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|---|----------------|------------|--|---|
| 1 | <u>1698621</u> | 17/08/2015 | Email between NZSF staff - "RE: Alleged comments on phosphorus during 'occupation' of reception in 2014 | Partially withheld under sections 9(2)(a) and 9(2)(g)(i). |
|---|----------------|------------|--|---|

From: [REDACTED]

Sent: Sunday, 16 August 2015 10:54 a.m.

To: Adrian Orr [REDACTED]
[REDACTED]

Subject: RE: Alleged comments on phosphorus during 'occupation' of reception in 2014

[REDACTED]

The Superdocs for ICL is 1306776

I will put on RI Intranet page since it just keeps coming back.

Israel Chemicals (ICL) makes many phosphate products to supply to consumer product manufacturers - including calcium phosphate for toothpaste.

WP is pure phosphorus form and flammable. Special conditions needed to manage and is used as precursor also to other phosphorus products.

Mainly ICL sources from own phosphate reserves (calcium phosphate is normal form)

Exclusion of suppliers of materials to arms industry would widen the exclusion list to unworkable extent.

What made this case more difficult hence the detailed review was if the smoke screen devices 1. Are subject to international ban as an incendiary weapon and 2. If any devices which ICL supplied US with were used as such a weapon.

[REDACTED]

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|---|----------------|------------|--|---|
| 2 | <u>1306776</u> | 05/08/2014 | RI Engagement Decision on Israel Chemicals | Partially withheld under sections 9(2)(b)(ii), 9(2)(ba)(i). |
|---|----------------|------------|--|---|

RI Engagement Decision

| | |
|---|-------------------------------|
| Company | Israel Chemicals (ICL) |
| Domicile/Sector | Israel/Chemicals |
| Description of issue | |
| <p>Synopsis: <i>This profile considers the issue of ICL's supply of white phosphorus to the US Army for white phosphorus (WP) projectiles¹ where there is a risk that these weapons were exported to the Israeli Defense Force (IDF) which used them in a manner that breached the Geneva Convention Protocol I during the 2008-2009 conflict. There is debate as to whether or not WP weapons were used by the IDF in breach of Protocol III of the Convention on Certain Conventional Weapons during that conflict. The primary use by defence forces of White Phosphorus projectiles is as a smoke screen but they can also be used as an incendiary device . There were some allegations that the IDF has repeated its use of WP weapons against civilians in the current Gaza conflict but to date these allegations are unsubstantiated. We consider if ICL breaches our RI standards as a supplier of white phosphorus for WP weapons to the US Army.</i></p> <p>In determining whether to engage, hold or exclude a company, we consider if the company is <i>materially</i> breaching our RI standards, based on evidence from <i>reputable sources</i>, and where engagement is <i>unlikely</i> to materially change behavior. Exclusion would require a strong belief that the Guardians RI standards had been breached although the burden of proof might fall short of further verifying this breach through more extensive research or discussions with other parties. Our standards for companies include international law, New Zealand & national law and the UN Global Compact.</p> <p>Israeli Defence Force and White Phosphorus</p> <p>During the 2008-2009 Gaza conflict, the Israeli Defence Force (IDF) used white phosphorus weapons over areas of civilian population causing significant harm and fatalities through serious burns (white phosphorus keeps burning on exposure to oxygen so can burn to the bone for example). The United Nations Fact Finding Mission on the Gaza Conflict 2009 reported that the IDF breached Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).</p> <p>It has been a <i>matter of intense debate</i> that the IDF's use of WP weapons could also have breached the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW).² The UN mission did not make a finding on the CCW in its report.</p> | |

¹ A description of white phosphorus weapons can be found here <http://www.globalsecurity.org/military/systems/munitions/m110.htm> Definitive proof of recent export by the US of WP Projectiles is still being assessed.¹ The most common use for white phosphorus during war is for smoke screens or illumination. Sometimes the same weapon can be used as an incendiary device directly at military personnel.

² WP weapons did not kill the most civilians during the 2009 Gaza conflict - many more died from missiles, bombs, heavy artillery, tank shells, and small arms fire – but their use in densely populated neighbourhoods, including downtown Gaza City, violated international humanitarian law. (Human Rights Watch report)

In 2013 the IDF said it would find alternatives to the use of WP projectiles, seeming to announce an end to use (except in certain circumstances not disclosed). White phosphorus projectiles used in the conflict included US supplies of the weapon (the US supplies the vast majority of Israel's weaponry). Defence forces report that the common use for White Phosphorus is as smoke screens and for illumination. The IDF and the US has also referred to using it to "flush out" enemy military personnel.

