WHICH BUSINESSES OWE REPARATIONS FOR STAYING IN RUSSIA?
A POLICY REPORT ON BUSINESS AND HUMAN RIGHTS RESPONSIBILITIES TO UKRAINE

By Tara Van Ho & Anil Yilmaz-Vastardis
Essex Business and Human Rights Project
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EBHR

Human Rights Centre | University of Essex

Key Findings

- In conflict-affected areas, businesses should carry out heightened human rights due diligence (hHRDD), meaning that the engagement needs to be both more routine and deeper into understanding the dynamics of the conflict and the relationship the business has with the various actors in the conflict.
- A business is expected to account for impacts it causes directly and those it contributes to or is directly linked to through its business relationships. Businesses that are 'directly linked to' a harm are expected to exercise their leverage to affect change, but where there is a risk of a severe threat, the business must be able to affect change quickly or they risk moving along the continuum of responsibility and 'contributing to' the harm, triggering their remedial responsibilities.
- When applying the severity threshold to the Russian invasion of Ukraine, it is possible to expect divestment by foreign businesses from Russia due to the widespread and systematic nature of the violations of international human rights law (IHRL) and international humanitarian law (IHL).
- Any assessment of responsibility on the basis of 'mere presence' raises significant concerns about how finding mere presence as a contribution could undermine the rights of Russian civilians. However, the report finds that there are situations when staying in an economy *can be* a contribution despite certain mitigating factors.
- It is now established law that where there are serious breaches of international law, other actors must not assist in the maintenance of that illegal situation.
- It is crucial for businesses to assess, as part of their hHRDD, whether and to what extent their actions or omissions are assisting in the maintenance and prolonging of the illegal situation created by the Russian state in the context of its invasion of Ukraine.
- The hHRDD is an essential process for businesses to assess and weigh the likelihood of whether their continued presence and payment of taxes in Russia is essential to the realisation of human rights against how those payments are impacting the conflict and the role they play in financing violations of IHRL and IHL.
- Businesses should not assume that payment of taxes is a neutral act in contexts like this and take seriously the possibility that its contributions to the war economy outweigh the contributions to the realisation of rights.
- Staying in Russia for an extended period of time may move the business from 'directly linked to' to 'contributing to' the harm, incurring a responsibility to remediate.

- The responsibility to stay in Russia is also not as broad reaching as some of the businesses have claimed in defense of continuing to do business in Russia. Simply because a business does something that could contribute to the realization of a human right does not mean that the business is always excused from acting.
- IHRL offers significant guidance as to what kinds of rights and interests and economic activity are essential to preserve even when economic disengagement is otherwise appropriate. In conducting their hHRDD and assessing responsible exit, businesses should be guided by these principles in weighing retrogression against potential contributions to gross violations of IHRL and IHL.
- Businesses that have stayed in Russia might be liable to provide reparations if it is established that they have caused or contributed to gross IHRL and IHL violations committed in Ukraine.
- As part of a comprehensive and victim-centred reparations programme, it would be appropriate for businesses that stayed in Russia when they should have left to make appropriate contributions.
- Home states of foreign businesses have an obligation to regulate their corporate actors operating in Russia, and to hold them accountable for staying in Russia when they should have left. These home states should be ensuring their businesses are contributing to the Ukrainian national reparations programmes and should adopt legislation to facilitate this if they have not already done so.

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1. Introduction

Russia's 2022 full-scale invasion of Ukraine was not only a breach of the United Nations Charter, but it also involved several breaches of international human rights law (IHRL) and international humanitarian law (IHL). For example, hospitals and civilian infrastructure appear to have been targeted, children have been unlawfully deported or transferred from occupied Ukrainian territories to Russia, and the destruction of the Kakhovka Dam caused extensive environmental damage. It was not the first time Russia had invaded Ukraine. The 2014 invasion of Eastern Ukraine and Crimea already made clear that Russia did not intend to respect Ukrainian sovereignty or the IHRL and IHL protections owed to Ukrainians. A recent ruling by the European Court of Human Rights in the case of *Ukraine and the Netherlands v Russia* has found that since 2014, Russia was liable for pursuing a systemic pattern of gross human rights violations in Ukraine, including extrajudicial killings of Ukrainian civilians and soldiers, torture, rape and sexual violence, forced labour, forcible transfer and adoption of children.[1]

In response to the invasion, many foreign businesses withdrew from the Russian market.[2] Many others stayed. All businesses—those that stayed and those that left Russia—have a responsibility to respect human rights under international law.[3] This responsibility should have informed the decision to stay or go. In this report, we consider what businesses that chose to stay needed to do in order to ensure that choice aligned with their responsibility to respect human rights, and which kinds of businesses should owe reparations to Ukraine as a consequence of their choice to remain in Russia.

To determine which businesses owe reparations for staying, we take as a starting point the United Nations Guiding Principles on Business and Human Rights (UNGPs),[4] the leading authority on businesses' responsibilities for internationally recognised human rights. The UNGPs specifically, and the field of business and human rights (BHR) more generally, focus on the minimum expectations and accountability for businesses when they cause, contribute to, or are directly linked to violations of IHRL and IHL. This makes BHR and the UNGPs distinct from "corporate social responsibility" (CSR), which is a voluntary choice of a business to invest

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[1] *Ukraine and the Netherlands v Russia* (applications nos. 8019/16, 43800/14, 28525/20 and 11055/22), ECtHR Grand Chamber, Judgment 09 July 2025.
[2] See for a database of companies that have stayed in or exited Russia https://leave-russia.org/leaving-companies.
[3] John Ruggie (Special Representative of the Secretary-General), Guiding Principles of Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, 15, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011)
[4] Ibid.

in an area of philanthropy or social interest. As Anita Ramasastry has explained, "CSR, historically, has focused on corporate voluntarism … often emphasiz[ing] self-guided decision making rather than the imposition of new legally binding requirements and voluntary measures rather than state-sponsored regulation."[5] BHR, on the other hand, is centred on "a specific core set of human rights obligations" and focuses on corporate accountability to mitigate or prevent … adverse impacts" to internationally recognized human rights.[6] The UNGPs, unanimously endorsed by the UN Human Rights Council, now represents international law's minimum expectations for businesses.

According to the UNGPs, all businesses are to "respect" human rights in all contexts by identifying and preventing real or potential adverse human rights risks posed by their products, activities, and business relationships.[7] Invoking a precautionary approach, the UNGPs call on businesses to seek to prevent all adverse human rights impacts related to their products and operations through human rights due diligence (HRDD).[8] This requires that the business adopt policies and practices aimed at identifying, avoiding, and mitigating risks proactively.[9] In conflict-affected areas, the HRDD actually needs to be enhanced and become heightened (hHRDD), meaning that the engagement needs to be both more routine and deeper into understanding the dynamics of the conflict and the relationship the business has with the various actors. As the United Nations Working Group on Business and Human Rights (UNWG) has made clear, businesses cannot remain 'neutral' during a conflict because their mere presence is likely to influence conflict dynamics.[10] As such, businesses need to account for such impacts.

A business is expected to account for its direct and indirect impacts, meaning those it causes directly and those it contributes to or is directly linked to through its business relationships.[11] The UNGPs state that businesses who "cause or contribute to" a negative impact on human rights owe remedies and reparations to the victims of their conduct.[12] Where a business is causing or contributing to an adverse human rights impact, the business should

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[5] Anita Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability," (2015) 14 *Journal of Human Rights* 237, 237.
[6] Ibid, 238.
[7] UNGPs, Principle 11.
[8] UNGPs, Principle 11.
[9] See, 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, 924 (2017).
[10] UNWG Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action, para 43. A/75/212 21 July 2020
[11] UNGPs, Principles 11-22.
[12] UNGPs, Principles 11, 19, 22, Commentary.

cease the problematic conduct.[13] Where it is only "directly linked to" the harm through a business relationship, the business is expected to exercise leverage to affect change in the conduct of a business partner.

One outstanding question that has long been debated is on the responsibility of businesses that stay in the economy of a state that is unlawfully occupying another, or otherwise committing widespread and serious violations of IHR and IHL, for paying taxes and supporting the general economy. Traditionally, the field of BHR has not addressed this question explicitly, but a mainstream narrative advanced by the UNGPs' author John Ruggie is that '[m]ere presence in a country and paying taxes *are unlikely* to create liability. But deriving indirect economic benefit from the wrongful conduct of others may do so.'[14] There has been no serious or substantial analysis of this claim, however, and in this report, we test Ruggie's assertion and identify the limits of that responsibility. In doing so, we not only rely on the UNGPs and the related guidance, but also on the International Court of Justice's 2024 Advisory Opinion on the *Legal Consequences Arising from the Policies and Practices of Israel on Occupied Palestinian Territory*,[15] which identifies a responsibility on third-party states to ensure economic engagement does not support internationally wrongful acts and does not give legitimacy to an illegitimate occupation.

After explaining the international legal framework, we construct an argument as to why and under what circumstances the choice to stay in Russia should give rise to a responsibility to provide reparations. We identify some mitigating circumstances related to the conflict of rights present in the Russian invasion of Ukraine and discuss other 'mitigating' circumstances that businesses have invoked to assess their relevance to ascribing responsibility. Before concluding, we examine what the businesses' reparations should look, considering both the substantive nature of reparations and the way in which reparations can be provided in a context like Ukraine's, as well as the human rights responsibilities of home states to support Ukraine in recovering these reparations.

2. The International Framework for Business Responsibility

The UNGPs call on all businesses to respect all human rights in all contexts and to refrain from "causing or contributing to" adverse impacts on human rights. To define businesses' international human rights responsibilities, the UNGPs call on businesses to

[13] UNGPs, at Principles 11, 19, 22, Commentary.
[14] J G Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *American Journal of International Law* 819, 832 (emphasis added).
[15] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, International Court of Justice (Advisory Opinion) 2024.

respect, at a minimum, the International Bill of Human Rights, meaning the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). To realize their responsibility, businesses are to engage in the process of "human rights due diligence" (HRDD) in all contexts, and "heightened human rights due diligence" (hHRDD) in conflict-affected areas. While there is some debate over the contours of what constitutes a "conflict-affected area,"[16] it is clear that it encompasses, at a minimum, those states or territories engaged in armed conflicts. To understand when a state is engaged in an armed conflict, IHRL turns to the laws of going to war (*jus ad bellum*) and the laws in war (*jus in bello*, which is sometimes called IHL). Under IHL, states engaged in a military occupation (regardless of whether it breaches the UN Charter) are bound by the Fourth Geneva Convention of 1949.[17] Where that treaty conflicts with the protections afforded in IHRL—for example, when it comes to questions of whether and under what conditions a civilian can be killed by a military—IHL defines the rights and obligations of the state.[18]

2.1. Heightened Human Rights Due Diligence in Conflict-Affected Areas

HRDD must involve identifying both actual and potential negative impacts on human rights in consultation with affected stakeholders. Given the ongoing nature of due diligence, businesses must engage in a dynamic assessment rather than rely on a one-time risk evaluation. If a business faces too many real or possible risks to address simultaneously, it may opt to concentrate on the most severe and irreparable harms, referred to as 'salient risks.'[19] While it is acceptable for a business to prioritize these significant risks, this decision does not imply that the business can neglect other risks indefinitely. The expectation is that the business will gradually expand its focus and efforts to tackle all risks until it can fully meet its duty to respect. The business remains accountable for addressing other harms arising from less salient risks if it has caused or contributed to them.

