Rights Responsibilities to Ukraine*, ESSEX BUS. & HUMAN RTS. PROJECT 14-16 (2025) (on file with the author pending full release).

²⁵³ *Id.* at 34-35.

The choice on responsibly staying or exiting must start with HRDD: what rights are being respected, and what harms are being inflicted? What is the business's relationship to the harm and what will it be if it continues to stay? Finally, when considering whether to "responsibly stay" or "responsibly exit," businesses must consider the severity of the harms. At times, this will require considering conflicts of rights between two individuals or groups. As explained in that report, "when we apply this to the rights of Russian workers to continued employment compared to the rights of Ukrainians to be free from unlawful killings and war crimes, violations of the right to life are simply more severe given both the gravity of the violation and its irremediable character."²⁵⁴ Understanding when a business should terminate operations or a relationship is complex and often an imprecise art that is better left to individual fact patterns than to a firm rule. It may be impossible to identify the exact moment to disengage, and none of the existing literature states an expectation that businesses identify such timing with precision. But, a choice to stay can have consequences: where a business lacks leverage and is facilitating severe harms, it may move along the responsibility continuum and incur an obligation to provide remediation for the harms.²⁵⁵

C. Increased Enforceability

If businesses in the arms sector do not adhere to the UNGPs, they risk judicial and non-judicial challenges in States that have implemented the UNGPs through domestic laws or regulations.²⁵⁶

²⁵⁴ *Id.* at 16.

²⁵⁵ See UNGPs, *supra* note 8, at Principle 19 and Commentary. For more on the limits of this, see, Tara Van Ho & Anil Yilmaz Vastardis, *Which Businesses Owe Reparations for Staying in Russia? A Policy Report on Business and Human Rights Responsibilities to Ukraine*, Essex Business and Human Rights Project (September 2025), <https://www.essex.ac.uk/research-projects/essex-business-and-human-rights> [https://perma.cc/KT92-AWV8].

²⁵⁶ See, e.g., French Corporate Duty of Vigilance Law, Loi No. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Article 1 [French Corporate Duty of Vigilance Law], (Fr.) <https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf> [https://perma.cc/UJY8-QGHB]; Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Vom 16 Juli 2021 (Ger.) https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4 [https://perma.cc/F5EK-TGQE] (last accessed Aug. 9, 2025).

Perhaps the three most significant legislative initiatives for the arms trade are the French Duty of Vigilance law,²⁵⁷ the German Due Diligence in Supply Chains Law,²⁵⁸ and the recently agreed European Union (“E.U.”) Corporate Sustainability Due Diligence Directive.²⁵⁹ The futures of the CSDDD and the German law are currently uncertain, but the French law currently covers some major arms manufacturers and part suppliers. Beyond direct implementation of the UNGPs, developments in U.K. tort law, and U.S. state tort claims have enhanced the ability of victims to hold businesses accountable for their impacts on human rights. Each of these developments can and has been the subject of its own article. In this Section, I briefly explain the French Duty of Vigilance Law, the evolution of U.K. tort law in this area, the potential for U.S. tort claims, and additional means of enforcing the business responsibility to respect human rights.

1. *The French Duty of Vigilance Law*

France’s Duty of Vigilance law applies to companies headquartered in France and employing either 5,000 employees within France or 10,000 employees globally for two consecutive years—this can be directly or indirectly through a subsidiary.²⁶⁰ A covered company must establish and effectively implement a “vigilance plan,” which includes a risk-mapping exercise.²⁶¹ The plan must cover the company’s own operations, its subsidiaries, and business partners with whom it has an “established commercial relationship”

²⁵⁷ French Corporate Duty of Vigilance Law, *supra* note 255, Article 1.

²⁵⁸ Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Vom 16 Juli 2021 (Ger.) https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4 [<https://perma.cc/F5EK-TGQE>] (last accessed Aug. 9, 2025).

²⁵⁹ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, art. 2(1)(a), 2024 O.J. (L 2024/1760) 1.

²⁶⁰ French Corporate Duty of Vigilance Law, *supra* note 255. For a critical overview of the law and its relationship to Business and Human Rights, see Elise Groulx Diggs, et al., *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT’L L. 309, 345-358 (2019).

