

Opinion – Responsible Business Conduct in Times of War

Written by Jernej Letnar Čerňič and Eva Gerritse

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JERNEJ LETNAR ČERŃIČ AND EVA GERRITSE, OCT 22 2022

Russia's invasion of Ukraine prompted not only an exodus of civilians, but also the exit and disengagement of hundreds of companies who feared the potential financial, reputational and legal consequences of remaining active in a war zone. Other companies stayed, citing a variety of valid or less convincing reasons. While the effects of leaving and staying are still playing out, one thing became clear from the outset: most companies were caught unprepared. This unpreparedness is of concern. In conflict-affected areas, businesses are never neutral, and business operations – including decisions to stay or exit – always impact conflict dynamics. They influence the everyday lives of ordinary persons caught in the war. In these contexts, the risk of businesses becoming implicated in gross human rights abuses is, therefore, exceptionally high and acute.

Responsible business conduct in conflict situations has gained particular attention since Russia's invasion of Ukraine. However, the actual and potential negative impact of doing business in conflict-affected situations is not novel. The involvement of companies in conflicts from Colombia to Syria has been well documented in research by civil society.

In some cases, business involvement in conflict resulted in criminal prosecutions of either individuals or companies for complicity in severe human rights violations or international humanitarian law. Some of the first business and human rights cases against responsible individuals derived from the atrocious business activities of some companies during the Second World War. Currently, the former CEO and chairman of the oil company Lundin are standing trial for complicity in war crimes during the civil war in Sudan; the French cement company Lafarge has recently been indicted for contributing to crimes against humanity during the war in Syria. These examples show the risks of business involvement in conflict most poignantly.

However, many more companies are at high risk of contributing to or exacerbating conflict and negatively impacting human rights in conflict-affected areas. Examples are companies importing minerals from conflict-affected regions in DR Congo, companies supplying materials for the construction of houses in the illegal settlements in the Occupied Palestinian Territories, or companies supplying arms to Saudi Arabia. To avoid and mitigate risks like these, companies must exercise extra caution on all their operations and business relations in conflict-affected areas and carry out 'heightened due diligence'.

Doing responsible business in conflict-affected areas requires businesses' heightened diligence because their conduct affects the human dignity of rights holders and conflict dynamics. UN Guiding Principles (UNGPs) recognize in Principle 7 that '...the risk of gross human rights abuses is heightened in conflict-affected areas'. They ask states to '...help ensure that business enterprises operating in those contexts are not involved with such abuses'.

Businesses, therefore, should more diligently and carefully respect human rights in their operations in conflict areas by employing heightened human rights due diligence. The UNGPs thus establish clear and direct expectations of conduct for home states and businesses to ensure that they comply with international human rights and humanitarian law in conflict areas. Radu Mares has convincingly argued that 'Contrary to its title Principle 7 is about (high risk of) gross abuses requiring exceptional actions from home states, and not narrowly about conflict-affected areas' (p. 38).

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The UN Working Group on Business and Human Rights clarified in its October 2020 report 'Business, human rights, and conflict-affected regions: towards heightened action' that 'In conflict-affected situations, the complexity will be increased by the operating context, where State structures are weak or non-existent; business relationships, as some actors may be active participants to the conflict, former combatants or abusers; and the severity of potential human rights abuses' (para. 41). The UNDP published in June 2022 a detailed guide on Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts, which also includes annexes with practical questions, capacity assessment, and a checklist for businesses doing business in conflict zones. The Guide defines conflict-affected zones where heightened human rights diligence is required as situations of 'Conventional armed conflict', 'Military occupation', 'Mass atrocities', and 'Widespread violence' (p. 53). It uses the useful concept of 'red flags,' which should encourage businesses to conduct heightened due diligence. These include, among other things: reports of violations of international human rights and humanitarian law and risks in supply chains.

Heightened Human Rights Due Diligence encourages businesses to identify actual and potential risks to human rights, society, and the environment and their existing and potential contribution to the conflict. More specifically, corporations operating in conflict-affected areas are expected to recognize hazards, manage them in their operations, measure their impacts, take measures to respond, and ensure that they are conflict-sensitive in themselves (i.e., do not create new or contribute to existing tensions and grievances). States and businesses are also expected to provide remedies and compensation to rightsholders.

In the same week of the Russian invasion of Ukraine, the European Commission published its long-awaited proposal for mandatory human rights due diligence legislation. Once in effect, the *Corporate Sustainability Due Diligence Directive* will require companies to identify and mitigate risks for human rights connected to their global operations and business relations. Although, in theory, a significant and essential step forward in enhancing responsible business conduct and corporate accountability, the current draft has grave shortcomings and deviates from the UNGPs and OECD Guidelines on many fundamental points. One crucial gap is the absence of any reference to conflict-affected areas and what the heightened risks in these areas should mean for companies' due diligence efforts.

At the moment of writing, the Council of the European Union and the European Parliament are discussing the text of the draft Directive and drafting their positions, with trilateral negotiations expected to start in the summer of 2023. EU policymakers now have the chance to ensure that the Directive truly lives up to its stated objectives and aligns strongly with the UN Guiding Principles and the OECD Guidelines, including concerning what these standards require from companies active in conflict-affected areas.

First of all, the Directive should refer to the fact that in situations of armed conflict, not only human rights and environmental law need to be respected, but also international humanitarian law. Secondly, the Directive should require all companies – regardless of sector or size – that have activities or upstream or downstream business relations in conflict-affected or high-risk areas to conduct heightened, conflict-sensitive due diligence, referring to existing guidelines developed by the UN Working Group on Business and Human Rights and the International Committee of the Red Cross.

The Guiding Principles were drafted when the implication of businesses in violent conflicts in Colombia, the Democratic Republic of the Congo, Liberia, and Sierra Leone were brought to the world's attention. The current war in Ukraine has shown that most companies still have a long way to go in ensuring that their due diligence efforts, especially in these contexts, adequately address these implications. In most cases, they must move beyond merely complying with imposed sanctions and draft and implement their heightened due diligence policy for doing business in the conflict areas. It is now up to the EU Member States to take responsibility by ensuring that mandatory due diligence legislation is effective in those areas of the world where the risks of human rights violations are most severe, where the level of corporate abuses is highest, and where people are most in need of protection.

In August 2022, a group of 51 civil society organizations and academics active in the field of business, conflict, and human rights, including PAX and International Alert, issued a joint statement calling upon EU policymakers to include specific provisions on responsible business conduct in conflict-affected areas in the Corporate Sustainability Due

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Diligence Directive. Find the joint statement, including more recommendations, [here](#).

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