While the duty to respect applies to all businesses consistently, the UNGPs recognize that "conflict-affected areas" (broadly defined to encompass more than just those involved in armed conflicts as per international law) present an inherent heightened risk for human rights

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[16] Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide, UNDP 16 June 2022.
[17] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Arts 1-3.
[18] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 2004 ICJ Rep. 136 (July 9).
[19] UNGP 12, 14, Commentary.

abuses. The UNGPs assert that businesses must adhere to IHL where applicable.[20] Businesses are also expected to conduct "heightened" or "enhanced" HRDD, which involves a more comprehensive examination of the links between the business and violations of IHRL or IHL, considering how the business interacts with conflict parties and the effect of its operations on conflict dynamics.[21]

The leading guidance on hHRDD arises from a combination of reports issued by the U.N. Working Group on Business and Human Rights[22] and a collaborative guide on heightened HRDD published by the OHCHR and the United Nations Development Programme (UNDP).[23] In addition to the obligation to comply with IHL, the joint guide highlights two other "distinctive features" of conflict-affected and high-risk areas that necessitate heightened HRDD. The first is that conflict invariably produces negative impacts on human rights.[24] Actions that affect the existence or dynamics of a conflict contribute to adverse impacts, violating the business's responsibility to respect rights. As explained by OHCHR and UNDP, “causing, contributing, or being directly connected to armed conflict or widespread violence equates to causing, contributing, or being directly linked to human rights violations.”[25]

The second issue is that even businesses that assert neutrality will inevitably influence conflict dynamics.[26] The joint guidance provides examples such as hiring practices that may heighten local tensions by implying that one community possesses greater economic power or stability than another, as well as land acquisitions that, although legally permissible, are based on the previous dispossession or forced eviction of communities. These concerns establish the basis for the type of information and investigations that businesses should consider in their hHRDD. OHCHR and UNDP advocate that businesses adopt a ‘conflict-sensitive lens’ in their hHRDD, which facilitates a mapping of the conflict's causes, key players, and dynamics relative to the business's activities in the area.[27] Some scholars have complained that requiring hHRDD of businesses in situations of ‘disputed territories,’ and requiring them to disengage from disputed territories where hHRDD would require it, asks

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[20] UNGP 12, Commentary.
[21] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises - Business, human rights and conflict-affected regions: Towards heightened action (A/75/212); OHCHR, Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting, August 2023.
[22] Ibid.
[23] Heightened Human Rights Due Diligence for Business in Conflict Affected Contexts: A Guide, UNDP 16 June 2022.
[24] Ibid., 10.
[25] Ibid.
[26] Ibid.
[27] Ibid 22-27.

businesses to make geopolitical determinations they are not well-qualified or well-positioned to make.[28] The OHCHR guidance makes clear that

> *In some situations, …, the legal and/or political situation may leave business enterprises with little room for mitigating their risks of involvement in adverse human rights impacts and addressing them in the manner expected under the UNGPs. In such cases, it would be appropriate for the business enterprise to consider exiting the operating context*.[29]

In this report, we provide further guidance on business responsibility to exit and the consequences of failing to disengage in a timely manner.

2.2. Cause, Contribute or Directly Linked To

According to the OHCHR, a business causes "an adverse impact where its activities (its actions or omissions) on their own 'remove or reduce' a person's or a group of persons' ability to enjoy a human right.[30] A business contributes to a harm when its activities impact human rights alongside other entities or actors. Finally, a business is deemed directly linked to a harm when it has not caused or contributed to the impact but there is a direct link between its operations, products and services, and the human rights harm.[31] Pursuant to UNGP 22, when a company causes or contributes to harm, it is obligated to provide reparations; if it is only directly associated with the harm, it should use its influence to promote positive change among its business partners. John Ruggie and the OHCHR outline that the three levels of participation—cause, contribute, or directly linked to—exist on a continuum.[32] A business that is "directly linked to" a harm and possesses leverage but chooses not to utilize it may shift along the continuum to "contribution," thus taking on the responsibility to remediate. If a business lacks adequate leverage, it should seek methods to enhance that leverage, which may involve collaborating with other businesses facing similar challenges. If the business tries

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[28] Galia Rivlin 'ESG, Geopolitics, and Human Rights in Disputed Territories,' (2024) 44 *Northwestern Journal of International Law & Business* 69.
[29] OHCHR, Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting, August 2023 p.6
[30] 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* (12 June 2017) p.5.
[31] Ibid.
[32] Ibid p.6-7

to use its leverage but fails, it should contemplate whether it ought to sever any relevant relationships or operations.

The phrases “cause, contribute, and directly linked to” hold significance within the context of the UNGPs, yet they lack clear definitions. These terms were designed to be *sui generis* (meaning unique to the situation), establishing a global benchmark that is not reliant on existing domestic tort or civil delict standards. In examining the meanings of cause, contribute, and directly linked to (which can be referred to as “participation terms”), Ruggie, his team, and the OHCHR generally utilized hypothetical scenarios rather than outlining the elements that would clarify their application. To address this omission, one of the co-authors of the present report analyzed existing guidelines and identified five factors that determine a business’s “relationship” to the harm caused.[33] In this subsection, we describe these five factors and identify preliminarily how these factors might impact the responsibility of businesses that stayed in Russia. As we explain, certain factors are more significant than others. When evaluating a business’s responsibility, there will be an initial position within the continuum, which may be adjusted by additional factors and information that can alter the business’s level of involvement.

The initial factor is the *power* of the business, either in relation to the harm itself, the environmental factors that cause the harm, or through its comparative power with another entity involved in the harm. The next factor is the business's *independence* in either generating the harm, stopping the harm, or managing its relationship with the harm. These factors exist on a continuum, ranging from strong to weak, and combining the two provides a preliminary evaluation of the business’s accountability. For instance, if a business participates in forced labour, it possesses significant power over the harm’s existence since it is actively involved in the violation and directly causing the harm. However, the level of independence the business has can be either strong or weak, depending on whether the use of forced labour is mandated by the state in which the violation occurs. The UNGPs do not insist that a business violate the law; nonetheless, a business might be required to sever ties (which could include exiting a territory) if it is implicated in human rights abuses through that relationship and attempts to alter or improve the conditions leading to the harm are unsuccessful. Thus, if the use of forced labour is mandated and the business is unable to exercise leverage to improve conditions, it is crucial to evaluate if the business is capable of leaving the territory and ending the relationship (a situation typical for transnational corporations) or if it is a local business that cannot easily withdraw. A business with both significant power and independence (like a

[33] T Van Ho, ‘‘Defining the Relationships: “Cause, Contribute, and Directly Linked to” in the UN Guiding Principles on Business and Human Rights” (2021) 43(4) *Human Rights Quarterly* 625-658.

transnational corporation that opts to remain despite a legal mandate to utilize forced labour) would be seen as causing the harm, while a business with substantial power but limited independence may be considered contributing to the harm as long as it simply adheres to the law, refrains from exploiting the situation, and implements measures to mitigate its impact and involvement in the harm.

For businesses that directly commit war crimes or violations of IHRL or IHL, the high level of power and independence will be met, meaning they have caused the harm and owe reparations. We have not identified any businesses that were forced to commit war crimes, although there are businesses now that may be deemed to support the military and the maintenance of the illegal situation (as described below) because they have chosen to stay in Russia.

If, after an initial evaluation, it is found that the business has “caused” the harm, no further investigation is required. The business will be responsible for providing remedies. However, if the business is either directly linked with or contributing to the harm, three additional elements may be significant: the *severity of the harm*; the *predictability of the harm*; and the business's *measures to mitigate* those harms. The more severe the harm is, the stronger the presumption that appropriate due diligence would have revealed a risk and led to mitigation efforts. The greater the severity of a harm, the more substantial is the intervention required to avoid a contribution.

The predictability of harm is not synonymous with “foreseeability” in various domestic tort systems. Rather, the inquiry here is whether a competent due diligence process could have uncovered the risk and extent of the harm and identified the appropriate preventive or mitigative actions. Lastly, a business's efforts to mitigate can affect its level of responsibility. When a business’s power and independence do not place it at the point of “causation,” any contribution to the harm will rely on the actions of others. The business should implement mitigation measures that are suitable for the harm, the context of the violation, and its relationship with the other actors. This could involve effectively leveraging influence over a business partner, enhancing capacity, providing remediation, or altering its practices and operations to ensure better compliance with IHRL and IHL. If the measures are adequate to diminish the harm, the business may still be seen as having been “directly linked to” the level of participation. Conversely, if the measures are found to be inadequate or ineffective, the business might have to end its relationship or risk contributing to the harm. The last three elements combine, often interacting with one another, to indicate whether a business bears responsibility for contributing to the harm.

It is crucial to note that the 'proximity' of a harm to a business's operations does not play a role. This may stem from a deliberate decision by Ruggie and the OHCHR to prevent a scenario wherein a company could merely layer its global supply chain to evade liability. The UNWG has explained that 'the concept of "proximity" to the impact is not one that is found in the UNGPs, and it risks creating confusion rather than clarification.'[34]

The absence of a proximity factor holds significance for dual-use and interchangeable or pool-able goods or services. For instance, when several banks pool funds for a project's benefit, each bank can be viewed as "contributing to" a harm.[35] There is existing guidance that suggests banks that co-finance a project are only "directly linked to" the harms that the project produces, but this would lead to non-sensical accounts.[36] A framework that permits a business to lessen its liability by contributing to a communal pool of fungible goods encourages businesses to cleverly arrange their operations so they frequently contribute items to common pools and thereby diminish their liability. This outcome would jeopardize the preventive intent of the UNGPs. The UNGPs will only achieve their intended purpose in this context if businesses are held accountable for their contributions to the pool and not merely for the direct causal relationship to a specific harm.

