

27 July 2018

Ms Mavis Tan
ASX Corporate Governance Council
20 Bridge Street
SYDNEY NSW 2000
By email mavis.tan@asx.com.au

Dear Ms Tan

Embedding respect for international humanitarian law into the Fourth Edition of the ASX Corporate Governance Council's Principles and Recommendations

Australian Red Cross, together with the Graduate School of Business and Law at RMIT University, welcome the chance to make this submission on the proposed changes to the Fourth Edition of the ASX Corporate Governance Council's Principles and Recommendations.

Summary of submission

Principle 3 states that companies should operate legally, ethically and responsibly, in part to maintain their 'social licence to operate' and be 'good corporate citizens.' We recommend reference be made, in the Commentary to Principle 3, not only respect for human rights (as it already does, albeit only once) but also respect for international humanitarian law (otherwise known as the laws of war) as a prime consideration for companies to fulfil Principle 3.

Background

International humanitarian law, found primarily in the *1949 Geneva Conventions*, is relevant to any actor exposed to armed conflict. This body of law exists, in part, to protect civilians and civilian property – including company personnel, assets and operations – in situations of armed conflict. However, international humanitarian law remains underrepresented in contemporary discussions on corporate social responsibility and sustainability.

Businesses are increasingly demonstrating their commitment to conduct activities in a conflict-sensitive manner, particularly vis-à-vis human rights obligations and in accordance with the Sustainable Development Goals. There is also growing global acknowledgment of both the positive and negative impacts that businesses can have on armed conflict and other situations of violence. For instance, there are examples of businesses playing significant social, political and economic roles in conflict situations, such as providing valuable services to civilian populations in times of war, but also evidence of businesses being complicit in atrocities amounting to war crimes and crimes against humanity. Public distrust and more formal allegations of corporate impropriety also continue to be levelled against corporate bodies, including Australian companies, in response to their conduct in conflict-affected areas.

Further, Australian companies are increasingly exposed to these conflict-affected areas around the globe, primarily due to the proximity of business operations to war zones and the propensity to hire private security forces when operating in insecure environments. Such exposure gives rise to heightened legal, operational, ethical and reputational risks to business personnel, assets and 'corporate brand'.

Of particular relevance to companies, as well as individual corporate executives and employees, is the exposure to the risk of legal liabilities they may face as a result of activities in a conflict-affected area. These include the possibility of both criminal responsibility for the commission of, or complicity in, war-crimes and civil liability for damages.¹ States and organised armed forces bear the greatest responsibility for implementing international humanitarian law. However, a company conducting business activities closely connected to an armed conflict must also respect applicable rules of international humanitarian law, such as the prohibition against providing assistance or support that has a substantial effect on the commission of a war-crime. Such legal actions have been launched in multiple jurisdictions around the world.

Despite this, our research indicates that Australian companies remain largely unfamiliar with international humanitarian law and its relevance to their operations.

We submit that the heightened risk associated with working in conflict-affected areas, and the severity of potential violations of international humanitarian law – not only to businesses, their employees and their operations, but also to the communities in which they work – merits particular attention for the Australian corporate sector. In particular, for those companies looking to minimise their associated legal, ethical and reputational risks and, therefore, maintain their social licence to operate.

Proposed changes

This all gives rise to a need to incorporate explicit mention of international humanitarian law, and responsible corporate conduct in conflict-affected areas, in the ASX Corporate Governance Council's Principles and Recommendations.

Specifically, we make the following recommendations:

1. Strengthening the reference to business impact on 'human conflict'; and
2. Including additional regulatory and guidance materials in footnotes referring to human rights-related instruments.