The recent July-August 2014 Israeli-Gaza conflict has again led to allegations of the use by IDF of WP weapons over civilian populations.³ [REDACTED] reviewed media coverage of these allegations and has concluded *that there remains insufficient evidence to support the allegation that WP has been used as a weapon in the present conflict*. Corroborating evidence for the use of WP as a weapon is insufficient for independent reportage by Western media, particularly British media (Guardian, Independent). Nor has Al Jazeera reported on any use of WP in the present conflict.

We do not have corroborated evidence that the IDF has used WP weapons in civilian areas during the current conflict.

Israel Chemicals

Israel Chemicals description: Israel Chemicals (ICL) is a supplier of fertilizer and agricultural chemicals including a major manufacturer of specialty fertilizers and specialty phosphates, bromine, flame retardants and water treatment solutions. ICL's mining and manufacturing activities are located in Israel, Europe, the Americas and China. ICL's sales to the military account for <1% of revenues. Israel Corporation is a parent of ICL (from which it receives the majority of its profits).

NZSF holding: As at 1 August 2014: \$887,121 in Israel Chemicals and \$275,073 in its parent Israel Corporation. Both companies are on the (lower end) of the MSCI Large Cap index.

ICL & WP weapons:

ICL is a strategic supplier of white phosphorus to the US Army for its manufacture of white phosphorus projectiles at its Pine Bluff Arsenal. [REDACTED]

[REDACTED] ICL is primarily known as a supplier of fertilisers, flame retardants and phosphates to a wide range of industries including food and personal care. White phosphorus itself forms a pre-cursor to other phosphate products.⁵ Documents released by the US Army in 2013 identify ICL as a strategic supplier of white phosphorus to the US Army for the production of White Phosphorus (WP) projectiles between August 2008 and September 2011. The US Army's (and other defence forces) primary use of these projectiles is for screening, spotting and signalling purposes. Another document confirms that ICL was awarded another US Army contract in January 2013.

A US Army release makes it clear that it sees white phosphorus as a strategic component of its weapons arsenal and its suppliers as strategic given the specialized nature of the facilities required for producing, storing and transporting white phosphorus. The Army in turn requires specialized facilities (Pine Bluff Arsenal) to assemble white phosphorus (WP) projectiles. The US Army document focuses on this aspect in its justification for not opening the supplier arrangements up to open competition, with its preference being for a North American supplier. The only US supplier identified by them was Monsanto who had supplied via a distributor ("as Monsanto would not supply the US defense force directly"). Monsanto's contract with the distributor had expired and it is not known if it has been renewed. The US army had sourced white phosphorus from two other suppliers - Israel Chemicals' subsidiary ICL Performance Products and a US firm Mil-Spec Industries⁶ specifically for white phosphorus for WP M110, 155MM Projectiles.

Therefore, ICL's business as a white phosphorus supplier for weapons can be considered "*strategic*" rather than "*off-the-shelf*". [REDACTED]

The majority of Israel's armaments are imported from the US. Therefore, the IDF is *likely* to import most of its white phosphorus weapons from the US. We cannot determine that ICL also provided white phosphorus prior to 2008 as portions of the US Army document are redacted. WP projectiles exported to Israel which could have been used in

³<http://www.presstv.ir/detail/2014/07/21/372201/israel-drops-phosphorus-bombs-on-gaza/> (poor quality source - see notes below)

⁵ <http://education.ilab.org/itselemental/ele015.html>

⁶ Appears to be un-listed. There are no NZSF holdings in Mil-Spec.

the previous conflict of 2008-2009 *may have* contained ICL white phosphorus, although are more likely to have contained white phosphorus material from Mil-Spec Industries.

If the IDF has used WP weapons during the *current* conflict, it is likely (*but not able to be verified*) that WP weapons exported by the US during 2008-2013 would be amongst the IDF's arsenal and it is likely (*but not able to be verified*) that ICL's white phosphorus would be a component of these weapons.