It is worth noting that there is a continuum of responsibility that stretches from 'causation' to 'directly linked to,' meaning that a business can fully progress along the spectrum, reaching causation, based on its actions.[37] This is not yet a universally accepted position in BHR, and to an extent it is more of a normative consideration than a practical one: businesses hold the duty to provide remedies even at the "contribution" stage.[38] The importance of this point, however, may be found in determining substantive reparations. As is discussed in Section 6 below, there is a 'bouquet' of remedies, of which financial compensation is one form of remedy. Another is 'satisfaction,' meaning the acknowledgement of wrongdoing, and a third is 'guarantees of non-recurrence,' meaning reforms to the policies and practices of the responsible party to ensure the harm does not occur again in the future. If a business has merely 'contributed to' a harm caused by someone else, they might argue that they do not bear significant financial responsibility, that they are responsible for only

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[34] Michael K. Addo, Chair of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Letter to Members of the Thun Group of Banks (23 Feb 2017), p.4 https://media.business-humanrights.org/media/documents/files/documents/20170223_WG_BHR_letter_to_Thun_Group.pdf.
[35] Van Ho, Defining the Relationships.
[36] 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* (12 June 2017), at 6, https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf
[37] Van Ho, Defining the Relationships.
[38] UNGP 22.

acknowledging some wrongdoings, or that they may only tweak policies and practices to fix any deficiencies. By finding that a business has caused the harm, they bear a great social responsibility, but they may also need to undertake a greater role in the provision of substantive reparations.

2.3. Applying the Relationship Terms Requires Distinguishing between Domestic and Foreign Business

Before continuing, it is worth considering how the relationship terms should be applied to businesses choosing to stay in the Russian economy on a prima facie basis. When it comes to the power and independence of the businesses, very few businesses will have the power to stop Russia's choice to wage an unlawful war or change the way in which the Russian military is conducting itself within the conflict. Yet, the ability to stop the harm is not the only way to understand power and independence. The two factors can also be understood by the business's power and independence to cease its own participation in the harm. A business that can easily leave Russia would have strong power and independence in choosing whether to support a harm. A business that cannot easily leave would have limited power and independence. This calls for distinguishing between transnational businesses, which have the ability to leave, and domestic or indigenous businesses, which can continue to operate in the state. To clarify, this is not to say that domestic businesses are absolved from their responsibility to respect human rights because they may be unable to divest. It is a distinction merely made to distinguish between businesses who have the power and the independence to exit due to being foreign investors and those that may not have such a power.

Businesses may argue that leaving Russia is impractical and difficult, and that it may undermine the human rights of civilians and their own employees. It is difficult, but it is not always impractical. Instead, they would have us conflate *impractical* with *expensive.* In many instances, that expense is often one of the businesses' own making. The human rights impacts of exiting a conflict affected area are real and serious; however, as we discuss below in Sections 2.4 and 4, this is not a blanket justification for remaining in Russia.

For the remainder of this report, we focus on the responsibility of transnational businesses as domestic businesses appear to be excused from the responsibility to leave the Russian economy, though we note domestic businesses are not excused from the responsibility to respect human rights.

2.4. 'Human Rights Offsets' are the Reality in Conflict

A common refrain within BHR is that businesses cannot engage in 'human rights offsets,' meaning that a business cannot justify breaching one human right in one context because they contribute positively to the realization of another human right either in that same context or in another context.[39] Unfortunately, this assumption does not always hold up when discussing BHR in conflict-affected areas. Oftentimes, what is in the interest of one side is not in the interest of the other, and this can carry over into human rights.

This conflict is perhaps best demonstrated by an example from Myanmar, where it is said that if fast fashion left Myanmar, "the cost would be borne by over 600,000 workers, many of them women, who do not have the option of alternate employment."[40] Where businesses can stay responsibly, one of the authors of the commentary argue, "we would encourage them to stay. I believe that's the view of the vast majority of workers, as well as labor rights organizations working here."[41] Implicit in this claim, however, was a necessary and important adjective: this reflects 'the view of the vast majority of [*non-Rohingya*] workers.' The textile manufacturers that were the focus of this analysis operate in central Myanmar, far from the Rohingya who are subjected to widespread and systematic abuses of IHRL and IHL that allegedly reach the level of genocide.[42] In the context of Myanmar, the Rohingya being persecuted and exiled in the north are one set of rights-holders, while the women working in textile manufacturing in the south are a distinct rights-holder group. The challenge then is to consider how to navigate the conflict between the interests of women workers in the central region to ongoing employment versus the interests of Rohingya in cutting off economic drivers of their persecution. In the context of Russia's full-scale invasion of Ukraine, a responsible exit facilitates the rights of Ukrainians—workers and non-workers alike—while 'responsible staying' centers the rights of Russian employees.

We must note that Galia Rivlin, a member of the Israeli Ministry of Foreign Affairs (writing in her personal capacity), has argued that the geopolitical considerations overlap with human rights but 'a retreat of business enterprises from disputed territories may cause adverse human rights impacts, in itself, and ultimately undermine the interests of the local

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[39] UNGP 11, Commentary.
[40] Salil Tripathi, John Morrison and Vicky Bowman, "Staying or Leaving Myanmar? What's needed is a Human Rights-led Approach," IHRB (14 September 2021).
[41] Jamin Malik Chua, "Stay or Go? In Myanmar, Fashion Faces More Questions than Answers," *Yahoo News* (2 February 2023). Available at https://www.yahoo.com/news/stay-myanmar-fashion-faces-more-115600149.html.
[42] See, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Gambia v Myanmar*, Provisional measures, ICJ GL No 178.

population.'[43] Relying on Business and Peace literature, she argues that businesses can have a positive role in the development of peace and mitigate abuses in the armed conflict, and consequently, this should play a role in determining whether a business should stay or leave occupied territory. She argues that the complexity and uncertainty of the positives and negatives in a situation means that the issue of whether businesses need to leave a disputed area or territory 'should be viewed as a policy question, to be specifically addressed and decided by the international community,' rather than a legal responsibility.[44] While she is correct that the issue is a complex one, treating the question of navigating conflicting rights as a mere policy issue and not a legal responsibility is not in line with the UNGPs.

The UNGPs provide greater clarity on this issue than previous authors have suggested. The answer comes down to weighing the severity of the harm by the nature of the harm. As noted above, businesses that are 'directly linked to' a harm are expected to exercise their leverage to affect change, but where there is a risk of a severe threat, the business must be able to affect change quickly or they risk moving along the continuum of responsibility and 'contributing to' the harm, triggering their remedial responsibilities. According to the UNGPs and Ruggie, the severity can be assessed either by the number of individuals harmed ("scale") or the type of violation committed ("scope and irremediable character").[45] While various factors can influence a company's decision to terminate relationships or operations, the most significant factor, according to the UNGPs, is the severity of the harms inflicted on the victims. Similarly, when a business's HRDD indicates that there are too many potential issues for it to address all at once, the UNGPs indicate businesses can prioritise on the basis of severity.[46]

The severity of harms therefore holds a particular weight within the UNGPs, and it is appropriate and consistent to use severity to address questions around the conflict of rights. This is not only true when it comes to how the UNGPs identify issues, but it is also true more generally within IHRL: while all rights are considered indivisible and interdependent, human rights law recognizes that some rights are non-derogable, meaning they cannot be subjected to any limitation even in times of crisis. The breach of these rights is a particularly severe form of harm, and IHRL has determined that even the competing rights and interest of others or of the state must give way to the demands in this right. Applying this same approach to the UNGPs allow for the UNGPs themselves to advance IHRL.

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[43] G Rivlin 'ESG, Geopolitics, and Human Rights in Disputed Territories,' (2024) 44 *Northwestern Journal of International Law & Business* 69, 79.
[44] Ibid.
[45] UNGP Principle 1 Commentary.
[46] UNGP 24.

When applying the severity threshold to the situation of Ukraine and Russia, it is possible to expect divestment from situations where there are widespread and systematic violations of IHRL and IHL by those businesses with the power to leave. For example, 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. As such, the impacts on the rights of Ukrainians are more severe and outweigh the competing rights of the Russian civilians to have access to employment. Here, in assessing competing rights, we are not calling for a blanket prescription for all businesses that remained in Russia. Acknowledging the context specific nature of these assessments, we argue that businesses should factor this guidance into their assessment of competing rights within their hHRDD processes.

3. When Staying in an Economy is a Contribution

As discussed above, the architect of the UNGPs, John Ruggie, suggested that 'mere presence' in a state or the payment of taxes is unlikely to trigger a business's responsibility to remediate the harms.[47] A common refrain about ascribing responsibility for mere presence or the payment of taxes is that it could unduly punish a state's own citizens for operating in a state and economy that is already oppressing those very businesses and individuals. Taxes enable the provision of public services essential to the realisation of human rights. This concern was well articulated by the South African Truth and Reconciliation Commission, when it set out a three-tier approach to understanding businesses' responsibility for supporting apartheid:

> *one can categorise third-order involvement as ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society. Condemning such businesses suggests that all who prospered under apartheid have something to answer for, in that they took advantage of a situation which depressed the earnings of black South Africans, whilst boosting their own. Taken to its logical conclusion, this argument would need to extend also to those businesses that bankrolled opposition parties and*

[47] OHCHR, Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting, August 2023, FN 12.

funded resistance movements against apartheid. Clearly not all businesses can be tarred with the same brush. [48]

We agree that any assessment of responsibility on the basis of 'mere presence' raises significant concerns about how finding mere presence as a contribution could punish those who are already victims of Russia's abuses.

In this section, however, we consider how staying in an economy *can be* a contribution. We lay out a *prima facie* case for understanding a business's responsibility for staying in Russia that appropriately distinguishes despite the unlawful war of aggression and breaches of IHRL and IHL. We recognize that a line must be drawn between those businesses with the power to leave and domestic companies who cannot easily leave or foreign companies who should be staying for a variety of legitimate reasons. To accomplish this, we take a step-by-step approach to understanding when and why tax payments or presence can constitute a contribution to harm.

In this section, we first examine the jurisprudence of the International Court of Justice (ICJ) relevant to 'normalizing' illegal situations. We then set out the leading guidance on when financial support outside the context of tax payments can constitute a contribution to the harm. Finally, drawing these two settled areas of law together, we argue that there are situations when the payment of taxes and the continued presence in a situation as rife with abuse as Russia's unlawful war of aggression may constitute a *contribution* as that term is used in the UNGPs. In the next section, we consider appropriate mitigations to this *prima facie* judgment of businesses staying in Russia, which includes addressing essential goods and services, the human rights of Russians, and the impact of duress. Through these two sections, we advance a balanced approach to understanding both the responsibility of businesses for staying as well as the limits of responsibility for leaving.