²⁶¹ French Corporate Duty of Vigilance Law, *supra* note 255, art. 1.

such as suppliers and subcontractors.²⁶² Businesses can incur fines for failing to publish an adequate plan and can incur liability for harms that the due diligence report should have prevented.²⁶³ There has been limited success in implementing the law, but a recent decision against La Poste, the French postal services, clarifies expectations under the law.²⁶⁴ The plaintiffs alleged the postal service's vigilance plan failed to adequately consider risks posed to undocumented workers arising from its choice to outsource delivery services to subcontractors.²⁶⁵ The Court found that the required mapping exercise must provide sufficient information about risks and responsibilities, and that where there are significant risks via subcontractors, the business must have a procedure for assessing and responding to those risks.²⁶⁶ The Court also found that, although La Poste's reports identified certain measures it has taken in response to risks, the report was too vague; as a result, the Court concluded that the report "does not enable the effectiveness of the measures taken to be usefully measured, nor does it serve as a useful assessment to guide action in terms of vigilance."²⁶⁷ Although plaintiffs did not ask the Court to order damages, the Court ordered an injunction requiring La Poste to address these deficiencies.²⁶⁸

2. *The Evolution of U.K. Tort Law*

Over the past two decades, U.K. courts have faced a number of cases involving tort claims against parent companies, like Rockwool, for the human rights impacts of their subsidiaries in other States.²⁶⁹ A comprehensive review of that case law would require

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See *French Court Reaches Precedent Decision on the Duty of Vigilance Law*, LATHAM & WATKINS: CLIENT ALERT COMMENTARY (Jan. 26, 2024), <https://www.lw.com/admin/upload/SiteAttachments/French-Court-Reaches-Precedent-Decision-on-the-Duty-of-Vigilance-Law.pdf> [<https://perma.cc/2ZTE-5X8L>] (last accessed Aug. 9, 2025).

²⁶⁵ Theá Bounfour & Lucie Chatelain, *A (So Far Unlikely) Day in Court: An Overview of the First Judicial Decisions under the French Duty of Vigilance Law*, (First View) BUSINESS AND HUMAN RIGHTS JOURNAL 1,2 (2025).

²⁶⁶ See Latham & Watkins, *supra* note 263.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ For a comprehensive overview, see Ekaterina Aristova, *Tort Litigation Against Transnational Corporations: The Challenge of Jurisdiction in the English*

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more space than is appropriate for this article, but it is worth briefly outlining the current state of the law. In 2019, the U.K. Supreme Court's decision in *Vedanta v. Lungowe* addressed whether parent companies can have a duty of care for individuals harmed by their overseas subsidiaries.²⁷⁰ Without deciding on the merits, the Court concluded that the possibility exists where a parent company holds itself out as exercising a duty of care through policy statements.²⁷¹ The Court found that parent company's responsibility does not constitute a unique category of liability. Instead, traditional tort principles govern whether a parent company has assumed a duty of care in areas such as human rights or environmental protection.²⁷² The Court subsequently affirmed their position reiterated in *Okpabi v. Shell*.²⁷³ As Lucas Roorda and Daniel Leader have rightly argued, the U.K. cases increase the viability of claims against parent companies for adverse impacts on human rights.²⁷⁴ Not only did the cases expand the scope of parent companies' duty of care but they also ease the process for plaintiffs to secure discovery from parent companies.²⁷⁵

Courts, 14 UTRECHT L. REV. 6 (2018).

²⁷⁰ See, *Vedanta Resources PLC v. Lungowe* [2019] UKSC 20.

²⁷¹ *Id.* ¶ 25 at 11.

²⁷² *Id.*

²⁷³ *Okpabi and Others v. Royal Dutch Shell PLC and Another* [2021] UKSC 3.

²⁷⁴ Lucas Roorda & Daniel Leader, *Okpabi v. Shell and Four Nigerian Farmers v. Shell: Parent Company Liability Back in Court*, 6 BUS. & HUM. RTS. J. 368, 372 (2021).

²⁷⁵ *Id.* at 372-74.

3. U.S. Tort Opportunities

In addition to European laws directly implementing the UNGPs, or in the U.K. case echoing them, it is necessary to discuss the potential to enforce BHR standards in the U.S. Traditionally, discussions on the enforceability of BHR standards in the U.S. have focused on the U.S.'s infamous and anomalous Alien Tort Statute ("ATS").²⁷⁶ The ATS grants federal courts jurisdiction over tort claims alleging violations of customary international law.²⁷⁷ The statute was long considered the most viable U.S. route for holding corporations accountable, but its sordid history—the subject of extensive scholarship²⁷⁸—has resulted in very few successes for plaintiffs.²⁷⁹

In 2024, however, a verdict exceeding USD \$38.5 million was returned against Chiquita Brands International, Inc., for payments and logistical support provided by the company and its wholly-owned Colombian subsidiary to the brutal paramilitary group (and U.S. designated terrorist organization²⁸⁰) United Self-Defense Forces of

²⁷⁶ 28 U.S.C. § 1350. On these discussions, *see, infra* notes 281 & 282.

²⁷⁷ *See* *Kiobel v. Royal Dutch Petroleum, Co.*, 569 U.S. 108, 124-25 (2013).