ICL's degree of involvement:

In deciding whether a company is breaching the Fund's responsible investment standards and how material that breach is, we take account of the proximity and importance of the company's actions to an activity that breaches our standards. We draw a distinction between being directly and materially involved in an activity versus being a supplier of materials or services in the normal course of business. In doing so, we consider whether the product or service is integral to the activity and tailor-made as opposed to being an off-the-shelf substitute or readily replaceable alternative.

There is no evidence that ICL has not complied with relevant laws, including arms control law, in its supply of white phosphorus to the US Army.

ICL's involvement in the production of the US WP weapons is *direct*. ICL's connection to the breach of international law is *indirect*. ICL is not responsible for the US Army's export arrangements. ICL also cannot control the IDF's use of these weapons against civilians and the production of such weapons are not banned.

Nevertheless, ICL would have had knowledge of the accusations of misuse during the 2009 Gaza conflict and the UN investigation into it when continuing to supply WP for WP weapons production in 2010, 2011 and 2013. The company is exposed to a high degree of reputational and therefore business risk through involvement in these types of weapons. We would expect ICL to ensure its compliance with *UN Global Compact Principles 1&2 on Human Rights* in relation to the controversy surrounding this issue.

In 2013 the company had a contract approved to supply the US Army white phosphorus so we can assume it has not exited this business.

In summary, ICL's degree of involvement is: indirect in terms of proximity although its product is integral to the production of WP weapons. In considering the intention of ICL's supply arrangements, the main use of these weapons is meant to be as smoke screens.

International & National Law and UN Global Compact

Legal status of the use of White Phosphorus weapons and its use in Gaza during 2008-9

There has been detailed investigations into the IDF's use of WP weapons during the 2008-2009 Gaza conflict. *Unsubstantiated* accusations have been made that the IDF has used WP weapons against civilians during the ongoing conflict (2014).

The UN has a role to address contravention of UN conventions by member states. The following explains the breach of international law by the IDF. Israel Chemicals itself has not breached international law.

International Law

Report findings on IDF's use of WP weapons in Gaza during 2008-9 are summarised below⁷.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

The UN Mission finds that in a number of cases Israel failed to take feasible precautions required by customary law reflected in article 57 (2) (a) (ii) of Additional Protocol I to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. The firing of white phosphorus shells over the UNRWA compound in Gaza City is one of such cases in which precautions were not taken in the choice of weapons and methods in the attack."... "The Mission, while accepting that white phosphorus is not at this stage proscribed under international law, finds that the Israeli armed forces were systematically reckless in determining its use in built-up areas".

⁷ See also <http://www.weaponslaw.org/weapons/white-phosphorus-munitions> for full range of potentially applicable laws.

The UN Convention on Certain Conventional Weapons (CCW)⁸.

The CCW has a number of protocols. Protocol III deals with the use of incendiary weapons. White Phosphorus projectiles themselves are not banned but the way they are used is controlled. There are two key uses i) smoke screen or illumination; ii) incendiary. It appears that the same type of projectile can be used in both ways (multi-use). Smoke shells, even when using white phosphorus, are not considered to be incendiary weapons. However, armed forces also may use the incendiary nature (together with the smoke) of the device to “flush out” personnel. Producers and armed forces inevitably state that WP’s primary use is as a smoke screen or for illumination, and as such its use falls outside the definition of an incendiary device. Regardless of the type of use, care needs to be taken near civilian populations to avoid the extreme harm that can result.

The CCW definition for incendiary weapons does not deal well with multipurpose use. Therefore, because producers and militaries describe WP artillery projectile rounds as smoke munitions, Protocol III can be read to preclude them from its remit.

Protocol III prohibits the use of incendiary weapons in a way that causes indiscriminant harm to civilian populations.

“Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons prohibits, in all circumstances, making the civilian population as such, individual civilians or civilian objects, the object of attack by any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat or a combination thereof, produced by a chemical reaction of a substance delivered on the target. The protocol also prohibits the use of incendiary weapons against military targets near concentration of civilians, which may otherwise be allowed by the principle of proportionality.”

Protocol III Definition

"Incendiary weapon" means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.

(a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.