3.1. Normalization as a Contribution

The UNGPs sit within a broader framework of international law. They refer back to the broader umbrella of IHRL, which itself derives substance from the broader umbrella of public international law. When considering a business's potential responsibility for staying in a context like Russia, it is appropriate to turn to international law to understand whether and to what extent these activities may normalize internationally wrongful conduct and to what extent that normalization is itself a contribution to IHRL or IHL violations. In this sub-section we

[48] South African Truth and Reconciliation Commission, Final Report, Vol.4, Chapter 2, https://www.justice.gov.za/trc/report/

examine the jurisprudence of the ICJ to find an answer. The ICJ has not addressed the responsibility of businesses for staying in a context like Russia, but it has had a few instances to consider the responsibility of third-party states for supporting other states, including in the economic arena, that are engaged in internationally wrongful conduct. It is that case-law that is the focus of this section.

In its 1971 Advisory Opinion on the continued (unlawful) presence of South Africa in Namibia, the Court first found that South Africa was in serious breach of international law by failing to secure Namibia's independence.[49] It concluded that South Africa needed to withdraw from Namibian territory and to terminate its ongoing violations of Namibia's right to self-determination. It is worth noting that while South Africa's occupation of Namibia is not the same as Russia's breach of Ukrainian sovereignty and independence, there are appropriate parallels: both involve serious violations of the integrity of the other state; both involve deprivation of the right to self-determination, and *erga omnes* violations; and both were accompanied by widespread and systematic violations of IHRL.

Once the court established that South Africa was in the wrong, it examined the consequence of this for third-party states. The ICJ concluded that U.N. Member States were

> *under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia*.[50]

The Court, as it often does, deferred to the political organs of the U.N. (the Security Council and the General Assembly) to determine exactly what measures were needed for this, but it did identify certain kinds of conduct that states are prohibited from doing 'because [those acts] may imply a recognition that South Africa's presence in Namibia is legal.'[51] The Court found that 'the duty of non-recognition' meant states were 'under obligation to abstain' from maintaining diplomatic relations with South Africa that include Namibian territory and under a positive obligation to 'make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority

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[49] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ GL No 53, [1971] para 118.
[50] Ibid, para 119.
[51] Ibid, para 121.

with regard to Namibia.'[52] Perhaps more importantly for this policy report, the Court also found that South Africa's illegal conduct and the duty of non-recognition

> *Impose[s] upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.*[53]

The Court determined that the only limitation to the obligation of non-recognition was in the protection of Namibian human rights. According to the Court, 'the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international Co-operation.'[54]

The Court's finding in the Namibia case that third-party states must terminate economic relationships that 'may entrench' the illegal situation in Namibia is significant. It suggests that the normalization of an unlawful situation through economic activity is itself an internationally wrongful act. This finding was bolstered by two additional ICJ Advisory Opinions, both involving Israel's unlawful activities in Palestine. While there are some nuances that differentiate the situations in South Africa-Namibia from Russia-Ukraine, those differences are not present with Israel's activities in Palestine. Both Israel and Russia are engaged in unlawful occupations of Palestine[55] and Ukraine, respectively. Both of those unlawful occupations involve conflict and military interventions even beyond the occupied territories. Both involve widespread and systematic violations of IHRL and IHL. In both Advisory Opinions, the Court re-emphasized the obligation on third-party states to not economically engage with a state engaged in widespread and serious breaches of international law in a way in a way that would normalize or recognize as normal and illegal situation.

In its 2004 Advisory Opinion regarding the legality of Israel's construction of a border wall in Palestine, the Court first concluded that the manner in which the border wall was constructed breached several international legal obligations.[56] It acknowledged that Israel must cease its unlawful conduct and 'put an end to the violation of its international obligations,' and to provide reparations to Palestinians harmed by the construction of the wall.[57] It then

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[52] Ibid, para 123.
[53] Ibid, para 124.
[54] Ibid, para 56.
[55] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* International Court of Justice (Advisory Opinion of 9 July 2004), https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf
[56] Ibid, para 147.
[57] Ibid, para 150-153.

turned to the responsibility of other states. It found that Israel's illegal conduct created several obligations for other states:

> *Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation* ***not to render aid or assistance in maintaining*** *the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.*[58]

The Court did not specifically note that this obligation extends to economic relations, but its 2024 Advisory Opinion what is implicit becomes explicit. After identifying the illegality of Israel's annexation of Palestine and its conduct in the occupied territories, the Court explained

> *The Court considers that the duty of distinguishing dealings with Israel between its own territory and the Occupied Palestinian Territory encompasses, inter alia,* ***the obligation to … abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory;*** *…* ***and to take steps to prevent trade or investment relations that assist in the maintenance*** *of the illegal situation created by Israel in the Occupied Palestinian Territory*.[59]

In this case, the ICJ also examined the responsibility of non-state actors: 'The duty of non-recognition specified above also applies to international organizations, including the United Nations, in view of the serious breaches of obligations *erga omnes* under international law.'[60] As such, the United Nations was also under an 'obligation not to recognize as legal the situation arising from the unlawful presence of Israel … and the obligation to distinguish in their dealings with Israel between the territory of Israel and the Occupied Palestinian Territory.'[61]

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[58] Ibid, para 159.
[59] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, International Court of Justice (Advisory Opinion) 2024, para 278.
[60] Ibid, para 280.
[61] Ibid, para 280.

Taken together, the ICJ's position is quite clear: where there are serious breaches of international law, other actors must not assist in the maintenance of that illegal situation. They cannot facilitate its ongoing reality or normalize a situation that is supposed to be, legally speaking, abnormal due to its illegality. Economic presence and relationships is one way in which actors other than those directly responsible can breach their own, distinct obligations.

As noted above, the ICJ's jurisprudence does not explicitly address business actors as the ICJ's mandate does not extend that far unless it is specifically requested to address that issue. Yet, the ICJ's jurisprudence does help set a foundation for understanding when the maintenance of economic relationships, the payment of taxation or other financial transactions can be a contribution, as that term is used in the UNGPs. It has also been noted by the UNDP that "when the use of force … is deemed unlawful under international law … in addition to respecting human rights and international humanitarian law, at a minimum, business should assess, and avoid or mitigate its connection to the war efforts of the aggressor country to "ensure that they do not exacerbate the situation."[62] We argue that 'normalisation' should be a factor in interpreting whether a business has caused, contributed, or is merely directly linked to a harm, and the guidance emerging from the UNWG and the OECD on different types of financial and economic relationships.

3.2 Money as a Contribution to adverse human rights impacts

The extent to which financial support can be understood as a contribution to human rights abuses has been one of hot debate in BHR. The South African Truth and Reconciliation Commission found Swiss banks had actively funded the regime in a manner that ensured its continuation when the regime would otherwise have failed.[63] Yet, in the aftermath of apartheid, a U.S. court found that the banks could not be held responsible for aiding and abetting the apartheid regime's violations of IHRL because loans to a government were too diffuse to establish a proximate relationship between the banks and the victims.[64] The apartheid regime and its aftermath took place before the UNGPs solidified the international legal standards for BHR. Since the adoption of the UNGPs, it has become clear that financial actors and financial activity can *contribute to* harms, as that term is used in the UNGPs, that are directly caused through the use of their funds.

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[62] Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide, UNDP 16 June 2022 p.28.
[63] South African Truth and Reconciliation Commission, Final Report, Vol.4, Chapter 2.
[64] *Khulumani and ors v Barclays National Bank Ltd and ors,* Appeal judgment, 504 F3d 254 (2d Cir 2007), ILDC 686 (US 2007).

3.2.1. Project financing

In 2013, relatively soon after the adoption of the UNGPs, the Thun Group, a network of financial institutions, argued that banks could not fail to meet their UNGPs responsibility to respect human rights by loaning money.[65] Instead, they argued that a bank's HRDD responsibilities only extended to their immediate employees rather than to any responsibility for how their customers and clients use the funding the banks provide. The UNWG authoritatively rebuked the Thun Group's assertion:

> *in brief, as set out in the UNGPs, the scope of due diligence and appropriate response depends on the nature of the risks to human rights and how the bank is involved (either causing, contributing or directly linked), but should not depend on the type of financial service provided.'*[66]

It further gave a clear example of how a bank could *contribute* to a client's adverse impacts, as that term is used in the UNGPs. According to the Working Group, a bank may contribute to harms caused by an infrastructure project where the bank 'proceeds with financing, absent rigorous due diligence and safeguards … since it could have mitigated or prevented harm through' appropriate processes and decision-making.[67]

The potential for project financiers to incur a responsibility to remediate adverse harms caused by the project is also supported by applying the five factors outlined above to determine whether a business causes, contributes to, or is directly linked to an adverse human rights impact. Project financiers usually have significant relational power. As the party that determines monetary contributions to, and the commercial viability of, a project, project financiers can generally set significant conditions on the individuals and entities they lend to. The financiers also have moderate independence. While they cannot unilaterally initiate or terminate adverse impacts from the project, they can determine the extent to which they participate in projects that cause adverse impacts. While they may have commercial interests in remaining in a project with adverse impacts, this is not a sufficient reason to stay when the nature of the project would otherwise require them to either not participate in the project or to

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[65] Thun Group of Banks, *Discussion Paper on the Implications of Guiding Principles 13 & 17 in a Corporate and Investment Banking Context* 3 (2017), https://www.business-humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf

[66] Michael K. Addo, Chair of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Letter to Members of the Thun Group of Banks (23 Feb 2017), https://media.business-humanrights.org/media/documents/files/documents/20170223_WG_BHR_letter_to_Thun_Group.pdf p. 4.

[67] Ibid p. 3.

terminate their participation in the project. With strong power and moderate independence, project financiers would seemingly 'contribute to' adverse impacts caused by the project. They could, however, point to the predictability, severity of the harm, or mitigatory measures to argue that they are only 'directly linked to' the harm. This would be the case if, for example, the financier had conducted its own human rights due diligence, requested the project developers to conduct their own human rights due diligence, and had taken steps to ensure that the project has effective remedial systems in place. Should a new harm arise—one that was not predictable—the question would come down to the severity and mitigation measures the financier had adopted to ensure the harms stop and are remediated.

