

# JCB OFF TRACK

Evading responsibility for human rights  
violations committed with JCB machines  
in the Occupied Palestinian Territories

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For many years JCB's machinery has been used by the Israeli authorities to demolish Palestinian homes and construct illegal Israeli settlements on the seized Palestinian land. This report shows that JCB has not taken adequate steps within the company's means to prevent its machinery from being used for these purposes, a failure that puts the firm in breach of its responsibilities under international human rights standards. The report draws on extensive interviews with organisations that have witnessed human rights violations and with senior compliance and risk-management practitioners from well-known companies, as well as open-source research techniques.

**JCB Off Track: Evading responsibility for human rights violations committed with JCB machines in the Occupied Palestinian Territories**

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# Glossary

EU	European Union
JCB	J.C. Bamford Excavators Ltd (including subsidiaries)
NCP	National Contact Point
OCHA	UN Office for the Coordination of Humanitarian Affairs
OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
OPT	Occupied Palestinian Territories
UN	United Nations
UNGPs	UN Guiding Principles on Business and Human Rights

# Executive summary

J.C. Bamford Excavators Limited (JCB) is a private company incorporated in the UK. The principal activity of JCB and its subsidiaries is the design, manufacture, marketing and sale of machines for the construction and agricultural industries, along with the provision of after-sales service and supply of parts. JCB lists a privately-owned Israeli company, Comasco Ltd (Comasco), as its sole dealer in Israel.

For many years JCB's heavy machinery has been used in situations in the Occupied Palestinian Territories (OPT) where war crimes and human rights violations have been committed. Since 1967, Israel has demolished tens of thousands of Palestinian homes and structures, and displaced large swathes of the population, to build homes and infrastructure to settle its own population. These practices breach the Fourth Geneva Convention, which prohibits an occupying power from:

- transferring its own civilians into the territory that it occupies;
- forcibly transferring the original population of the territory;
- destroying property, unless justified by absolute military necessity.

JCB has not taken adequate steps within its power and capacity to prevent its equipment from being used to demolish Palestinian homes and construct Israeli settlements. This failure puts the company in breach of its responsibilities under international human rights standards applicable to business and may be sufficiently serious to carry legal liability.

The company cannot claim ignorance of the human rights impacts of its products as these impacts have been highlighted publicly by organisations that have borne witness to them. JCB was also made aware of these concerns by the UN Office of the High Commissioner for Human Rights (OHCHR), which engaged with the company about these issues and found it to be clearly and directly linked to human rights violations.<sup>1</sup>

JCB harbours illusions that it believes insulates the company from responsibility for the uses of its bulldozers in the OPT. Its justifications for this are incompatible with evolving interpretations of the international human rights standards applicable to companies.<sup>2</sup> They are a negation of the concept of human rights due diligence, which is a key element of these standards, and do not reflect the attempts of companies across sectors to understand and mitigate human rights impacts across their value chains.

JCB defends its position by stating it doesn't have operations in the OPT.<sup>3</sup> This is irrelevant: a company does not have to have its own business operations in or near the place where human rights abuses occur to be culpable. In a globalised world, a company's involvement may be determined in other ways, such as its domination of a particular market, its business relationships with suppliers and users of its products, or the technological means it adopts to manage its operations.

JCB asserts that once products have been sold to its sales agent in Israel – Comasco, a sole agent for JCB equipment – JCB has no legal ownership of them and therefore cannot stipulate to whom their products can or cannot be sold.<sup>4</sup> This argument misses the mark. JCB undeniably has the means to influence the conditions under which its products are

sold by its sole agent in Israel, and a company's responsibility for human rights abuses carried out with its equipment does not simply evaporate when using an intermediary sales agent. JCB should be aware that Comasco has contracts with Israel's Ministry of Defence for the maintenance of backhoe loaders manufactured by JCB, which are the type of bulldozer used in demolitions.<sup>5</sup> This creates a foreseeable risk that these particular products might be implicated in human rights violations.

JCB contends that equipment from other providers is also used in demolitions and, if it was to cease supplying its machinery, the demolitions would not be affected in any way. Apart from the dubious morality of the position, this line of argument has been rejected in two recent court decisions. It is not an adequate defence to these types of criminal and civil liability for a business to argue a particular harm would have occurred anyway because of another party's actions.<sup>6</sup>

JCB has tried to bolster its position by arguing that any attempt to stop the supply of its machinery to Israel would prevent its equipment being used for entirely peaceful purposes, such as construction of hospitals, roads and schools. It also points to its consistent record in providing urgent and substantial support in response to natural disasters around the world.

Any such benefits arising from JCB's commercial or philanthropic activities are irrelevant to consideration of the company's specific responsibility to respect human rights according to international standards. Human rights compliance should not be viewed as a scorecard where abuses of rights can be traded-off and thereby justified.

JCB has the technological means to establish whether some of its equipment is involved in both the construction of Israeli settlements and the destruction of Palestinian property.<sup>7</sup> It also has the means, including by contract, to take significant steps to avoid such harmful uses.<sup>8</sup> Identifying this involvement and the means of preventing harm is a necessary and essential aspect of the international standard of human rights due diligence.

There is an abundance of evidence in the public domain regarding the use of JCB's machines to commit human rights violations, and this might be expected to have prompted JCB to engage with the organisations that have compiled and published the evidence.<sup>9</sup> This would have put the company in a better position to establish the validity of the material, strength of the allegations arising from it, and potential consequences of not taking action to address the issues raised. Instead, JCB has remained largely detached from those who have raised serious human rights concerns. This is indicative of a lack of commitment to give effect to the company's human rights responsibilities and at odds with the fact that engaging with stakeholders to assess human rights risk is an international standard applicable to companies.<sup>10</sup> Apart from any business risk arising from such an approach, it exposes Palestinians in the OPT to much greater risk of human rights violations.

As a UK-domiciled company, JCB's activities should be regulated by the UK government so the company is required to identify and address the human rights impacts of its operations and products. Such mandatory human rights due diligence measures are a necessary step to ensure UK companies do not contribute to human rights violations in the UK or abroad.<sup>11</sup> Breaches of such requirements should be linked to the withdrawal of governmental support in the form of export credits and trade promotion, and, if

applicable, the denial of export licences. The UK's legal framework should ensure that any failure by a company to undertake proper human rights due diligence would expose the business to increased risk of civil liability in the UK and of exclusion from public procurement contracts.

Carrying out some form of due diligence to assess the risks of doing business with customers working in specific jurisdictions or operational contexts is hardly a novel or unusual practice. On the contrary, well-run companies regard these kinds of activities as fundamental to good governance.<sup>12</sup> Already well-established for the purpose of compliance with legal standards on issues such as anti-money laundering, fraud prevention and anti-corruption, these techniques have started to be applied towards the management of other kinds of risks, notably downstream human rights risks.

JCB's failure to conduct proper human rights due diligence on the end use of its products represents a failure to respect human rights. This is something the company must do at all times in line with international human rights standards for business, regardless of business opportunity or expediency.

## RECOMMENDATIONS

### To JCB

1. Identify and assess the human rights impacts of the company's products and services, especially when they are used in conflict-affected areas, including occupied territory.
2. Take action to address human rights risks and abuses, including through the contractual and technological means available to the company, and with regard to the leverage it can exert over dealers, agents, and others with whom it has business relationships.
3. Publicly communicate all such risks that have been identified and how they are being addressed in the fullest way possible.
4. Commit to respect human rights and create robust human rights due diligence policies and processes connected with the use of the company's products and services, including via its business relationships.
5. Withdraw from markets in conflict-affected areas, including occupied territories, where there is no realistic prospect the company's actions will prevent its equipment from being used to commit human rights violations.
6. Provide reparation where the company's products have contributed to adverse human rights impacts.
7. Engage with organisations that have credible evidence of human rights violations linked to the company's products.
8. Learn from best practice across sectors to prevent its products being used by those who might cause or contribute to actual or potential adverse human rights impacts.
9. Consult with all stakeholders in relation to actual and potential human rights risks arising from its activities and from the activities of those with whom it has business relationships.

## **To the UK government**

1. Adopt and enforce a legal framework requiring companies to conduct human rights due diligence in their global operations and value chains, including in relation to the use of their products and services.
2. Ensure consequences for companies that fail to conduct human rights due diligence, including the prospect of civil and criminal liability in certain circumstances.
3. Prohibit the export of machinery, equipment and technologies to countries where they have been repeatedly linked to human rights abuses or violations of international humanitarian law, and where the company has not taken the necessary steps within its powers and capacity to prevent or mitigate such abuses.
4. Ensure that the UK National Contact Point for the OECD Guidelines for Multinational Enterprises has the expertise, capacity and independence to assess and examine human rights complaints in keeping with current UN and OECD interpretations of the international standards applicable to companies.

## **To UK local authorities and other public bodies**

Exclude from tendering processes any companies causing or contributing to grave human rights violations, or linked to such violations through their business relationships where they have failed to take preventive measures.<sup>13</sup>



# Methodology

The overall purpose of this report is to debunk some of the arguments that lie behind JCB's attempts to smooth over its tracks in the Occupied Palestinian Territories (OPT), and to propose actions that would enable JCB to adhere to international human rights standards applicable to companies.

Chapter 1 examines the context in which human rights violations are occurring, focusing on the demolition of Palestinian homes, and sets out the human rights standards, including international humanitarian law, applicable to companies.

Chapter 2 sets out evidence of violations of human rights and international humanitarian law arising from use of JCB's heavy machinery, the company's approach to engaging with issues of concern, JCB's justifications, and JCB's relationship with its sole agent in Israel, Comasco.

Chapter 3 sets out the legal context of the end-use of products with regard to trends and developments in both civil and criminal liability.

Chapter 4 examines how human rights due diligence should be applied by companies in situations where human rights violations might arise from the use of their products, especially in high-risk situations such as areas of conflict and those under occupation.

Chapter 5 outlines a workable approach to end-use risk management, drawing on examples of good practice, with particular emphasis on the contractual mechanisms and technological safeguards that would enable companies to respect human rights.

The research for this report took place largely during the first and second quarters of 2021. The evidence set out in Chapter 2 was drawn from publicly available material and from interviews with organisations that have a presence on the ground in the OPT and have borne witness to human rights violations.

The evidence in Chapters 3, 4 and 5 was drawn from a series of one-to-one interviews with senior practitioners working within companies or within organisations that have supported corporate efforts to recognise and respond to human rights issues in the downstream value chain. The latter included a benchmarking organisation, a business and human rights consulting firm, and corporate networks – both multi-sector and industry specific – focusing on business and human rights. These interviews were supplemented by desk-based research into the key international standards relating to management of end-use risks.

Corporate representatives interviewed for the purposes of this project were all senior compliance or risk management practitioners working within well-known companies exporting internationally and often with complex downstream value chains. They represented a range of sectors – engineering, telecommunications and digital technologies, vehicle manufacturing and pharmaceuticals.

These one-to-one interviews had three main aims:

- to test the levels of awareness among corporate leaders working within different sectors of the different forms that end-use risks can take within their specific sector;
- to gain an appreciation of the strength of corporate policy commitments to respond to these risks including the direction of travel of internal discussions of these matters;
- to understand the practical steps that have been considered and implemented to mitigate these risks within different types of businesses, and their experiences with them.

These conversations also helped to clarify which types of risk management strategies and solutions were more sector and context specific in nature, and which had potentially broader application. The strategies set out in Chapter 5 have been informed by the insights drawn from these conversations.

The sections of this report relating to the legal context for analysing and mitigating end-use risks, which is the focus of Chapter 3, are largely the product of desk-based research, supplemented by feedback from legal practitioners specialising in tort litigation and negotiating commercial contracts. They also draw from on-going work by legal professional bodies to raise awareness among legal practitioners of the various legal strategies and techniques that can be adopted to help enhance a corporate client's leverage as regards effective management of end-use risks.

### **Open-source digital research**

Amnesty International's Crisis Evidence Lab and Digital Verification Corps used open-source research techniques to obtain and verify the media assets included in this report. Some videos were sourced from social media platforms such as Instagram, Facebook, YouTube and Twitter. Others were sourced from the websites and archives of human rights organisations, including B'Tselem and Al-Haq.

All such content was verified for its authenticity and accuracy. The verification methodology includes analysis of:

- the origin of the content
- the source
- the time/date the event depicted occurred
- the location the content was captured
- any corroborating evidence that supports what is shown in the content. In verifying the location of each case in the digital mapping, many incidents could be precisely geolocated by comparing information from the audio-visual evidence gathered against satellite and other street-level imagery available on platforms such as Google Earth and Mapillary. However, as highlighted by international news outlets,<sup>14</sup> recent high-resolution satellite imagery over Israel and the OPT is not readily accessible, hindering the effectiveness of geolocation efforts. In cases where precise geolocation was not possible, Amnesty International relied on corroborating evidence and consistent reporting from local human rights organisations and news outlets to confirm where an event took place.

# 1 Background

## 1.1 Destroying Palestinian homes and property to make way for Israeli settlements

The destruction of Palestinian homes, agricultural land, and other property in the Occupied Palestinian Territories (OPT), including East Jerusalem, is inextricably linked with Israel's long-standing policy of appropriating the land it occupies, notably by establishing Israeli settlements. The transfer of parts of an occupying power's civilian population into the territory it occupies is prohibited under international humanitarian law and is a war crime.<sup>15</sup>

The obligations of occupying states under international humanitarian law are provided for in the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 relating to the protection of civilians in time of war. A company's assessment of the legal and human rights situation in the context of an occupation must take account of the standards laid down in these norms, which relate to the protection of people in occupied territory. They include special protections designed to:

- safeguard the local population from abuse;
- protect their assets from being pillaged;
- ensure the continuation, as far as possible, of the pre-conflict way of life, which includes respect for cultural rights.<sup>16</sup>

Under international humanitarian law, occupying powers have responsibilities to protect the well-being of the occupied population. Resources of the occupied territory are treated as being held in trust for the benefit of the local population. The occupying power may only confiscate land and property and consume resources if this is justified by military necessity. Members of the local population must be treated humanely and protected from violence and degrading treatment.

Appropriation of land and destruction of property also breach other rules of international humanitarian law. Under the Hague Regulations of 1907, the public property of the occupied population (such as lands, forests and agricultural estates) is subject to the laws of 'usufruct'. This means an occupying state is allowed only limited use of this property. The limitation is derived from the notion that occupation is temporary – the core idea of the law of occupation.

The Hague Regulations also prohibit the confiscation of private property.<sup>17</sup> The Fourth Geneva Convention prohibits the destruction of private or state property, 'except where such destruction is rendered absolutely necessary by military operations'.<sup>18</sup> An occupying power is therefore forbidden from using state land and natural resources for purposes other than military or security needs or for the benefit of the local population.<sup>19</sup>

The unlawful appropriation of property by an occupying power amounts to 'pillage', which is prohibited by both the Hague Regulations and the Fourth Geneva Convention,<sup>20</sup> and is a war crime under the Rome Statute of the International Criminal Court and some national laws.<sup>21</sup> Corporations may also find themselves liable for pillage.<sup>22</sup>

The ‘extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly’ is a grave breach of the Fourth Geneva Convention and a war crime. Similarly, the ‘transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory’ is a war crime.<sup>23</sup>

Any company considering operating in occupied territory, or being linked to an occupied territory through a business relationship as is the case with JCB, must take these norms into account.

## 1.2 What human rights are affected?

Across Israel and the OPT, Israeli authorities have applied a set of interrelated discriminatory laws, policies and practices that have directly caused the displacement and dispossession of many Palestinian communities and created unbearable living conditions for other Palestinians that have resulted in their forced displacement or in them being placed at high risk of it. This has amounted to a state-sanctioned policy of forcible transfer of population.

Against the background of the largescale racially motivated seizures of Palestinian land and property, Israel’s restrictive and discriminatory planning laws and policies have made it almost impossible for Palestinians to obtain building permits. These policies have created a coercive environment with the aim of forcing many Palestinians in these communities to leave their homes.

Israel uses additional methods such as the punitive demolition of homes in the OPT to punish and displace Palestinians. The evidence suggests that most of the acts of destruction of property in the OPT are not justified by military necessity and amount to violations of international humanitarian law.

Forced evictions and house demolitions are usually carried out without warning, sometimes at night, with the occupants given little or no time to leave their homes and salvage their belongings. Often the only warning is the rumbling of bulldozers, which force the inhabitants to flee as they begin to tear down the walls of their homes. Thousands of families have had their homes and possessions destroyed in this manner. In the wake of the demolitions, men, women and children return to the ruins of their homes to search for whatever can be salvaged from the rubble: passports or documents, children’s schoolbooks, clothes, kitchenware or furniture.<sup>24</sup>

In some cases, the justification given by the Israeli authorities for the destruction of homes, agricultural land and other properties relates to military and security needs, which have been given very wide interpretation by Israeli courts. In other cases, the justification is a lack of building permits, which are rarely granted for Palestinians.<sup>25</sup> This has been exacerbated by the reclassification by Israel of many Palestinian properties without title deeds as state land.<sup>26</sup> The demolition of Palestinian homes has gone hand in hand with the expansion of Israeli settlements, which are designated for Jewish communities and where Palestinians are prohibited from living.

In some cases, the demolition of Palestinian housing is imposed as a form of collective punishment, which is prohibited under international law.<sup>27</sup> The result is the same: families are left homeless and destitute. They must rely on relatives, friends and charity organisations for shelter and subsistence.

Through forced eviction and the mass demolition of homes in the OPT, the Israeli authorities have deliberately made tens of thousands of Palestinians homeless. This process is ongoing, relentless, and a continuous source of conflict.<sup>28</sup> Such forced evictions are inconsistent with the realisation of the right to adequate housing. They are also inconsistent with the obligation for states under international law, including in occupied territory, to refrain from forced evictions.<sup>29</sup>

Under international law there is a prohibition on forced evictions, which are defined as the ‘permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protections.’<sup>30</sup>

The right to housing is a human right, a fundamental component of the right to an adequate standard of living, and central to the enjoyment of other human rights. The imperative for all people ‘of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity’<sup>31</sup> has led the international community to enshrine the right to housing in a number of human rights instruments, including Article 25 of the Universal Declaration of Human Rights and international human rights treaties to which Israel is a party.<sup>32</sup>

Forced evictions are not only a violation of the right to housing. They also violate the rights to privacy, family and home, and the peaceful enjoyment of possessions under Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) to which Israel is a party.<sup>33</sup> In some cases, the destruction of homes has resulted in violations of the rights to life and security of persons, guaranteed by Article 6 and 9 of the ICCPR. People have been killed or injured during the demolition of their homes or nearby buildings or while protesting against demolitions.

The UN Committee against Torture has expressed concern about Israeli policies on house demolitions, which may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment, in violation of Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The committee called on the Israeli government to desist from the policy of such house demolitions.<sup>34</sup>

The demolition of Palestinian homes and critical infrastructure, the expropriation of Palestinian land, and the resulting forcible transfer represent a fundamental obstacle to the enjoyment of human rights by Palestinian children. Research by Save the Children shows the consequences for children of demolitions go far beyond loss of physical property – their mental health and sense of security deteriorates, their family relationships become strained, their education is jeopardised, and they are exposed to protection risks.<sup>35</sup> As documented by the UN, some of these children will have already been traumatised by attacks from Israeli settlers, which are part of the pressure being brought to bear on Palestinians to leave their land.<sup>36</sup> This is a breach of the UN Convention on the Rights of the Child, which obliges Israel to make the best interests of the child a primary consideration in all actions concerning children.<sup>37</sup>

Israel's demolition of homes and resources in the OPT is discriminatory in intent and effect as it is targeted exclusively at Palestinians. Israeli Jews living in settlements in the OPT are not similarly affected. This constitutes a violation of the right of Palestinians to non-discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) forbids any discrimination in the exercise of the various rights, including the right to housing.<sup>38</sup>

A wide range of structures have been subject to demolition. The United Nations Office for the Co-ordination of Humanitarian Affairs (OCHA) produces a monthly inventory of demolitions in the OPT. For example, it notes in June 2021 the targets of demolition in the OPT included homes, stone walls, water and sanitation facilities such as cisterns, cess pits and drainage channels, animal shelters, solar panels, main roads and an entire village.<sup>39</sup> The destruction of these facilities impacts a number of rights, including the rights to health,<sup>40</sup> to water,<sup>41</sup> and to gain a livelihood.<sup>42</sup>

According to the OCHA, between January and September 2021, 673 structures were demolished, displacing some 958 Palestinians, with 7,549 people being affected altogether.<sup>43</sup> The number of people affected are much greater than the numbers displaced because the facilities destroyed include those essential for hygiene, sanitation, agriculture, and livelihoods. Some of these demolished structures have been funded by humanitarian aid programmes of the European Union and of states, including the UK. Most are 'administrative demolitions' undertaken on the pretext of lack of a building permit.<sup>44</sup> The actual reason relates to Israel's de facto policy of displacing Palestinians, which in many cases is designed to facilitate the expansion of Israeli settlements, and also arises from the fact Palestinians have no choice but to build 'illegally' as permits are rarely granted.<sup>45</sup>

### 1.3 What human rights standards apply to JCB?

#### International humanitarian law

In the Occupied Palestinian Territories (OPT), two sets of complementary legal frameworks apply – international human rights law and international humanitarian law.<sup>46</sup>

International humanitarian law applies to situations of armed conflict. A situation of military occupation is considered a conflict even if active hostilities may have ceased or occur sporadically. International human rights law applies to all situations, in both peacetime and conflict. The essence of this is that businesses should respect human rights.

The OPT is a conflict-affected area. This fact alone increases the risks of companies whose products are used in the area contributing to serious human rights abuses.

The International Committee of the Red Cross has noted humanitarian law standards, while applying primarily to states, also apply to businesses in situations of armed conflict.<sup>47</sup> International humanitarian law provides some protection to business personnel and assets, but also imposes obligations on managers and staff not to breach its standards. If they do so, individual personnel and the enterprise are exposed to the risk of criminal or civil liability.



## **The UN Guiding Principles on Business and Human Rights**

The UN Guiding Principles on Business and Human Rights (UN Guiding Principles) provide the most authoritative statement of the human rights responsibilities of companies, based on international human rights law.<sup>48</sup> They were adopted by the UN Human Rights Council in 2011, and have been endorsed by governments and business associations. Since 2011, states have been developing national action plans to give effect to the principles,<sup>49</sup> and businesses have been developing policies to embed them across their operations.<sup>50</sup> While the UN Guiding Principles are not legally binding on companies directly, they are being integrated rapidly into national laws and policies.<sup>51</sup>

The UN Guiding Principles apply in all operational contexts,<sup>52</sup> including situations of conflict. They explicitly recognise conflict-affected areas present heightened risks of business involvement in human rights abuses,<sup>53</sup> and contain specific provisions for preventing and addressing the human rights impacts of businesses operating in conflict-affected areas.<sup>54</sup>

## **The OECD Guidelines for Multinational Enterprises (OECD Guidelines)**

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises are recommendations jointly addressed by governments to multinational companies. They provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. They contain a dedicated chapter on human rights that is intended to align with the UN Guiding Principles.<sup>55</sup>

Under the OECD Guidelines enterprises are specifically required to:

1. respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved;
2. in the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur;
3. seek ways to prevent or mitigate adverse human rights impacts directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts;
4. have a policy commitment to respect human rights;
5. carry out human rights due diligence as appropriate to their size, the nature and context of operations, and the severity of the risks of adverse human rights impacts;
6. provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify they have caused or contributed to these impacts.