(b) Incendiary weapons do not include:

(i) *Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;*”

Human Rights Watch’s report (Rain of Fire) into the use of White Phosphorus in the 2009 Gaza conflict made the case that the IDF’s use of white phosphorus weapons was as an incendiary weapon, and as such when used in heavily populated civilian areas such use breached of Protocol III of the CCW in 2009.⁹ There has been much debate since on whether the WP Phosphorus weapons used fall within or without the CCW – but HRW itself says the CCW is flawed in this respect for not being clear in its definition on multi-purpose use.

Background to UN investigation into 2009 conflict

The United Nations Fact Finding Mission on the Gaza Conflict, known as the **Goldstone Report**, was a team established in April 2009 by the United Nations Human Rights Council (UNHRC) during the Gaza War (January 2009) as an independent international fact-finding mission to investigate alleged violations of international human rights law and international humanitarian law in the Palestinian territories, particularly the Gaza Strip, in connection with Gaza War. The report says that Israeli forces were "systematically reckless" in determining the use of white phosphorus in built-up areas. The writers highlighted the Israeli attack on the UN Relief and Works Agency compound in Gaza City on 15 January, the attack on the Al Quds hospital, and the attack on the Al Wafa hospital, each of which involved using white phosphorus. They described its use as disproportionate or excessive under international law. More generally, the UN report recommended that "serious consideration should be given to banning the use of white phosphorus in built-up areas".

Nevertheless, the UN mission’s report states that the IDF acted in contravention of the Geneva Convention Protocol 1 – it did not state, unlike the Human Rights Watch report, that the IDF contravened the CCW Protocol III.

New Zealand

⁸ Full name: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001.

⁹ White Phosphorus used as a smoke shell, its most common use in conflict, is not defined as an incendiary weapon under the CCW so it is only WP projectiles use against personnel that is the subject of investigation here.

New Zealand is a party to Protocol III of the CCW (Israel and US are not) and to the Geneva Convention.

New Zealand Position on Israel (<http://www.mfat.govt.nz/Foreign-Relations/Middle-East/2-Arab-Israeli-conflict.php>) New Zealand states its position on Israel-Palestine clearly on the MFAT website. This supports a lasting two-state settlement in accordance with UN Security Council resolutions and with subsequent agreements between Israel and Palestine. More recently, it supported a UN resolution calling for a ceasefire to the current conflict.

Israel Law

Following criticism over its use of White Phosphorus during its 2009 offensive in Gaza, Israel proposed a prohibition on use except in two limited undisclosed exceptions. In April 2013 the Israeli army said in a statement that it would replace white phosphorus shells with ones based entirely on gas. Officials didn't offer further details, nor give a specific date for when they would retire the shells.

“On May 13, 2013, the Israeli Supreme Court heard a petition by Israeli human rights and other civil society groups seeking a ban on the Israel Defense Forces’ use of certain white phosphorus munitions in populated areas. At the hearing, the Israeli state attorney proposed “a prohibition on the use of white phosphorus in built-up areas for the time being, with two limited exceptions that were presented before the judges” in a separate ex parte hearing. For undisclosed security reasons, the petitioners and their lawyers were not allowed to review the proposed exceptions.”¹⁰ In July 2013 the Israeli High Court dismissed a petition calling for a complete ban on the Israeli military’s use of white phosphorus munitions in populated areas.¹¹

In summary, a customer of ICL, the US Army, may have exported white phosphorus weapons to the IDF which has used these weapons in a breach of international conventions to which New Zealand is a signatory.

Company Policies, Standards and Practices

The Israeli Defense Force used US-made WP projectiles during the 2008-2009 Gaza conflict. We consider if ICL’s own response to the issue of the use of WP weapons against civilians has been inconsistent with the UN Global Compact Principles 1 & 2. In doing so, we consider the proximity of the company’s actions to a breach of standards and the materiality of the issue. It is also relevant to consider if breaches are ongoing or historic.

UN Global Compact Standards

The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption:

UN Global Compact Human Rights Principles:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
Principle 2: make sure that they are not complicit in human rights abuses.

The UN Guiding Principles for Business and Human Rights provide guidance to the UN Global Compact Principles 1 & 2. The guidance recognizes that States themselves are responsible for abiding by human rights law. They also have a responsibility to see that business enterprises in the State respect human rights. The guidance to companies states that the responsibility to respect human rights requires that business enterprises **seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.**

It furthers states business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. 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. The importance to the viability of the business are factors to take into consideration.