3.2.2. Institutional investors

The example of project finance is only one way in which authoritative BHR guidance indicates finance can constitute a *contribution* and not just a *direct link* to a harm. The responsibility of institutional investors for their contribution, through investee companies, has also been well examined in BHR. The UNWG explicitly stated that 'the Guiding Principles apply to all investors as business enterprises, irrespective of their size (including in terms of volume of assets under management), location, ownership (public, private or both) and structure, and the asset classes in which they invest.'[68] They have recognized that 'financial actors – such as private sector commercial banks, institutional investors, development finance institutions, and other sources of financial capital – have an unparalleled ability to influence companies and scale up progress on the implementation of the Guiding Principles.'[69] The UNWG has also called on financial actors to better connect their 'ESG' (environmental, social and governance) criteria for investing in a company with human rights standards and their responsibility to respect human rights.[70]

It is not just that institutional investors can prevent adverse human rights impacts, however, or can encourage businesses to do better. The UNWG has also noted that institutional investors have a responsibility to not 'cause or contribute to adverse human rights impacts, and should seek to prevent or mitigate such impacts that are directly linked to their operations, products or services by their business relationships, including in their value chain.'[71] Whether an investor has caused or contributed to a harm caused by an investee company, according to the UNWG may 'depend [ ] on factors such as type of investor,

[68] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Investors, environmental, social and governance approaches and human rights', A/HRC/56/55, May 2024, para 48.
[69] Ibid, para 77.
[70] Ibid, paras 3-5.
[71] Ibid, para 49.

investment strategy and asset class.'[72] Where an investor identifies a risk from their investee, however, they should use leverage to affect change in the investee's conduct.[73] If, however, their 'efforts prove unsuccessful, divestment may be considered. The Working Group notes that, when investors consider whether to divest, it is crucial that they assess whether ending the relationship with the investee would result in adverse human rights impacts, as divestment may not be appropriate in all cases.'[74]

The UNWG has also issued communications to individual institutional investors over concerns those investors have caused or contributed to adverse human rights impacts in conflict-affected areas through their investments. In 2024, the Working Group wrote to several institutional investors to inquire about how they conducted human rights due diligence in their investments in the arms industry.[75] In a communication to the Bank of America—which appears to follow a model template for similar banks approached over their financing of the arms industry—the UNWG noted that 'Financial institutions have their own responsibilities under the United Nations guiding principles on Business and Human Rights to respect human rights and conduct human rights due diligence. Financial businesses can be directly linked to adverse human rights impacts through its business relationships (such as through the provision of financing).'[76] While the UNWG seems to assume an investor will initially only be 'directly linked to' a harm through their investment, they further assert that

> *A financial business can move from being directly linked to an adverse human rights impact to contributing to that impact if it does not take action to prevent or mitigate the business relationship to which it is directly linked, including by undertaking human rights due diligence.*[77]

For instance, an investigation by BankTrack and B4Ukraine has recently revealed that Raiffeisen Capital, a Russia based asset management firm indirectly wholly owned by its Austrian parent company Raiffeisen Bank International "continues to actively trade in securities issued by the Russian government, state-owned energy giant Gazprom, and state-

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[72] Ibid, para 50.
[73] Ibid, para 69.
[74] Ibid, para 71.
[75] See, e.g., UNWG, et al., Letter to Blackrock (20 May 2024), Ref: AL OTH 87/2024. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=29091; UNWG, et al., Letter to Bank of America (20 May 2024), Ref: AL OTH 86/2024. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=29090; UNWG, et al., Letter to Amundi Asset Management SA (20 May 2024), Ref: AL OTH 85/2024. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=29089
[76] UNWG, et al., Letter to Bank of America, p. 5.
[77] UNWG, et al., Letter to Bank of America p. 5.

owned financial institution Sberbank".[78] Maintaining investments in entities central to the war economy, without demonstrating that the financial institution has engaged in meaningful hHRDD to prevent or mitigate harms, can result in the financial institution moving across the continuum from being directly linked to a harm to contributing to a harm, thus triggering a duty to remediate harms. It is crucial for investors to assess, as part of their hHRDD, whether and to what extent their actions or omissions are assisting in the maintenance of the illegal situation created by the Russian state in the context of the war in Ukraine.

Applying the five factors for determining 'cause, contribute, or directly linked to' to institutional investors results in a similar analysis to that of project financiers. Institutional investors will rarely have direct or environmental control, but they can have significant relational power (although the extent and effectiveness of this power will depend on the nature of the company and the extent of their investment). They also have moderate independence: unable to determine the initiation or termination of a harm directly, they can determine the extent of their participation, how they use their leverage, and when they will terminate a relationship due to its human rights impacts. This means that, again, whether an institutional investor incurs a responsibility to remediate a harm will depend on the predictability and severity of the harm, and the investor's efforts at using leverage and adopting other mitigatory measures.

3.2.3. Generalized corporate lending and securities underwriting

The UNWG is not alone in finding that a financial contribution to harmful conduct, including by a government, can result in a business 'contributing to' a harm. This usually happens when a business moves from 'directly linked to' to 'contribution' because it fails to effectively use leverage and to divest when necessary. The OECD has issued similar guidance not just for investors on their human rights due diligence responsibilities,[79] but also for banks that underwrite securities or engage in corporate lending.[80] The OECD Guidelines

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[78] BankTrack and B4Ukraine, 'Raiffeisen Bank International subsidiary still invested in sanctioned Russian entities, find BankTrack and B4Ukraine' 12 March 2025 https://www.banktrack.org/news/raiffeisen_bank_international_subsidiary_still_invested_in_sanctioned_russian_entities_find_banktrack_and_b4ukraine

[79] OECD, Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, 2017 https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf

[80] OECD, Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises 2019, https://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf

on Multinational Enterprises were tailored to ensure implementation of the UNGPs, and both the OECD Secretariat and the OECD National Contact Points offer authoritative interpretations of both the UNGPs and the OECD Guidelines. The OECD issued guidance that focused on the responsibility of banks for 'carrying out due diligence with respect to adverse impacts associated with a bank's client's activities.'[81] The OECD noted that:

> *In the context of corporate lending and securities underwriting, a preventative approach to adverse impacts may mean having strong ex-ante due diligence processes in place to avoid providing financing or securities underwriting services to client activities that cause, contribute to, or are linked to significant adverse [responsible business conduct] impacts.*[82]

The OECD guidance acknowledges that a bank *can* incur a remedial responsibility due to its lending practices. According to the OECD guidance:

> *Adverse impacts caused by a client of the bank would, in the majority of cases, be "directly linked" to the financing or underwriting services of the bank, which has a business relationship with the client. In some instances, however, a bank may also contribute to adverse impacts if the activities of the bank somehow cause, facilitate or incentivize the client to cause harm.*[83]

The inclusion of 'facilitate' in this sentence is not fully explained, but it suggests that financially supporting a company without exercising due diligence, or employing effective leverage, can move a bank along the UNGPs' continuum from 'directly linked to' to 'contribution,' meaning the bank incurs a responsibility to remediate. This is bolstered by the one example the OECD provides demonstrating when a bank's lending activities can 'contribute to' an adverse impact. The OECD found a bank may have contributed to an adverse impact through financing when:

> *All of the following elements occur together:*
>
> - *The adverse impact caused or contributed to by a client's activities or projects was foreseeable;*
> - *The use of proceeds was known (or likely) to be for those client's high-risk activities or projects …; or almost all of the client's activities were*

[81] Ibid, p. 8.
[82] Ibid, p.16.
[83] Ibid, p.42.

high risk of causing or contributing to the type of adverse impact being considered …; and

- *The provision of the finance or underwriting service occurred without adequate due diligence... In this respect the due diligence processes the bank had in place, and how they were implemented should be considered.*[84]

This is perhaps the clearest statement by the OECD as to when a bank, merely by providing money to a client, can contribute to a harm. It is in the failure to act with due diligence or to take adequate action generally when there is a clear risk that the bank's finance will result in another actor causing a predictable harm.

It is worth noting that the OECD guidance note acknowledges the potential of a bank to *contribute to* a harm, as that term is used in the UNGPs, by financing a client's activities in other statements as well. When discussing when and how to engage stakeholders, the OECD guidance notes that '[i]n cases where a bank has *contributed to* an adverse impact' it should engage stakeholders to identify 'appropriate forms of remedy,' to communicate how the problem is being addressed, and to 'devis[e] prevention and mitigation strategies w*ith respect to ongoing impacts linked to a specific client*.'[85] Similarly, the guidance calls on banks to 'develop[] a process for assessing the banks involvement with an adverse impact, e.g. *whether it may have contributed to the impact via its actions or omissions*, and determining the appropriate response.'[86] Through these statements, the OECD clearly acknowledges that a bank may incur a duty to remediate a harm that it financed through its lending practices.

The OECD's guidance aligns well with how we have previously understood the five factors that situate a business's responsibility along the 'cause, contribute, directly linked to' continuum. Where a business, including a bank, has power and independence in its conduct, where the harm and its relationship to that harm is predictable and severe, and where the bank fails to take adequate steps to mitigate the harm, it can be contributing to the harm even where it might normally be considered only 'directly linked to' the harm.

3.3. When Paying Taxes Can Be a Contribution

It is now clear that financial support in economic relationships can constitute a contribution to an adverse impact on human rights or to the maintenance of illegal conduct.

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[84] Ibid, pp. 44-45.
[85] Ibid, p. 24 (emphasis added).
[86] Ibid, p. 38 (emphasis added).

While this has never been taken to the extent of finding that businesses breach their responsibility to respect human rights by paying taxes to a regime that is engaged in widespread and systematic breaches of international law, we believe that in certain circumstances this is the natural conclusion of these two stands of jurisprudence. Where a business with the power and independence to leave a situation arising from systematic violations of human rights opts to stay, this may represent a *prima facie* contribution to the resulting harm. This conclusion does not only emerge from the impact of financial contributions to the economy sustaining illegal conduct but also because the ongoing economic activity is normalising the situation in a way that can prolong the state's breaches of international law. While this reasoning shares a common thread with some understandings of sanctions law, sanctions are a political choice aimed at punishing a regime whereas the business responsibility to respect has an accountability and preventative purpose. In this policy report, we are only focused on the business responsibility to respect human rights. The purpose of divesting from an economy like Russia's is not to punish the Russian regime but to avoid contributing financially to the gross human rights violations that Russia is committing against Ukrainians. In that sense, it is no different than asking for an investor or a bank not to finance an infrastructure project that is harming the human rights of the local population. A key difference between the infrastructure project and the state economy is that the state economy has a broader remit to it that should also facilitate the realisation of human rights of the state's own population.