Each state adhering to the OECD Guidelines is required to establish a National Contact Point to resolve complaints against companies for alleged breaches of the guidelines. This is a non-judicial process that may result in mediation or a determination as to whether a company has breached the guidelines. Observance of the OECD Guidelines by enterprises is not legally enforceable. However, the countries adhering to the guidelines – which include all OECD countries – make a binding commitment to implement them in accordance with OECD decisions.

### **BOX 1: The relationship between the UN Guiding Principles and the OECD Guidelines**

The UN Guiding Principles on Business and Human Rights<sup>56</sup> are the global, authoritative statement on the responsibilities of businesses to respect human rights. This important set of principles was unanimously endorsed by the Human Rights Council in June 2011.

The finalisation and endorsement of the UN Guiding Principles on Business and Human Rights coincided with a revision and update of the OECD Guidelines for Multinational Enterprises, which took place during 2011.

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises and provide ‘non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards’.<sup>57</sup>

As part of that 2011 update, the OECD introduced a new chapter on human rights (Chapter IV). This is designed to be aligned with, and capture the key elements of, the standards of responsible business conduct laid out in the UN Guiding Principles on Business and Human Rights, specifically the provisions relating to human rights due diligence set out in Pillar II of the Guiding Principles (on the corporate responsibility to respect human rights).

### **The case against G4S for breach of the OECD Guidelines**

In May 2014, the UK National Contact Point (UK NCP) accepted a case against G4S submitted by Lawyers for Palestinian Human Rights (LPHR), which alleged G4S contributed to serious human rights abuses through its subsidiaries that provided, installed and maintained equipment used for security purposes in Israel and in the OPT. In its final statement on the matter, the UK NCP found G4S’s actions were inconsistent with its obligations under the Human Rights Chapter of the OECD Guidelines. The company was required to address impacts it was linked to by a business relationship.<sup>58</sup> Nine months after the adverse decision, G4S announced its decision to sell G4S Israel.<sup>59</sup>

### **The case against JCB for breach of the OECD Guidelines**

In December 2019, LPHR submitted a case against JCB to the UK NCP.<sup>60</sup> The complaint concerns JCB’s impacts in the OPT, focusing on the use of the company’s heavy machinery by Israel’s military authorities and private contractors in demolitions and settlement-related construction that violate the human rights of Palestinians. LPHR provided evidence of how JCB has failed to take the actions needed to identify, prevent and mitigate the use of its heavy machinery in demolitions and settlement construction. The complainant alleges JCB is therefore in breach of five human rights responsibilities under the OECD Guidelines. In October 2020, the UK NCP issued an initial assessment accepting core aspects of the complaint for further consideration, while rejecting other aspects including the claim that JCB had caused or contributed to human rights abuses.<sup>61</sup>



## UK National Contact Point's Findings and Recommendations in case against JCB

In a statement<sup>62</sup> published on 12 November 2021 the UK NCP concluded the following:

- JCB did not breach its obligation under paragraph 3 of Chapter IV of the Guidelines by virtue of its relationship with Comasco.
- JCB did not fully observe the Guidelines under paragraph 4 of Chapter IV by not having a policy commitment to respect human rights.
- JCB did not observe its obligations under paragraph 5 of Chapter IV by not carrying out human rights due diligence in its supply chain.

The UK NCP recommended that JCB:

- Write a statement of policy which expressly states its commitment to respect human rights. This statement should be separate from its statement on Modern Slavery, Supplier's Code of Conduct and the Dealer's Charter.
- Carry out human rights due diligence to assess actual and potential human rights impacts. In line with the OECD Guidelines and Due Diligence Guidance, JCB should also set out a plan on how it will integrate and act upon the findings of its due diligence – including how impacts will be addressed – if adverse human rights impacts are identified in its supply chain. This process should go beyond simply identifying and managing material risks to the enterprise. As the human rights risks may change over time, due diligence should be a regular, on-going exercise, which should be part of JCB's policy statement on human rights.

## 2 JCB's tracks

### JCB machines used to violate human rights: the evidence

To accompany this report, Amnesty International has produced a digital map from open-source data showing demolitions in the Occupied Palestinian Territories (OPT) that were carried out with JCB equipment.

#### 2.1 Mapping violations

JCB's heavy machinery has left a trail of destruction in its wake in the OPT. There is extensive photographic and video evidence of the use of its equipment by the Israeli authorities and their agents to demolish Palestinian homes in the OPT in breach of international law. Civil society organisations with a presence on the ground, including B'Tselem, Al-Haq and Who Profits, have collected and published such evidence for many years. War on Want drew attention to the use of JCB's machines for work on the Separation Wall in OPT in 2006.<sup>63</sup> Some of this evidence relates to recent demolitions.<sup>64</sup>

While JCB is not the only manufacturer<sup>65</sup> of equipment used in demolitions of Palestinian property, resources and infrastructure, the widespread use of its equipment in the OPT indicates, in some contexts, the company is the brand of choice for these purposes.

In February 2020, a UN report from the Office of the High Commissioner for Human Rights (OHCHR)<sup>66</sup> identified JCB and 111 other companies for their involvement in activities that raise particular concerns regarding the human rights of Palestinians in the OPT. The OHCHR defined 'involved' in terms of substantial and material business activity clearly and directly linked to one or more of the listed activities,<sup>67</sup> which included:

- (a) The supply of equipment and materials facilitating the construction and expansion of settlements and the wall, and associated infrastructures.
- (b) The supply of equipment for the demolition of housing and property, and the destruction of agricultural farms, greenhouses, olive groves and crops.

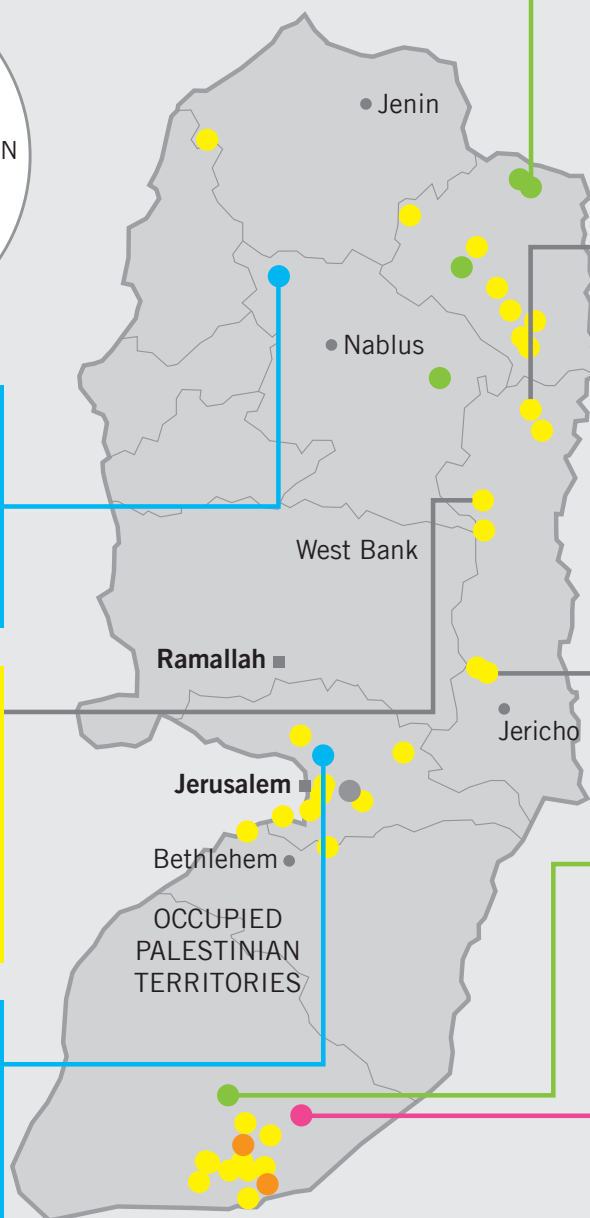
In a letter, the OHCHR informed JCB of the listed activities it appeared to be involved in – based on all the information reviewed by the body – and set out the basic facts of the company's alleged involvement.<sup>68</sup>

Amnesty International's Crisis Evidence Lab, with the help of its Digital Verification Corps based at the University of Essex, verified more than 100 photos and videos from 56 separate incidents, revealing the repeated use of JCB's equipment in activities resulting in human rights violations in the OPT.<sup>69</sup> This research focused primarily on events between 2011 and 2021 in Area C, which makes up around 60 per cent of the West Bank and is under full Israeli control for security, planning and construction purposes. This is where Israel's illegal settlements are located.

Many of the incidents involved the demolition of residential buildings. In some cases, JCB equipment was used to demolish agricultural facilities such as livestock pens and olive trees, while in other cases the company's equipment was used in the destruction or removal of water, sanitation and hygiene infrastructure.

# Use of **JCB products** to commit human rights violations in the Occupied Palestinian Territories

**Affected structure type** ● Residential ● Religious ● Agricultural ● Commercial ● Water, sanitation and hygiene ● Other



**Event date:** 20 Apr 2020  
**Location:** Sabastiya, Nablus  
**Event type:** Demolition  
**Structure types affected:** Commercial; Residential  
**Notes:** Tourism facility and mobile caravan demolished in Sabastiya and Burqa.

**Event date:** 28 Jan 2021  
**Location:** Wadi-al-Ahmar  
**Event type:** Demolition  
**Structure types affected:** Residential; Agricultural  
**Notes:** Three tents housing two families of 13 in total demolished along with structures and equipment used for keeping livestock.

**Event date:** 21 Nov 2018  
**Location:** Shua'fat Refugee Camp  
**Event type:** Demolition  
**Structure types affected:** Commercial  
**Notes:** 18 storefronts and three gas stations demolished.

**Event date:** 7 Feb 2017  
**Location:** Kardala, Tubas  
**Event type:** Demolition  
**Structure types affected:** Agricultural  
**Notes:** Structure used to keep livestock destroyed.

**Event date:** 20 Nov 2013  
**Location:** al-Jiftlik  
**Event type:** Demolition  
**Structure types affected:** Residential  
**Notes:** Family home demolished, affecting its 10 residents.

**Event date:** 17 Mar 2021  
**Location:** a-Nuweim'ah  
**Event type:** Demolition  
**Structure types affected:** Residential  
**Notes:** One shack demolished as well as 10 tents and nine plastic water containers confiscated, affecting 11 families totalling 66 people.

**Event date:** 1 Dec 2020  
**Location:** Tal Zif  
**Event type:** Demolition  
**Structure types affected:** Agricultural  
**Notes:** The forces destroyed a cave and two pre-fabricated buildings used for agricultural purposes.

**Event date:** 27 Jan 2021  
**Location:** Um Qusah  
**Event type:** Demolition  
**Structure types affected:** Religious  
**Notes:** Mosque under construction demolished.

## Mapping human rights violations

■ With the help of its Digital Verification Corps based at the University of Essex, Amnesty International's Crisis Evidence Lab verified more than **100 photos** and videos from **56 separate incidents**, revealing the repeated use of JCB equipment in activities resulting in human rights violations in the OPT. Most of the incidents took place between 2011 and 2021.

■ The coloured rectangles on this page are examples of the details available in our interactive digital map, which can be viewed at: [www.amnesty.org.uk/jcb](http://www.amnesty.org.uk/jcb)



SCAN ME

While 45 of the 56 incidents analysed involved the demolition of residential structures, agricultural land and facilities were also affected in 22 cases. For example, footage analysed shows JCB equipment was involved in the uprooting of 450 olive trees in the village of Bardala in the northern Jordan Valley on 6 February 2019.<sup>70</sup>



### CASE 1: Khirbet Humsah

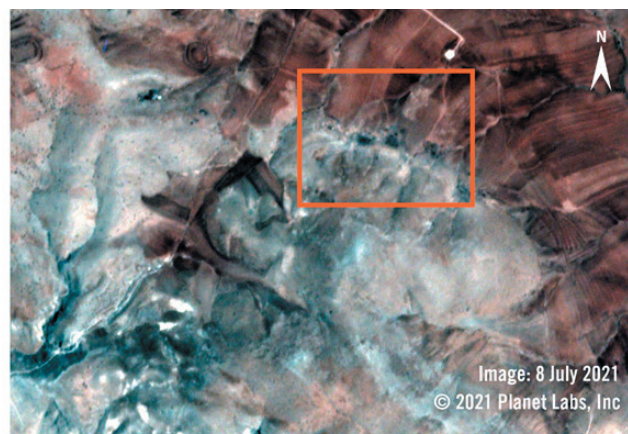
Khirbet Humsah, a Palestinian village of approximately 177 residents, is located in the northern Jordan Valley.<sup>71</sup> The community earn their living as shepherds and farmers. The Israeli settlements of Ro'i, Beka'ot and Hemdat surround the village.

Since 2007, Amnesty International has been documenting Israeli violations against residents of Khirbet Humsah and other communities in the northern Jordan Valley, including multiple demolition incidents and denial of water as a means of expulsion.<sup>72</sup> Palestinians living in Khirbet Humsah and other similar communities are among the most economically marginalized in the OPT. They face harsh winters and summer heat exceeding 40°C, and recently the Covid-19 pandemic, and are without access to adequate health facilities. The constant eviction of residents has had a devastating economic and social impact, as well as taking a psychological toll on the residents. Residents of Khirbet Humsah fear that army bulldozers may return at any time to destroy their homes.

Israeli authorities prevent Palestinian residents of Khirbet Humsah from connecting to electricity or water grids or drilling new wells in the area. The community obtains its water by travelling and filling a water tanker at the 'Ain Shibli spring, 15km away.<sup>73</sup> Since 1972, the land of Khirbet Humsah has been designated as a "firing zone", which prohibits Palestinian construction and is often used as an instrument for mass expulsion of Palestinian Bedouins, especially those living in Area C.<sup>74</sup>

On 7 July 2021, JCB machinery was used in the demolition and attempted forcible transfer of the community of Khirbet Humsah. According to the human rights organization B'Tselem,<sup>75</sup> Israeli soldiers and Civil Administration staff demolished 13 residential and 17 agricultural structures belonging to the community. They also destroyed four water tanks, water lines, fencing, and farming equipment. This was the sixth incident in 2021 alone of demolitions in the community using JCB equipment.





## CASE 2: Al-Hadidiya

The village of Al-Hadidiya is in the northern Jordan Valley. Its nearly 200 residents earn their living as shepherds and farmers. Surrounding Al-Hadidiya, Israel established the settlements of Ro'i in 1976, which has a population of 175 settlers; and Beka'ot in 1972, which has a population of 182 settlers, allocating them parts of the farmlands of Al-Hadidiya.<sup>76</sup> Al-Hadidiya is not connected to a water grid and is deliberately cut off from any regular water supply despite its proximity to Beka'ot settlement, which has a water pump installed by the Israeli national water company Mekorot.

Before Israel's occupation of the West Bank in 1967, residents of Al-Hadidiya lived a few kilometres east of the village's current location. The site was declared to be a "firing zone" and the residents were ordered to vacate it in 1997. The residents filed a petition to the Supreme Court of Israel against the expulsion, which was rejected in 2003, and the residents were forced to leave. However, the Israeli Civil Administration issued demolition orders for structures built in the new location as well, claiming it was designated agricultural land.<sup>77</sup> The villagers filed another petition in March 2004, but it was rejected in December 2006 after the Supreme Court declined to intervene in the considerations of the Civil Administration. Palestinian residents of the community have been forcibly displaced at least five times since 2006.

Due to these and other policies, the Israeli authorities have forced the residents of Al-Hadidiya to live in extremely difficult conditions. They are forbidden from building permanent structures by discriminatory planning and building laws and are consequently forced to live in tents and shacks that provide little protection from the harsh weather. Israeli authorities consider these structures to be "illegal" and have demolished them on several occasions.<sup>78</sup> According to OCHA, between January 2009 and August 2020, Israel demolished 119 structures in Al-Hadidiya, displacing 142 people and affecting a total of 430 people.<sup>79</sup> Of these demolished structures, 37 were homes and 63 were agricultural structures.

On 11 October 2018, JCB equipment was used to demolish three residential structures in Al-Hadidiya.<sup>80</sup> Israeli Civil Administration officials, as well as military and border police escorts, led the demolition of three homes housing a family of eight. Analysis shows the roof of a structure in this area present in satellite imagery captured before the reported demolition was no longer visible after 11 October.

## 2.2 JCB's reticence

The fact JCB's equipment is used extensively in ways that abuse human rights has at best been downplayed by the company, if not ignored. JCB has been reticent in defending its position publicly, which would have made it easier to scrutinise the company's arguments.

JCB has been associated with human rights violations in the OPT since at least 2006 through the use of its equipment. But the company appears to have had little contact with organisations that have drawn its attention to these impacts, including those that have a strong presence on the ground and provide photographic and video evidence of the demolition of Palestinian homes.<sup>81</sup>

For example, UK charity Lawyers for Palestinian Human Rights (LPHR) wrote to JCB in 2018 about human rights violations linked to the company's products and asking several related questions.<sup>82</sup> LPHR asserts that JCB did not respond.

The Business and Human Rights Resource Centre (Resource Centre) is an international NGO that engages extensively with companies on human right issues.<sup>83</sup> It acts as an intermediary between civil society organisations alleging human rights violations and the companies against whom the allegations are made. It operates a company response mechanism that invites companies to engage with human rights issues. The Resource Centre wrote to JCB in 2018 drawing attention to concerns raised by LPHR. According to the Resource Centre's website, no response was received.<sup>84</sup>

The abundance of evidence now in the public domain might have been expected to have prompted the company to engage with the organisations responsible for compiling and publishing it. This would have put the company in a better position to establish the validity of the material, the strength of the allegations, and the potential consequences of failing to address the issues raised.

Instead, JCB appears to have ignored much of the material from organisations aiming to raise the profile of human rights issues within the company and receive a response. The lack of constructive engagement with those who have presented serious human rights concerns and the apparent unwillingness to examine the evidence is indicative of a lack of commitment by the company to give effect to its human rights responsibilities.

Engaging with stakeholders<sup>85</sup> to assess human rights risks has become a key principle under international standards applicable to all companies, including private companies. The importance of stakeholder engagement is set out very clearly in UN Guiding Principle 18:

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- a) draw on internal and/or independent external human rights expertise
- b) involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

By not consulting with and seeking to understand the concerns of potentially affected stakeholders, JCB is failing in its due diligence to assess human rights impacts that may be associated with the company through the use of its products. Even in situations where such consultation is not possible, the company could avail itself of advice from credible independent experts and human rights defenders.

JCB's reluctance to fully engage<sup>86</sup> makes it more difficult for the company to understand the public concerns and business risks relating to violations of human rights arising from the use of its products. In the 'Principal risks and uncertainties' set out in the company's 2019 Strategic Report, it lists a number of issues, including the cyclical nature of the industry, the competitive environment, availability of key raw materials, changing regulations and macroeconomic factors such as cyber security, terrorism, natural disaster and infectious disease.<sup>87</sup> Despite the extensive evidence linking JCB products to human rights violations, this does not feature in the company's public reports as a business risk.

This failure to engage with communities adversely affected by the company's products and with other key stakeholders amounts to a failure to conduct proper human rights due diligence – a key concept of the international human rights standards applicable to companies.<sup>88</sup> It also appears to be inconsistent with JCB's claims in its Strategic Report filing that it 'maintains a strict code of conduct to promote and maintain high standards of business conduct and to ensure it acts fairly towards its various stakeholders'.<sup>89</sup>

## 2.3 JCB's defence

JCB distances itself from responsibility for the use of its products in the OPT on a number of grounds. These were submitted to the UK government's National Contact Point for the OECD Guidelines (UK NCP) to defend the company against a human rights complaint lodged by a UK charity, Lawyers for Palestinian Human Rights, with supporting evidence.<sup>90</sup> These grounds are set out by the UK NCP in its initial assessment of the complaint against the company (see Box 2 below).<sup>91</sup> They are also contained in a response from JCB to the European Trade Union Network for Justice in Palestine.<sup>92</sup>

### **BOX 2:** Extract from the UK NCP's Initial Assessment: Lawyers for Palestinian Human Rights complaint to the UK NCP about JCB, published on 12 October 2020

19. In their response, JCB confirmed that all of the products they supply to Israel are via a third-party independent distributor, Comasco. They state that they have not sold any machinery directly to the Israeli authorities. They state that once products have been sold to Comasco, JCB has no legal ownership of them and they claim, therefore, they cannot stipulate to whom their products can or cannot be sold to.

20. In their response JCB notes, and provides information, that there is an established second-hand market in Israel for their products. They therefore challenge the complainant's assertion that the only route for Israeli authorities, or privately contracted companies, to obtain JCB machinery is through purchasing it directly

from Comasco. JCB also highlights they sell products throughout neighbouring countries, which could subsequently be transported into Israel.

21. JCB claims that without knowing the serial numbers of the machinery in question it is not possible to confirm their origin and whether or not they originated from Comasco or whether they were purchased second hand or provided via a lease.

22. In light of all the above, JCB maintains that no meaningful link can be made between JCB and the alleged adverse impacts. JCB state that any link between the two, by virtue of machines manufactured by JCB being used, is minor.

...

25. JCB claims from the information provided that their products are only associated with a small number of the incidents of demolitions that LPHR raise in the complaint. They also note that the complainant's information shows equipment from other providers being used in demolitions. JCB therefore argues that if they were to cease supplying their machinery as the complainant request, the demolitions would not be affected in any way. JCB also argues that any attempt to stop the supply of their machinery to Israel would also prevent such machinery being used for entirely peaceful purposes, for example the construction of hospitals, roads and schools and to restrict the sale of machines in Israel would impact the peoples' ability to build essential amenities which would promote their human rights. The complainant states that JCB have been silent in their response on the issue of their involvement in settlement-related construction.

**Source:** <https://www.gov.uk/government/publications/lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-jcb/initial-assessment-lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-jcb>

The positions JCB takes, as outlined above and in Annex 1, are not compatible with international human rights standards applicable to the company or with the experience of other companies that have implemented measures to prevent harms linked to their products. They also ignore the contractual and technological mechanisms available to JCB to monitor and manage the use of its machinery.

- **JCB does not have business operations in the OPT.**

A company does not need to have any business operations in or near the place human rights abuses occur to be culpable. In a globalised world, a company's involvement may be determined in other ways, such as its domination of a particular market, business relationships with suppliers or users of its products, or the technological means it adopts to manage its business operations. In JCB's case, all three of these aspects may be applicable to the use of the company's equipment in contexts where human rights violations occur. For example, JCB's LiveLink system<sup>93</sup> could be deployed to track and monitor use of its machinery in the OPT if the company chose to use it (See Box 3).



### BOX 3: JCB's LiveLink fleet management and security system

The LiveLink system fitted to some JCB products is telematics software that records and provides the location of the item and critical data about its functioning. These include machine alerts, diagnostic data, maintenance records and service history, fuel consumption, duty cycles, and immobiliser code recording.

JCB promotes LiveLink as a means of enabling users of its products to have complete control over their entire fleet. This includes tracking and reporting facilities and the capacity to share machine data with others.

JCB's Privacy Policy specifies LiveLink is active on JCB products as they leave the factory. Even if users of its products choose not to use the system, it remains active and continues to collect data.

In this way JCB is able to maintain comprehensive information about the use of its equipment after leaving the factory. The default position would appear to be that such information gathering will continue to be active unless users of its products contact the company to discontinue it.