²⁷⁸ For relatively recent contributions, *see, e.g.*, Beth Stephens, *The Rise and Fall of the Alien Tort Statute*, in Surya Deva and David Birchall (eds.), *RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS* 46-62 (2020); Uta Kohl, *Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute*, 63 *INT'L & COMP. L. Q.* 665 (2014); Rachel Chambers & David Birchall, *How European Human Rights Law will Reshape U.S. Business*, 20 *UC L. SF BUS. J.* 3 (2024); Stephen Stasko, *The Expectations Game: The Alien Tort Statute, Corporate Liability and the International Law Forum after Nestle*, 28 *GONZ.*

J. INT'L L. 74 (2024); Ayodeji Kamau Perrin, *Ogoni Activism and Access to Remedy: Business and Human Rights from the Bottom Up*, 55 *COL. HUM. RTS. L. REV.* 858 (2024); Mark Gibney, *Legal Imperialism by Other Means: The Selective Extraterritorial Application of U.S. Law and the Denial of Human Rights Protection*, 54 *CAL. W. INT'L L. J.* 61 (2023); Christopher Ewell, et al., *Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment*, 107 *CORNELL L. REV.* 1205 (2022); William S. Dodge, *Corporate Liability under the US Alien Tort Statute: A Comment on *Jesner v. Arab Bank**, 4 *BUS. & HUM. RTS. J.* 131 (2019).

²⁷⁹ Stasko, *supra* note 277 at 77, 80 (2024); Ewell, *supra* note 277 at 1235-1243

²⁸⁰ *Designation of the AUC as a Foreign Terrorist Organization*, U.S. DEPT. STATE (Sep. 10, 2001), <https://2001-2009.state.gov/secretary/former/powell/remarks/2001/4852.htm> [<https://perma.cc/C7RG-VL4X>] (last accessed Aug. 9, 2025).

Colombia (known as the “AUC” for its Spanish name).²⁸¹ The victims’ claims under the ATS were dismissed in 2014,²⁸² but the plaintiffs pursued state-based tort claims.²⁸³ To reach a verdict, the plaintiffs’ claims needed to survive a variety of procedural challenges, including a claim of *forum non conveniens*.²⁸⁴ Although, the jury verdict was the first of its kind in the U.S., it points to a potential future avenue for holding U.S. businesses, including those in the arms industry, accountable.²⁸⁵

Where there is a potential to use normal tort law in the U.S. to enforce BHR standards, claims against the arms industry face a unique hurdle.²⁸⁶ Firearms manufacturers receive protection from tort law claims in the U.S. under the Protection of Lawful Commerce in Arms Act.²⁸⁷ The statute does not provide immunity to all arms manufacturers (only firearms manufacturers) nor to all potential claims against those manufacturers, but it does bar claims against companies engaged in the manufacturing, sale, or transfer of firearms solely on the basis that a third-party used those weapons criminally or unlawfully.²⁸⁸ In June 2025, the U.S. Supreme Court dismissed a claim brought against gun manufacturers by the government of Mexico, which alleged that the companies’ failure to exercise “reasonable care” in their commercial activities led to as

²⁸¹ In re: Chiquita Brands International, Inc., Alien Tort Statute and Shareholder Derivative Litigation, No. 08-MD-01916- KAM (S.D. Fla. June 10, 2024) (jury verdict), https://earthrights.org/wp-content/uploads/2024/06/2024-06-10-Jury-Verdict-CHQ-TRIAL_Redacted-1.pdf [<https://perma.cc/J4NK-N7YX>].

²⁸² Cardona, et al., v. Chiquita Brands Int’l, et al., No. 12-14898 (11th Cir. 2014).

²⁸³ See Jane Doe 8, et al., v. Chiquita Brands International Inc., Cause No. 20-3244, Complaint and Demand for Jury Trial (D.N.J. Mar. 2020), ¶¶ 1032-1162, <https://earthrights.org/wp-content/uploads/Jane-Doe-8-v.-Chiquita-Complaint-New-Claims-March-2020.pdf> [<https://perma.cc/RBT8-S37X>].

²⁸⁴ See *When the Law Works: In Re Chiquita, State Torts, and a New Frontier*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2024), <https://corpaccountabilitylab.org/calblog/2024/8/5/when-the-law-works-in-re-chiquita-state-torts-and-a-new-frontier> [<https://perma.cc/4J56-PC9E>].

²⁸⁵ *Id.*

²⁸⁶ It is possible that there are additional hurdles, particularly related to the U.S. government’s issuance of arms export licenses, but that issue sits beyond the scope of this article. A literature review has not revealed any scholarship on this particular issue.

²⁸⁷ 15 U.S.C. § 7901 (2005).