Here, the hHRDD becomes an essential process for businesses to assess and weigh the likelihood of whether their continued presence and payment of taxes in Russia is essential to the realisation of human rights against how those payments are impacting the conflict and the role they play in financing violations of IHRL and IHL. Businesses should not assume that payment of taxes is a neutral act in contexts like this and take seriously the possibility that its contributions to the war economy outweigh the contributions to the realisation of rights. The standard of hHRDD is clear that a business should assess how it impacts not only rights holders but also how it impacts the conflict itself. Here again, hHRDD requires companies to assess whether and to what extent their actions or omissions are assisting in the maintenance of the illegal situation created by the Russian state in the context of the war in Ukraine. This is not an assessment that can be made in the abstract; factors beyond tax payments will need to be considered when assessing responsibility, such as the provision of essential goods and services which may constitute mitigating factors.

In light of this, it is important to return to those five factors set out at the beginning of this report that determine businesses' relationship to a harm. These factors should inform the

businesses' hHRDD process in assessing when payment of taxes may move from being directly linked to being a contribution to the IHRL and IHL violations in the context of the conflict. Those five factors are the power and independence of the business, the severity and predictability of the harm, and the business's effort to mitigate that harm when the concern is its relationship to the harm via a business relationship. Talking about power and independence necessarily requires a distinction between businesses that are truly indigenous or local to the aggressor state and those that are not. The parent company has its own distinct responsibility to ensure that its operations and business relationships including a supply chain and its corporate group do not cause or contribute to the harm. While the Russian subsidiary may be allowed to continue to operate as it exists distinct from the parent companies, the parent companies themselves have a responsibility to divest from the Russian economy. This requires not just spinning off the local subsidiary on paper but actually severing the local subsidiary from the corporate group. The failure to do so allows for the parent company to not only continue to benefit from but to continue to provide a relationship with the local subsidiary that normalises that situation and its economic contribution to Russia's violations of human rights and humanitarian law.

Tax contributions, like other forms of financial support by bankers or investors, would normally only create a 'directly linked' relationship between the business and the state to which it is paying taxes. But as with other situations of direct linkage, the next questions are about the predictability and severity of the harm, which we have already covered above, as well as the business's own ability to use leverage and the effectiveness of that leverage and other forms of mitigation. In the context of Russia's invasion of Ukraine, it does not appear that there is any amount of leverage from foreign businesses that can force the Russian government to give up its ongoing war of aggression and attempt to annex Ukraine. Businesses have already used their leverage, and instead of changing Russian conduct it has merely resulted in businesses being nationalized or excluded from the Russian territory. Consequently, any attempt to use leverage is doomed to fail. Where leverage or other mitigation measures are unlikely to deter a business partner from committing severe violations of human rights, the business is responsible for divesting from its relationship with the business partner or it risks moving to a point of contribution. How quickly the business will move from 'directly linked to' to 'contribution' will depend on the severity of the harm and the effectiveness of leverage efforts. In a situation with severe harms and no means of effective leverage, the business needs to divest quickly, or it will move along the continuum of responsibility. In this case, this means businesses should have divested from Russia's economy quickly. Staying in Russia for an extended period of time—for businesses that have remained, it has been over three

years—may move the business from 'directly linked to' to 'contributing to' the harm, incurring a responsibility to remediate. For instance, some multinational businesses have remained in Russia and benefitted from a significant increase in returns from this market since the start of the war due to their main international competitors disengaging early on. In situations like this, the failure to exit promptly along with the corresponding increase in their tax payments to the aggressor state raises a serious risk that such businesses have moved along the continuum from being directly linked to harms to being a contributor. Payment of taxes would be one of the key elements in assessing whether these businesses have failed to meet their responsibility to respect human rights, and such a failure would trigger their responsibility to remediate harms.

While this section presents a novel approach to understanding the responsibility to respect human rights, we also find—as we set out in this section—that this is the natural conclusion of the existing jurisprudence on financial contributions to adverse human rights impacts. We argue this creates a *prima facie* situation, and where the *prima facie* evidence indicates a contribution, individual businesses should carry the burden of proof to demonstrate that remaining in Russia has not amounted to a breach of their responsibility to respect. In the next section, we examine the mitigating factors that mean a business can remain in the Russian economy without incurring a responsibility to provide remedies and reparations.

4. Mitigating Factors

Jeffrey Sonnenfeld, who leads a team of researchers at Yale School of Management, began tracking, and later rating, business engagement with Russia.[87] According to Sonnenfeld, his "goal" was "absolute, and some might even say extreme: Every corporation with a presence in Russia must publicly commit to a total cessation of business there. Russians who rely on the food or medicine those companies make or jobs they provide may suffer hardship. But if that's what it takes to stop Mr. Putin from killing innocent Ukrainians, that's what businesses must do."[88] Sonnenfeld writes from a position of ethical corporate governance, where this line of thinking may be acceptable or appropriate. Within the context of BHR, however, this line of thinking is more complex than Sonnenfeld suggests. In fact, a BHR-based approach to corporate accountability would require certain businesses to stay in

[87] Jeffrey Sonnenfeld and Steven Tian, "Some of the biggest brands are leaving Russia. Others just can't quit Putin. Here's a list." *The New York Times* (April 7, 2022). Available at https://www.nytimes.com/interactive/2022/ 04/07/opinion/companies-ukraine-boycott.html.
[88] Ibid.

Russia if "responsibly exiting" would actually be a cause or contribution to adverse human rights impacts.

Yet, the responsibility to stay in Russia is also not as broad reaching as some of the businesses have claimed in defense of continuing to do business in Russia. Simply because a business does something that could contribute to the realization of a human right—like employing people or providing snacks or other shelf-stable products—does not mean that the business is always excused from taking action. Instead, IHRL again offers significant guidance as to what kinds of rights and interests and economic activity are essential to preserve even when economic disengagement is otherwise appropriate.

In this section, we set out the standards BHR and IHRL set for when to responsibly stay. In the context of claims for reparations, these may best be understood as mitigatory reasons why a business that would otherwise need to leave Russia has not and should not.

4.1. Retrogressive Measures for Economic, Social and Cultural Rights

Several multinational businesses that have stayed in Russia publicly stated that their business was providing essential goods and services to the civilian population and exiting would undermine the provision of such goods and services. While many have not invoked human rights explicitly, their responsibility to respect and exit responsibly calls for a human rights-centred assessment of whether exiting Russia would amount to a breach of the principle of non-retrogression.

The UNGP 12 clearly states that business responsibility to respect human rights covers respect for the realisation of economic, social and cultural rights (ESCRs), as well as core international labour standards. While the UNGPs do not recognise a business responsibility to fulfil ESCRs, and under IHRL the fulfilment obligation rests with states, businesses often play a central role in the provision of goods and services, and creation of employment essential to the realisation of ESCRs.[89] For those businesses providing essential goods and services, responsibility to respect requires alignment with state obligations set by the ICESCR, as well as other relevant ESCR instruments. We discussed the issue of employee rights in Section 2.4. above. This section will focus on the right to food and the right to health.

[89] Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para 1.

The ICESR requires states to "take steps, … to the maximum of its available resources, with a view to achieving progressively the full realization of"[90] ECSRs and ensure rights can be exercised without discrimination. While the ICESCR stipulates progressive realisation of rights to take the complex challenges involved in the realisation of ESCRs, it is recognised that there is "a minimum core obligation to ensure, the satisfaction of, at the very least, minimum essential levels of each of the rights".[91] This also means that "any deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of maximum available resources."[92] Minimum core captures access to necessities such as essential foodstuffs, essential primary healthcare, basic access to shelter, housing, education, and water.

There is insufficient clarity on when retrogressive measures might amount to a violation of the Covenant, and there are complex challenges in empirically demonstrating that retrogression has happened,[93] however, what is certain is that not all reductions in protection or provision will amount to a breach.[94] While there are several considerations taken into account by the Committee on Economic, Social and Cultural Rights (CESCR) on assessing whether retrogression reaches the threshold of a violation,[95] in the context of business responsibility to respect, key considerations include whether exiting had a reasonable justification, whether "alternatives were comprehensively examined", whether key stakeholders were consulted, and whether the exit "will have a sustained impact on the realization of the right…, an unreasonable impact on acquired … rights or whether an individual or group is deprived of access to the minimum essential level of the right".[96] In conducting their hHRDD and assessing responsible exit, businesses should be guided by these principles in weighing retrogression against potential contributions to gross violations of IHRL and IHL.

As with other categories, this is not an assessment that can be made in the abstract, but for illustration purposes, we will consider the food and pharmaceutical sectors, to

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[90] ICESCR Art.(2)
[91] CESCR General Comment No. 3 on the Nature of States Parties' Obligations (Art.2, Para.1 of the Covenant), para 10.
[92] Ibid para 9.
[93] Ben Warwick, "Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights" (2019) 19(3) *Human Rights Law Review* 467-490, p.473.
[94] Ibid.
[95] Ibid, p 479; CESCR General Comment No. 19 on the right to social security (Art. 9 of the Covenant) para 42.
[96] Ibid.

understand whether exiting would constitute retrogression in the way it is understood under IHRL.

4.1.1. Food

Food is essential to the realisation of the right to an adequate standard of living guaranteed under Article 11 of the ICESCR. The right to food is recognised as a fundamental right in several IHRL instruments and it is crucial for the enjoyment of other human rights.[97] OHCHR has explained that "The right to food requires States to provide an enabling environment in which people can use their full potential to produce or procure adequate food for themselves and their families."[98] Adequacy is central to the right to food and it is taken into account "in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances… The precise meaning of 'adequacy' is to a large extent determined by prevailing social, economic, cultural, climactic, ecological and other conditions…"[99]

Some multinational businesses in the food sector have invoked an essential goods argument in defence of their decision to remain in Russia. If we look at this defence from a human rights lens, and assess it under the business responsibility to respect human rights, the assessment will entail two steps: (1) are the products sold by the business invoking the defence, essential to the realisation of the right to adequate food, and (2) if (1) is true, will the business's exit from Russia have a retrogressive impact on the realisation of the right? Not every food is essential to the realisation of the right to adequate food, particularly given the rising concerns over the impact of certain highly processed foods on the right to health.[100] However, even if all or some products of a business can be considered to support the realisation of the right to food, this does not automatically lead to the conclusion that their exit from a market would have a retrogressive effect, if the exit does not have "a sustained impact on the realization of the right…, an unreasonable impact on acquired … rights" or does not deprive individuals or communities of access to the essential level of the right. For instance, in a crowded packaged foods sector with multiple domestic operators, it might be less likely that a foreign corporation's exit will deprive individuals and communities of access to adequate food.