Extracted from: <https://www.jcb.com/en-gb/customer-support/livelink>

- **No meaningful link can be made between JCB and the alleged adverse impacts.** Under the UN Guiding Principles, business enterprises are considered to be involved in human rights harm by causing or contributing to the adverse impact, or because the impact is caused, or contributed to, by an entity with which the company has a business relationship and is linked to its own operations, products or services. The sole sales agency agreement between JCB and Comasco falls within the definition of a business relationship under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.<sup>94</sup> The sale of JCB machinery products by Comasco is part of the business relationship, as it forms part of the value chain, irrespective of whether JCB has control over the sale or leverage over the user. There is also an independent assessment by the UN Office of the High Commissioner for Human Rights (OHCHR) that JCB machinery is used for adverse human rights impacts in the OPT.<sup>95</sup> Accordingly, JCB is directly linked to the use of its machinery – sold by Comasco – that has potential or actual adverse human rights impacts on Palestinians.
- **JCB has not sold machinery to contractors carrying out the acts complained of in the OPT or to the Israeli government, as all its sales to Israel are via its sole sales agent, Comasco.** JCB can be implicated in human rights abuses without having a contractual business relationship with those bodies primarily responsible for the violations. Where transactions are conducted at arms' length from the perpetrators of harm, a key question is whether the company knew or should have known some of the equipment sold to Comasco – the sole agent – was likely to contribute to human rights abuses. If the company had this knowledge, then it has the responsibility to take preventative measures. If JCB failed to carry out due diligence fact finding and assessments, then it is responsible for that failure to act – wilful ignorance is

no defence. A responsible company should not create false walls between itself and the impact of its actions.

- **Once products have been sold to Comasco, JCB has no legal ownership of them and therefore cannot stipulate to whom their products are sold.**

This argument misses the mark. JCB undeniably has the means to influence the conditions under which its products are sold by its sole agent in Israel. A company's responsibility for human rights abuses carried out with its equipment does not evaporate simply by using an intermediary sales agent.

Furthermore, JCB has an ongoing role in the maintenance of its products through its agents, dealerships, and LiveLink digital diagnostic systems.<sup>96</sup> The heavy earthmoving products JCB supplies to Comasco are complex pieces of machinery requiring spare parts and technological know-how that JCB, or those trained by the company, are best placed to provide. Comasco's ability to enter into maintenance agreements with Israel's Ministry of Defence for equipment of the type used in demolitions of Palestinian property may therefore depend on ongoing support from JCB.<sup>97</sup>

As set out in Chapters 4 and 5, other companies have found ways of preventing their products falling into the hands of those who might misuse them in ways that breach human rights.

- **Without knowing the serial numbers of the machinery implicated in human rights violations, it is not possible to confirm their origin and whether they originated from Comasco, were purchased second-hand or provided via a lease.**

Through its LiveLink technology, JCB can track and monitor most aspects of its earthmoving equipment's performance. This includes location of its products and critical machine alerts, diagnostic data, maintenance records and service history, fuel consumption, duty cycles and immobiliser code recording. Such technological means should put JCB in a position to identify the serial numbers of its machinery used for the destruction of Palestinian property and construction of Israeli settlements. This information should be viewed by the company as a necessary part of its human rights due diligence.

JCB's claim it cannot keep track of what happens to its products after they leave its factories should be put in context. According to JCB, LiveLink has become the standard default option for its earthmoving equipment for a five-year period after leaving the factory. Therefore JCB should be in a position to know when, where and for what purposes each item of equipment sold to Comasco is used. If JCB chooses to disable this technology at the request of a customer, then this is a conscious decision taken by the company. Given the high risk of equipment sold by Comasco being implicated in human rights violations in the OPT, JCB should insist, as a condition of sale to Comasco, its tracking technology for its earthmoving products remains active, and that this condition is imposed contractually on any subsequent purchasers.

- **JCB has no control over the second-hand market for its products. Therefore it cannot be held responsible for human rights violations arising from the use of its products sourced from the second-hand market.**

In reality, JCB has oversight over a significant proportion of the second-hand market in so far as it provides certification of used machines, advertises used machines that have been certified, and points customers in the direction of dealers who stock and maintain these machines.<sup>98</sup> Anyone from Israel seeking new or pre-owned JCB equipment on JCB's website will be pointed in the direction of Comasco.<sup>99</sup> JCB promotes its extensive dealer network as offering the best used JCB machines on the market. As a result, JCB's business relationships with an established second-hand market may link the company to human rights violations arising from the use of its products procured from that market.
- **Equipment from other providers is also used in demolitions. If JCB ceased supplying its machinery, the demolitions would not be affected in any way.**

This assertion embodies the idea it is acceptable to undertake commercial activity contributing to human rights violations that would have occurred anyway. This line of argument is unethical and has been widely discredited, as it would give any corporation a licence to become involved in human rights violations provided it could show these abuses would still have occurred even if the company had not been part of the chain of causation in so far as another company would have taken its place.<sup>100</sup> It is not an adequate defence to criminal or civil liability for a business to argue a particular harm would have occurred anyway because of another party's actions. This line of argument has been dismissed in two recent cases.<sup>101</sup>
- **Any attempt to stop the supply of its machinery to Israel would prevent its equipment being used for entirely peaceful purposes, such as the construction of hospitals, roads and schools.**

This cannot be used as a justification or mitigating factor for harmful activities undertaken by the company. Any positive benefits arising from JCB's commercial or philanthropic activities are irrelevant to consideration of the company's specific responsibility to respect human rights according to international standards. Human rights are not a scorecard that allow abuses to be traded-off in this way.
- **JCB has a consistent record in providing urgent and substantial support in response to natural disasters around the world.**

The same consideration applies as above. Businesses may undertake other commitments or activities to support and promote human rights. But this does not offset their failure to respect human rights throughout their operations according to international standards.<sup>102</sup>

The defences listed above are variations on a common theme, articulated by some companies when they face allegations of involvement in human rights violations.<sup>103</sup> Such arguments ignore the development of international human rights standards for companies that have evolved within the UN and the OECD over the past two decades. They also ignore the growing efforts of victims and those taking up their causes to ensure companies are held accountable for their involvement in abuses.

What is changing is that the arguments JCB uses in its defence are increasingly being challenged in principle and being rejected in court decisions. Chapter 3 assesses these arguments from a legal perspective with regard to trends and developments in

jurisprudence on these issues. Chapter 4 examines these arguments through the lens of how companies should be managing human rights risks proactively. Chapter 5 sets out practical mechanisms for addressing the human rights impacts that might arise from use of a company's products.

## 2.4 JCB's distribution network in Israel

J.C. Bamford Excavators Limited is a private company incorporated in the UK. The company and its subsidiaries are part of a family-owned group, where most of the directors are members of the Bamford family. Ultimate control over the group rests with a holding company based in Bermuda, Amberlake Holdings Limited.<sup>104</sup> As a private rather than a public company, only limited information about the nature of its work and business relationships is available to the public.

The principal activity of JCB and its subsidiaries is the 'design, manufacture, marketing and sale of machines for the construction and agricultural industries'.<sup>105</sup> This includes a comprehensive range of excavating, earthmoving, materials handling and agricultural machines, and the provision of after-sales service and supply of parts for those machines.<sup>106</sup> JCB manufactures and markets construction machinery and equipment for use worldwide. It produces generators, wheel loaders, dump trucks, backhoe loaders, hydraulic excavators, forklifts, lighting towers, utility vehicles, and defence products.<sup>107</sup>

JCB lists a privately-owned Israeli company, Comasco Ltd (Comasco), as its sole dealer in Israel.<sup>108</sup>

Comasco is a family-run company that has been a JCB dealer in Israel since 1966. It states it offers customers a full solution for machines and service packages, and provides a wide selection of JCB machine models, including backhoe loaders, telescopic handlers, wheeled loaders, wheeled excavators, tracked excavators, skid steer loaders, mini excavators, JCB's Electric 'E-tech range', compaction equipment, and rough terrain forklifts.

Comasco states it not only imports hundreds of different models of mechanical engineering tools and equipment but also provides service to over 5,000 customers in Israel.<sup>109</sup> The company's website makes it clear it has an ongoing role in supporting customers 'through our extensive service center and first of its kind "Uptime Center" in Israel'.

This means Comasco is likely to enter into contracts with customers for provision of after-sale maintenance services. Amnesty International has obtained a number of these contracts between Comasco and Israel's Ministry of Defence, some of which relate to JCB's backhoe loaders, which are specifically used in demolitions.<sup>110</sup>

While it is theoretically possible for Comasco to be maintaining Ministry of Defence equipment that was purchased from elsewhere, it is more likely the Israeli government and its security forces are purchasing products directly from Comasco, JCB's sole agent in Israel with the requisite expertise.

JCB defends its position by citing the second-hand market for its products and emphasising the lack of knowledge and control the company has over its products after they leave the factory. In reality, JCB has oversight over a significant proportion of the second-hand market in so far as it provides certification of used machines, advertises used machines that have been certified, and points customers in the direction of dealers who stock and maintain these machines.<sup>111</sup> Anyone from Israel seeking new or pre-owned JCB equipment on JCB's website will be pointed in the direction of Comasco.<sup>112</sup> JCB promotes its extensive dealer network as offering the best used JCB machines on the market.

Given the extent to which the second-hand market for JCB's products is linked to its network of dealers, the company cannot distance itself from the way in which its products are sold second-hand.

In its complaint to the UK National Contact Point, Lawyers for Palestinian Human Rights (LPHR) cite 2014 data for JCB's market share in Israel that appeared on Comasco's website describing JCB as:

a brand with 65% of the market share for diggers, 65% of the market share for telescopic tools and 90% of all loaders up to 150HP with a 1.5m<sup>3</sup> bucket... [T]he above data clearly illustrates quite objectively that anyone involved in construction, municipal services, earthmoving, removal, industrial and agriculture work clearly prefers JCB. Nine out of every ten loaders up to 150 HP (1.5m<sup>3</sup>) is a JCB; there can be no doubt that no other loader offers as many advantages.<sup>113</sup>

LPHR also points to the JCB catalogue on Comasco's website. It advertises 15 different vehicles, four different pieces of equipment, and various parts, which are all available through Comasco.

This indicates the extent to which JCB's products are likely to be used for construction and demolition across Israel and the OPT. This is reinforced by the multiplicity of video and photographic evidence of use of JCB's products for demolishing Palestinian homes and constructing Israeli settlements.

## 2.5 Twin track approach – upstream v downstream

### BOX 4: The terminology used in this report

A **value chain** is the range of activities and processes needed to create a product and get it to market (and, ultimately to an **end user**; see definition below).

The **downstream value chain** refers to the part of the value chain concerned with the delivery of a product (or component of a product) to market, and ultimately to an **end-user**. It is distinguishable from the **upstream value chain** (often referred to as the **supply chain**), the part of the value chain concerned with the sourcing by a manufacturer of the goods (or components of goods, such as raw or unprocessed materials) needed to make products (or components of products) for market.<sup>114</sup>

**Downstream actors** refers to companies or intermediaries in the downstream value chain that are instrumental in the delivery of a product (or component of a product) to market, up to and including the **end user**. Depending on the way a business enterprise and its downstream value chain is structured, key **downstream actors** could be **dealers, distributors, franchisees, licensees, purchasers, customers and consumers**.

A **Tier 1 actor** refers to a person with whom the company in question has a direct contractual relationship (being the actor on the next tier down the value chain from the relevant company), and a **Tier 1 business relationship** refers to the relationship between those parties.

The term **downstream human rights risks** refers to the risks of adverse human rights impacts occurring in the **downstream value chain** and in which one or more **downstream actors** could be said to be involved.

An **end user** is the downstream actor right at the end (or bottom) of the value chain. This is the person or entity that actually uses a product (as opposed to a dealer, distributor, or other intermediary who facilitates, in some way, the transfer of the product down the value chain).

**End-use risks** refer to the risk of human rights abuses occurring either to an end user or at the hands of an end user of a product. These are the **downstream human rights risks that occur at the point of, or because of, the end use of a product**.

Note that in this report the term **end-use risks** is used flexibly to encompass situations where the products have been **used in the manner intended**, but also situations in which products have been **misused in some way, repurposed for some unauthorised use**, or incorporated into some other product that is then used in a way that abuses human rights.

JCB defends itself from accusations of involvement in human rights abuses in the OPT on the basis the company does not sell machinery to the Israeli authorities directly.<sup>115</sup> Instead, JCB's responses to the UK National Contact Point for the OECD Guidelines for Multinational Enterprises suggest a mindset in which the responsibility of a manufacturer or exporter to identify and address human rights risks arising from use of its products ends as soon as ownership of those products passes to another person or company.

What is particularly revealing about JCB's approach to addressing the human rights context of use of its products is how significantly this differs from its stated approach to human rights violations in its supply chain. This can be seen mostly starkly by contrasting the ethical commitments in the company's Modern Slavery Statement<sup>116</sup> with the lack of any such commitments towards its downstream value chain.

While the commitments in the company's Modern Slavery Statement are not supported by an explicit human rights policy, and therefore may be motivated largely by the need to comply with Section 54 of the UK Modern Slavery Act 2015, it is nonetheless significant JCB acknowledges in principle it has responsibility for its upstream supply chain.



TABLE 1  
JCB's approach to upstream and downstream activities

JCB's acknowledgement of responsibility for its upstream activities (upstream supply chain)	JCB's lack of acknowledgement of responsibility for its downstream activities, (downstream value chain)
Policy commitment: 'JCB has a zero tolerance approach to Modern Slavery within our operations and supply chain.'	Policy commitment on human rights:  <b>Not apparent</b>
Whistleblowing Policy: 'We also operate a Whistleblowing Policy aimed principally at our UK employees but also available to all our employees which encourages individuals to report wrong doing which extends to human rights violations like Modern Slavery.'	Whistleblowing Policy on use of its products:  <b>Not apparent</b>
'The supply chain involved in the manufacture of JCB's products is complex, involving multiple levels between JCB and the source of raw materials that enter the manufacturing process.'	Getting to grips with complexity of its user chain:  <b>Not apparent</b>
'The approach we take is to actively manage and use our Tier 1 (direct) suppliers as the means by which JCB clearly communicates our expectations down through the supply chain.'	Actively use its Tier 1 customers as the means to communicate expectations throughout its user chain?  <b>Not apparent</b>
'Before any JCB supplier is appointed, a comprehensive review is undertaken of their commercial, financial and reputational standing.'	Reviewing the reputational standing of JCB's distribution agents' with regard to human rights?  <b>Not apparent</b>
'JCB's Supplier Code of Conduct communicates our social standards and business ethics to our supply chain. This includes specific requirements which are directly relevant to ensuring Modern Slavery is not taking place within the supplier's business.'	User Chain Code of Conduct for all JCB's agents?  <b>Not apparent</b>
'Acceptance of our Supplier Code of Conduct is a mandatory requirement of doing business with JCB. All new and existing suppliers are required to sign this important document.'	Code of Conduct to avoid harmful use of JCB's products:  <b>Not apparent</b>
'JCB's standard Terms and Conditions of Purchase include dedicated Modern Slavery & Labour Law compliance clauses, which contractually oblige our suppliers to ensure Modern Slavery is not occurring in their business. These clauses also oblige them to implement due diligence procedures for their own suppliers to ensure that no Modern Slavery is taking place further down the supply chain.'	Terms and Conditions of Sale of goods to include human rights compliance clauses and due diligence requirements:  <b>Not apparent</b>
'JCB continues to work with our suppliers to increase supply chain transparency and more specifically in relation to ensuring Modern Slavery is not taking place within its supply chain.'	Working with customers to ensure user chain transparency:  <b>Not apparent</b>

# 3 Legal responsibility for end-use of products

## Chapter summary

1. The tests for corporate legal liability for harm arising from end-use of products allow for a number of bases on which companies may be held liable for the use and misuse of their products further down the value chain.
2. The fact that another party might be more to blame (eg an intermediary such as a distributor, dealer or licensee, or a customer) does not provide a company with an automatic or complete defence.
3. The legal principles used by judges to determine whether a corporate duty of care exists towards people whose human rights might be impacted by business activities are currently undergoing some development. Judges appear to be moving towards a less legally rigid, more flexible, real-world approach, which takes greater account of commercial and operational realities, specifically the options open to companies to exercise leverage over other entities to mitigate risks.
4. Companies providing products to customers in challenging operating environments, such as conflict-affected areas, place themselves at potentially heightened risks of both criminal and civil liability arising from human rights violations.
5. Poor regulatory standards, inadequate local regulatory oversight and enforcement efforts, corruption or lack of respect for the rule of law may not be factors that serve to transfer responsibility elsewhere. Rather, they may be treated as factors that exacerbate risks, increasing foreseeability of harm and making the case for the imposition of a duty of care, and hence legal liability, more compelling.
6. The content of export control laws, and the fact a company was operating in compliance with its obligations under such laws (including the terms of an export licence) would not ordinarily provide a defence to corporate negligence resulting in human rights harms.

JCB defends itself from accusations of involvement in human rights abuses in the OPT on the basis the company does not sell machinery to the Israeli authorities directly.<sup>117</sup> Instead, JCB's responses to the UK National Contact Point for the OECD Guidelines for Multinational Enterprises (see extract reproduced in Box 2) suggest a mindset in which the responsibility of a manufacturer or exporter to identify and address human rights risks arising from its products ends as soon as ownership of those products passes to another person or company.

JCB seeks to bolster these arguments by claiming the presence of a second-hand market for its machinery – coupled with the fact equipment from other suppliers is also used in the demolitions and the likelihood competitors would step in should JCB cease to supply its machinery – effectively sever any causal relationship between JCB and the human rights abuses in question, or render those relationships so weak as to be meaningless.



As discussed in Chapter 4, these comments suggest an approach to risk management that falls far below the standards of human rights due diligence laid down in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

However, this chapter focuses on the legal position and how poor management of end-use risks is an increasingly significant source of legal risk. JCB's apparent reliance on the idea that 'human rights responsibilities end at the factory gate' is seriously misguided. On the contrary, there are many situations in which manufacturers can be held legally responsible for the way third parties use or misuse their products, regardless of whether the products also have socially beneficial uses.

### 3.1 Are manufacturers liable for harmful use of their products?

The short answer is yes, although much depends on the relationships involved and the individual circumstances of the case.

The idea manufacturers can be held legally responsible for the harms their products can cause to people further down the value chain is a long-established principle of tort law, going back to the famous English legal case of *Donoghue v. Stevenson*.<sup>118</sup> In this case, the judges decided a person or entity could be legally liable under the law of negligence if they fail to take reasonable care to avoid acts or omissions that could (on a standard of what is 'reasonably foreseeable') result in injuries to other people.

The basic elements of this widely applied test for negligence are as follows:

- foreseeability of harm to other people giving rise to a 'duty of care'
- failing to live up to the requisite standard of care towards those people
- a causal link between the person or entity's conduct and the harm.

Two issues of particular relevance to the legal context for understanding and addressing end use risks are:

- What kinds of harms should a company be able to foresee, and in relation to whom?
- How close does the causal relationship between the company and the eventual harm need to be for the company to be legally liable?

To help clarify the legal obligations of companies and ensure liability is not completely open-ended, legal tests for foreseeability and causation are often qualified by the requirement that there is sufficient 'proximity' between the harm and the acts or omissions of the defendant in the particular case. This proximity requirement provides judges with the space to take account of relevant policy considerations in favour of, or perhaps against, the imposition of liability in the particular circumstances. This flexibility is important for ensuring well-established principles of law continue to be appropriately responsive to changing social expectations and needs (see Chapter 4), or changing corporate practices made possible, for example, by new technologies enabling better tracking of products (see Chapter 5).

## 3.2 What makes end-use risks foreseeable?

Which end-use risks are reasonably foreseeable by manufacturers? The question is not always easy to answer. However, for products (a) known to be prone or susceptible to misuse or (b) which appear indispensable to the pursuit of certain human rights-abusing policies, end-use risks would seem to be easier to anticipate with a reasonable degree of precision than widely available or generic products (such as household objects) with multiple possible uses.

As noted previously, the concept of reasonable foreseeability is often qualified in legal tests by the requirement for there to be some proximity between the defendant company and those who have been harmed.<sup>119</sup> However, this does not imply the need for geographical closeness. There are no geographical limits as a matter of principle to the people or communities that may be owed a duty of care.<sup>120</sup> If the risks to people or communities are reasonably foreseeable, it is at least arguable a duty of care to them will exist, wherever in the world they are located.

The objective standard implied by the use of the word ‘reasonable’ for this part of the test for liability confirms companies cannot avoid liability for negligence by failing to do proper checks. On the contrary, ignorance of easily accessible facts or complacency in the face of credible information about human rights harms associated with the use of a company’s products, will more likely harm a company’s defence. This is because judges are generally obliged to base their determinations (as to whether there was a duty of care) on what relevant decision-makers in the company ought to have known in the circumstances, rather than what they can definitely be proved to have known.<sup>121</sup>

In the case of JCB, there is copious, compelling and easily accessible evidence the company’s equipment is used in ways that violate the human rights of Palestinians. Images and mappings of demolitions that have involved JCB’s products are available on the websites of organisations that undertake thorough and credible research into human rights violations in the OPT.<sup>122</sup> Further material is available in some of their archives.

## 3.3 The chain of responsibility

As noted above, the test for legal liability for end-use risks under the law of tort is two-pronged. In addition to the reasonably foreseeable human rights harms, there must be a clear causal link between a company’s failure to respond adequately to human rights risks it could or should have identified (that is, the company’s failure to meet the requisite ‘standard of care’ towards those adversely affected) and the harms that were, in fact, suffered.

For cases concerning end-use risks, a key question that needs to be addressed, therefore, is whether the deliberate or negligent actions or omissions of some intermediary, such as a distributor, licensee or franchisee, or a person with criminal intent, has ‘broken the chain of causation’ to the extent attribution of fault (and imposition of liability in a legal case) would be unjust and unfair.

In its comments to the UK NCP and reported in the UK NCP's Initial Assessment (see Box 2), JCB appears to imply just this (see, especially, paragraphs 19 and 20).

The extent to which such claims are consistent with standards of responsible business conduct as laid down in the OECD Guidelines for Multinational Enterprises (the context in which the statements were made) is discussed in Chapter 4.

As a statement of the legal position, however, this is simplistic at best. The existence of an arguably more culpable intermediary (eg a distributor of products) that is reckless as to end-use risks, (eg as shown by a failure to carry out proper customer checks)<sup>123</sup> may not necessarily absolve a manufacturer of legal responsibility for the harms arising from the manner in which its products are used or misused.

Although each case turns on its own facts, there are legal precedents for the proposition that, where a company is responsible for, or had created, a situation or product with the potential for danger,<sup>124</sup> courts might be inclined to hold that company legally responsible for human rights harms occurring downstream in the value chain where:

- there was a risk the intermediary (or intermediaries) might act in a certain way, making the eventual harm quite predictable,<sup>125</sup> or
- there was a relationship of control between the defendant and third parties more directly involved in the harm (meaning the defendant could and should have done more to prevent the harm from occurring).<sup>126</sup>

In other words, the fact there might be another party arguably more to blame may not necessarily add up to a defence to legal liability for adverse human rights impacts resulting from the way a company's products are used or misused, even in cases where the outcomes were not ones the defendant company would necessarily have approved of or condoned.

### BOX 5: 'It would have happened anyway' – a legitimate defence?

A line of argument raised by JCB on the issue of causation is that 'if they were to cease supplying their machinery as the complainants request, the demolitions would not be affected in any way' (see Box 2, paragraph 25).<sup>127</sup>

In essence the company asserts the human rights harms set out in the complaint by Lawyers for Palestinian Human Rights to the UK NCP would have happened anyway, regardless of anything JCB did or did not do. By extension, this implies JCB's activities had no added effect on the human rights of Palestinians.