²⁸⁸ *Id.*; Smith & Wesson v. Estados Unidos Mexicanos, 605 U.S. 280 (2025).

much as 90 % of all crime-related gun deaths in Mexico.²⁸⁹ The Supreme Court unanimously concluded that Mexico's claim was barred by the law because it rested not on the business's knowingly participating in the crime but on the responsibility of the companies to alter their commercial activities to prevent wrongful conduct by a third party.²⁹⁰

4. *Additional Means of Enforcing the Business Responsibility to Respect*

As the ABA has noted, due diligence legislation is not the only mechanism for enforcing the UNGPs against businesses in the arms industry.²⁹¹ Businesses can face criminal liability in domestic courts for complicity in war crimes.²⁹² The International Criminal Court ("ICC") would only have jurisdiction over business leaders,²⁹³ rather than the businesses themselves. However, some states have universal jurisdiction over war crimes and can recognize corporate criminal responsibility or the individual responsibility of business leaders.²⁹⁴ The Netherlands, for example, has previously prosecuted an individual business leader for facilitating the supply of component parts to Saddam Hussein,²⁹⁵ while Germany has successfully prosecuted "manufacturers who sold small arms to known human rights abusers in Mexico and Colombia."²⁹⁶ Even when a case does not lead to a conviction, the prosecution itself can be significant. This point is illustrated by the case of an Italian exporter which faced

²⁸⁹ *Smith & Wesson*, 605 U.S. at 287.

²⁹⁰ *Id.* at 294-298.

²⁹¹ ABA, *supra* note 176, at 10.

²⁹² *See Id.* at 10.

²⁹³ Rome Statute, *supra* notes 136 & 169, at art. 25.

²⁹⁴ *See Multinational Lafarge and Four Former Executives to Stand Trial for Financing of Terrorism in Syria*, SHERPA (Oct. 16, 2024), <https://www.asso-sherpa.org/multinational-lafarge-former-executives-to-stand-trial-for-financing-of-terrorism-in-syria> [<https://perma.cc/NG2G-KMW2>]; *See also The Significance of the Lundin Trial*, BUS. & HUM. RTS. RES. CTR. (July 11, 2023), <https://www.business-humanrights.org/en/latest-news/the-significance-of-the-lundin-trial/> [<https://perma.cc/V6FG-J4RZ>] (reviewing two ongoing cases, one against France's Lafarge for financing ISIS in Syria, and the other against Sweden's Lundin for complicity in war crimes by the Sudanese military).

²⁹⁵ *See* TARA VAN HO, *Transnational Civil and Criminal Litigation, in* CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 59 (Sabine Michalowski ed., 2013).

²⁹⁶ ABA, *supra* note 176, at 10.

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criminal investigation for its role in alleged war crimes in Yemen.²⁹⁷

Additionally, a 2021 report by Debevoise & Plimpton (“D&P Report”) found that judicial and quasi-judicial bodies in every region of the world, except Asia, have cited the UNGPs in their decisions.²⁹⁸ More significantly, judicial bodies are engaging with other international standards,²⁹⁹ including the OECD Guidelines on Multinational Enterprises, which were designed to align with and implement the UNGPs.³⁰⁰ The D&P Report predicts that judicial and quasi-judicial bodies will continue to gradually rely more on the UNGPs and the OECD Guidelines, partly due to an increase in new mandatory HRDD laws and partly due to increased familiarity with the standards by legal practitioners.³⁰¹

V. ASSESSING RESPONSIBILITY IN THE ROCKWOOL CASE

This article started with the case of Danish insulation company Rockwool, who directly or through its Russian subsidiary, supplied the Russian Navy with marine insulation used in warships that are currently engaged in hostilities off the coast of Ukraine.³⁰² In this section, I return to that case to consider Rockwool’s responsibility towards Ukraine and its citizens under the UNGPs. I focus not only on the ongoing operations of Rockwool within Russia, but also on the company’s choice to enter into the Russian market despite the

²⁹⁷ See *Italy Fails Victims of War Crimes in Yemen Despite Proof of Violations of Arms Trade Treaty: Indictment of Italian Public Officials and RWM Italia Manager for Contributing to Potential War Crimes Dismissed*, EUR. CTR. FOR CONST. & HUM. RTS. (Mar. 15, 2023), <https://www.ecchr.eu/en/press-release/italy-fails-victims-of-war-crimes-in-yemen/> [<https://perma.cc/9S8Q-BDSK>].

²⁹⁸ *UN Guiding Principles on Business and Human Rights at 10: The Impact of the UNGPs on Courts and Judicial Mechanisms*, DEBEVOISE & PLIMPTON 20 (2021), <https://www.debevoise.com/-/media/files/insights/publications/2021/06/full-report.pdf> [<https://perma.cc/ZP8N-KXT8>].

²⁹⁹ *Id.* at 17.

³⁰⁰ *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD (2023), https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990/81f92357-en.pdf [<https://perma.cc/JFW4-6DHK>].

³⁰¹ Debevoise & Plimpton, *supra* note 297, at 14.