1. Strengthening the reference to business impact on 'human conflict'

We note the reference to 'human conflict or terrorism' in dot-point six of the Commentary to Principle 3. We submit that this dot-point should be strengthened in four ways:

- i. Replacing the term 'human conflict' with 'armed conflict': Presumably 'human conflict' was adopted to differentiate between situations of armed conflict and business conflict or conflict of interest. However, this term is ambiguous. 'Armed conflict' is a widely-used term found in international law and already accepted by the international community.² We submit that using this term would more helpfully clarify the situation to which the passage refers, and more importantly, would direct companies to consider their obligations, rights and responsibilities under international humanitarian law.
- ii. Separating dot-point six into two independent points, in order to distinguish between the financing of crime, corruption and terrorism, and the related yet distinct recommendation to avoid involvement in armed conflict.
- iii. Expanding upon the heightened legal, ethical and social responsibilities attributed to companies in conflict-affected areas.³
- iv. Replacing 'not dealing with those involved in armed conflict' with 'not dealing with those that unlawfully and unethically contribute to armed conflict'. It is reasonable to expect that some companies will 'deal with' stakeholders involved in armed conflict, such as governments and militaries.

¹ Div. 268, *Criminal Code (Cth) 1995*, outlines corporate individual responsibility for war crimes and crimes against humanity.

² See for instance the *Geneva Conventions of 1949* and their *1977 Additional Protocols*.

³ Noting that this is language already employed in the *UN Guiding Principles on Business and Human Rights*.

Our concern stems from the obligation to respect and ensure respect for international humanitarian law during times of armed conflict.

With respect to the above suggestions, we propose the following revised wording for inclusion into the list of factors companies should consider in upholding Principle 3:

- *Not dealing with those involved in or who finance crime, corruption and terrorism.*
- *Not dealing with those that unlawfully or unethically contribute to armed conflict and acting in accordance with international legal frameworks when conducting business in conflict-affected areas.*

2. Including additional regulatory and guidance materials in footnotes referring to human rights-related instruments

We note the references and hyperlinks to the *OECD Guidelines on Multinational Enterprises*, ISO26000, the *Ten Principles of the UN Global Compact* and the *UN Guiding Principles on Business and Human Rights* in Footnotes 39 and 40. We recommend the inclusion of the following conflict-specific regulatory initiatives and useful guidance tools tailored specifically to the corporate sector as well. These include:

- The [Voluntary Principles on Security and Human Rights](#), which is already supported by several leading Australian companies.
- The International Committee of Red Cross' publication: '[Business and International Humanitarian Law](#)', which provides an introduction to the rights and obligations of business enterprises under international humanitarian law.
- The International Committee of the Red Cross and the Geneva Centre for the Democratic Control of Armed Forces' publication: '[Addressing Security and Human Rights Challenges in Complex Environments](#)'.

These tools exist to assist companies in understanding and operationalising their duties in conflict-affected areas, and minimising associated risks.

Our interest in business engagement with international humanitarian law

Australian Red Cross has been part of the Australian community for over 100 years, supporting the needs of vulnerable people both here and internationally. We are part of the International Red Cross and Red Crescent Movement, the largest humanitarian network in the world. We are guided by seven Fundamental Principles: Humanity, Impartiality, Neutrality, Independence, Voluntary service, Unity and Universality. Like all Red Cross and Red Crescent National Societies around the world, Australian Red Cross has a duty to disseminate international humanitarian law, also known as the laws of war, and improve understanding and respect for these laws.

Dr Jonathan Kolieb is a Lecturer in Law at the Graduate School of Business and Law, RMIT University. Jonathan's research and teaching interests focus on global governance issues, including current projects on the legal protections of children in armed conflict, and the international legal rights, protections and obligations of transnational corporations in conflict-affected areas. In 2018, Australian Red Cross formally partnered with RMIT University to advance a project aimed at integrating respect for international humanitarian law into the policy and practice of Australian business.

Concluding remarks

Companies are presented with unique difficulties in upholding Principle 3 when operating in, and doing business with, politically-fragile and conflict-affected countries. Nevertheless, effective and socially-responsible corporate governance must include standards that respond to all risks and duties that companies face, not only in times of peace, but also in more fragile times of armed conflict. International humanitarian law provides just such standards.

Thank you for the opportunity to provide this submission. If you have any questions or would like to discuss this submission further, please do not hesitate to contact us. We stand ready to assist the ASX Corporate Governance Council and ASX Companies in understanding corporate rights and duties under international humanitarian law.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Y. Zegenhagen', with a long horizontal flourish extending to the right.

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A handwritten signature in black ink, appearing to read 'Jonathan Kolieb', with a large, stylized flourish underneath.

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