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[97] CESCR General Comment No.12 on the right to adequate food, para 4.
[98] OHCHR, 'The Right to Adequate Food', Fact Sheet 34, 2010 pp3-4.
[99] CESCR General Comment No.12, para 7.
[100] See CA Monteiro, G Cannon, M Lawrence et al., 'Ultra-processed foods, diet quality, and health using the NOVA classification system' Food and Agriculture Organization of the United Nations 2019, p. 3.

4.1.2. Medicines

In the context of the full-scale invasion of Ukraine, calls were issued to pharmaceutical companies to limit their activities to only trading in medicines listed as essential by the World Health Organization.[101] In this section, we look at what business respect for IHRL and IHL requires from multinational pharmaceutical companies operating in Russia. Access to medicines is protected under IHL and IHRL, covering both civilians and military personnel.[102] Medicines and health services are essential to the realisation of the right to health codified in Article 12 of the ICESCR. Realisation of the right to health requires that medicines are available, accessible, and of adequate quality.[103]

There is a question whether access to medicines is limited to access to necessary or essential medicines, e.g. those listed on the WHO list of essential medicines.[104] The purpose of the WHO essential medicines list is to provide guidance on minimum core obligations.[105] As access to medicines/right to health are subject to the progressive realisation principle,[106] the WHO list might not be the appropriate guide on determining the contours of the responsibility of a pharmaceutical business in the context of its operations in an aggressor state. IHL requires that during a conflict, impact on civilians should be kept to a minimum,[107] and as a result, a pharmaceutical company's responsibility to respect a population's right to access medicines is likely to capture a broader range of medicines than the WHO essential medicines list.

This does not mean that pharmaceutical companies cannot take active steps in Russia to avoid causing and contributing to harms. For instance, hHRDD would call for companies to take steps to protect against their production facilities being re-purposed for military production and against their products being used in the commission of war crimes, crimes against humanity and other gross human rights violations. hHRDD would also require steps to prevent

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[101] Argument in favour of only supplying medicines on the WHO list: https://theconversation.com/western-pharma-companies-should-supply-only-essential-medicines-to-russia-179658

[102] ICRC, Respecting and Protecting Health Care in Armed Conflicts and in Situations Not Covered by International Humanitarian Law, https://www.icrc.org/sites/default/files/document/file_list/health-care-law-factsheet-icrc-eng.pdf

[103] CESCR General Comment No. 14 on the right to the highest attainable standard of health (Art 12), para 12.

[104] WHO Model Lists of Essential Medicines, https://www.who.int/groups/expert-committee-on-selection-and-use-of-essential-medicines/essential-medicines-lists

[105] CESCR General Comment No. 14, para 12.

[106] CESCR General Comment No.3.

[107] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Arts 1-3.

and mitigate any potential discriminatory effects of their supply business, e,g, by medicine production and sales being redirected disproportionately to the military at the expense of civilians.

While multinational pharmaceutical companies have sufficient power and independence with limited need to be operating in the Russian market, as a business directly enabling the realisation of the right to health, and in a market that is not crowded with many alternatives, their decision to remain operating in Russia may be justified due to the nature of its products and business, as well as the market structure. They should, nevertheless, take appropriate steps to prevent contributing to or being directly linked to violations of IHRL and IHL through their products, where their products are used by the military in the commission of such violations.

4.2. Banking and financial services

Banking and financial services present a complex set of questions and some of these are addressed in Section 3 above. Banking services are relied upon by Russian civilians and they are essential for the purchase of goods and services essential to human rights. However, as outlined earlier in the report, banking and financial services may also be clearly contributing to human rights harms in two main ways: (1) they might be facilitating transactions that directly enable the maintenance of the war economy as well as transactions that directly finance purchases of arms and dual use products; (2) their tax contributions may enable the maintenance of an illegal occupation and the normalization of gross violations. For instance, an investigative report published by BankTrack and B4Ukraine disclosed that Raiffeisen Bank International will facilitate payments for Turkish natural gas imports from Russia, which reportedly will cover annual payments of over EUR 7 billion, a very substantial contribution to the Russia's budget.[108] Facilitation of such payments would play a significant role in the maintenance of a sector central to the war economy, as well as being a key enabler of the maintenance of the illegal occupation of Ukraine and gross violations of IHL and IHRL. Such contributions to serious violations cannot be simply offset by maintaining that the bank is also contributing to the realisation of rights through its banking services to civilians. In situations like this, hHRDD would require the bank to assess which of its activities have moved from

[108] BankTrack and B4Ukraine, 'Raiffeisen Bank International to Process Turkish Gas Payments to Russia: BankTRack and B4Ukraine Response' 28 May 2025; https://www.banktrack.org/blog/raiffeisen_bank_international_to_process_turkish_gas_payments_to_russia_banktrack_and_b4ukraine_response

direct linkage to contributing to a harm and take effective steps to cease such activities. The bank should also assess whether it can avoid contributing to IHL and IHRL violations or mitigate these if it remains in the economy solely for the provision of services to the civilian population. Here, the principles outlined in relation to the right to food would also be relevant here, particularly the question of retrogression and the structure of the banking services market.

5. The Irrelevance of Certain Claimed 'Mitigations'

Some businesses have cited their contributions to humanitarian or development assistance or the threat of nationalization of assets as mitigating factors. When businesses do this, they rarely invoke the legal concept of mitigating factors because they rarely accept that they are legally in breach of their responsibilities. Instead, they seem to invoke their contributions as evidence that they are engaging ethically, trying to muddy the waters by suggesting the situation is complex and they are making the best decision they can in light of that complexity. In this section, we challenge those claims and explain why neither contributions to humanitarian or development assistance nor the threat of nationalization are appropriate mitigating circumstances under the UNGPs.

5.1. Humanitarian and Development Assistance

To the extent that humanitarian or development assistance contributions evidence any sort of effort at ethical engagement in the conflict, they fall into the category of "corporate social responsibility," meaning a voluntary engagement unrelated to the UNGPs' standard that the business should respect human rights. Contributions to humanitarian or development assistance cannot replace or be used to mitigate a business's reparation responsibilities. As the UNWG has explained:

> *Post-conflict reconstruction, peacebuilding and development initiatives should not count as reparations programmes, unless they comply with the legal standards inherent in the right to remedy and reparation and are linked to and aimed at providing reparation to victims of human rights violations and abuses, rather than meeting the State's social and economic rights obligations that are generally owed.*
>
> *Likewise, the participation of companies in these initiatives cannot be understood as a reparation per se, nor does it free businesses from their specific responsibilities regarding reparations derived from human rights abuses. While*

businesses might be reluctant to engage in reparations programmes and more inclined to engage in development projects, as this does not require recognition of responsibility, to count as a reparation, any benefit or service needs to be accompanied by an acknowledgement of responsibility, and it must be directly linked to truth, justice, and guarantees of non-recurrence. Therefore, business contributions to development or post-conflict reconstruction can only be considered reparation if this element is present.[109]

Implicit in a "recognition of responsibility" is a willingness to cease harmful activities, although given the context discussed in the UNWG's report this was not made explicit. As noted above, a business that is causing or contributing to a harm is expected, first and foremost, to stop the harmful conduct even before providing reparations. Businesses that fail to cease wrongful conduct cannot invoke their contributions to humanitarian or development assistance as a mitigatory measure. That kind of contribution amounts to CSR efforts and does not alleviate a business's BHR responsibilities.

5.2. 'Bettering' Conditions or Contributing to Peace

As noted above, a member of the Israeli Ministry of Foreign Affairs (writing in her personal capacity) has argued that the potential for businesses to contribute to peace complicates consideration of accountability and should mean, at least in part, that businesses operating in 'disputed territories' should not be bound by the UNGPs but should make 'policy' judgments about their presence.[110] This argument is not new to BHR. The South African Truth and Reconciliation Commission reported that businesses attempting to justify their presence in South Africa argued that "by creating jobs and generating wealth, business improved living standards and created the conditions for successful political transition."[111] As the UNGPs make clear, a business's potential contribution to peace efforts or it's contributions to the lives of everyday civilians in conflict affected areas cannot act as an offset against the harms it causes and contributes to.[112]

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[109] UNWG on the issue of human rights and transnational corporations and other business enterprises, "Implementing the third pillar: lessons from transitional justice guidance by the Working Group: Annex: Guidelines for designing and implementing transitional justice reparations processes involving business actors as part of the right to an effective remedy under Pillar III of the UN Guiding Principles on Business and Human Rights," U.N. Doc. A/HRC/50/40/Add.4, Annex paras 51-52.
[110] G Rivlin 'ESG, Geopolitics, and Human Rights in Disputed Territories,'.
[111] South African Truth and Reconciliation Commission Vol. 4, Ch. 2, para 10.
[112] UNGP 11, Commentary.

5.3. Duress

Certain foreign businesses have faced serious threats of the nationalization of their assets. Some have invoked these threats in their responses to calls to divest from Russia. While threats of nationalization are very serious, businesses should also consider fully their hHRDD obligations in the aftermath of the 2022 full-scale invasion of Ukraine. If businesses have not engaged in an effective hHRDD process swiftly and have remained in Russia longer than they should have, this might have contributed to their current predicaments and may undermine the validity of the duress justification when assessing business responsibility to respect.

6. Deciding how to provide reparations

Businesses that have stayed in Russia or have continued to contribute to the Russian economy without a physical presence may be liable to provide reparations if it is established that they have caused or contributed to gross IHRL and IHL violations committed in Ukraine. If businesses are found to be directly linked to the violations in the context of the conflict, and have not caused or contributed to them, the UNWG Guidance on conflict affected areas strongly encourages businesses to engage with reparations processes:

> *Even businesses that have not incurred legal responsibility but, for example, benefited from the conflict, should be very strongly encouraged to engage with the truth component of the transitional justice process and provide the full truth about their role in the conflict, even if they acted within the realm of the lawful. The Truth and Reconciliation Commission of South Africa, for example, recommended that businesses that had benefited from doing business under apartheid contribute to a reparations "tax" on the wealth acquired through systematic discrimination*.[113]

A national reparations programme may include reparations measures for those businesses that have caused or contributed to harms, and in some cases, programmes may also extend to those businesses that are directly linked to the violations in the context of the conflict. Businesses' obligations to afford reparations may also be determined via national or international court proceedings or via negotiation and agreement between the government and businesses or particular business sectors. Those deciding on reparations face (at least) two important questions. The first is what *kinds* of reparations the business should provide (and their scope or quantum), and the second is *how* the business should provide them. In

[113] UNWG Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action, Para 90.

this section, we outline both the types of reparations that may be owed and a variable means of providing those reparations when the harms the businesses are responsible for are diffuse.