³⁰² Svensson & Glistrup, Millions, *supra* note 6.

country's history of *jus ad bellum* and IHL violations. I begin with the salient risks that arise from the Russian military before turning to the expectations on Rockwool itself. I then consider the lessons learned from this case, focusing on the potential for businesses to serve as guardians on IHL and the need for additional implementation measures for the UNGPs, while raising concerns about entrusting them with that role.

A. *Russia's Salient Risks*

By 2014, Rockwool would have or should have known that Russia has a history of *jus ad bellum* violations. Not only had Russia invaded Crimea that year, but it was already occupying Moldova's Transnistria, and Georgia's South Ossetia and Abkhazia regions. Setting aside concerns over Russia's IHL violations in these regions—of which there are many³⁰³—the mere provision of weapons to a State with a history of unlawful wars and occupations creates a risk of future unlawful conflicts. As explained above, breaches of *jus ad bellum* appear to constitute breaches of IHRL as well.³⁰⁴ Even if this were not true, the UNGPs expect businesses to take into consideration how their relationships with parties to a conflict can impact the trajectory of the conflict.³⁰⁵ By supplying the aggressor, businesses like Rockwool are, at a minimum, directly linked to the hostilities and its harms. In response, the business should have been taking account of its relationship with Russia by 2014, at the latest.

When Russia invaded Ukraine in 2022, it did so in violation of international law.³⁰⁶ Its conduct since then has demonstrated a disregard

³⁰³ See *Case of Ukraine and the Netherlands v. Russia*, Eur. Ct. H.R., Appl'n Nos. 8019/16, 43800/14, 28525/20 & 11055/22, Judgment (Merits) (July 9, 2025) <https://hudoc.echr.coe.int/?i=001-244292> [<https://perma.cc/M7TE-ZEAZ>] (last accessed Aug. 10, 2025).

³⁰⁴ See *supra* Section III.A.2.a.

³⁰⁵ See *supra* Section III.A.

³⁰⁶ Adil A. Haque, *An Unlawful War*, 116 *AJIL UNBOUND* 155, 155 (May 23, 2022). A comprehensive discussion of the illegality of Russia's conduct cannot fit within the space constraints of this article, but see generally, James A. Green, Christian Henderson & Tom Ruys, *Russia's Attack on Ukraine and the Jus Ad Bellum*, 9 *J. USE OF FORCE & INT'L L* 4 (2022); Michael Kelly, *Russia's Illegal Invasion of Ukraine & the Role of International Law*, *LIEBER INST.* (Mar. 4, 2022), <https://lieber.westpoint.edu/russias-illegal-invasion-ukraine-international-law/> [<https://perma.cc/Q2N4-CXN5>] (last accessed Aug. 10, 2025); Oona A. Hathaway,

for IHL and has led the ICC to issue multiple arrest warrants.³⁰⁷ Consequently, Russia has breached the human rights of Ukrainians. Unfortunately, the State does not seem prepared to take its own obligations to investigate, prosecute, punish, and remediate those violations seriously. This makes it important for Ukraine and its citizens to identify other actors who may have an international responsibility to remediate the harms they are facing as a consequence of Russia's conduct.

B. *Rockwool's Responsibility*

Rockwool clearly has a responsibility under the UNGPs. That its products have not yet been subjected to E.U. sanctions is irrelevant for determining its human rights responsibilities. Applying the standards set out in Section III, above, the company should have a human rights policy and undertake HRDD on its subsidiaries, supply chain, clients, and distribution networks. From the adoption of the UNGPs and onward, Rockwool should have treated Russia as a "conflict-affected area" given the State's ongoing unlawful occupations of Moldova (since 1992) and Georgia (since 2008). In 2014, that need was reinforced by the invasion of Ukraine in Crimea and eastern Donbas. As a conflict-affected area, Rockwool should have undertaken hHRDD, with consideration as to how Rockwool's relationships—through its subsidiaries, distribution networks, and government relations—may be impacting the dynamics of the conflict and facilitating IHL violations. This should have led to a clearer investigation and the adoption of specific mitigation measures when it became clear that distributors were supplying the Russian government.

How Russia's Invasion of Ukraine Tested the International Legal Order, BROOKINGS INST. (Apr. 3, 2023), <https://www.brookings.edu/articles/how-russias-invasion-of-ukraine-tested-the-international-legal-order/> [<https://perma.cc/9JNZ-CF6B>] (last accessed Aug. 10, 2025).

³⁰⁷ ICC, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), <https://reliefweb.int/report/ukraine/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova> [<https://perma.cc/ECK5-FMB3>], <https://www.icc-cpi.int/situations/ukraine> [<https://perma.cc/4BDL-UMSV>] (last accessed Aug. 10, 2025).