ICL is in the situation highlighted in the UN Guiding Principles of lacking leverage. This is common amongst component suppliers to armament manufacturers who in turn supply armed forces. ICL is not the weapons producer or exporter. There are a multitude of strategic component suppliers that cannot be held directly responsible for the illegal use of products to which those components are supplied.

The military force using weapons has the primary responsibility to use these in compliance with all relevant law and the State has responsibility to hold them to account. The weapons producer and exporter has responsibility to

¹⁰ <http://www.hrw.org/news/2013/05/18/israel-strengthen-white-phosphorus-phase-out>

¹¹ <http://www.hrw.org/news/2013/07/12/israel-high-court-rejects-legal-ban-white-phosphorus>

ensure it abides by arms control regulations. The armaments industry is then reliant on behavior of the State as most weapons could be used in contravention of international law. In fact many more civilians died in Gaza from other conventional weapons than from white phosphorus weapons.

Israel Chemicals has not published any position on its provision of white phosphorus to armed forces for use in weapons that addresses the risk of its use on civilians. Following the 2008-9 conflict, ICL would be expected to review its supply of white phosphorus for use by defence forces. We do not know if such a review was undertaken but we do know that ICL was awarded another contract to supply the US Army in 2013. There may be some leverage the company can bring through legal contracts restricting use of WP to smoke screens and away from civilians.



| Relevant RI standards | Status |
|--|--|
| Based on 2008-2009 conflict, the breach of standards by the IDF is historic. There is a risk that the breach could be repeated in current or future conflicts. | |
| International Law | Indirect – IDF breach of Geneva Convention Protocol I/ possibly CCW |
| Universal Declaration of Human Rights | Indirect – IDF action inconsistent with Human Rights Norms |
| National Law | Indirect- IDF action contrary to NZ Law (party to Geneva/CCW) |
| UN Global Compact Principles 1 | Direct-Inconsistent with support for international human rights |
| UN Global Compact Principles 2 | Direct-Inconsistent in avoiding complicity in human rights abuse |
| Assessment | <i>Indirect connection to past breach of international law by customer. Potential direct breach of UN Global Compact by ICL to avoid indirect complicity.</i> |

| Materiality of issue | | |
|---|----------|--|
| Contravention of international sanctions or International Law.? | Indirect | * Contravention not directly by ICL. |
| Significant regulatory non-compliance? | Indirect | <p>WP weapons are not banned under any international convention. The use of white phosphorus incendiary devices in highly populated civilian areas presents breaches the Geneva Convention Protocol I and has a <i>high risk</i> of breaching Protocol III of the CCW. This breach of use has severe long term material impact on civilian populations including death and severe injuries. The IDF announced in 2013 it would find alternatives to white phosphorus but it is not clear if the IDF has truly committed not to use WP weapons in civilian areas. Israel Chemicals does not have control over how defence forces use the WP weapon or who the US Army exports these weapons to. Israel Chemical's involvement is therefore <i>indirect</i> through the provision of a strategic component – white phosphorus – to the US Army. It is a reasonable assumption that the IDF purchased WP weapons from the US. The white phosphorus material is the cause of significant harm. <i>It cannot be verified</i> that ICL's white phosphorus was in the weapons used by the IDF – it may have been another supplier. But ICL's continued supply may breach the UN Global Compact given its knowledge of the severity of the human rights risk associated with WP weapons, post the UN inquiry into the 2009 Gaza conflict. We do not know if ICL has tried to use legal leverage to restrict use to smoke screens. <i>However suppliers of weapons components typically have little control over use of the final product in the field.</i></p> |
| Severe long-term impact | Indirect | |
| Severe but short-term impact | Indirect | |
| Structural problem (history of problems)? | ? | |
| Direct involvement? | No | |
| <p>The issue is material – currently treated as historic as have no proof of misuse of white phosphorus in current conflict.</p> | | |
| Assessment | | Materiality high due to impact from past illegal use of product by defence forces. Proximity to ICL is indirect. |
| Key sources | | |
| <p>https://www.fbo.gov/index?tab=documents&tabmode=form&subtab=core&tabid=932cd90366b54e388c441ac36160095f https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=b521c13567ed9f314ed170d0a9d3a04f UN http://www.un.org/en/ga/search/view_doc.asp?symbol=A/ES-10/PV.36 NZ support for UN ceasefire MFAT website: CCW http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Disarmament/0--Conventional-arms/0-conventional-weapons.php; Israel-Palestinian ceasefire 2014 http://www.beehive.govt.nz/release/nz-calls-gaza-ceasefire http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (Goldstone Report) http://www.weaponslaw.org/weapons/white-phosphorus-munitions</p> <p>Gaps in information – ICL's controls over misuse by customers; whether ICL was the actual source of the WP used by IDF. Unreliable source suggesting IDF misuse during current conflict but this has not been corroborated by reliable media or organisations.</p> | | |
| Assessment | | Reliable sources concerning the past use of WP on civilians & ICL as a supplier to US Army. No reliable source of current breaches. There are gaps in information linking ICL to IDF weapons. |