In the context of a legal claim under the law of tort, arguments like this have some legal support in the form of the 'but for' or 'no effect' test for causation.

The 'but for' test poses the question 'would the damage have occurred *but for* the defendant's actions?'. If the answer is yes, then the defendant should not be held liable.

However, the application of the 'but for' test is problematic in more complex cases where there are several causes of harm operating together.

In the recent UK decision of *Begum v Maran (UK) Limited*<sup>128</sup> one of the judges had stern words for defendants who might wish to raise arguments of this kind in a context where downstream human rights risks are well documented and well known.

The *Begum v Maran (UK) Limited* case has elements analogous to the situation alleged in the complaint to the UK NCP regarding JCB, in that the operating environment into which assets (a ship in the case of *Begum v Maran*; heavy machinery vehicles and earthmoving equipment in the case of the complaint against JCB) were transferred was a particularly risky one in which the acts or omissions of state agencies were also material contributing factors.

The case of *Begum v Maran (UK) Limited*<sup>129</sup> concerned the death of a worker in a shipbreaking yard in Bangladesh. In a Court of Appeal hearing in 2021, the argument was made on behalf of the defendant (the shipowner that entered into a contract for the ship's demolition) that, given the woeful health and safety standards at the yard in question, the claimant's husband 'might just as easily have been killed or injured when working on another ship'. Lord Justice Males said this was 'a submission which, in my view, does the Defendant no credit', adding 'the fact that the Claimant's husband was exposed to other risks which did not materialise provides no answer to the Claimant's claim resulting from the fatality which did occur... as a result of a foreseeable and foreseen risk'.<sup>130</sup>

### 3.4 Corporate involvement in human rights abuses

Companies can be legally liable for human rights harms, even when they are not the primary perpetrators, under theories of ‘secondary liability’, such as complicity or accomplice liability. While legal tests for secondary liability vary from jurisdiction to jurisdiction, they typically cover behaviour such as aiding and abetting crimes, incitement to commit crimes (or ‘encouragement’), or ‘procuring’ the commission of a crime.

Under UK law, the various heads of secondary liability (traditionally expressed as ‘aid, abet, counsel or procure’) are interpreted reasonably flexibly, treated as overlapping, and cover a range of different forms of encouragement and assistance.

While most familiar in the criminal context, these secondary liability theories are also potential sources of liability in the civil law context.<sup>131</sup> Aiding and abetting was the basis of the civil claim against Caterpillar under the US Alien Tort Statute in the case of *Corrie et al. v. Caterpillar*<sup>132</sup> (see Box 6).

#### **BOX 6: Corrie et al v Caterpillar**

*Corrie et al v Caterpillar* was a federal lawsuit filed under the US Alien Tort Claims Statute against Illinois-based company Caterpillar, Inc. It was filed on behalf of the parents of Rachel Corrie and four Palestinian families whose relatives were killed or injured when Caterpillar bulldozers demolished their homes. Corrie, a 23-year-old activist and US citizen, was crushed to death by a Caterpillar D9 bulldozer in 2003 while protesting against the demolition of a Palestinian home with a family inside. The plaintiffs claimed compensatory damages, alleging liability under the US Torture Victim Protection Act and customary international law.

In their statement of claim, the plaintiffs alleged:

Caterpillar, Inc., has aided and abetted or otherwise been complicit with the Israel Defense Forces... in the above-mentioned human rights violations and war crimes by providing the bulldozers (and/or parts or other assistance related to the bulldozers) used to demolish homes of Palestinians in the OPT in violation of international law when it knew, or should have known, that such bulldozers were being used to commit human rights abuses.

The plaintiffs went on to allege Caterpillar, Inc.:

had constructive notice of such violations since at least 1989 and likely before, when human rights groups began to publicly condemn the demolitions, and beginning in at least 1999, such condemnations were widely circulated in the international press.

And that since 2001 Caterpillar had been on actual notice:

that the bulldozers it was supplying have been used to commit crimes in violation of international law” due to the fact that “[b]eginning that year, human rights groups and concerned U.S. citizens began notifying Caterpillar that it was aiding and abetting violations of international law by providing the IDF with the bulldozers used to destroy homes.

The plaintiffs claimed this knowledge, together with the fact of having provided ‘substantial assistance’ to Israeli Defence Forces to commit crimes of international law, amounted to aiding and abetting violations of international law.

According to the statement of claim, the ‘substantial assistance’ provided to the Israeli Defence Forces took the form of:

1) supplying, selling, and/or entrusting bulldozers used to destroy their homes and inflict severe emotional distress; 2) renewing the lease of such equipment; 3) making repairs and/or supplying necessary parts and/or training, support, manuals, specialized knowledge, or other important information for the bulldozers; and/or 4) failing to provide a warning regarding the use of the bulldozers, or to recall the bulldozers, cancel, or suspend the lease and/or sales of the bulldozers to the IDF even though legally entitled to do so, after it was foreseeable that acting or failing to act could lead to such abuses, and even after it knew or should have known through actual or constructive notice that the bulldozers were being used to commit war crimes, Caterpillar is directly responsible for war crimes. (see para 86).

**Source: Corrie et al v Caterpillar, Statement of Claim, 2 May 2005.**

[https://ccrjustice.org/sites/default/files/assets/Corrie\\_AmendedComplaint.pdf](https://ccrjustice.org/sites/default/files/assets/Corrie_AmendedComplaint.pdf)

The case was ultimately dismissed by the district court and then the Ninth Circuit Court of Appeals in 2007, without consideration of the matters pleaded in support of the claim based on aiding and abetting liability, on the basis of the involvement of the US government in the supply of the bulldozers. According to the court, this meant pronouncing on whether Caterpillar had aided and abetted crimes under international humanitarian law would be beyond the scope of its jurisdiction, as this would be to second guess the foreign policy decisions of the US executive branch. A further attempt to petition the court for a rehearing in 2009 was unsuccessful.

**See further Center for Constitutional Rights.**

<https://ccrjustice.org/home/what-we-do/our-cases/corrie-et-al-v-caterpillar>

The law on secondary liability is notoriously complex. However, secondary liability is an important potential source of corporate legal liability in business and human rights cases for several reasons. First, in many jurisdictions, including the UK, it is not always necessary to prove the secondary party had exactly the same state of mind (ie intent) as the main perpetrator, and actually intended the same results from the illegal behaviour; only that the company had knowledge of the essential elements of the offence.

Second, in many cases judges are permitted to infer knowledge from the circumstances (this is often referred to as ‘constructive knowledge’), which goes some way to address the significant challenge of proving a company’s state of mind.<sup>133</sup>

Thirdly, unlike the theories of corporate liability discussed above, it may not be necessary to prove a direct causal relationship between the assistance given and the commission of the offence; just that ‘substantial assistance’ had been given.

### **BOX 7: What do the UN Guiding Principles on Business and Human Rights say about complicity?<sup>134</sup>**

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being “complicit” in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.

**UN Guiding Principles on Business and Human Rights, Guiding Principle 17, Commentary.**

## **3.5 The law on value chain liability is changing**

The case of *Begum v Maran (UK) Ltd* (see Box 5) is one of a series of recent decisions by UK courts in which judges have sought to clarify the parameters of legal liability of UK-based companies for harms occurring abroad in which other corporate actors – subsidiaries, contractors, or customers – may also have played a part or be more closely causally connected with the situation that gave rise to the harms.

The general direction of travel of these cases suggests judges are becoming less inclined to view intermediaries (eg subsidiaries, contractors, etc) as third parties breaking the chain of causation’, and more inclined to examine the substance of the commercial relationships to better understand the risk management opportunities that may have existed, as part of a more holistic appraisal of whether the relevant duty of care was met.

In other words, the starting point of the analysis is less likely to be that the intermediary (ie the third party) is autonomous. Rather the fact that a company operates through intermediaries, and the operating contexts in which those intermediaries do business, are factors relevant to the salient human rights risks for the business enterprise as a whole. In keeping with this, a suitable risk mitigation plan by a company should be designed to exert leverage over intermediaries and influence their conduct.

This can be seen in the case of *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines*<sup>135</sup> in which the UK Supreme Court took account of the opportunities a UK parent company might have had to influence the operation of a mine in Zambia to decide there was an arguable case that should be allowed to go to trial. In coming to this decision, Lord Briggs commented he was:

reluctant to shoehorn all cases of the parent’s liability into specific [ie pre-determined] categories” ... [adding that] ... “there is no limit to the models of management and control which may be put in place within a multinational group of companies.”<sup>136</sup>

This more flexible, less formulaic, approach was endorsed in a further Supreme Court decision in the case of *Okpabi and others v Royal Dutch Shell Plc*.<sup>137</sup> Here the judges agreed the issue of whether there was a duty of care should be determined by ordinary principles of tort, and that the level of control indicated by the form of the relationship was not as important as the roles played by different corporate actors *in fact*.<sup>138</sup>



Then, in the case of *Begum v Maran (UK) Limited* (see Box 5), the Court of Appeal opened the door to ‘value chain liability’ a little further, by suggesting it would be appropriate (for the purposes of deciding whether or not there was a duty of care) to take account not just of the presence of contractual safeguards,<sup>139</sup> but whether they were likely to be enforced in reality.<sup>140</sup>

As noted above, the tests for corporate legal liability provide flexibility for judges to respond to new policy developments and challenges, including shifts in societal expectations or needs.

The UN Guiding Principles, as a global and authoritative statement of expectations of companies in terms of human rights risk management is obviously a key reference point for lawyers and courts as they weigh up the merits of arguments about whether the applicable legal standards have been met in specific instances.<sup>141</sup> The key components of the UN Guiding Principles framework, and the implications of this framework for managing end-use risks, are discussed in more detail in Chapter 4.

### 3.6 Other legal developments relating to end-use risks

The judge-driven legal developments described immediately above echo some interesting and important legislative developments and proposals elsewhere.

Over the past few years, a number of jurisdictions have been considering, or taken positive steps to implement, mandatory human rights due diligence (mHRDD) regimes. While these regimes may be structured in a variety of ways, and differ in terms of scope and issue coverage,<sup>142</sup> their common thread is a legally enforceable standard for the conduct of human rights due diligence (or certain aspects of human rights due diligence) by companies.

One of the earliest, and also most ambitious, of the pieces of legislation was the 2017 French Corporate Duty of Vigilance Law.<sup>143</sup> This law requires larger French-registered companies (those with 5,000 or more employees in France, including employees of their French subsidiaries, or 10,000 or more employees worldwide) to prepare a ‘vigilance plan’. It creates new civil causes of action under which people harmed by failures of companies to comply with their statutory obligations under the regime can apply to French judicial authorities for corrective orders and, in some cases, also financial compensation.<sup>144</sup>

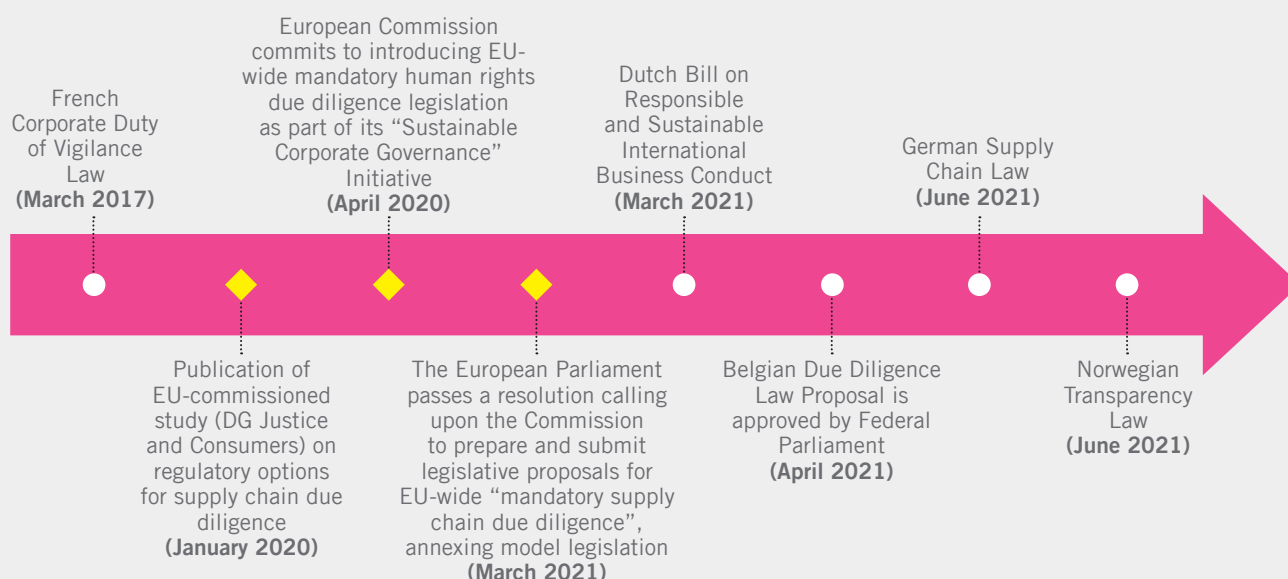
The French law has been followed by a series of domestic legal regimes in a number of jurisdictions (within the EU and elsewhere) that draw from, in one way or another, concepts of ‘human rights due diligence’.

Importantly, the EU is now considering the introduction of an EU-wide regime on due diligence for supply chains.<sup>145</sup> These EU proposals have implications for:

- the manner in which end-use risks are managed by companies in practice;
- the risk profiles of companies that produce and distribute products, technologies and equipment capable of being deployed in human rights-abusing ways.



## A timeline of mandatory human rights due diligence



Running alongside existing laws on tort and negligence will be a series of specialised regimes at member State level focusing specifically on human rights and environmental harms, which will be enforceable in a range of different ways. Although the tort-based and the specialised mHRDD regimes have different legal origins, some degree of cross-fertilisation and convergence seems inevitable over time, as the relevance of the UN Guiding Principles to judicial determinations of liability in a variety of contexts (especially as these relate to human rights due diligence) becomes clearer.<sup>146</sup> These standards, and what they mean for the practical management of end-use risks, provide the focus of Chapter 4.

### 3.7 Do exporters to conflict-affected areas face increased liability?

The answer to this question is yes, for three main reasons:

- First, the risks of downstream human rights harms arising from misuse of products are likely to be exacerbated in challenging operational contexts such as these.
- Second, doing business in conflict-affected areas significantly raises the risks of involvement in serious violations of international human rights or humanitarian law committed by state actors such as the military, security forces, or the police.<sup>147</sup>
- Third, there may also be regulatory restrictions to consider, for instance under export control regimes.

#### Heightened risks of misuse of products

In challenging or dangerous operating contexts, such as conflict-affected areas or areas of weak governance, the risks of harms arising from misuse of products or machinery are often far greater than in regulatory environments where there is the political will and resources to uphold domestic and international law and standards.

As discussed in earlier sections of this report relating to civil liability, heightened risks of harm have a bearing on questions of foreseeability and hence whether there is a duty of care towards those who are harmed, or may be harmed, as a result.

Heightened risk applies in States with a poor track record of complying with international human rights and humanitarian law, and in contexts where there is inadequate regulatory oversight, corruption or lack of respect for the rule of law. These factors may not transfer responsibility elsewhere by breaking the chain of causation; rather, they may be treated as factors that exacerbate risks, increasing foreseeability of harm and making the case for the imposition of a duty of care that much more compelling.<sup>148</sup>

### **Heightened risks of being found complicit in grave human rights abuses**

As John Ruggie, UN Special Representative on Business and Human Rights, observed in a report to the UN Human Rights Council in 2007:

Few legitimate firms may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of “complicity” in such crimes. For example, of the more than forty [Alien Tort Statute] cases brought against companies in the US – now the largest body of domestic jurisprudence regarding corporate responsibility for international crimes – most have concerned alleged complicity, where the actual perpetrators were public or private security forces, other government agents, or armed factions in civil conflicts.<sup>149</sup>

In 2020, the Supreme Court of Canada ruled a lawsuit against Canadian mining company, Nevsun Resources Ltd for violations of ‘customary international law’ in Canada could go ahead. ‘Customary international law’ is part of international law; it is like the common law of the international legal system. Within customary international law, some rules are so important no one is allowed to ever break them. This case was taken by workers on Eritrea’s National Service Program who were forced to construct a mine under harsh and dangerous conditions. The workers sued Nevsun, saying it was responsible for slavery; forced labour; cruel, unusual, or degrading treatment; and crimes against humanity.<sup>150</sup>

**The OPT is a conflict-affected area.** This fact alone increases the risks of companies operating there causing or contributing to serious human rights abuses, and for their directors and managers to be found individually responsible. (For an example of how such a situation could arise in practice, see Box 8.) The risks attached to operating in the context of a military occupation, or being linked to such a context via business relationships, are compounded by the fact Israel has a long track record of demolishing homes and evicting Palestinians to make way for Israeli settlements, which are illegal under international humanitarian law.<sup>151</sup> Their construction also constitutes war crimes under the Rome Statute of the International Criminal Court.<sup>152</sup>

**Companies providing machinery, equipment or technologies to governments in the knowledge they will be used, or are reasonably likely to be used, to commit gross human rights abuses including war crimes, risk placing themselves, their directors and managers in legal jeopardy under criminal law.**<sup>153</sup>

### **BOX 8: Conflict and legal risk: Indictments of Amesys and Nexa executives**

On 16 and 17 June 2021, four Amesys and Nexa Technologies executives were indicted by investigating judges of the crimes against humanity and war crimes unit of the Paris Judicial Court. They were charged with complicity in torture in Libya and complicity in torture and enforced disappearance in Egypt. The indictments are connected with the alleged supply of surveillance equipment to the authoritarian regimes in Libya and Egypt, which were allegedly used to help track down political opponents who were then arrested and tortured in jail.

The indictments arise from complaints filed in 2011 by civil society organisations the International Federation for Human Rights (FIDH) and the French League for Human Rights (LDH), following reports published in the *Wall Street Journal* and WikiLeaks. A further complaint was filed in November 2017 by the same organisations alleging complicity in the repressive operations carried out by the government of President Abdel Fattah el-Sisi of Egypt through the sale of surveillance equipment.

**Source: FIDH Press Release, 22 June 2021, ‘Surveillance and torture in Egypt and Libya: Amesys and Nexa Technologies executives indicted’.**

<https://www.fidh.org/en/region/north-africa-middle-east/egypt/surveillance-and-torture-in-egypt-and-libya-amesys-and-nexa>

Many jurisdictions have made aiding and abetting the commission of war crimes in other jurisdictions a criminal offence,<sup>154</sup> and it is not unusual for these legal regimes to provide for the possibility of prosecutions against corporate entities, as well as individuals.<sup>155</sup> The risk of criminal liability for offences of this kind is compounded by the very broad geographical reach typically given to these types of legal regimes.

For enterprises operating across national borders, and companies with business interests in multiple jurisdictions, the result is an ‘expanding web of liability for business entities implicated in international crimes’.<sup>156</sup>

### **BOX 9: Professor John Ruggie, former UN Special Representative on Business and Human Rights, on corporate liability for crimes under international law**

In this fluid setting, simple laws of probability alone suggest that corporations will be subject to increased liability for international crimes in the future. They may face either criminal or civil liability depending on whether international standards are incorporated into a State’s criminal code or as a civil cause of action (as under the United States Alien Torts Claims Act, or ATCA).

Furthermore, companies cannot be certain where claims will be brought against them or what precise standards they may be held to, because no two national jurisdictions have identical evidentiary and other procedural rules.

**John Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts*, 19 February 2007, A/HRC/4/35, para. 27.**

## Regulatory considerations for exporters

Companies considering exporting goods or services to jurisdictions affected by conflict or with repressive regimes may be subject to special conditions, prohibitions or licensing requirements under domestic export control laws.

However, the fact that an export licence has been granted, and the compliance of an exporter with all relevant licence terms, does not provide any immunity from legal liability on other grounds. While the information used for governmental human rights risk assessments may be taken into account in judicial appraisals of the level of risk, this may not be conclusive when it comes to determining a company's duty of care.

In other words, the human rights-related risks assessments government agencies may carry out as part of the administration of an export licensing regime<sup>157</sup> is no substitute for a company having robust, well-tailored human rights due diligence processes of its own.<sup>158</sup> The key elements of a robust human rights due diligence process aimed at identifying and addressing end use risks are considered in Chapter 4.

Box 10 sets out some illustrative examples of past instances in which the UK government has imposed trade restrictions on exports of items to areas affected by conflict or subject to repressive regimes because of concerns about the risk of misuse and implications for personal safety and/or enjoyment of human rights. However, there are also many examples where the UK failed to impose trade restrictions when it should have done to give effect to its international human rights obligations.<sup>159</sup>

### **BOX 10:** How the UK government has used trade restrictions to address the risk of human rights abuses

**Example 1:** In the early 1990s, the UK government amended regulations to:

prohibit export without an export licence of certain all-wheel drive utility vehicles capable of off-road use, heavy-duty recovery vehicles and drop-sided trucks ... This control was introduced to address concerns that such vehicles might be used by paramilitary groups against British troops deployed on peacekeeping duties in the former Yugoslavia.

These restrictions have since been removed.

**Source:** Hansard, 26 July 1992, column 151, <https://publications.parliament.uk/pa/cm199899/cmhansrd/vo990726/text/90726w37.htm>

**Example 2:** In 2019:

HM Government took decisive action to restrict the sales of crowd control equipment to Hong Kong in light of serious protests. We applied international sanctions rigorously and monitored a range of political, military and other developments across the world reflecting these in our licensing decisions.

On 25 June 2019, the UK Foreign Secretary made a statement as follows:

We remain very concerned about the situation in Hong Kong, and I raised those concerns with the Chief Executive on 12th June. Today I urge the Hong Kong Special Administrative Region Government to establish a robust, independent investigation into the violent scenes that we saw. The outcome of that investigation will inform our assessment of future export licence applications to the Hong Kong police, and we will not issue any further export licences for crowd control equipment to Hong Kong unless we are satisfied that concerns raised about human rights and fundamental freedoms have been thoroughly addressed.

**Source:** Department of International Trade (Export Control Joint Unit), *United Kingdom Strategic Export Controls Annual Report 2019*, presented to Parliament pursuant to Section 10 of the Export Control Act 2002, ordered by the House of Commons to be printed on 30th November 2020. PP. 1, 25, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/940273/uk-strategic-export-controls-annual-report-2019-web-accessible-version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940273/uk-strategic-export-controls-annual-report-2019-web-accessible-version.pdf)

**Example 3:** On 12 January 2021, UK Foreign Secretary Dominic Raab announced a package of measures designed to help ensure that British organisations, whether public or private sector, are not complicit in, nor profiting from, the human rights violations in Xinjiang. This package of measures was reported to include:

- A ‘review of export controls as they apply to Xinjiang to ensure the Government is doing all it can to prevent the exports of goods that may contribute to human rights abuses in the region.’
- The ‘introduction of financial penalties for organisations who fail to meet their statutory obligations to publish annual modern slavery statements, under the Modern Slavery Act.’
- ‘New, robust and detailed guidance to UK business<sup>160</sup> setting out the specific risks faced by companies with links to Xinjiang and underlining the challenges of effective due diligence there.’

The Foreign Secretary added in his statement to the press:

The evidence of the scale and severity of the human rights violations being perpetrated in Xinjiang against the Uyghur Muslims is now far reaching. Today we are announcing a range of new measures to send a clear message that these violations of human rights are unacceptable, and to safeguard UK businesses and public bodies from any involvement or linkage with them.