Rockwool does have a “Human Rights Policy.”³⁰⁸ It is approximately 1.5 pages and was last revised in 2024.³⁰⁹ It endorses the UNGPs and the OECD Guidelines for Multinational Enterprises (which were designed to align with the UNGPs³¹⁰), while acknowledging it has a responsibility for its impacts through its “operations, supply chain, business relationships, and in the communities where we operate.”³¹¹ It then asserts a “heightened focus on our salient risks, which include discrimination, child and forced labor, safety and health together with employment and working conditions.”³¹² At no point does it recognize that its products are used in warships or that it should be undertaking hHRDD in situations of armed conflict. This may reflect the company’s clear commitment to staying in Russia and its hopes that no one notices the disconnect between that decision and its stated commitment to the UNGPs. Unfortunately, the disconnect merely highlights the inadequacy of Rockwool’s HRDD policy, given that its salient risks do not address one of the most publicly documented and pressing concerns over its operations and products.

The stated policy is a first step. The next step should be hHRDD and the use of mitigation measures. There is no public indication that Rockwool has undertaken this step, but if it did the hHRDD seems woefully inadequate. Had Rockwool’s hHRDD appropriately mapped its clients and distributors to assess the likelihood that the products were being used in the commission of IHL violations, Rockwool would have identified distribution networks that supply the Russian military at an early stage. Even if this proved impossible before the 2022 invasion, Rockwool should have acted on the actual information revealed by the investigative journalists at Danwatch. Assuming the facts are as the journalists indicate, this should have resulted in a variety of effective mitigation measures, the most obvious of which are contractual clauses requiring the parent company’s approval for any military transfers, capacity-building measures for the Russian subsidiary and distributors, fines for

³⁰⁸ *Human Rights Policy*, ROCKWOOL (Dec. 12, 2024), <https://www.rockwool.com/syssiteassets/rw-group/media/human-rights-policy.pdf?f=20250317193749> [<https://perma.cc/QZ7B-WR65>].

³⁰⁹ *Id.*

³¹⁰ See OECD, *supra* note 299.

³¹¹ ROCKWOOL, *supra* note 307.

³¹² *Id.*

non-compliance with the human rights policy, and contractual terminations when there is a consistent pattern of non-compliance with the policy. Unfortunately, in light of what Rockwool has said publicly on the matter, it appears that it (1) has not conducted hHRDD on its Russian operations, and (2) has not adopted mitigation measures to limit the likelihood that its products end up in Russian warships committing IHL violations.³¹³ Instead, Rockwool appears to be distancing itself from the subsidiary so as to avoid liability while ensuring the subsidiary continues to operate profitably.

The next question for the UNGPs is whether Rockwool's supply of weapons meant it was "causing, contributing, or directly linked to" the harms Ukrainians are experiencing. As explained above, this requires firstly considering Rockwool's power and independence in the situation. Rockwool does not have direct control over the breaches of IHL or over the environmental conditions giving rise to that harm. It does have relational power given its role as a supplier, but Rockwool claims its relational power is limited.³¹⁴ It also has significant independence to determine whether to maintain operations in Russia. It is a transnational corporation that could terminate its operations in Russia, even if it does not want to. The duration of its presence and the number of its employees mean that Rockwool would need to exercise caution in leaving Russia, but it could still do so. Consequently, it has a great deal of independence.

Rockwool claims it should not be expected to leave because staying is the "least bad option." Yet, that was not always true. Russia's practice of nationalization was not present at the start of the conflict and many businesses left before that occurred.³¹⁵ Rockwool finds itself in this "least bad" position specifically because it failed to act on earlier reports resulting from appropriate heightened human rights due diligence. That choice does not depose the business of its strong independence; it indicates the business did not exercise that independence when it was more profitable or safe to do so. By 2014, Rockwool would have or should have known that Russia

³¹³ See *supra* Section II.

³¹⁴ GLOBAL INSULATION, *supra* note 24.

³¹⁵ See *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. MGMT. (Sept. 30, 2025), <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> [<https://perma.cc/LST7-XLM3>].

has a history of *jus ad bellum* and IHL violations. Rockwool could have and likely should have exercised its independence then to mitigate the risks that its products would end up in Russian Navy warships. Given this balance of limited power but significant independence, it appears Rockwool, *prima facie*, directly links itself to Russia's breach of *jus ad bellum*.