| Likely effectiveness of engagement | | |
|---|---------|---|
| Context | | <p>ICL has many other business lines and so is not reliant on the White Phosphorus supply to the military (all military sales <1%). This may however be more material to its subsidiary company.</p> <p>Engagement has two challenges: <i>proximity</i> and <i>leverage</i>. ICL cannot control how WP weapons are used and its use as smoke screens away from civilians is legal. ICL's own intention is most likely that the product is used as a smoke screen – but must be aware of its use as an incendiary. ICL's own legal compliance is not sufficient to address the problem of use of WP weapons on civilians.</p> <p>The company is reliant on the US Army to end exports if the WP weapons is misused. The only other reliable means to end connection to the misuse of its product is most likely to exit the WP weapons supply business.</p> <p>The issue is structural in the sense that white phosphorus supply is strategic, and the difficulty to control use of WP weapons is ongoing. The UN confirmed misuse in 2009, but not since. However, there continues to be concern at the highest levels in the UN over the use of white phosphorus in conflict.</p> <p>We have not yet engaged, nor are we aware of other engagement by investors, or NGOs, with ICL. The other CFIs do not hold ICL at present. ICL is on the lower end of the LC Index so less likely to be held by investors. Engagement would be hindered by our low level of ownership. Investors will have a range of views on complicity and remedy – it is not straight forward. We have faced cultural barriers when engaging with Israeli companies over the actions of the IDF and expect this would be the case here.</p> <p>The UN says business must <i>seek to prevent or mitigate adverse human rights impacts directly related to their product</i>. Engagement with the company would ask it to comply with the UN Global compact guidance by assessing ongoing risks in supplying white phosphorus for defence.</p> <p>In summary, ICL's degree of complicity is indirect – in fact twice removed. White phosphorus is the main cause of harm when WP projectiles are misused, but otherwise its use is as smoke screen. <i>Remedy is limited to legal requirements or exit</i> as ICL has little control of over ultimate use.</p> |
| Issue conflicts with viability of company? | No | |
| Lacks of ability to control situation? | Correct | |
| Legal compliance is not sufficient to control situation. | Correct | |
| Responsiveness | | |
| Structural issue (history of problems)? | Yes | |
| History or culture of non-engagement (e.g. only responds to extreme actions)? | ? | |
| Ability to collaborate with peers? | Limited | |
| Has reached limits of what company can do? | ? | |
| Language or cultural barriers? | Yes | |
| | | |
| Assessment | | Limited effectiveness. |