**Source:** UK Government, Foreign and Commonwealth Office, Press Release, 12 January 2021, ‘UK Government announces business measures over Xinjiang human rights abuses’, <https://www.gov.uk/government/news/uk-government-announces-business-measures-over-xinjiang-human-rights-abuses>

Some applications for export licences inevitably raise complex human rights issues and dilemmas. These call for a rigorous and robust human rights risk assessment on the part of governments, applying consistent and transparent criteria and drawing from a range of information sources.

In view of the human rights violations and breaches of the Fourth Geneva Convention linked to the use of JCB's equipment in the OPT, it would be appropriate for the UK government to take measures to prevent equipment exported from the UK being used for such purposes, in addition to sending clear signals to the Israeli government that these violations are unacceptable. The absence of such measures does not absolve JCB from responsibility and will not necessarily shield the company from liability.



## 4. Human rights due diligence and the downstream value chain

### Chapter summary

1. Human rights due diligence is distinctive from many other forms of due diligence in that the primary focus of analytical efforts is an appreciation of, and then the mitigation of, risks posed to people rather than to corporate or shareholder interests.
2. The UN Guiding Principles on Business and Human Rights (UN Guiding Principles) provide the global standard for human rights due diligence.
3. Human rights due diligence, as defined in the UN Guiding Principles, has four main elements: assessing actual and potential human rights impacts; integrating and acting upon the findings; tracking responses; and communicating how impacts are addressed.
4. The OECD Guidelines for Multinational Enterprises lay down recommendations for companies and adhering governments on responsible business behaviour. The provisions in Chapter IV of the OECD Guidelines on human rights due diligence closely follow the structure and approach of the UN Guiding Principles.
5. Human rights due diligence encompasses the entire value chain, both upstream and downstream. The scope of human rights due diligence is not limited to those activities for which a company might be held legally liable (eg on the basis of legal notions of causation) or those entities with which the company in question has a contractual relationship. It also encompasses environmental harm and climate change in so far as these have impacts on human rights.
6. It is not sufficient just to identify and analyse risks; meeting the standard of human rights due diligence laid down in the UN Guiding Principles also requires taking appropriate action.
7. Use of leverage is a key element of corporate strategies to properly address downstream human rights risks.
8. If it is not possible to address every actual and potential adverse human rights impact in a value chain, priority should be given to areas where the risks are most significant.
9. Special considerations apply when a company is supplying products or equipment to conflict-affected areas. This is because operating in, or supplying products to customers in conflict-affected areas, can considerably increase the risk of a company becoming complicit in gross human rights abuses committed by other actors. For example, state security forces, the military, or police.
10. Where goods are subject to export controls, the fact certain exports may have been permitted by the home state of the company in question does not remove the need for the company to do human rights due diligence of its own.

11. Failures by exporters to assess, analyse and respond to downstream human rights risks in the manner required by the OECD Guidelines have been the subject of complaints to OECD Guidelines National Contact Points.
12. There are many legal, ethical, reputational, commercial, operational and practical reasons why companies find it beneficial to carry out human rights due diligence, using the framework laid down in the UN Guiding Principles.

JCB's responses to the recent complaint by Lawyers for Palestinian Human Rights,<sup>161</sup> reproduced by the UK NCP and in press statements,<sup>162</sup> reveal multiple and serious misunderstandings about the nature of human rights due diligence as an ongoing, iterative risk management process, as well as the interconnectedness of key elements of this process.

Under the UN Guiding Principles, responsibilities to identify and address human rights risks are not transferred down the value chain with ownership. Instead, they involve a holistic appraisal of all of the various ways in which an enterprise's business activities may impact on human rights, including impacts that might arise both upwards and downwards on the value chain. They call for creative use of leverage to prevent and mitigate these impacts where possible, regardless of how far down the value chain they may be. The UN Guiding Principles call for proactive behaviour from companies, working closely with affected stakeholders, to help anticipate and respond quickly to new and emerging sources of risk.

#### **4.1 What is human rights due diligence?**

The term 'due diligence' can mean different things to different people. As a risk management exercise, it can take many forms.

For lawyers, due diligence has a particular meaning. As seen in the previous chapter, due diligence is used in law to denote a legal standard of care, falling below which could give rise to legal liability (see Box 11).

Lawyers will also be familiar with the due diligence that takes place prior to an investment or acquisition, to ensure the price of assets or shares is fair, and the risks and liabilities, to which the investor or buyer may become liable, are properly understood so they can be addressed in the relevant transaction documents and pricing.

Human rights due diligence borrows from some of these concepts. However, it is distinctive in that the primary focus of analytical efforts is an appreciation of, and the mitigation of, risks posed to people rather than to any other interests, such as those of the company or its shareholders. These risks include environmental harm and climate change in so far as they impact on people's human rights.

### **BOX 11: Due diligence as a legal standard**

Due diligence is legally defined and understood as a measure of prudence or care.

For the purposes of civil liability under tort law (discussed in Chapter 3) it refers to the standard of care a person or company would reasonably be expected to demonstrate in the circumstances. Falling below this standard exposes the person or company to the risk of legal liability for harms that may be caused by the negligence of said person or company.

However, due diligence concepts can be integrated into legal regimes in other ways. For instance, some legal regimes may stipulate due diligence as a legal standard of behaviour, under which a failure to undertake specific, legally-required activities (eg customer checks under anti-money laundering legislation) can result in legal liability, irrespective of whether any harm actually occurs.<sup>163</sup>

### **BOX 12: How the UN Guiding Principles define human rights due diligence**

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

**UN Guiding Principles on Business and Human Rights, Guiding Principle 17**

See further UN Guiding Principles on Business and Human Rights, esp. 17-22, and OHCHR, The Corporate Responsibility to Respect Human Rights: an Interpretative Guide

## 4.2 Key international standards on human rights due diligence

### UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) are the global standard for human rights due diligence. Supported by governments from all regions of the world, they carry considerable authority as an internationally-accepted framework for enhancing standards and practices with regard to business and human rights.<sup>164</sup> Since their unanimous endorsement by the Human Rights Council in 2011, they have acted as a key reference point and source of inspiration for numerous national, regional and sectoral initiatives aimed at improving the prevention and mitigation of human rights risks connected with business activities, including the EU proposals for mandatory human rights due diligence (discussed in Chapter 3), and the OECD-led initiatives highlighted below.

The UN Guiding Principles provisions on human rights due diligence can be found in Part II (or Pillar II), which is concerned with setting out key elements of the corporate responsibility to respect human rights.

As defined in the UN Guiding Principles, human rights due diligence has four main elements:

- **identification and assessment** of actual or potential human rights risks (see UNGP 18 and commentary);
- **integrating the findings** from human rights impact assessments across all relevant internal functions and processes and taking appropriate action to prevent or mitigate impacts (see UNGP 19 and commentary);
- **tracking the effectiveness of responses** to human rights impacts and risks (see UNGP 20 and commentary); and
- **communicating information** on how human rights risks are addressed to external audiences (see UNGP 21 and commentary).

Importantly, human rights due diligence is conceived as an ongoing and iterative process, in which lessons learned from past experience, especially concerns raised by stakeholders, are fed back into management functions and processes. It is not a series of isolated tasks, but a holistic process, meaning the standard cannot be met through tick-box approaches or approaches prioritising some aspects while neglecting or ignoring others.

### OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises,<sup>165</sup> originally adopted by industrialised states in 1976, provide recommendations on responsible business behaviour with respect to interactions with the environment, people and government. They have been revised twice since their adoption, in 2000 and 2011. The second occasion provided an opportunity to reflect the provisions of the UN Guiding Principles, which, as already noted, had received unanimous endorsement of the UN Human Rights Council the same year. Thus, a new chapter on human rights (Chapter IV) was added, which closely follows the structure and approach of the UN Guiding Principles as far as human rights due diligence is concerned.

An important feature of the OECD Guidelines institutional architecture is a special grievance mechanism designed to handle complaints about non-compliance by multinational enterprises with the recommendations set out in the guidelines. This is known as the National Contact Point (NCP) system, whereby the governments

of each OECD member state, and governments of other states agreeing to adhere to the Guidelines ('adhering states'), designate a point of contact to receive and seek to resolve complaints from people who feel they have been negatively impacted by:

- business activities taking place within that jurisdiction, or
- the behaviour of companies domiciled within their jurisdictions.

Over the years, these NCPs have received a number of complaints relating to alleged failures by companies to manage end-use risks properly, resulting in harm to people (see Box 13).

### **BOX 13: Recent NCP cases on end-use risks**

The 2019 complaint by Lawyers for Palestinian Human Rights against JCB joins a series of cases submitted to NCPs under the OECD Guidelines concerning the adequacy with which multinational companies assess, analyse and respond to downstream human rights risks.

The cases submitted thus far cover a broad range of products, including pharmaceuticals, surveillance equipment, information and communications technologies, and military, defence and security apparatus and equipment.

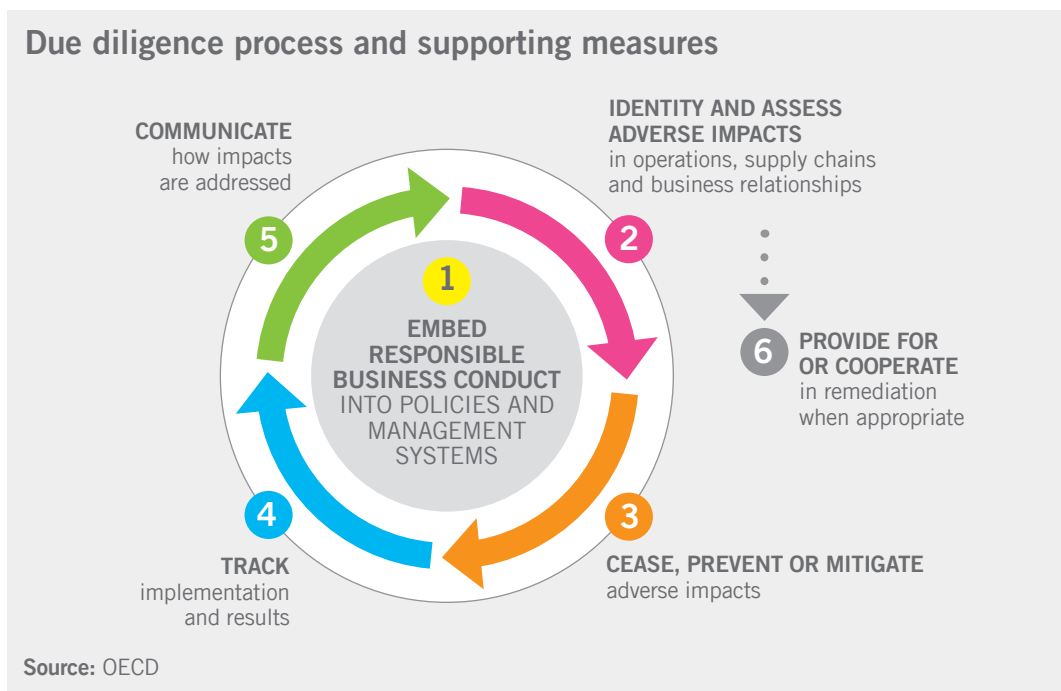
The case of *Bart Stapert & Mylan* (2014-2017) raised with the NCP in the Netherlands is instructive. It arose from reports of diversions of pharmaceuticals produced by Mylan for use in executions by lethal injection in the US. As part of the settlement mediated by the NCP between the complainant and the respondent, the company agreed to:

- continue implementing a plan to strengthen restrictions on the distribution of products that could be used for lethal injections; and
- review periodically the distribution of such products in order to monitor compliance with the controls.<sup>166</sup>

At a compliance review conducted by the Dutch NCP in 2017, the NCP commended Mylan's proactive reactions to the changing risk landscape and the company's further efforts to raise concerns about harmful, unauthorised uses of their products through lobbying of US state officials. The NCP observed 'companies such as Mylan should remain vigilant in this changing landscape. Where companies become aware of developments that could undermine their controls, proactive steps should be taken to address the issue'.<sup>167</sup>

*Lawyers for Palestinian Human Rights & G4S* (2013-2017) was a case concerning allegations of involvement in human rights abuses taking place at military checkpoints in the OPT and Israel through provision and servicing of equipment. In it, the UK NCP turned its attention to whether the company could have done more to address adverse human rights impacts by using leverage, concluding:

there is evidence that G4S has leverage, and could take action such as: lobbying immediate business partners and/or government and legal representatives, sharing best practice (with business partners, stakeholders and the wider sector), and committing to new practices in regard to future contracts.<sup>168</sup>



### OECD Due Diligence Guidance for Responsible Business Conduct<sup>169</sup>

Published by the OECD in 2018, this guidance is designed to provide further support to businesses as they develop their own approaches to due diligence, both with respect to their own activities and for better risk management within their supply chains.

It is essentially a ‘how to’ guide setting out, under each broad principle, a list of practical actions to be considered by management and pointing to further resources that can be consulted in order to strengthen corporate efforts to identify and mitigate social, human rights and environmental risks.

## 4.3 Misunderstandings about the downstream value chain

When it comes to address human rights, JCB has not reached first base. The company lacks a publicly communicated human rights policy and a coherent approach to addressing its human rights impacts. When JCB does eventually start to go down this route, as it surely must, it will have to overcome some persistent misunderstanding of the human rights responsibilities of companies for downstream activities.

Despite the progress being made by many companies regarding the identification and mitigation of downstream human rights risks (discussed in more detail in Chapter 5), and despite the proliferation of available guidance and tools, there remain some lingering myths and misconceptions about what is expected, under the UN Guiding Principles on Business and Human Rights and other standards, over the management of end-use risks.

As a number of these misconceptions are reflected to varying degrees in JCB’s own responses to criticism and complaints about the use of its products in demolitions and other activities in the OPT,<sup>170</sup> it is worth confronting them head-on.



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**MYTH ONE:** The most pressing human rights risks are likely to be upstream in the value chain, and human rights due diligence activities should focus on them.

**Wrong:** Business enterprises should not prejudge where the most salient human rights risks are within value chains, and which should be prioritised for attention, without first carrying out a proper human rights assessment (see UNGP 17 and 18).

Human rights due diligence, as defined in the UN Guiding Principles, extends to the whole of the value chain. UNGP 18 states business enterprises should identify and assess ‘any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships’.

‘It is important for enterprises to look beyond the most obvious groups and not assume, for instance, that the challenges lie in addressing impact on external stakeholders while forgetting direct employees; or assume that those affected are employees alone, ignoring other affected stakeholders beyond the walls of the enterprise.’<sup>171</sup>

OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012), p. 37, [https://www.ohchr.org/documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf)

‘These are complex issues. We now have getting on for decades of experience trying to address upstream human rights risks in the supply chain. But more and more companies including ourselves are starting to look down the value chain to see what risks might be there and how we can act upon them even though our leverage may be limited in relation to customers. Traditionally you would only look up the supply chain, but that is not what the UNGPs say.’

Human rights adviser, pharmaceuticals company

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**MYTH TWO:** Businesses should always prioritise human rights impacts they may be causing or contributing to over downstream human rights risks, which they are only directly linked to because of commercial relationships. Such downstream risks are less important.

**Wrong:** In the first place, the business enterprise in question is unlikely to have a clear picture of the salient human rights risks associated with its business activities without a robust human rights due diligence process.

The manner in which such salient risks may arise, and the business enterprise’s relationship to them, will depend on the sector and context. For example, in some cases the most salient human rights risks will arise from employees or local communities, while in other cases a particular focus on upstream supply arrangements may be needed. There are also many contexts in which the most salient human rights risks might arise from the end-uses to which products may be put.

#### BOX 14: What are salient human rights risks?

The most salient human rights for a business enterprise are those that stand out as being most at risk. This will typically vary according to its sector and operating context. The Guiding Principles make clear that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise. But the most salient rights will logically be the ones on which it concentrates its primary efforts.

**OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012), p.8,**

[https://www.ohchr.org/documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf)

Therefore, the assessment part of the human rights due diligence processes needs to be designed in such a way as to cover ‘any actual or potential adverse human rights impacts with which they may be involved *either* through their own activities *or* as a result of their business relationships’.<sup>172</sup> According to the commentary to the UN Guiding Principles:

Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.<sup>173</sup>

Once this initial assessment process is complete, the company needs to ‘integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action’.<sup>174</sup>

While all adverse human rights impacts need to be addressed, the UN Guiding Principles recognise it may not be physically or practically possible to achieve all of this at once and so it may be necessary to prioritise.<sup>175</sup> However, the basis for prioritisation laid out in the UN Guiding Principles is not the nature of the relationship between the adverse impacts and the business in question, but the severity or irremediability of the human rights risks (see Box 15).<sup>176</sup>

#### BOX 15: What the UN Guiding Principles say about prioritising actions to address adverse human rights impacts

Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

**Commentary:** While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect remediability. Severity is

not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.

**UN Guiding Principles on Business and Human Rights, Guiding Principle 24, and commentary.**

‘A company has to look beyond simply assessing whether a product could have a direct impact on human rights to the possibility of it having an indirect impact – for instance, where the equipment supplied is not directly used to abuse people but enables a downstream actor with poor employment practices to continue to operate and thus continue its abusive behaviour.’

**Head of export control policy, engineering company**

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**MYTH THREE:** When adverse human rights impacts are found in the value chain, it is only necessary to respond to the ones the business has directly caused or contributed to.

**Wrong:** This comment confuses the requirements laid down in the UN Guiding Principles with regard to remediation of human rights harms (see especially UNGP 18) with what the principles say about ‘addressing adverse human rights impacts’. It also implies a clearer set of distinctions between these different categories of involvement than is actually the case. As the OHCHR has explained, they are not intended as fixed and precisely definable categories; they exist on a continuum and the nature of the relationship (eg whether a company is culpable of ‘contribution’ or ‘direct linkage’ to human rights violations) ‘may shift over time depending on the company’s own actions and omissions’.<sup>177</sup>

In practice, abstract arguments about whether a specific case is one of ‘causation’, ‘contribution’ or ‘directly linked’ can miss the point. While the requirements of the UN Guiding Principles relating to remediation<sup>178</sup> are confined to cases where business enterprises have caused or contributed to adverse impacts, this does not imply companies can ignore impacts that may be directly linked to their operations, products or services (by a business relationship) altogether.

On the contrary, the UN Guiding Principles make it clear that, when it comes to addressing downstream human rights risks, proactive action – and a certain degree of creativity – is required (see Box 16).

## **BOX 16: What is expected of businesses in relation to impacts linked to their commercial relationships in the downstream value chain?**

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond.

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so. **UN Guiding Principles on Business and Human Rights, Guiding Principle 23, and commentary.**

This is echoed in the recommendations set out in the OECD Guidelines for companies to:

'Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.'<sup>179</sup>

Further guidance on the type of action expected from companies in relation to downstream human rights risks can be found in the OECD's subsequent *Due Diligence Guidance for Responsible Business Conduct*:

Appropriate responses to risks associated with business relationships may at times include: continuation of the relationship throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, disengagement with the business relationship either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. A decision to disengage should take into account potential social and economic adverse impacts. These plans should detail the actions the enterprise will take, as well as its expectations of its suppliers, buyers and other business relationships.<sup>180</sup>

In summary, to meet these standards of responsible business conduct, companies cannot ignore or discount adverse impacts that might be said to have been caused by another party, such as when an end-user of a product has misused a product in a way that causes human rights harms.

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**MYTH FOUR:** There is little a business can do about downstream human rights risks, so it is rarely worth putting time and resources into this area.

**Wrong:** Addressing downstream human rights risks can be challenging, and in many cases it may not be possible to remove downstream human rights risks entirely, especially where these occur at points two or more tiers down the value chain. However, companies striving to improve their responses to downstream human rights risks, to better meet their ‘corporate responsibility to respect human rights’, are developing and evaluating a range of strategies designed to reduce the chances of their products ultimately being associated with human rights abuses.

The different forms these strategies can take are discussed in more detail in Chapter 5. These strategies – which may include practical, contractual, legal enforcement and technological components, depending on the context and need – have been compiled based on conversations with several companies from different commercial sectors that have recognised the need to increase their leverage in relation to end-use risks and are currently building their capacity to do so.

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**MYTH FIVE:** Once a business has sold something to someone else, the human rights impacts of that product are no longer its responsibility.

**Wrong:** This proposition, which seems implicit in JCB’s comments to the UK NCP (see Box 2), especially at paragraph 19,<sup>181</sup> confuses legal responsibilities specifically tied to ownership of property with the broader ‘corporate responsibility to respect human rights’. As the UN Guiding Principles explain, the corporate responsibility to respect human rights exists ‘over and above compliance with national laws and regulations protecting human rights’.<sup>182</sup> As discussed further in Chapter 3, the suggestion legal responsibilities can inevitably be offloaded in this manner is to misstate the legal position. For the time being, it is sufficient just to note the corporate responsibility to respect human rights is not constrained by narrow legal questions of ‘who owned what property when’.

On the contrary, the very act of selling a product to a particular party in a particular jurisdiction or operating context may give rise to human rights risks that would need to be properly identified, analysed and addressed if the company is to meet its corporate responsibility to respect human rights. As noted above (see discussion under Myths Three and Four) and discussed further in the next Chapter, a range of strategies can be considered in order to respond appropriately to those risks, in line with the UN Guiding Principles and the human rights chapter of the OECD Guidelines.

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**MYTH SIX:** Human rights due diligence is a largely technical exercise. If there are no adverse human rights impacts in the value chain the business can definitely be said to have directly caused or contributed to, there is no basis for suggesting the business is not meeting the corporate responsibility to respect human rights.

Human rights due diligence can be a technical exercise, but it is one with a serious preventative purpose. Companies which focus overly on the technical aspects (for instance by adopting box-ticking type approaches) but insufficiently on the ultimate goals of human rights due diligence to prevent human rights harms, will not meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles.

Thus, the absence of definitively determined cases of causing or contributing to human rights abuses, while a possible sign of success, is not the most important indicator of how well a company respects human rights in its business activities and commercial relationships. Some of the key indicators of the extent to which a company respects human rights are:

- The rigour with which it identifies and analyses actual and potential sources of risk to people.
- The speed, proactivity and creativity with which it addresses actual and potential human rights impacts.
- The quality of tracking of effectiveness and responses.
- The level of institutional commitment to the idea of continuous improvement.
- The transparency with which it deals with affected stakeholders and the public at large on these issues.

Finally, because human rights situations are dynamic,<sup>183</sup> human rights due diligence programmes need to be responsive to changing operating contexts, commercial partners, and behaviours of downstream actors. This has implications for the way in which downstream human rights risks are assessed and the frequency of assessments. It also has implications for the types of leverage that may be needed, and shows the need for flexibility in the commercial arrangements with downstream actors, so companies have the commercial and contractual space to respond quickly and proactively to changing risks and needs.<sup>184</sup>

#### **4.4 Do special considerations apply when selling to conflict-affected areas?**

The answer is yes. Because of the high risk of human rights abuses in conflict-affected areas, there is a need for special vigilance on the part of companies.<sup>185</sup> Operating in or supplying products to customers in conflict-affected areas can considerably increase the risk of a company becoming complicit in gross violations of international human rights or humanitarian law committed by other actors; for example, state security forces, the military, or police.<sup>186</sup>

This does not mean a company needs to assess the entire human rights record of state agencies in the relevant area, but it does need to investigate thoroughly the risks the products supplied might be used to further human rights abuses if placed in the hands



of certain actors, particularly state agencies,<sup>187</sup> and then to take steps to address those risks.<sup>188</sup> In doing so, the past conduct and accountability of relevant state agencies will be an important consideration, alongside other factors such as:

the general stability and rule of law in the area in question; local circumstances, such as any current or likely tensions among communities, between communities and local authorities or between communities and the enterprise; local attitudes to the Government or the armed forces; and, of course, the training and skills of the armed forces in handling such assignments in line with human rights.<sup>189</sup>

For companies with multi-tiered and complex value chains, it may not be feasible to assess every business relationship. In these circumstances, companies are asked to:

identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.<sup>190</sup>

According to the OECD Due Diligence Guidance for Responsible Business Conduct, the higher risks posed by factors such as conflict, presence of vulnerable groups, weak rule of law, and high rates of corruption suggest a need for prioritisation in human rights due diligence processes. Importantly, it then adds 'business relationships are categorised as "high-risk" and prioritised for further assessment on the basis of their risk profile and not on the strength of their relationship with the enterprise'.<sup>191</sup>

In other words, rejecting issues for prioritisation on the basis of a lack of a direct contractual relationship between the company and the end user or another actor committing human rights abuses would not be consistent with the expectations under the UN Guiding Principles or the OECD Guidelines.