As explained above, a *prima facie* finding that a business is "directly linked to" a harm requires considering the additional three factors to determine if its responsibility has moved to a form of contribution: (1) the severity of the harm; (2) the predictability of the harm; and (3) Rockwool's mitigation measures. If Rockwool is "contributing to" the harm, it owes remedies and reparations to Ukraine and its citizens. The potential severity of harm caused by a functioning warship is significant, cause by the international crimes of aggression, grave breaches of the Geneva Conventions, crimes against humanity, and genocide. The predictability of the harm can vary significantly with warships. Some states are unlikely to misuse a warship for aggression or war crimes. By the end of 2014, however, Russia had a modern history of *jus ad bellum* and IHL violations. The predictability that Russia would use a warship in a way that breaches IHL or IHRL was strong. The severity and predictability of the harms are of such significance that the mitigation measures need to be proportionate to that risk. Mitigation measures in this situation would include using the business's leverage over its subsidiary and distributors. Yet, there is no public indication that Rockwool has adopted mitigation measures. The question of leverage is crucial in this case: Rockwool has had, and likely continues to hold a significant power and influence over its subsidiary and distribution networks. Instead of using that leverage to affect change, Rockwool appears to have restructured its operations to reduce liability. This is the inverse of what the UNGPs expect. Rather than alleviating its responsibility, Rockwool, through its approach, increases its liability under the UNGPs. Based on this, Rockwool appears to be contributing to the adverse harms Ukraine and its citizens are experiencing.

C. *Businesses as the New Guardians of IHL?*

As the case of Rockwool clarifies, the UNGPs establish an expectation that businesses will take proactive measures to identify,

prevent, mitigate, and remediate harms. That responsibility extends not only to harms businesses cause, but also those harms businesses have contributed to or are directly linked to. The potential utility of the UNGPs in enforcing IHL is significant. Rockwool does not appear to have met its human rights responsibilities, but companies engaged in the arms industry *could* do so. As explained above, the relationship between IHRL, IHL, and *jus ad bellum* means that IHRL considerations can be identified by understanding who is responsible for breaches of both *jus ad bellum* and IHL.³¹⁶ A business engaged in the arms trade does not need to assume that all States (or non-State armed groups) are engaged in breaches of IHL. Instead, and as the ABA guidance clarifies,³¹⁷ the business can investigate and reasonably conclude that States (or non-State armed groups) with a strong record of complying with *jus ad bellum* and IHL—or who treat seriously accusations of wrongdoing by investigating, prosecuting, and punishing violations—are responsible business partners. The business would still need to undertake mitigatory measures, such as capacity-building and training exercises, or contractual clauses identifying lawful uses of weapons and imposing fines for systematic or unremedied breaches of IHL. But the business could provide weapons in those circumstances. In fact, arms companies supplying Ukraine with weapons *can* meet their human rights responsibilities so long as they engage in ongoing HRDD and adopt appropriate mitigatory measures. Ukraine did not breach *jus ad bellum* and is lawfully using force. It also has a strong track record of compliance with IHL, even if it is not perfect compliance.

That businesses engaged in the arms trade, *can* meet its responsibility to respect and thereby effectively enforce IHL, does not necessarily mean it should be entrusted with the enforcement of IHL. On the one hand, businesses may be motivated to appropriately enforce IHL so as to avoid a responsibility to remediate. History demonstrates that businesses that are complicit in breaches of IHL can face claims for remediation even decades after the harm has arisen.³¹⁸ For potential victims of IHL breaches, the intervention of

³¹⁶ See *supra* Section II.A.2.

³¹⁷ See *supra* Section III.B.

³¹⁸ See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000); *Mitsubishi Heavy Ordered to Compensate Forced S Korean War Workers*, BBC NEWS (Nov. 29, 2018), <https://www.bbc.com/news/business->

businesses to enforce IHL offers significant gains: prevention of the breach of IHL, termination of the economic drivers and facilitation of the conflict, or alternatively, holding the business accountable and incurring a responsibility to remediate the harms victims have suffered. These are not equally worthy outcomes, but they do suggest normative and practical progress for victims.

Yet, businesses have not demonstrated a strong track record in enforcing human rights—a concept arguably simpler to grasp than IHL. Germany, perhaps unintentionally, conducted one of the largest real-world experiments in testing whether businesses would respect human rights throughout their operations and supply chains without regulatory mandates. In 2016, Germany adopted a four-year National Action Plan on BHR that pledged to use non-legislative measures to encourage businesses to adopt “elements of human rights due diligence . . . into their corporate processes by 2020.”³¹⁹ If “at least 50% of all enterprises based in Germany with more than 500 employees” met this target, the Government would consider regulation unnecessary; if fewer than 50% of the relevant businesses achieved the goal, “the Federal Government [would] consider further action, which may culminate in legislative measures.”³²⁰ A 2019 government survey found that only 17-19% of the companies complied with the necessary standards.³²¹ A 2020 survey was even worse: only 13-17% were “considered to be ‘compliers.’”³²² Within the group of “non-compliers,” only 10-12 % were “‘on the right track’ towards fulfilling the NAP requirements.”³²³

Companies already implicated by the arms trade have seemed reticent to take seriously their responsibilities to respect human

46381207 [https://perma.cc/V2CX-9CWM].