| Resource Focus | | |
|---|---------|---|
| One of our focus issues? | ✓ | Human rights and conflict is a key focus issue for our engagement programme. The company is not important to the portfolio in terms of size of holding (although it is in the large cap index) and it is not a New Zealand or Australian company that could be held on our local portfolios. This company is not currently part of a UNPRI clearinghouse engagement initiative and we are unlikely to find other investors to work with. Exclusion will not harm fund performance. The resources required to conduct <i>further investigation and limitations to a successful engagement</i> preclude against including Israel Chemicals on our engagement focus list – beyond signaling to it our concern and requesting it reviews this part of its business. |
| NZ or Australian company? | ✗ | |
| We have a large holding in the company? | medium | |
| Can work with other investors? | Limited | |
| Exclusion will harm fund performance? | ✗ | |
| | | |
| Assessment | | Resource intensive given size of holding. Conduct limited engagement. |
| Other issues / comments | | |
| <p>There are likely to be other companies involved in the production of white phosphorus weapons. We have not identified or researched these companies. There are other companies providing components to legitimate weapons that may be used in a manner that breaches international law. Risk mitigation by the company includes compliance with arms control law and redress through the courts if contracts are breached. We cannot reasonably ask all arms component suppliers to exit supply arrangements with arms companies. We can ask arms companies to comply with export controls. Arguably white phosphorus weapons could be judged to be particularly controversial.</p> | | |
| Conclusion | | |
| <p>Israel Chemical is not directly responsible for a breach of international law as it does not manufacture, export or use the WP weapons. The company's <i>intention</i> is not for WP to be used on civilians. The weapons are not banned by a convention (like landmines are for example).</p> <p>The breach by the IDF in relation to WP weapons is material, but it is also in the past. Other conventional weapons have killed civilians during this current conflict but we do not have evidence of a repeat of this breach with regards to white phosphorus.</p> <p><i>ICL is likely</i> to have breached UN Global Compact Principle 1 & 2 if it has not looked to use what leverage it can address the issue. Whilst its ability to influence its customers to avoid human rights abuses is limited, UN guidance suggests companies could consider ending such relationships where they have little leverage and are not reliant on the business. ICL must be aware of the controversy over WP weapons used in its own country in the past.</p> <p>We consider the proximity and importance of the company's actions to an illegal or unethical activity. Although white phosphorus is a key component (and the cause of harm), the proximity of the company is twice removed through the US Army and the IDF. The company has not breach international or national law. It may have breached the UN Global Compact standards given the severity of the issue if it has not used what leverage it can to control use of its product. To our knowledge, the breach by the IDF is in the past, it has made statements it will replace its use of WP weapons with alternatives and allegations of <i>current</i> breaches are unverified.</p> <p>Engagement is <i>unlikely</i> to materially address the issue but we can signal our concerns to the company through a limited engagement approach.</p> <p>If new evidence emerges that the IDF has again used WP weapons against civilians we will re-visit the recommendation.</p> | | |
| Recommendation: | | Limited Engagement. |
| Israel Chemicals and Israel Corporation (parent) | | |

Additional notes:

The Goldstone Report Excerpts

(a) Precautions in launching attacks

1919. The Mission finds that in a number of cases Israel failed to take feasible precautions required by customary law reflected in article 57 (2) (a) (ii) of Additional Protocol I to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. The firing of white phosphorus shells over the UNRWA compound in Gaza City is one of such cases in which precautions were not taken in the choice of weapons and methods in the attack, and these facts were compounded by reckless disregard for the consequences. The intentional strike at al-Quds hospital using high-explosive artillery shells and white phosphorous in and around the hospital also violated articles 18 and 19 of the Fourth Geneva Convention. With regard to the attack against al-Wafa hospital, the Mission found a violation of the same provisions, as well as a violation of the customary law prohibition against attacks which may be expected to cause excessive damage to civilians and civilian objects.

Section 8: Certain Weapons

48. Based on its investigation of incidents involving the use of certain weapons such as white phosphorous and flechette missiles, the Mission, while accepting that white phosphorous is not at this stage proscribed under international law, finds that the Israeli armed forces were systematically reckless in determining its use in built-up areas. Moreover, doctors who treated patients with white phosphorous wounds spoke about the severity and sometimes untreatable nature of the burns caused by the substance. The Mission believes that serious consideration should be given to banning the use of white phosphorous in built-up areas. As to flechettes, the Mission notes that they are an area weapon incapable of discriminating between objectives after detonation. They are, therefore, particularly unsuitable for use in urban settings where there is reason to believe civilians may be present.

49. While the Mission is not in a position to state with certainty that so-called dense inert metal explosive (DIME) munitions were used by the Israeli armed forces, it did receive reports from Palestinian and foreign doctors who had operated in Gaza during the military operations of a high percentage of patients with injuries compatible with their impact. DIME weapons and weapons armed with heavy metal are not prohibited under international law as it currently stands, but do raise specific health concerns. Finally, the Mission received allegations that depleted and non-depleted uranium were used by the Israeli armed forces in Gaza. These allegations were not further investigated by the Mission.

CCW Protocol III Definition

"Incendiary weapon" means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.

(a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.