6.1. The Type of Reparations Owed

First, it is necessary to note that financial compensation is only one of the forms of reparation that may be owed by businesses that cause or contribute to adverse impacts on IHRL and IHL protections. The obligation to afford reparations in international law rests on the foundational premise that victims should be restored to the position they would be in but for the violation.[114] This is the same expectation for businesses, although the extent to which they have contributed to the harm may affect what constitutes an appropriate form and scale of reparation. To realise victims' right to reparation, businesses may need to adopt a 'bouquet of remedies,' which can include not only compensation but also: ***satisfaction***, meaning the acknowledgment of wrongdoing and in many cases a telling of the truth of what occurred; ***restitution***, meaning the restoration of property or other tangible items taken from the victims, or to the extent it is feasible and appropriate for businesses, the restoration of rights taken away from victims, such as accrued employment rights or pensions; ***rehabilitation***, meaning physical, mental, social, economic, or environmental interventions aimed at restoring the victims' ability to participate in society and enjoy the full range of their human rights to the extent possible; and ***guarantees of non-recurrence***, meaning changes to businesses' operations, policies, practices, and where necessary personnel, to ensure they do not again cause or contribute to the same or similar violations.

6.2. To Whom are Reparations Owed?

Normally, BHR expects a business to provide reparations to a "clear" victim. This is on the premise that there is a clear line between the business's responsibility, a breach of that responsibility, and the damage caused to actual individuals or communities. When the contribution to the harm is in the context of an armed conflict and emanates from engaging in a state's economy, however, that line is less clear. Following the guidance provided above, a business may be found to have caused or contributed to breaches of IHRL and IHL, yet there may not be a clear set of victims for whom the business owes reparations. The victims—potentially every Ukrainian harmed by the conflict—are not necessarily direct victims of the

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[114] *Factory at Chorzów, Germany v Poland*, Judgment, claim for indemnity, merits, Judgment No 13, PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), 13th September 1928, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ] [125]; see for commentary on reparations under international law: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e392

business's actions, and it is difficult for an individual victim to demonstrate a specific claim against a particular company that should grant it greater or lesser status than any other Ukrainian or than the Ukrainian government. This raises questions about how a business should provide reparations and to whom the business owes reparations.

In contexts such as this one, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[115] endorsed by the UN General Assembly in 2006 provide useful guidance. In Sections 8 and 9, the Basic Principles clarify victimhood in similar contexts:

> *8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.*
>
> *9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.*

The Basic Principles thus make clear that in situations of armed conflict and widespread violations of human rights, those responsible for the violations might be diffuse and the continuous nature of the violations may render it challenging to draw clear causal links between individual victims and distinct actors that have inflicted the harm. Furthermore, the OHCHR guidance provides that one business "taking on remediation responsibility does not alter such responsibilities for any other companies that may have contributed to the adverse human rights impacts in question."[116] In this area, Ukraine has an opportunity to break new ground by requiring contributions from responsible businesses to a national programme on reparation. Section 15 of the Basic Principles clarify that "In cases where a person, a legal

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[115] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA 60th Session, 21 March 2006, A/RES/60/147

[116] OHCHR, Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting, August 2023, p.8.

person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim." South Africa has come closest to adopting this kind of contribution when its Truth and Reconciliation Commission suggested the state should impose a tax on foreign businesses to fund the state's reparation programme.

A domestic reparations programme could allow for a wide array of victims to secure reparations for the harms they suffered, alongside the Council of Europe's Register of Damage for Ukraine and planned Claims Commission for Ukraine.[117] In this context, with a comprehensive and victim-centred programme, it would be appropriate that, amongst the variety of contributors, businesses that stayed in Russia when they should have left should make contributions to the reparations programme.

7. The Role of Businesses' Home States

Throughout this report, we have focused on the responsibilities owed by businesses. Home states have a role to play as well. In its 2024 Advisory Opinion on the *Israeli Policies and Practices in Palestine*, the ICJ made clear that where a state breaches *erga omnes* obligations—meaning obligations owed to all other states, which includes many obligations in IHRL and IHL as well as the prohibition on unlawful annexation of territory—there are additional obligations for other states:

> *The Court considers that the duty of distinguishing dealings with Israel between its own territory and the Occupied Palestinian Territory encompasses, inter alia, the obligation to … to abstain from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the territory; to abstain, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory; and* ***to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory*** *…Moreover … all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian*

[117] https://www.rd4u.coe.int/en/

> *Territory. They are also* ***under an obligation not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory.***[118]

These were only some of the obligations the ICJ found applied to third-party states, and the ones that are most relevant to considering states' responsibility to regulate and hold accountable their businesses. Third-party states are expected to stop trade and investment relations they have with Israel where those relations support Israel's ongoing breaches of *erga omnes* obligations. This same reasoning also applies to Russia, which like Israel is engaged in the unlawful annexation of eastern Ukraine and Crimea, a breach of the U.N. Charter's prohibition on aggressive use of force, and additional breaches of IHRL and IHL. Consequently, home governments must exercise care in ensuring they are not economically supporting Russia's unlawful war of aggression, its annexation and ongoing attempted annexation of Ukrainian territories, or its widespread and serious breaches of IHRL and IHL.

The ICJ's language in its Advisory Opinion focused narrowly on the responsibility of third-party states towards Israel and did not directly address their responsibility towards businesses registered by them and subject to their laws and regulatory frameworks. But the United Nations' human rights treaty bodies have consistently invoked the responsibility of home states to regulate their corporate nationals when the latter operate abroad. In particular, the Human Rights Committee and the Committee on Economic, Social, and Cultural Rights have repeatedly recognized that home states have a responsibility arising from the ICCPR and ICESCR to regulate the extraterritorial human rights impacts of their corporate nationals.[119] Both human rights treaty bodies have found this obligation entails both a responsibility to regulate as well as a responsibility to provide venues and mechanisms for victims to secure remedies from businesses responsible for harming human rights. Taken together, the ICJ opinion and the opinions of these treaty bodies suggest that home states have an obligation to regulate their corporate actors, and to hold them accountable for staying in Russia when they should have left. Home states can implement this duty through various measures such as excluding businesses that cause or contribute to harms from public procurement, and limit eligibility for public financing such as export credit or overseas investment insurance. On supporting reparations, these home states should be ensuring their

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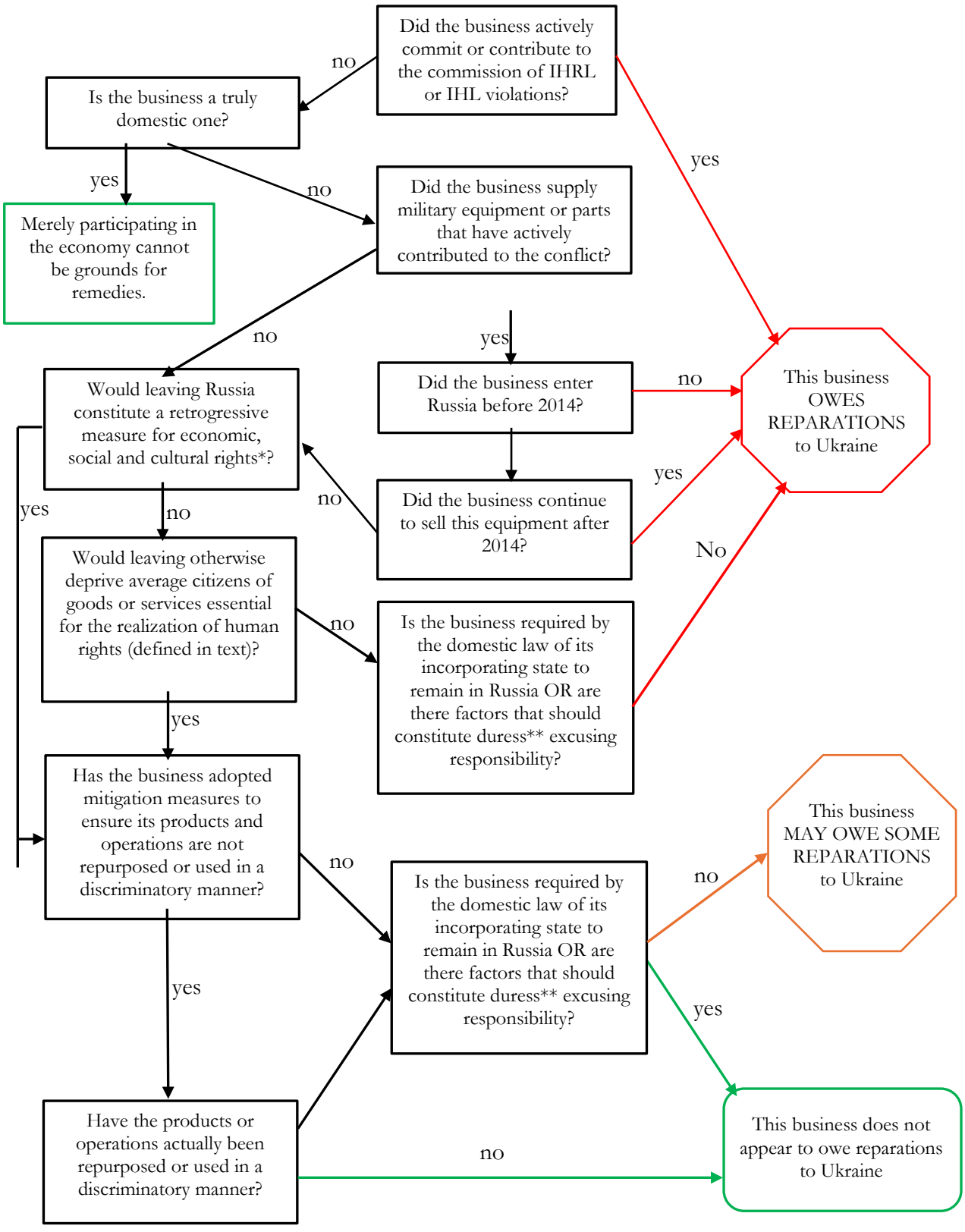
[118] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, International Court of Justice (Advisory Opinion) 2024, paras 278-279.
[119] See for instance CESCR General Comment No 24.

businesses are contributing to any Ukrainian national reparations programme and should adopt legislation to facilitate this if they have not already done so.

Annex: A Flow Chart for Identifying Responsibility



* As that term is both defined and understood in the text of this report.
**Merely employing people in Russia or a financial loss cannot meet the duress standard.