³¹⁹ *National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, 2016-2020*, at 10, FED. FOREIGN OFF., FED. REP. GER. (Sept. 2017), <https://globalnaps.org/wp-content/uploads/2024/01/NAP-Germany-2016-2020-English.pdf> [https://perma.cc/4DUP-WRHC].

³²⁰ *Id.*

³²¹ *Interim Report: Survey Phase 2019* at IV, FED. FOREIGN OFF. FED. REP. GER. (Feb. 24, 2020), <https://globalnaps.org/wp-content/uploads/2021/03/Germany-nap-monitoring-summary-of-the-second-interim-report-2019.pdf> [https://perma.cc/HP5Z-A8HF].

³²² *Final Report of the NAP Monitoring (2018-2020)*, at 4, FED. FOREIGN OFF. FED. REP. GER. (Oct. 8, 2020), <https://www.auswaertiges-amt.de/resource/blob/2417212/9c8158fe4c737426fa4d7217436acc7/201013-nap-monitoring-abschlussbericht-data.pdf> [https://perma.cc/X3JY-2H35].

³²³ *Id.*

rights. As noted above, German manufacturer thyssenkrupp suggested it did not consider the UNGPs when engaged in the arms trade.³²⁴ While thyssenkrupp's response deserves contempt, it is also unsurprising. Increasing the number of actors responsible for protecting IHL or IHRM has not historically led to greater enforcement of either. In fact, having multiple actors with equal responsibilities can lead to the "hot potato" blame game discussed above.³²⁵ While businesses are not the ideal guardians of IHL, it is significant that *someone* has a responsibility to act and that victims have the potential to hold that *someone* accountable. To fully realize the potential, however, additional mechanisms of implementation are needed. The UNGPs recognize businesses owe a reparation where they "cause or contribute to" a harm. Because it is contributing to the harms, Rockwool owes reparations. This remains true regardless of Denmark's willingness to enforce Rockwool's responsibility. Yet, the enforceability of the UNGPs is what will really make businesses take IHL seriously. As discussed earlier in this article, States have an ongoing obligation to protect human rights by regulating their corporate actors. The ability of businesses like Rockwool (and potentially thyssenkrupp) to breach their responsibility to respect without the prospect of immediate accountability suggests States are failing to meet their own international obligations. Unfortunately, this leaves victims with a familiar problem: they have rights but lack the necessary means of enforcing them.

VI. CONCLUSION

This article is grounded in the case of Rockwool, a Danish insulation manufacturer with an indirect relationship to the Russian Navy. The question for this article was whether Rockwool should have prevented the transfer of its insulation to Russia prior to or since the invasion of Ukraine. The answer is a resounding yes. The consequence, under the UNGPs, is that Rockwool owes reparations to Ukraine and its citizens. The company's claim that staying is the "least bad option" does not excuse this responsibility.

³²⁴ Letters from thyssenkrupp, *supra* note 201.

³²⁵ See Tara Van Ho, "Band-Aids Don't Fix Bullet Holes:" *In Defence of a Traditional State-Centric Approach*, in THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY (Jernej Letnar Cernic & Nicolás Carrillo-Santarelli, eds., 2018).

By examining Rockwool's responsibility—a rather obscure and indirect actor for the arms trade—this article points to the significant potential the UNGPs present for enforcing IHL. As established above, the UNGPs institute an expectation that businesses in the arms trade *prevent* violations via their mitigation measures. Where they fail to do so, however, a business that “causes or contributes to” the harm incurs a responsibility to remediate. With the ever-increasing enforceability of the UNGPs via legislative and judicial developments, the UNGPs present a tangible means of advancing respect for IHL. It is unfortunate, however, that it is *businesses* who are being entrusted with IHL as States fail to meet their own responsibilities. Relying on businesses to adjudicate IHL—a complex field they are not yet well equipped to handle—presents challenges, including the potential that businesses and States will engage in a “hot potato” blame game rather than rise to the responsibility of enforcing IHL.

The findings in this article should lead to further research. First, space constraints meant this article could only establish the IHRL and IHL responsibilities of businesses engaged in the arms trade. This responsibility should be compared to the responsibility of States under the 2013 Arms Trade Treaty and IHRL to determine how to strengthen the enforcement of IHL through mutually reinforcing responsibilities. Second, entrusting IHL to the hands of businesses should raise concerns about the erosion of the State-centric nature of international law, an issue I identified but could not examine in detail in this article. Third, this article sets out a framework for understanding the application of the UNGPs to businesses operating in the arms trade. There are outstanding questions about how to apply the UNGPs to businesses whose link to a conflict is less obvious, such as retail companies or luxury goods producers. Further research on these issues may inform the ongoing discussion over the relationship between the ATT and BHR, allowing for a cyclical development aimed at enhancing respect for IHL. Finally, scholarly research should continue to explore how the arms sector can learn from other regulated industries that recognize that the responsibility to respect human rights is independent of the regulatory process.