#### **BOX 17: What factors can heighten risks of business involvement in serious human rights impacts?<sup>192</sup>**

In practice, heightened risk of severe human rights impacts can arise from different sources:

- The broader operational context, including factors such as conflict, corruption and weak governance.
- Business relationships, including the experience, track record and management capacities of suppliers, joint venture partners, customers and others to manage human rights risks.
- Business activities, including activities commonly associated with human rights impacts, such as land acquisition and resettlement and extensive water usage.
- The presence of vulnerable groups, meaning those groups within a society who experience political, social or economic marginalization that makes them particularly vulnerable to business impacts.

**Extracted from Shift, *Human Rights Due Diligence in High Risk Circumstances: Practical Strategies for Business*, March 2015, pp. 5-6**

<https://shiftproject.org/resource/human-rights-due-diligence-in-high-risk-circumstances/>

‘Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue.’

**UNGP 23, commentary**

‘If enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable. This is so because of the severity of the human rights abuses at stake and also because of the growing legal risks to companies as a result of involvement in such abuses.’

**OHCHR, *The Corporate Responsibility to Respect: An Interpretative Guide* (2012), p. 79, [https://www.ohchr.org/documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf)**

## 4.5 Do export licences make a difference?

The answer, strictly speaking, is no, although the methodologies and sources of information used by state actors in making their own determinations – and the conclusions they come to in the course of a vetting process – may be referred to and taken into account by the companies concerned, as part of their own information-gathering.

As noted in Chapter 3, governments may conduct a form of human rights analysis in deciding whether or not to grant an export licence in relation to items (eg machinery, equipment or components) on a controlled goods list.<sup>193</sup> However, this does not remove the need for the company to do human rights due diligence of its own in relation to the downstream human rights risks that may be entailed by the proposed sales.

While companies will want to take account of official documents shedding light on the nature of existing and unfolding human rights risks in different jurisdictions, ‘applying for and in fact receiving a dual-use license does not exhaust the obligation to conduct human rights due diligence (HRDD), nor provide a “free pass” for companies that hold such licenses to not perform HRDD.’<sup>194</sup> This is because the weight given to human rights considerations, relative to other considerations, such as national security, economic interests and foreign policy, vary greatly from state to state, depending on domestic policy and international commitments.

The upshot is that properly conducted human rights due diligence might require companies to go beyond what is legally required in a given jurisdiction; it might also require them to refrain from engaging in business that would otherwise be permitted under state licensing laws.

In any event, and as the UN Guiding Principles make abundantly clear, the corporate responsibility to respect human rights exists above and beyond domestic law. It exists, in the words of the commentary to the UN Guiding Principles, ‘independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights’.<sup>195</sup>

## 4.6 Why responsible companies carry out human rights due diligence

There are many reasons why increasing numbers of companies are carrying out human rights due diligence, using the framework laid down in the UN Guiding Principles.<sup>196</sup> These include:

- A desire to make a positive and concrete contribution to the prevention of human rights abuses and demonstrate progress towards meeting the corporate responsibility to respect human rights under the UN Guiding Principles.
- Achieving compliance with the OECD Guidelines for Multinational Enterprises and avoidance of complaints from stakeholders under the NCP system about non-compliance with those internationally agreed standards.
- Recognition of the value of human rights due diligence in the context of strategies to reduce exposure to legal risks, for example of tort-based liability (see Chapter 3).
- Ensuring compliance with regimes requiring the reporting of environmental, social and governance (ESG) risks.
- Satisfying the demands of investors for detailed information regarding the way in which the company manages different kinds of ESG risks.
- Ensuring compliance with the growing number of domestic law regimes requiring companies to properly assess and respond to human rights-related risks (see Chapter 3).
- Informing corporate decision-making about whether commercial transactions should go ahead, or whether certain business relationships should be invested in or terminated.
- Tracking progress towards achievement of publicly stated commitments relating to human rights; for example, sustainability goals.
- Improving stakeholder relationships and enhancing corporate reputations.
- Improving understanding of markets and the functioning of value chains.
- Managing business risks better.

## 5 Addressing end-use risks in practice

### Chapter summary

1. Internal decision-making systems need to respond to the full range of ways in which different products can potentially contribute to end-use harms.
2. Companies seeking to improve their management of end-use risks already deploy a range of different systems – ‘know your customer’ checks, red flag indicators, and decision-trees, which may be partially automated – to help decision-makers identify downstream risks posed by commercial opportunities and proposed transactions, and the correct response from a human rights risk prevention and mitigation perspective.
3. The best strategies for addressing downstream human rights risks will vary depending on many different factors. Prospects for exercising leverage to prevent or mitigate adverse human rights impacts occurring in the downstream part of the value chain are in most cases considerably enhanced when there is a contract in place. But creative companies have nevertheless found ways of extending their reach and influence further down the value chain.
4. A contractual relationship presents opportunities for the establishment and exercise of leverage to prevent or mitigate adverse human rights impacts through:
  - Contractual safeguards.
  - Legal enforcement, for example of contractual commitments, or of licence terms.
  - Checks and corrections in the context of aftersales service and upgrades.
5. Although contractual safeguards may only be legally enforceable against the tier one downstream party (eg a dealer, or wholesaler, distributor or franchisee), at least some of these can be cascaded down to other actors further down the value chain.
6. Proper use of leverage involves not only signing up to commitments on paper, but investing in the operational systems needed to ensure human rights abuses arising from the use of products will be quickly detected and breaches of legal obligations by downstream partners vigorously enforced.
7. Responsible design ideas can be applied across sectors. Technology can be used to ‘enable the tracking of deployment’, ‘alert the exporter to misuse’ and ‘limit the use of products once sold’. Such devices are already widely available and increasingly integrated into the design of vehicles and equipment.
8. While these options may not completely mitigate downstream human rights risks on their own, they can often have impact as part of a creative package of measures, tailored to the particular operating and commercial context.

Compared to many other manufacturing and exporting companies whose products pose known end-use human rights risks, JCB's approach to risk management as indicated in its statements<sup>197</sup> is remarkably passive. Are companies really as powerless in relation to downstream human rights risks as JCB's comments suggest? To explore this question, this chapter considers two areas of leverage that can and are being used by companies to address downstream human rights impacts – the strengthening of contractual safeguards and the use of responsible design technology. Both areas are particularly relevant to JCB.

Below is a distillation of insights gained from conversations with human rights and legal practitioners working within companies and within organisations that serve and advise them.

## **5.1 A workable approach to end-use risk management**

At a practical level, what can companies do to address the downstream human rights risks in their value chains? What steps can they take to reduce the risks of their products being used in human rights abusing ways? Even if the company's business activities cannot be said to have been the main cause of human rights abuses – for example, where there are intervening factors or actors or where a product has been misused in a way the company did not condone or ever intend – are there things that can be done? For example, by enhancing or harnessing whatever leverage the company might have to reduce the risks of adverse human rights impacts in the downstream value chain in future.

Carrying out some form of due diligence to assess the risks of doing business with customers working in specific jurisdictions or operational contexts is hardly a novel or unusual practice. On the contrary, well-run companies regard these kinds of activities as fundamental to good governance. Already well-established for the purpose of compliance with legal standards on issues such as anti-money laundering, fraud prevention and anti-corruption, these techniques have started to be applied to the management of other kinds of risks, notably downstream human rights risks.

### **Customer due diligence (or 'know your customer') checks**

Customer due diligence systems are fundamental to corporate risk management in several respects. They are a basic feature of corporate anti-fraud strategies, as well as ensuring compliance with legal regimes relating to money-laundering, anti-bribery, export controls and sanctions. Whatever the reasons underlying their use, 'know your customer' checks typically have four main aims:

- Establishing the identity of the customer or client.
- Understanding the customer or client's own business activities.
- Clarifying the extent to which the company may be exposed to legal or other risks as a result of: (a) the conduct or business practices of the customer; (b) the contractual or business relationships the customer may have entered into; or (c) the conduct or business practices of other actors further down the value chain.
- Clarifying needs vis-à-vis future risk mitigation and monitoring.

For administrative efficiency and effectiveness, it is common for companies to apply a graduated approach to 'know your customer' checks and monitoring activities with 'basic', 'simplified' and 'enhanced' systems of checks depending on the level of risk. Enhanced systems of checks and monitoring may involve additional information gathering and the need for higher level management approval than is the case with

basic or simplified checks. Whatever systems are chosen, clear management policies are needed to support effective implementation, along with staff training and robust reporting and record keeping arrangements so there is consistency across the organisation and important intelligence relating to specific customers, jurisdictions or operating contexts does not fall through the cracks.

As can be seen from the example set out in Box 18, ‘know your customer’ checks have an important role to play in the identification and mitigation of downstream human rights risks. This example does not necessarily provide a model for JCB or any other company to follow, but it is indicative of frameworks that companies are putting in place with the potential to address human rights impacts in so far as they are being implemented as part of a broader human rights due diligence process.

### **BOX 18: Sales approvals under a technology company’s Sensitive Business Framework<sup>198</sup>**

In response to the risk of misuse of the company’s technology with potential for adverse human rights impacts, the company established a Sensitive Business Framework that integrates human rights due diligence into sales approval processes. The framework comprises:

1. A Sensitive Business Board. A high-level committee comprising representatives from a range of group functions and business areas responsible for overseeing the Sensitive Business Framework and which meets regularly.
2. A Sensitive Business Core Team, which meets every two weeks and makes decisions regarding sales approvals in cases where possible sources of human rights risks have been identified.
3. A Sensitive Business Unit, which drives implementation of the framework.
4. A Sensitive Business automated tool, which performs the initial risk assessment.

If a potential risk is identified by the Sensitive Business automated tool in relation to a sales opportunity, the relevant market area must submit an application for approval. This is assessed by the Sensitive Business Core Team against four parameters:

- **Product risk.** What kind of risks might the product pose?
- **Country risk.** This takes account of issues such as human rights protections under national law, judicial oversight and independence, application of the law in practice (including accountability), and documented human rights violations. It is a more general evaluation of the country itself and is not connected to a specific customer.
- **Customer risk.** What human rights risks might be posed by selling this product to this particular customer?
- **Purpose risk.** What human rights risks may be posed by the particular purposes to which this product could be put?

At the conclusion of this vetting process the Sensitive Business Core Team makes its determination. There are three possible outcomes:

- **Dismiss.** Where the risks – product, country, customer, purpose or a combination of the four – are material and there is no prospect for contractual or technical mitigation.
- **Conditionally Approve.** Approve but with contractual and/or technical mitigations.
- **Approve.** No need for mitigations.



Where a decision is made to proceed with mitigations, key performance indicators are measured to ensure mitigations are implemented effectively and have the desired effect. In some cases, the decision-making may be escalated to the Sensitive Business Board for a final decision. The Sensitive Business Board also reflects on decision-making and risk issues more generally in light of company-level and sector-level developments and trends and country-risk profiles.

As part of its Sensitive Business Framework, the company also conducts country-level risks assessments aimed at clarifying sources of human rights-related risks and the mitigations needed in order to responsibly do business in the country.

### Red flag indicators

In many cases it will be possible to identify in advance of entering into a new business relationship the red flag indicators that ought to put company management on notice a proposed transaction is potentially risky on human rights grounds.

Red flag indicators are typically used at the early stages of a system for evaluating new sales or commercial opportunities. They may not provide a conclusive answer as to whether it is appropriate to proceed with a transaction; rather they show there is an issue that needs further and careful evaluation in light of the company's human rights responsibilities, legal requirements and other commitments.

#### **BOX 19:** Red flag indicators of country-level end-use risks

In 2020, the US Department of State published guidance for US businesses engaged in the export of products or services with surveillance capabilities. The aim of this guidance is to:

assist U.S. businesses that work with or design and manufacture products or services that have surveillance capabilities with implementation of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) as well as the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines). The guidance provides U.S. businesses with a way of identifying products or services that can be misused to violate or abuse human rights, and considerations to weigh prior to engaging in transactions linked to foreign government end-users or private end-users that have a close relationship with governments. This guidance will be particularly helpful for U.S. businesses that want to undertake a human rights review where the U.S. government does not require an authorization for export. (page 1).

The guidance includes a list of red flags to help exporters assess the risks that items earmarked for export might be misused to commit human rights violations. The guidance defines a red flag as 'any information that arises through any source where follow-up, assessment, and/or further due diligence is warranted' (page 6).

Although this guidance is explicitly oriented towards tech exports with surveillance capabilities, many, if not all, of the highlighted red flags are relevant for other sectors as well, including exports of heavy machinery known to have been used to further governmental policies abusive of human rights.

The following red flags highlighted are with regard to the ‘potential for misuse to commit human rights violations or abuses by foreign government end-users or private end-users that have close relationships with a foreign government’ (para 1, p. 8).

#### **Red flags**

- Information (e.g., reports, articles, publications) that indicates a similar product or service has been misused to commit human rights violations or abuses.
- The transaction includes products or services that could be used to build, customize, or configure a system that is known to be misused to commit or facilitate human rights violations or abuses, or it is assessed by a reasonable person to be likely that it will be.” (page 8).

Other red flags are highlighted with regard to the ‘human rights record of the foreign government agency end-user of the country intended to receive the product or service’ (para. 2, page 8).

#### **Red flags**

- Information regarding the foreign government agency end-user’s misuse of products or services with similar capabilities to commit human rights violations or abuses (e.g., reports, articles).
- Laws, regulations, or foreign government policies that unduly restrict civic space and/or target individuals or members of a group solely on the basis of race, sex, language, religion, political opinion, national origin, or any other grounds inconsistent with international human rights law.
- Ongoing conflict in the region where the transaction involving the product or service occurs.
- Ongoing abuse or arbitrary detention of members of minority groups, civil society members, or journalists (e.g., for exercising freedom of expression).
- Lack of independent judicial or other appropriate oversight/rule of law.
- Foreign government agency end-user provides security services and has misused the product or service or similar products or services for something other than a legitimate law enforcement purpose.
- Foreign government agency end-user has a close relationship with the part of the foreign government that provides security services and has misused the product or service or similar products or services to commit or facilitate human rights violations or abuses.
- Foreign government end-user has a record of human rights violations or abuses, including where the foreign government end-user’s record on human rights is so poor that it raises credible concerns that the product or service would be misused to commit or facilitate governmental human rights violations or abuses.
- Foreign government end-user has a history of exporting products or services to other countries with a history of committing human rights violations or abuses. (page 9).

*Extracted from US Department of State, Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities.* <https://www.state.gov/wp-content/uploads/2020/09/DRL-Industry-Guidance-Project-FINAL-508.pdf>

Some companies have found it expedient to integrate red flag indicators of the kind referred to in Box 19 into automated vetting processes. By inputting certain information into a predetermined format, sales and business development personnel can quickly determine the types of human rights risks that may be raised and the internal clearances required.

However, as noted above, the need for more situational and contextual analysis to fully understand the risks that may be posed means automated processes will rarely be suited to anything more than an initial screening in conjunction with other methodologies that enable human rights risks to be identified. Issues flagged in an automated screening process would then be followed up with a more detailed evaluation process drawing from internal or external human rights expertise before a final decision is given.

### **Decision trees**

The use of ‘decision trees’ to assist with the analysis of risks and to help practitioners navigate towards a set of potentially useful mitigation options can also enhance the rigour and consistency of the decision-making process (see Box 18).

Whichever analytical methods and tools are chosen, it is important they are supported and complemented with suitable training and staff resources.

Having done the necessary checks about who the products are to be sold to, how they are likely to be used, and where they will be going, the decision as to whether to proceed or not with a commercial relationship or transaction will depend on the nature and extent of the human rights-related risks, and how far these can be addressed in practice.

## **5.2 Strengthening contractual safeguards**

The use of contractual safeguards to mitigate downstream human rights risks is a topic currently attracting attention in legal circles. The International Bar Association (IBA) and more recently the American Bar Association (ABA) have both released guidance for legal professionals on contractual techniques for addressing human rights-related risks in global supply chains.

The IBA work, which takes the form of an online handbook for lawyers,<sup>199</sup> is addressed to both upstream and downstream human rights risks. It has specific sections on the negotiation and oversight of downstream commercial arrangements such as sales, distribution, franchise and licensing agreements.

On the other hand, the ABA guidance, which takes the form of a series of ‘model clauses’ and explanatory information,<sup>200</sup> is primarily addressed to upstream supply chain issues. However, these clauses also contain features relevant to management of downstream issues with regard to requirements to perform human rights due diligence and allowing for termination or renegotiation of contracts in the event of non-compliance by business partners with human rights-related conditions.

The common aim of both initiatives is to demonstrate how commercial contracts can be framed to support the efforts of corporate clients to respect human rights throughout the value chain. The range of options potentially available to commercial lawyers are designed:

- To develop clearer and more robust contractual arrangements for the allocation of responsibilities for preventing and remedying human rights harms arising from the distribution or end uses of products.
- To enhance the leverage of contractual parties to prevent adverse human rights impacts, or to mitigate any adverse impacts that do arise, associated with the use of their products.

Some features of downstream commercial agreements (eg sale, distribution, licensing or franchise agreements) that may be relevant to achieving these objectives are listed below in Table 2.

**TABLE 2**  
**Features of downstream commercial contracts potentially relevant to mitigation of downstream human rights risks**

Feature/clauses	Relevance to addressing downstream human rights risks	Issues/comments
<b>Representations and warranties</b>	<p>The parties confirm to each other they have taken the steps needed to identify human rights risks and address any risks of adverse human rights impacts.</p> <p>The downstream party has put systems in place to prevent misuse of the product(s).</p>	Beyond acting as a contractual safeguard, a well-crafted set of representations and warranties can be a useful way of obtaining information from the downstream party about: downstream human rights risks; and the success or otherwise of the downstream party's efforts to identify and address them. This can then be fed into the company's own human rights due diligence processes.
<b>Contractual pre-conditions</b>	Completion/proper implementation of processes needed to properly gauge human rights risks in the supply chain.	Minimum agreed human rights risk assessment standards could be specified in the contract, perhaps as a technical annex.
<b>Covenants and undertakings</b>	<p>Ongoing obligations to:</p> <ul style="list-style-type: none"> <li>• Carry out human rights due diligence with respect to end-use risks.</li> <li>• Carry out 'know your customer' checks (see above).</li> <li>• Abide by certain standards, such as the product manufacturer's code of conduct or specified international standards.</li> <li>• Ensure staff are adequately trained vis-à-vis the identification and mitigation of downstream human rights risks.</li> </ul>	<p>Robust provisions on reporting and rights of inspection and audit can help parties to verify compliance with contractual covenants and undertakings.</p> <p>See also 'Conditions on use and onwards sales' below on obligations to carry out customer checks.</p>

<b>Prohibitions on unauthorised use and/or conditions on onward sales</b>	<p>No unauthorised modifications of product.</p> <p>Onwards sales subject to pre-agreed customer due diligence ('know your customer' checks, see above).</p> <p>Sets out categories of customer to which there must be no onwards sales (either at all or without prior authorisation from the company). For example, certain state agencies, or companies involved in certain high risk sectors or operational contexts.</p> <p>Sets out contractual safeguards required to be cascaded downwards through the value chain, together with provisions on the manner in which these obligations should be enforced.</p> <p>Downstream party to monitor activities of customers/end users for signs of misuse (to the extent possible and practicable in the circumstances).</p> <p>Downstream company to take corrective action at the request of the company in the event of evidence emerging of cases of unauthorised use.</p>	<p>Although these obligations are only likely to be enforceable against the 'tier 1' downstream party, it may be possible to arrange for at least some key obligations to be cascaded down the value chain through back-to-back commitments. For example, as regards human rights due diligence, information-sharing and enforcement, etc.</p> <p>In situations where obligations can be cascaded down in this way, there may be opportunities to enhance the contractual regime further through the use of 'step-in rights', which would enable the company to enforce certain aspects of downstream contracts on the downstream party's behalf, such as vis-à-vis other downstream actors.</p> <p>Robust provisions on reporting, also rights of inspection and audit can help parties to verify compliance with obligations to cascade down restrictions on use etc, and enforce them.</p>
<b>After sales service, or technical updates</b>	<p>Sets out the conditions on which company will provide after-sales care or technical updates.</p> <p>Specifies these commitments will/may be withdrawn in cases where the downstream party is not observing its contractual commitments as regards prohibitions on unauthorised use and management of downstream human rights risks.</p> <p>Makes clear renewal of associated service agreements will be subject to the relevant companies being able to demonstrate compliance with human rights due diligence standards.</p>	<p>See also 'Technological options' and 'Responsible design' below.</p>

<b>Complaints mechanism(s)</b>	<p>Downstream company must establish or participate in a mechanism through which it can field complaints about end-use risks and/or cooperate with a named independent third-party grievance mechanism.</p> <p>Sets out the bases on which parties will cooperate with respect to the resolution of grievances arising from adverse human rights impacts connected with the end-use of products.</p>	<p>On effective remediation and grievance mechanisms, see UNGPs.<sup>201</sup></p> <p>To avoid fragmentation in the way grievances arising from downstream human rights risks are addressed, and for greater credibility and objectivity of complaints resolution processes, the parties may agree to be bound by the decisions of a suitable third-party independent grievance mechanism (if available). Such obligations may be able to be cascaded down the value chain even further, through back-to-back provisions.</p>
<b>Record keeping and reporting</b>	<p>Sets out the record keeping obligations of downstream party as regards onward sales.</p> <p>Sets out periodic reporting obligations of downstream party as regards:</p> <ul style="list-style-type: none"> <li>• Onward sales and uses of products.</li> <li>• Complaints (see 'Complaints mechanisms' above).</li> </ul> <p>Obligation to notify company immediately in the event of non-compliance with contractual safeguards vis-à-vis downstream, risks. For example, human rights due diligence obligations, obligations to carry out customer checks, or obligations to comply with a corporate code of conduct, etc. Failures by downstream party to report suspicions of misuse would give the company a right of termination (see below).</p> <p>Downstream party to respond promptly to requests from the company for information.</p>	<p>Robust record keeping and reporting provisions are vital for enabling proper monitoring of compliance with contractual safeguards and need to be tailored accordingly.</p>
<b>Rights of inspection and audit</b>	<p>Company has the ability to inspect records and audit premises to check compliance with agreed joint human rights risk management processes and systems.</p>	<p>Robust provisions on rights of inspection and audit can be vital for enabling proper monitoring of compliance with contractual safeguards and need to be tailored accordingly.</p>



<b>Consequences of breach of contractual provisions designed to address downstream human rights risks</b>	<p>Depending on the context, type of relationship (including leverage), risk-management needs, and prevailing legal rules options might include:</p> <ul style="list-style-type: none"> <li>• Financial damages.</li> <li>• Termination of related services.</li> <li>• Agreement of (or imposition of) a remediation plan.</li> <li>• Appointment of a remediation adviser.</li> <li>• Enforcement by third party beneficiaries.</li> </ul>	<p>When a company can pre-estimate the financial losses it may suffer as a result of breaches of human rights-related commitments by the downstream party, it might be possible to provide for financial damages (subject to relevant rules under the law governing the contract). However, contractual remedies between the parties will not provide a remedy to affected people or communities for the harm suffered, hence the importance of provisions on arrangements for responding to human rights-related grievances (see above).</p> <p>Contracts are normally only binding between the parties to them (under the doctrine of ‘privity’). But it is sometimes possible for parties to waive privity of contract to create the possibility for enforcement of obligations by third parties (perhaps extending, in this context, individuals and communities whose human rights have been adversely impacted by poor management of end-use risks).</p>
<b>Termination provisions</b>	<p>Company has the right to terminate without notice or with minimal notice and without incurring any financial penalty in the event of:</p> <ol style="list-style-type: none"> <li>Breaches of terms establishing contractual safeguards against downstream/end-use human rights risks, and any other human rights-related commitments; and/or</li> <li>Failure of downstream party to abide by the terms of a remediation plan (or recommendations or instructions of a remediation adviser, see above).</li> </ol>	<p>The ability to speedily terminate the agreement for failures to abide by contractual safeguards designed to mitigate downstream human rights risks is an important way of ensuring the company has sufficient leverage.</p> <p>This also provides the company with the flexibility to end the relationship if that is the most appropriate way of addressing adverse human rights impacts (actual and potential) in the circumstances (see UNGP 19, and commentary).</p>

As can be seen, companies are far from powerless to mitigate the human rights risks of their products once they are out of the factory gate. Table 2 details the numerous contractual means through which companies can potentially enhance their leverage over other actors with regard to the mitigation of downstream human rights risks.