(b) Incendiary weapons do not include:

(i) Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;

(ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

Summary of International Media Reports on allegations of IDF use of White Phosphorus (WP) in the present Gaza conflict

██████████ has conducted a search of recent media, media blogs and NGO accounts of the use of white phosphorus as a weapon in the present conflict in Gaza. It is clear that:

- Corroborating evidence for the use of WP as a weapon is insufficient for independent reportage by Western media, particularly British media (Guardian, Independent), which have traditionally been sympathetic to the Palestinian cause
- The absence of independent reportage on WP, including by Al Jazeera, indicates that, to date, WP has not been used as a weapon in the present conflict
- Arab media (Press TV, Tehran Times, blogs) continue to report the use of WP as a weapon but the assertions are not supported by corroborating evidence
- A Norwegian doctor, Mads Gilbert, has alleged some injuries he has treated indicate the use of WP in a wider piece about the use of illegal weapons but he was not definitive on the issue
- Friends of Palestine.wordpress.com (blog) have published photographs that do show the use of white phosphorus but the photographs are unsourced. If the photographs do show WP in the present conflict, the nature of its use remains unclear (is it used as a weapon or a smokescreen, as the IDF has sought to distinguish in the past?)

Norwegian Doctor: <http://www.worldbulletin.net/news/140772/israel-using-banned-weapons-claims-norwegian-doctor>

PressTV (Iranian): <http://www.presstv.com/detail/2014/07/13/371162/israel-drops-cancerinducing-bombs-on-gaza/> and <http://www.presstv.ir/detail/2014/07/21/372201/israel-drops-phosphorus-bombs-on-gaza/>

Tehran Times: <http://www.tehrantimes.com/oped/117366-gaza-genocide-hamas-faces-murderous-zionist-terror-campaign>

Friends of Palestine: <http://friendsofpalestine.wordpress.com/resources-and-readings/image-galleries/photos-of-israeli-white-phosphorus-attacks-on-un-schools-in-gaza/>

In summary, there remains insufficient evidence to support the allegation that WP has been used as a weapon in the present conflict.

Use of WP in past conflicts

The IDF's use of WP in previous conflicts (Operation Cast Lead) is well documented, resulting in an investigation and report by Human Rights Watch:

- <http://www.hrw.org/fr/node/81821>
- <http://www.hrw.org/sites/default/files/reports/iopt0309web.pdf>

HRW took the issue to court, leading to a recommendation to cease use of WP, while contemporaneously the IDF meanwhile pledged to avoid use of WP in populated urban areas:

- <http://www.haaretz.com/news/diplomacy-defense/idf-to-stop-using-shells-with-white-phosphorus-in-populated-areas-state-tells-high-court.premium-1.523852>

Notes from HRW Report:

White phosphorus is a chemical substance dispersed in artillery shells, bombs, rockets, or mortars, used primarily to obscure military operations on the ground. When released upon ground contact or air-burst, it emits a dense white smoke that militaries use to screen the movement of troops. The smoke also interferes with infra-red optics and weapon-tracking systems, thus protecting military forces from guided weapons such as anti-tank guided missiles. Its use in open areas is permissible under international law, but air-bursting white phosphorus over populated areas is unlawful because it places civilians at unnecessary risk and its wide dispersal of burning wedges may amount to an indiscriminate attack.

White phosphorus munitions did not kill the most civilians in Gaza in 2008-09– many more died from missiles, bombs, heavy artillery, tank shells, and small arms fire – but their use in densely populated neighborhoods, including downtown Gaza City, violated international humanitarian law (the laws of war), which requires taking all feasible precautions to avoid civilian harm and prohibits indiscriminate attacks.

OPT

Israel Chemicals Dead Sea Works production facility is in Israel's area of the Dead Sea and is not sourcing phosphate from the Occupied Palestinian Territories. It has been criticized for its environmental impact and has reported on mitigating actions in its latest CSR report.

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| 3 | <u>1768801</u> | | Peace Action Wellington Report Profiting from War: New Zealand's weapons and military-related industry | Released in full. |
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See Attachment 1

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| 4 | <u>2513159</u> | | The Israeli Occupation Industry – Who Profits – Financing Land Grab – The Direct Involvement of Israeli Banks in the Israeli Settlement Enterprise | Released in full. |
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See Attachment 2