Although contractual safeguards may only be legally enforceable against the ‘Tier 1’ downstream party (eg a dealer, wholesaler, distributor or franchisee), at least some of these may potentially be cascaded down to other actors further down the value chain. For example, by imposing binding contractual obligations on the ‘Tier 1’ downstream party to monitor and report back on downstream markets and activities, maintain proper records, and take action where cases of harmful and/or unauthorised uses are detected.

The arrival of mandatory human rights due diligence regimes, such as the one currently under contemplation by the European Commission (see Chapter 3), is likely to drive further legal innovation. The recent ABA guidance on integrating human rights due diligence into commercial contracting<sup>202</sup> was produced explicitly in contemplation of new, and more wide-ranging and robust, legal regimes under which the human rights due diligence framework set out in the UN Guiding Principles will form the basis of legally enforceable standards. US State Department guidance on export of technologies with the potential for adverse human rights impacts<sup>203</sup> (see Box 20) shows a number of ways in which contractual safeguards developed for the purposes of ensuring compliance with export control regulations may also be adapted to help mitigate downstream human rights risks.

Clearly, proactive and creative legal counsel have a vital role to play in devising and negotiating a robust and workable set of contractual safeguards to allow companies to respond better to end-use risks. However, a paper regime will not be sufficient on its own to properly address human rights risks and meet legal duties of care. Proper use of leverage involves not only signing up to commitments on paper, but also investing in the operational systems needed to ensure human rights abuses arising from the use of products will be quickly detected and breaches of legal obligations by downstream partners (including contractual obligations) vigorously enforced.

### 5.3 Making the most of technology

The increasing integration of technologies into many different types of products creates a host of opportunities for enhancing a company's leverage and influence within different markets and sectors. Although the commercial benefits are obvious and well understood, companies are increasingly taking note of the ways in which the design of products, together with the structuring of servicing and aftercare packages (often in combination), can also increase their leverage.

**Responsible design:** Some leading technology companies, in particular, have been instrumental in developing and promoting the concept of 'responsible design'. This is shorthand for how companies can integrate ethical and human rights considerations into the design of a product rather than merely considering how to take account of different human rights challenges at a later stage, for example with add-ons or restrictions on use that may not be effective.

These ideas are now finding their way into regulatory guidance for the technology and communications sector (see Box 20).

## **BOX 20:** US State Department guidance to the technology sector on ‘responsible design’

### **Purpose:**

*The guidance seeks to assist U.S. businesses that work with or design and manufacture products or services that have surveillance capabilities with implementation of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) as well as the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines). The guidance provides U.S. businesses with a way of identifying products or services that can be misused to violate or abuse human rights, and considerations to weigh prior to engaging in transactions linked to foreign government end-users or private end-users that have a close relationship with governments ...” (p. 1).*

...

**5. To the extent possible and as appropriate, tailor the product or service distributed to countries that do not demonstrate respect for human rights and the rule of law to minimize the likelihood that it will be misused to commit or facilitate human rights violations or abuses.**

- *Integrate safety, privacy by design, and security by design features appropriate to the risks and technical capabilities of the covered product or service, such as:*
  - » *Mechanisms for individuals to report misuse of the product or service.*
  - » *Strip certain capabilities from the product or service prior to sale.*
  - » *Prevent interconnected products from being misused.*
  - » *Limit use to the authorized purpose.*
  - » *Limit upgrades, software updates, and direct support that enhance or provide new surveillance features.*
  - » *Provide for data minimization.*
- *Place conditions on intellectual property associated with use of the products or services to be consistent with international human rights standards.” (p.11).*

Extracted from: U.S. Department of State ‘Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities’, <https://www.state.gov/wp-content/uploads/2020/09/DRL-Industry-Guidance-Project-FINAL-508.pdf>

Responsible design ideas can obviously be applied beyond the technology sector. Devices to ‘enable the tracking of deployment, ‘alert the export to misuse and ‘limit the use once sold’ (see Box 20) are already widely available and increasingly integrated into the design of vehicles, agricultural and earthmoving equipment and other heavy machinery. JCB’s own LiveLink technology is one such example (see Box 3).

**Servicing and aftercare:** For some products and transactions, the sale of the product to the customer is only the start of a much longer relationship. The customer may

continue to rely on the manufacturer of the product for aftersales service, whether on the basis of a warranty or some separate servicing arrangement, or for periodic upgrades of products or of the integrated technologies.

The commercial advantages of forging continuing relationships with customers of these types need no explaining. However, companies are increasingly recognising the value of these relationships as part of a wider human rights due diligence strategy. They provide an opportunity for periodic checks on how products are being used and whether there have been instances of misuse, and create possibilities for commercial and contractual sanctions in cases of misuse if there is a breach of warranties or the terms of service or licence agreements (see Box 21).

#### **BOX 21: The UK NCP's 2014 decision on Privacy International and Gamma International UK Ltd**

This was a complaint brought by Privacy International and other co-complainants against a UK corporate member of the Gamma Group, which was described in the UK NCP's final statement as 'a group of companies founded in the 1990s that supplies and trains government agencies in the areas of communications monitoring, data recovery and forensics, and technical surveillance'. The complaint alleged Gamma had supplied a spyware product to Bahrain government agencies, which had used it to target pro-democracy activists.

The UK NCP analysed the options that might have been available to the company at different points in time, for the purpose of deciding which version of the OECD Guidelines would apply. Regardless of the timing and circumstances of the original supply, it observed:

a company can exercise some control via the software licensing mechanism to prevent a user deploying the product against more targets than the contract allows. A company may also stop updating the product so that it is less effective as security products develop counter measures.

**Source:** [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/847362/UK-NCP-Final-statement-complaint-Privacy-International-Gamma-International-UK-Ltd.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/847362/UK-NCP-Final-statement-complaint-Privacy-International-Gamma-International-UK-Ltd.pdf)

## **5.4 Denial and doing nothing are not viable options**

In JCB's response to serious concerns about the use of its machinery in demolitions of Palestinian homes and structures by Israeli authorities in the OPT, the company seems to take the position that, as it sells equipment into Israel through an 'independent third-party distributor', it is not involved in human rights abusing activities.<sup>204</sup> JCB also challenges any suggestion of involvement in, or responsibility for, human rights abuses in the OPT by arguing once the company's legal ownership of the equipment in question has passed to another party, there is no prospect of influencing what happens to or is done with the equipment.

Furthermore, JCB points to the possibility the authorities involved in activities giving rise to human rights abuses might have been served by a second-hand market for earthmoving and demolition machinery, over which the company has no control. The point is also made that ‘JCB has a consistent record of providing urgent and substantial support in response to natural disasters around the world’.<sup>205</sup>

It is not always clear from the wording of JCB’s rebuttals whether these denials of ‘involvement’, ‘responsibility’ or ‘liability’ are based on legal constructions or on a much more flexible normative view based on international standards applicable to companies. Even as a summary of a narrow legal position, these arguments are at best simplistic and unrelated to the real legal and practical position. The reasons why managers of exporting companies would be unwise to assume a transfer of ownership of a product would inevitably be sufficient to absolve it of all potential legal liability for downstream human rights risks are explained in Chapter 3.

JCB’s claims about the nature of its responsibilities, and where they begin and end, are at odds with standards of responsible business conduct laid down in the UN Guiding Principles and the OECD Guidelines. Companies do not meet their responsibility to respect human rights, as defined in the UN Guiding Principles, by selling their products to third parties and trusting to luck, especially when they are selling into jurisdictions affected by conflict and where there are known instances of their products being used in human rights abusing ways. As discussed in the previous chapter, companies are expected to proactively identify and analyse actual and potential sources of human rights risk, and then take appropriate action to mitigate those risks. In some cases, where the risks of involvement in adverse human rights abuses cannot be mitigated in any other way, this may mean withdrawing from markets or commercial relationships.

Specifically, there is nothing in the UN Guiding Principles or the OECD Guidelines to support the idea the legal transfer of ownership of a product severs any possible linkage between a company and the human rights abuses to which the products may be put. On the contrary, those downstream commercial relationships may be the very avenues through which a company is able to exercise the leverage needed to mitigate the downstream human rights risks. Further, it may be the very fact a sale has taken place at all, without proper checks in place or a coherent strategy to manage the downstream human rights risks, that could call the company’s level of respect for human rights into question.

While preventing products from reaching risky jurisdictions through other routes, such as second-hand markets, might indeed be more challenging, and items might find their way to a user who breaches human rights no matter what a company does, it does not follow that companies can simply do nothing. The fact the items in question may have beneficial uses – as has been stressed by JCB in relation to the equipment that is the subject of this report – or that the company may show generosity in other ways, does not alleviate the company of its responsibilities to exercise due diligence in order to respect human rights.

In furtherance of this approach, some pharmaceutical companies have taken significant steps to ensure their drugs are not used for administration of the death penalty. These range from legal injunctions against those who would misuse their products<sup>206</sup> to sophisticated strategies to restrict access to those who would use the product for execution by lethal injection, while maintaining access for those who would use it for therapeutic purposes (see Box 22 below).

## **BOX 22: Efforts to prevent the use of Nembutal for US executions**

A drug marketed as Nembutal, produced and distributed by Danish pharmaceutical company, Lundbeck, was found to have been used in executions by lethal injection in the US. Following months of pressure from human rights campaigners and civil society organisations, the company announced a new strategy aimed at restricting access to the product by US prisons engaged in capital punishment, while maintaining its availability for therapeutic purposes.

According to a 2011 statement to the press by Lundbeck CEO Ulf Wiinberg:

The company is opposed to the use of its products for the purpose of capital punishment. Use of our products to end lives contradicts everything we're in business to do – provide therapies to improve people's lives...

After much consideration, we have determined that a restricted distribution system is the most meaningful means through which we can restrict the misuse of Nembutal. As such, the company announced on July 1, 2011, that Nembutal will be supplied exclusively through a speciality pharmacy distributorship program that will deny distribution of the product to prisons in U.S. States currently active in carrying out the death penalty by lethal injection...

While the company has never sold the product directly to prisons and therefore can't make guarantees, we are confident that our new distribution program will play a substantial role in restricting prisons' access to Nembutal for misuse as part of lethal injection...

The new distribution programme ensures that hospitals and treatment centers will continue to have access to Nembutal for therapeutic purposes. Under the programme, Lundbeck will review all Nembutal orders before providing clearance for shipping the product and deny orders from prisons currently active in carrying out death penalty sentences.

Prior to receiving Nembutal, the purchaser must sign a form stating that the purchase of Nembutal is for its own use and that it will not redistribute any purchased product without express written authorisation from Lundbeck.

**Sources:** D. Jolly, 'Danish Company Blocks Sale of Drug for U.S. Executions', *New York Times*, July 1, 2011; 'Lundbeck acts to stop misuse of Nembutal in executions', *Reuters* <https://www.reuters.com/article/lundbeck-idCNLDE76007120110701>



## 6 Conclusions and recommendations

JCB harbours illusions it believes insulates the company from responsibility for the uses of its bulldozers in the OPT. Its justifications for this are incompatible with evolving interpretations of the international human rights standards applicable to companies. They are a negation of the concept of human rights due diligence, which is a key element of these standards, and do not reflect the attempts of companies across sectors to understand and mitigate human rights impacts across their value chain.

JCB's reliance on the idea that 'human rights responsibilities end at the factory gate' is seriously misguided. On the contrary, there are many situations in which manufacturers can be held legally responsible for the way third parties use or misuse their products, regardless of whether the products also have socially beneficial uses. Poor management of end-use risks is an increasingly significant source of legal risk.

JCB cannot claim ignorance of the human rights impacts of its products in the OPT as they have been publicly highlighted by organisations that have borne witness to them. In addition, the company was made aware of these concerns by the UN Office of the High Commissioner for Human Rights, which was engaging with JCB on these issues and found the company to have a clear and direct link to human rights violations.

Companies do not meet their responsibility to respect human rights, as defined in the UN Guiding Principles, by selling their products to third parties and trusting to luck, particularly where there are known instances of their products being used in human rights abusing ways and clear risks this will continue to happen, such as in conflict-affected situations.

JCB has the means to do things differently. It could exercise contractual leverage over its sole agent in Israel, Comasco, by embedding human rights conditions into its contracts that Comasco would be required to pass on to subsequent purchasers of JCB's products. Such contractual features are listed in Chapter 5 (Table 2).

JCB has the technology to keep track of what happens to its products after they leave its factories. It uses a diagnostic system, branded as LiveLink, which provides information that includes location of its products and critical machine alerts, maintenance records, service history, fuel consumption, duty cycles and immobiliser code recording. It is JCB's choice whether to put this technology to use to address the human rights impacts of its products.

JCB has remained largely detached from the organisations that have credible information relating to the use of its products for committing human rights violations. It has also failed to implement the steps some other companies are taking to prevent their products falling into the hands of those who might misuse them in ways that breach human rights.

## RECOMMENDATIONS

### To JCB

1. Identify and assess the human rights impacts of the company's products and services, especially when they are used in conflict-affected areas, including occupied territory.
2. Take action to address human rights risks and abuses, including through the contractual and technological means available to the company, and with regard to the leverage it can exert over dealers and agents, and others with whom it has business relationships.
3. Publicly communicate all such risks that have been identified and how they are being addressed, in the fullest way possible.
4. Commit to respect human rights and create robust human rights due diligence policies and processes connected with the use of company products and services, including via its business relationships.
5. Withdraw from markets in conflict-affected areas, including occupied territories, where there is no realistic prospect the company's actions will prevent its equipment from being used to commit human rights violations.
6. Provide reparation where the company's products have contributed to adverse human rights impacts.
7. Engage with organisations that have credible evidence of human rights violations linked to the company's products.
8. Learn from best practice across sectors to prevent its products being used by those who might cause or contribute to actual or potential adverse human rights impacts.
9. Consult with all stakeholders in relation to actual and potential human rights risks arising from its activities and from the activities of those with whom it has business relationships.

### To the UK government


1. Adopt and enforce a legal framework requiring companies to conduct human rights due diligence in their global operations and value chains, including in relation to the use of their products and services.
2. Ensure consequences for companies that fail to conduct human rights due diligence, including the prospect of civil and criminal liability in certain circumstances.
3. Prohibit the export of machinery, equipment and technologies to countries where they have been repeatedly linked to human rights abuses or violations of international humanitarian law, and where the company has not taken the necessary steps within its powers and capacity to prevent or mitigate such abuses.
4. Ensure that the UK National Contact Point for the OECD Guidelines for Multinational Enterprises has the expertise, capacity and independence to assess and examine human rights complaints in keeping with current UN and OECD interpretations of the international standards applicable to companies.

### To UK local authorities and other public bodies

Exclude from tendering processes any companies causing or contributing to grave human rights violations, or linked to such violations through their business relationships where they have failed to take preventive measures.

## ANNEX 1

### Letter from JCB to the European Trade Union Network for Justice in Palestine



**J C BAMFORD EXCAVATORS LTD**

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England ST14 5JP  
Tel: +44 (0) 1889 590312  
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Mr. Koen Vanbrabandt (Chairman)  
European Trade Union Network for Justice in Palestine  
4 February 2021

Dear Sir

European Trade Union Network for Justice in Palestine (ETUN)

I refer to your letter dated 28 January 2021. You do not provide any formal address in your letter and I am therefore responding to your e mail address.

JCB has wrongly been included on the OHCHR Database to which you refer. The Database acknowledges that it simply relied on '*desk research to receive the information received from Member States and stakeholders.*' The Database is not one that is supported by the UK Government. Indeed it firmly rejects it.

**The Facts**

1. JCB is not involved in any activities nor does it have business operations in the Occupied Palestinian Territories, and it has not (directly or indirectly) enabled, facilitated or profited from the construction and growth of Israeli settlements. Accordingly, it should never have been included on the Database. Following publication of the Database JCB has made extensive representations to OHCHR, explicitly rejecting the reasons for its inclusion and requested its immediate removal. JCB still awaits a formal response almost a year later. In JCB's view that informs the arbitrary nature of the process followed.
2. JCB strongly rejects any suggestion of involvement in, or responsibility for, any human rights abuses/infringement of human rights anywhere in the world. JCB does not condone any form of human rights abuse and has a consistent record of providing urgent and substantial support in response to natural disasters around the world.
3. JCB has not sold machinery to any contractors carrying out the acts complained of in the Occupied Palestinian Territory or to the Israeli Government. The only machinery JCB sells into Israel is sold via one independent third-party distributor with which JCB has no financial or management involvement. JCB's legal ownership of the machines ends at the point at which they are sold to that distributor, and JCB cannot dictate who that distributor can and cannot then sell the machinery to.
4. To the extent that JCB machines have been used in Israeli settlements these machines would not have been purchased from JCB. There are a substantial number of sources from which the machines could have been purchased, borrowed or leased.

Registered Office: as above.  
Registered No. 561597 England.





5. Whilst Israel has no domestic manufacturer of construction equipment, it is well served by numerous other non- Israeli manufacturers. It is also important to note there is an established second-hand market for construction machinery in Israel and the region. Machines can be purchased second-hand from sellers within Israel, from neighbouring countries and even by sea.
6. It is clear that products made by other manufacturers of construction machinery are also regularly used in the Occupied Palestinian Territories, but none of these companies are included on the Database.
7. JCB has no control over these markets and to seek to hold it liable for acts ultimately committed with JCB machinery is completely unreasonable.

**Rejection of Allegations by UK National Contact Point for the OECD Guidelines for Multinational Enterprises**

8. The UK National Contact Point for the OECD Guidelines for Multinational Enterprises (the "NCP"), has recently – on 12 October 2020 – largely dismissed a complaint alleging that JCB has breached those guidelines ("the Guidelines").
9. The complaint relied heavily on evidence purportedly showing machines manufactured by JCB being used in the demolition of Palestinian settlements/construction of Israeli settlements in the Occupied Palestinian Territory to allege that JCB was complicit in human rights abuses.
10. At the first available opportunity (the 'Initial Assessment' stage), the NCP rejected this allegation specifically stating that *'the UK NCP does not consider that the information provided by the complainant demonstrates that JCB has caused or contributed to the issues raised.'*
11. This is a clear rejection of any claim that JCB is involved in the infringement of human rights or that JCB in any way causes or contributes to such adverse human rights impacts.
12. The only aspect of the NCP referral that remains technically open is a follow up review of JCB's internal administrative procedures in relation to the relevant OECD guidelines which JCB has indicated that it is very happy to engage on.

I trust this now clarifies the position and we fully expect the OHCHR to remove JCB's name from the Database in the immediate future.

Yours faithfully

*J C Bamford Excavators Ltd.*

J C Bamford Excavators Limited

## ANNEX 2

Extract from a contract between Comasco Ltd and Israel's Ministry of Defence, translated from Hebrew, for maintenance of JCB's backhoe loaders, which have been used in the demolition of Palestinian homes and property. (This is one of seven contracts relating to JCB's equipment obtained by Who Profits via a Freedom of Information request to Israel's Ministry of Defence.)

### State of Israel

#### Ministry of Defence

##### State of Israel

##### DOPP

Security Classification: **Unclassified**

**Ministry of Defence** [Department of Production and Procurement]

<b>To:</b> Comasco Ltd.  <b>POB</b> 13195 <b>Postal Code</b> 4486400  Kokhav Ya'ir <b>Tel:</b> [redacted] <b>Fax:</b> [redacted] <b>Supplier:</b> [redacted] <b>Supplier for payment:</b> [redacted]  (hereinafter "the Supplier")	This document and its appendices, undersigned by the Ministry and the Supplier will hereinafter be referred to as:  <b>Order 4441075171</b> (version 2)  <b>*** This order supersedes any previous order of corresponding number ***</b>	<b>Division:</b> Maintenance and Procurement Division [redacted] <b>Procurement Group:</b> [redacted] <b>Procurement Group number:</b> [redacted] <b>Telephone:</b> [redacted] <b>Address:</b> MoD – DOPP POB 702 Ha'Kiryat TA [Tel Aviv] 6107001
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#### JCB- 31 Dec 2021 (2)

##### Order 4441075171 (Version 2)

**Valid dates:** 06.04.2020-31.12.2021

**Version 0 release date:** 27.07.2020

**No. of items:** 3

**Issued on:** 27.12.2020, 07:44

**Order sum w/o VAT:** 461, 538.40

**VAT:** 78,461.52

**Total sum:** 539,999.92

Contact person is Head of Division [REDACTED] by mail [REDACTED] or phone [REDACTED].

28/07/2020 – order increase by 200,000 (incl VAT)

31/12/2020 – order increase by 240,000 (incl VAT)

Order item number	Item description and price components	Sum/percentage	For each		Total value
			Quantity	Price units	
10	<b>Item:</b> JCB backhoe loader maintenance		[REDACTED]	CCY	
	Gross price	1,000 ILS	[REDACTED]	CCY	85,470
	VAT sum				14,529.9
	Total VAT included	1,170 ILS	[REDACTED]	CCY	99,999.99
30	<b>Item:</b> JCB backhoe loader maintenance		[REDACTED]	CCY	
	Gross price	1,000 ILS	[REDACTED]	CCY	170,940.2
	VAT sum				29,059.83
	Total VAT included	1,170 ILS	[REDACTED]	CCY	200,000.03
40	<b>Item:</b> JCB backhoe loader maintenance		[REDACTED]	CCY	
	Gross price	1,000 ILS	[REDACTED]	CCY	205,128.2
	VAT sum				34,871.79
	Total VAT included	1,170 ILS	[REDACTED]	CCY	239,999.99

## ANNEX 3

### Mapping the use of JCB products to commit human rights violations in the Occupied Palestinian Territories

Event date	Location	Structure type(s)	Description
19 Nov 2017	Khirbet al-Halawah	Residential	Two structures demolished leaving two families homeless.
17 Jun 2019	Khirbet al-Halawah	Residential	Three cement structures demolished leaving three families, totaling 21 people, homeless.
09 Oct 2018	Khirbet al-Halawah	Residential	Three dwellings donated by humanitarian aid organization demolished, leaving 21 people homeless.
19 Jun 2016	Khirbet Wadi Ejheish	Residential; Agricultural	Two family homes and two livestock pens demolished, affecting 21 people.
29 Dec 2020	Khirbet Wadi Ejheish	Residential	Prefabricated home demolished, displacing a family of eight.
29 Sep 2020	Khirbet Shaab al-Butum	Residential	Two cinder block structures demolished that were home to two families, totaling 14 people.
02 Mar 2021	Khirbet Khilet a-Dabe'	Residential	Two structures demolished that housed two families, totaling 11 people.
17 Jun 2019	Khirbet Khilet a-Dabe'	Residential	One cement structure demolished that was home to a family of 12.
11 Sep 2019	Khirbet Khilet a-Dabe'	Residential; WASH	Two structures used as housing for two families totaling nine people demolished, along with a water cistern.
2 Nov 2020	Ghzewi	Residential	Home under construction demolished that was intended to house a family of seven.
11 Aug 2020	Khirbet al-Fakhit	Residential	Residential tent that was home to seven people demolished.
24 Nov 2011	Umm Fagarah	Residential; Agricultural; Other	Two houses, a mosque, a barn and a structure containing a generator demolished.
6 Apr 2016	Um El Kheir	Residential	Six family dwellings demolished that housed 34 people. Three of the structures were donated by European aid agencies.
12 Jun 2019	Um al-Kheir	Residential	Caravan housing a family of 10 demolished.
28 Feb 2019	Al-Derat	Residential	Cement home demolished, affecting one family.
27 Jan 2021	Um Qusah	Religious	Mosque under construction demolished.
1 Dec 2020	Tal Zif	Agricultural	The forces destroyed a cave and two pre-fabricated buildings used for agricultural purposes.
21 Jul 2019	Wadi al-Hummus	Residential	Homes under construction demolished.
3 Sep 2018	Al-Walaja	Residential; Other	Four homes demolished, affecting 21 people.
15 Nov 2020	Beit Safafa	Residential	Machinery working on land slated for new illegal settlement.
08 Jan 2020	Jabal Al-Mukaber	Residential	Two family homes demolished, affecting 15 people.
4 Jul 2018	Abu a-Nuwar	Residential; Agricultural	Nine homes and three farm buildings demolished, affecting 62 people.
16 Feb 2021	Ras al Amud	Residential	Family home demolished, displacing four people.
20 Feb 2018	Jabal Al-Baba	Residential	One structure demolished, leaving a 13-person family homeless.
24 Jul 2018	Jabal al Baba	Other	Two structures dismantled, one of which was used as a day-care center and another that served as a community center.
2 Jul 2020	Al-Tur	Residential	Family home demolished.
21 Nov 2018	Shua'fat Refugee Camp	Commercial	18 storefronts and three gas stations demolished.
4 Jul 2018	Khan al-Ahmar	Residential	Preparation for forced removal of community.



4 Aug 2020	Beit Hanina	Residential	Demolition of family home, affecting seven people.
17 Mar 2021	a-Nuwei'mah	Residential	One shack demolished as well as 10 tents and nine plastic water containers confiscated, affecting 11 families totaling 66 people.
29 Dec 2020	Arab Al-Zayed	Residential; Agricultural	Three homes demolished and 350 olive trees uprooted.
25 Nov 2020	Fasayil a-Tahta	Residential; Agricultural; WASH	Multiple structures, including residential shacks, kitchens, toilets, and structures used for keeping livestock, demolished.
28 Jan 2021	Wadi-al-Ahmar	Residential; Agricultural	Three tents housing two families of 13 in total demolished along with structures and equipment used for keeping livestock.
11 Oct 2018	al-Jiftlik	Residential; Agricultural	Pre-fabricated home along with three livestock paddocks demolished, affecting a family of three.
20 Nov 2013	al-Jiftlik	Residential	Family home demolished, affecting its 10 residents.
26 Sep 2016	Beit Dajan, Nablus	Agricultural	Agricultural structure demolished.
7 Jul 2021	Khirbet Humsah	Residential; Agricultural; WASH	Thirteen tents and huts used as residences, 17 agricultural structures, and water infrastructure demolished, affecting nine families with a total of 61 members.
3 Feb 2021	Khirbet Humsah	Residential; Agricultural; WASH	A series of demolitions in February 2021 resulted in the destruction of most of the community's residential structures, livestock enclosures, and portable outhouses, affecting 74 people.
8 Feb 2021	Khirbet Humsah	Residential; Agricultural; WASH	
22 Feb 2021	Khirbet Humsah	Residential; Agricultural; WASH	
3 Nov 2020	Khirbet Humsah	Residential; Agricultural; WASH	18 tents and sheds housing 11 families totaling 74 people demolished along with numerous structures used for keeping livestock, toilets, and water containers.
11 Oct 2018	Al-Hadidiyah	Residential; Agricultural	Three huts demolished that housed a family of eight, along with a paddock and two livestock pens.
13 Oct 2016	Ras Ahmar, Tubas	Residential; Agricultural	10 homes and 17 livestock pens demolished affecting nine families and leaving 24 people homeless.
20 Apr 2020	Sabastiya, Nablus	Commercial; Residential	Tourism facility and mobile caravan demolished in Sebastiya and Burqa.
12 Jun 2019	Khirbet a-Ras al-Ahmar	Residential; Agricultural	Six tents housing two families with a total of 15 members demolished along with six tents used as livestock pens.
27 Jan 2021	Khirbet 'Einun	Agricultural; Other	3,000 forest trees and 130 olive and almond trees uprooted.
8 Feb 2021	Khirbet Yarza	Residential; Agricultural	Two pre-fabricated homes serving two families numbering 11 people demolished along with a shack used to house livestock.
7 Sep 2016	Aqaba, Tubas	Residential; Agricultural	Residential and agricultural buildings destroyed.
7 Feb 2017	Kardala, Tubas	Agricultural	Structure used to keep livestock destroyed.
5 Feb 2019	Bardala, Tubas	Agricultural	450 olive trees uprooted.
24 Jun 2020	Bardala, Tubas	Agricultural	70 olive trees uprooted.
9 Aug 2020	Farasin	Residential	Cave serving as home to a family of three demolished.
25 Nov 2020	Masafer Yatta	WASH	Water tanks and water lines destroyed.
24 Dec 2019	Maghayir Al Abeed	Residential	Three cinder-block homes serving three families totaling 12 members demolished.
11 Sep 2019	Al-Mufaqqarah	Residential; WASH	Three pre-fabricated buildings and a tent that housed four families, 18 people in total, demolished along with a water pipe bringing water to the area.
31 Jul 2019	Jawwaya	WASH	Water pipelines destroyed.

# Endnotes

- 1 Report of the UN High Commissioner for Human Rights, “*Database of all business enterprises involved in the activities detailed in paragraph 96 of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the OPT, including East Jerusalem*”, 12 February 2020, A/HRC/43/71
- 2 UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy Framework*, 2011, [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)
- 3 See Annex 1, JCB’s letter to the European Trade Union Network for Justice in Palestine, 4 February 2021
- 4 JCB’s response to the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, para 19, <https://www.gov.uk/government/publications/lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-jcb/initial-assessment-lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-jcb>
- 5 Amnesty International has seen seven contracts between JCB’s sole agent in Israel, Comasco Ltd, and Israel’s Ministry of Defence, including contracts for the maintenance of JCB’s backhoe loaders, which have been used in the demolition of Palestinian homes and property. See Annex 2 for an extract from one of these contracts, translated from Hebrew
- 6 See *Begum v Maran* case, *Begum v Maran (UK) Ltd* [2021] 3 WLUK 162. It has also been dismissed in relation to climate change; see *Milieudefensie v Royal Dutch Shell*, District Court of the Hague, 26 May 2021, para 4.4.49, <https://www.shearman.com/Perspectives/2021/06/Milieudefensie-v-Shell--Landmark-Court-Decision-For-Energy-Companies>
- 7 JCB’s promotion of its LiveLink diagnostic system suggests that this could be used to track and monitor its equipment for multiple purposes, <https://www.jcb.com/en-gb/customer-support/livelink>
- 8 See Chapter 5, Table 2, which sets out features of downstream commercial agreements (eg sale, distribution, licensing or franchise agreements) that are relevant to the mitigation of harms arising from the use of a company’s products.
- 9 See, for example, Amnesty International’s digital mappings, <https://amnesty-crisis-evidence-lab.github.io/israel-opt-jcb-map-en/>; the material of the Shoal Collective, [https://corporateoccupation.org/2021/04/02/jcbs-complicity-in-israeli-war-crimes-2020-statistics/?mc\\_cid=3f733d93d4&mc\\_eid=e04032c683](https://corporateoccupation.org/2021/04/02/jcbs-complicity-in-israeli-war-crimes-2020-statistics/?mc_cid=3f733d93d4&mc_eid=e04032c683); videos of the Israeli Committee Against House Demolitions, <https://icahd.org/2020/11/19/jcb-campaign-videos/>; profile of JCB by independent research center Who Profits, <https://www.whoprofits.org/company/jcb-j-c-bamford-excavators/>
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- 11 There is growing support for human rights due diligence legislation from civil society organisations, investors and business, <https://corporatejusticecoalition.org/resources/uk-businesses-investors-call-for-new-human-rights-and-environmental-due-diligence-law-2/>
- 12 Chapter 4 examines how human rights due diligence should be applied by companies in situations where human rights violations might arise from the use of their products. Chapter 5 outlines a workable approach to end-use risk management, drawing on examples of good practice
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- 15 Breach of Fourth Geneva Convention, Art.49, para 1.
- 16 International humanitarian law establishes obligations concerning humane treatment and physical integrity of people living under occupation (defined as ‘protected persons’): respect for their basic rights to education, a fair trial, family life, health, religion and work; maintenance of public order and safety; respect for and protection of personal property; and the management of public property, including natural resources, for the benefit of those living under occupation.
- 17 Article 55 of the Hague Regulations makes occupied property subject to the laws of usufruct.
- 18 Fourth Geneva Convention, Art. 53. Israel has not accepted that the Fourth Geneva Convention applies to its occupation of Palestinian territory.
- 19 J Crawford SC, Opinion, *Third Party Obligations with respect to Israeli Settlements in the OPT*, 2012, p24, <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> See also, *Letter to Policy Makers in the European Union and its Member States Calling for Compliance with International Legal Obligations related to Withholding Trade from and toward Israeli Settlements*, <http://www.eccpalestine.org/wp-content/uploads/2015/12/Letter-on-settlement-trade-FINAL-.pdf>
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- 21 Rome Statute of the International Criminal Court, Art. 8.2 (a) (b) (xvi), [http://legal.un.org/icc/statute/99\\_corr/cstatute.htm](http://legal.un.org/icc/statute/99_corr/cstatute.htm)
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- 23 Rome Statute of the International Criminal Court, Art. 8.2 (a) (iv) and (b) (viii). The Rome Statute codifies rules of customary international law that apply to all states, including Israel.
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- 25 UN Office for the Co-ordination of Humanitarian Affairs (OCHA), 'Most Palestinian plans to build in Area C not approved', *Humanitarian Bulletin* January-May 2021, <https://www.ochaopt.org/content/most-palestinian-plans-build-area-c-not-approved>
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- 28 For example, the protests in East Jerusalem in 2021 arising from actual and threatened forced evictions, <https://www.amnesty.org/en/latest/news/2021/05/israel-opt-scrap-plans-to-forcibly-evict-palestinian-families-in-silwan/>; <https://www.amnesty.org/en/latest/news/2021/05/israel-opt-end-brutal-repression-of-palestinians-protesting-forced-displacement-in-occupied-east-jerusalem/>
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- 30 UN Committee on Economic Social and Cultural Rights (CESR), General Comment 7, para 3.
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- 33 International Covenant on Civil and Political Rights, 1966, Article 17 (1), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
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- 35 Save the Children, *Hope under the Rubble: the impact of Israel's home demolition policy on Palestinian children and their families*, 2021 [https://resourcecentre.savethechildren.net/node/19371/pdf/hope\\_under\\_the\\_rubble\\_final.pdf](https://resourcecentre.savethechildren.net/node/19371/pdf/hope_under_the_rubble_final.pdf)
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- 44 <https://www.ochaopt.org/page/demolition-orders-against-palestinian-structures-area-c-israeli-civil-administration-data>
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- 52 UN Guiding Principles on Business and Human Rights, Principle 14
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- 85 A 'stakeholder' is considered here to be a party that has an interest in a *company* in so far as it can either affect or be affected by the *business*. JCB's stakeholders in the context of this report would include organisations with a presence on the ground in the OPT such as B'Tselem and Al-Haq.
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- 99 See JCB's dealer locator page, <https://www.jcb.com/en-gb/dealer-locator>
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- 101 See Begum v Maran case, *Begum v Maran (UK) Ltd [2021] 3 WLUK 162*. It has also been dismissed in relation to climate change; see *Milieudefensie v Royal Dutch Shell*, District Court of the Hague, 26 May 2021, para 4.4.49, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>
- 102 Commentary to UN Guiding Principles on Business and Human Rights, Principle 11, [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)
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- 118 *Donoghue v Stevenson*, 1932, AC 562, Doctrine of Negligence.
- 119 This has been judicially defined as 'a measure of control over and responsibility for the dangerous situation'. See *Sutradhar v National Environment Research Council* [2006] UKHL 33, see Lord Hoffman at para. 38.
- 120 Note the question of whether the court actually has jurisdiction over the matter is a separate question, decided on separate criteria. While these tests for jurisdiction may take account of the likelihood of success of the case (including on the question of whether there exists a legal 'duty of care'), the rejection of a case on jurisdictional grounds should not be taken to imply any geographical limits to the tests for liability for which, as noted above, the 'reasonable foreseeability' of the harm is a key plank.
- 121 *Chandler v Cape plc* [2012], explanation in Law Society Gazette, 5 September 2012, <https://www.lawgazette.co.uk/law/assumption-of-responsibility-for-a-subsiarys-responsibilities/67165.article>
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- 123 The issue of customer due diligence, and the contribution it can make to an effective human rights risk management strategy in relation to end-use risks, is discussed further in Chapter 5.
- 124 *Home Office v Dorset Yacht Club* [1970] AC 1004; *Smith and Littlewoods* [1987] AC 241.
- 125 *Home Office v Dorset Yacht Club*, [1970]. *Smith and Littlewoods*, [1987]. AG of the BVI v *Hartwell* [2004] UKPC 12. See also *Begum v Maran (UK) Limited*, Court of Appeal Judgment, 10 March 2021, para 45, <https://www.bailii.org/ew/cases/EWCA/Civ/2021/326.html>
- 126 *Home Office v Dorset Yacht Club*, [1970]. Also, *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)*, 2019, UKSC 3 para 147: 'control is just a starting point. The issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity.' <https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf>
- 127 See also JCB letter to the European Trade Union Network for Justice in Palestine, 4 February 2021.
- 128 *Begum v Maran (UK) Ltd* [2021] 3 WLUK 162.
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- 132 *Corrie et al v Caterpillar*, [2007], CV-05-05192-FDB.
- 133 See Allens Arthur Robinson, 'Corporate Culture' as the basis for the criminal liability of corporations, 2008, <https://media.business-humanrights.org/media/documents/f72634fd87adfd3d31a22f5f4b93150267b8a764.pdf>. See also Zerk, J, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies: A report prepared for the Office of the UN High Commissioner for Human Rights*, February 2014, <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>, at pp. 33-35.
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- 136 [2019] at para 51.



- 137 *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)*, 2019, UKSC 3.
- 138 [2021] UKSC 3, at [pp. 146-148].
- 139 On the use of contractual safeguards to help mitigate downstream human rights risks, see 5.2.
- 140 *Begum v Maran*, [2021], see esp. Lord Coulson at paras 68-69 and Lord Justice Males at para. 127. The different ways in which contractual safeguards may be used to help reduce end-use risks are discussed further in Chapter 5.
- 141 For further discussion on this point see OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability*, report submitted to the UN Human Rights Council for its 38th session, 1 June 2018, A/HRC/38/20/Add.2.
- 142 See OHCHR, *UN Human Rights 'Issues Paper' on legislative proposals for mandatory human rights due diligence by companies*, June 2020, [https://www.ohchr.org/Documents/Issues/Business/MandatoryHR\\_Due\\_Diligence\\_Issues\\_Paper.pdf](https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf)
- 143 La loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre.
- 144 Groulx Diggs, Regan and Parance, 'Business and Human Rights as a Galaxy of Norms', 2019, 50 *Georgetown Journal of International Law* 309.
- 145 See European Parliament, *Towards a mandatory EU system of due diligence for supply chains*, October 2020 [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS\\_BRI\(2020\)659299\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf)
- 146 For a more detailed discussion of the relevance of the UN Guiding Principles provisions on human rights due diligence to legal liability in a range of different contexts, from duty of care to sentencing, see OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability: Report of the United Nations High Commissioner for Human Rights*, June 2018, A/HRC/38/20/Add.2.
- 147 See UN Guiding Principles on Business and Human Rights, Guiding Principle 23.
- 148 See *Begum v Maran* (UK) Ltd [2021] 3 WLUK 162., in which Lord Males, having noted the dreadful safety standards of the Chattogram shipbreaking yard in Bangladesh (and expressing support for the theoretical possibility of a duty of care in such a case), observed: 'The Defendant was responsible for sending the ship to Chattogram ... It was not a case where there was merely a risk that the shipbreaker would fail to take reasonable care for the safety of its workers. On the contrary, this was a certainty, as the Defendant knew.' At para. 125.
- 149 UN Human Rights Council, A/HRC/4/35, para. 30.
- 150 *Nevsun Resources Ltd v Araya* (2020), Supreme Court of Canada judgement, <https://www.scc-csc.ca/case-dossier/cb/2020/37919-eng.pdf>
- 151 See Amnesty International, *Think Twice: Can companies do business with Israeli settlements in the OPT while respecting human rights?*, 2019, <https://www.amnesty.org.uk/files/2019-03/Think%20Twice%20report.pdf?BrN9N0VX3RkzTJR0uKYC46LE43hCpTu=>
- 152 Israel is not a party to the Rome Statute.
- 153 Amnesty International, *Think Twice: Can companies do business with the Israeli settlements in the Occupied Palestinian Territories while respecting human rights?* pp28-29.
- 154 See, in the UK, the International Criminal Court Act 2001, Part V.
- 155 Clapham, A. 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', Volume 6, Issue 5, November 2008, 6 *Journal of International Criminal Justice*, pp899-926.
- 156 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts*, 19 February 2007, A/HRC/4/35, paras. 19-32. See also Thompson, R., Ramasastry, A. and Taylor, M, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 2009, 40 *George Washington International Law Review*, pp841-902.
- 157 In a report to the UN Human Rights Council, the UN Working Group on Business and Human Rights drew attention to the lack of alignment between the screening procedures of State-based export credit agencies and the UN Guiding Principles on Business and Human Rights, A/HRC/38/48, 2 May 2018, <https://undocs.org/A/HRC/38/48>
- 158 The UN Guiding Principles on Business and Human Rights make it clear that the responsibility of companies to respect human rights is a global standard that exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and over and above compliance with national laws and regulations protecting human rights (Principle 11).
- 159 Examples include allowing UK defence companies to sell military equipment to Saudi Arabia despite evidence of use against civilian targets in Yemen, and not prohibiting UK companies from trading with and investing in Israel's illegal settlements in the Occupied Palestinian Territories.
- 160 FCO and FCDO Guidance, *Overseas Business Risk: China*, <https://www.gov.uk/government/publications/overseas-business-risk-china>
- 161 Lawyers for Palestinian Human Rights' complaint to the UK NCP regarding the involvement of JCB in human rights breaches in the OPT, 10 December 2019, <https://lphr.org.uk/wp-content/uploads/2019/12/Complaint-regarding-the-involvement-of-JCB-in-human-rights-breaches-in-the-occupied-Palestinian-territory-raised-by-LPHR-FINAL.pdf>

- 162 See, for instance, The Guardian, 'JCB challenged over machinery used to demolish Palestinian homes', 13 October 2020. An extract setting out the UK NCP's summary of responses as part of the UK NCP's Initial Assessment of the complaint appears at Box 2 above. The complete Initial Assessment can be accessed at <https://www.gov.uk/government/publications/lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-jcb>
- 163 For a discussion on the variety of ways in which due diligence concepts can be integrated into legal regimes, see OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability*, 1 June 2018, report to the 38th session of the UN Human Rights Council, A/HRC/38/20/Add.2
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- 165 For the current version of the OECD Guidelines for Multinational Enterprises, see <https://www.oecd.org/daf/inv/mne/48004323.pdf>.
- 166 Dutch National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, *Final Statement Bart Stapert, attorney vs. Mylan 11 April, 2016*, <https://www.oecdguidelines.nl/documents/publication/2016/4/11/bart-stapert-attorney-vs-mylan>
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- 169 OECD, *Due Diligence Guidance for Responsible Business Conduct*, 2018, p21, <https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>
- 170 JCB's letter to the European Trade Union Network for Justice in Palestine, 4 February 2021. See also the extracted sections from the UK NCP's Interim Assessment, reproduced in Box 2.
- 171 OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (2012), [https://www.ohchr.org/documents/publications/hr.pub.12.2\\_en.pdf](https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf), p. 37.
- 172 UN Guiding Principles on Business and Human Rights, Principle 18.
- 173 UN Guiding Principle 18, commentary.
- 174 UN Guiding Principles on Business and Human Rights, Principle 19.
- 175 UN Guiding Principles on Business and Human Rights, Principle 24 and commentary.
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- 178 See UN Guiding Principle 22: *Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.*
- 179 OECD Guidelines, IV(3).
- 180 OECD, *Due Diligence Guidance for Responsible Business Conduct*, 2018, section 3.2, p. 30, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>
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- 185 Report of the UN Working Group on Business and Human Rights, *Business, human rights and conflict-affected regions: towards heightened action*, 21 July 2020, <https://undocs.org/en/A/75/212>
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- 193 See, for instance, the human rights analysis described in the UK government's 2019 *Strategic Exports Controls Annual Report* in relation to applications to export certain products to Iraq with uses for surveillance and crowd control and other activities by law enforcement bodies, p. 40, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/940274/uk-strategic-export-controls-annual-report-2019-print-version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940274/uk-strategic-export-controls-annual-report-2019-print-version.pdf)

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- 200 American Bar Association, Section on Business Law, *Contractual Clauses Project: Working with stakeholders to ensure human rights due diligence in business contracting*, (2021), [https://www.americanbar.org/groups/human\\_rights/business-human-rights-initiative/contractual-clauses-project/](https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/)
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- 203 See US Department of State, *Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities*, 2020 <https://www.state.gov/wp-content/uploads/2020/09/DRL-Industry-Guidance-Project-FINAL-508.pdf>
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# JCB OFF TRACK

**Evading responsibility for human rights violations committed with JCB machines in the Occupied Palestinian Territories**

For many years JCB's machinery has been used by the Israeli authorities to demolish Palestinian homes and construct illegal Israeli settlements on the seized Palestinian land. This report shows that JCB has not taken adequate steps within the company's means to prevent its machinery from being used for these purposes, a failure that puts the firm in breach of its responsibilities under international human rights standards. The report draws on extensive interviews with organisations that have witnessed human rights violations and with senior compliance and risk-management practitioners from well-known companies, as well as open-source research techniques.

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