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Areas: The Unfortunate Example of Ukraine**

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Vladyslava Kaplina

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**HUMAN RIGHTS DUE DILIGENCE IN CONFLICT-AFFECTED AREAS:
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DEVIDA DILIGÊNCIA EM DIREITOS HUMANOS EM ÁREAS AFETADAS
POR CONFLITOS: UM EXEMPLO INFELIZ DA UCRÂNIA

VLADYSLAVA KAPLINA¹

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa
vkaplina@fd.ulisboa.pt

Abstract: The article examines the phenomenon of human rights due diligence in conflict-affected and high-risk areas through the example of Ukraine. It is stressed that in conflict-affected and high-risk areas the companies should conduct heightened human rights due diligence, which complements the 'classical' ongoing due diligence with conflict-sensitive approach. Using the data presented by Business & Human Rights Resource Centre, the article shows that, unfortunately, companies have not implemented heightened human rights due diligence into their activities in Ukraine and/or Russia after the beginning of full-scale military invasion in February 2022. Besides, the article highlights that the companies should constantly evaluate the ongoing conflict and/or high-risk area, since the situation may change rapidly. This has been proved by the fact that the recently announced partial mobilization in Russia jeopardizes companies and increases the risk of them being found complicit in war crimes committed in Ukraine. Conclusions present quick step-by-step advice on how to conduct heightened human rights due diligence in conflict-affected areas.

Keywords: Due diligence; human rights due diligence; heightened human rights due diligence; UNGPs; conflict-affected area; high-risk area; business in conflict.

Resumo: O artigo examina o fenómeno da devida diligência em direitos humanos em áreas afetadas por conflitos e áreas de alto risco por meio do exemplo da Ucrânia. A autora sublinha que em áreas afetadas por conflitos e áreas de alto risco, as empresas devem realizar devida diligência intensificada em direitos humanos, que complementa a "clássica" devida diligência contínua com abordagem sensível a conflitos. Usando os dados apresentados pelo Centro de Informação sobre Empresas e Direitos Humanos, o artigo mostra que, infelizmente, as companhias não implementaram a devida diligência intensificada em direitos humanos nas suas atividades na Ucrânia e/ou na Rússia após o início da invasão militar russa em fevereiro de 2022. Além disso, o artigo destaca que as empresas devem avaliar constantemente o conflito em curso e/ou a área de alto risco, pois a situação pode mudar rapidamente. Isso foi provado pelo fato de que a mobilização parcial recentemente anunciada na Rússia prejudica as empresas e aumenta o risco de serem consideradas cúmplices de crimes de

1. Guest Lecturer, University of Lisbon School of Law; Researcher of the Lisbon Public Law Research Centre. Eastern Europe & Central Asia Research Assistant & Intern at Business & Human Rights Resource Centre.

guerra cometidos na Ucrânia. As conclusões apresentam os conselhos passo a passo de como realizar a devida diligência intensificada em direitos humanos em áreas afetadas por conflitos.

Palavras-chave: Devida diligência; devida diligência em direitos humanos; devida diligência intensificada em direitos humanos; Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos; área afetada por conflito; área de alto risco; negócio em conflito.

1. Introductory remarks about Human Rights Due Diligence process

Every one of us faces business and human rights daily without even noticing this. Working in a private-owned company, buying Nestlé chocolate, calling an Uber, ordering goods from Amazon, writing an article on an Asus laptop, calling your dearest ones via WhatsApp. These are just several examples of how business and human rights sphere intertwines with our lives. It seems quite simple and obvious, but in reality, there is a huge and complicated net of processes, actors, rules, rights and obligations behind these examples, and we all are part of it.

Business can influence our lives both in positive and negative ways. On the one hand, business can be our employer, create more jobs in the country, bring economic prosperity, provide essential goods and services to the population, help developing technologies and deepening the globalization processes, but on the other hand, there is a wide range of violations of our rights and freedoms that enterprises can bring both internally (e.g., violate our rights as employees) and externally (e.g., violate our rights as consumers or the rights of local communities).

To prevent and mitigate possible violations and to protect rights and freedoms, the United Nations Human Rights Council adopted the Guiding Principles on Business and Human Rights (hereinafter “UNGPs”) in its resolution 17/4 on the 16th of June 2011². The UNGPs were created as a transnational framework that indicates to all States and business enterprises regardless of their size, sector, location, ownership, and structure, the best ways to address human rights impacts³. The UNGPs are based on a three pillars framework – protect, respect and remedy, which corresponds to the State duty to protect human rights, the corporate responsibility to respect human rights and the access to remedy.

As it is stated in the Principle 17 of the UNGPs, in order to identify, prevent, mitigate and account for how companies address their adverse human rights impacts, business enterprises should carry out *human rights due diligence* (hereinafter “HRDD”). OECD Guidelines for Multinational Enterprises (hereinafter “OECD Guidelines”) understand due diligence as the process through which enterprises can identify, prevent, mitigate, and account for

2. Human Rights Council, Guiding Principles on Business and Human Rights, 16 June 2011, p. 42. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciples_businessshr_en.pdf.

3. Ibid, p. 6.

how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems⁴.

The process should include assessing actual and potential human rights impacts, integrating, and acting upon the findings, tracking responses, and communicating how impacts are addressed⁵. The concept of HRDD was created as the basis for companies to fulfil their obligation to respect human rights (one of the pillars of the UNGPs) and as the way to distinguish this obligation from the one that States have under UNGPs (the responsibility to protect). HRDD is the behavior that everyone tends to expect from businesses in any environments (peaceful times, political instability, revolution, natural disasters, wars etc.). Besides, such behavior should be followed by companies in all business relationships, *i.e.* with business partners, entities in the supply chain and any other non-State or State entities directly linked to companies' business operations⁶. Failure to conduct adequate HRDD may lead to negative consequences for companies⁷.

As the UN Working Group on Business and Human Rights (hereinafter "UNWG") mentions, the HRDD process includes four core components: 1) identifying and assessing actual or potential adverse human rights impacts that the company may cause, contribute to, or be directly linked to (Principle 18); 2) taking appropriate action and integrating findings from impact assessments across relevant company processes (Principle 19); 3) tracking the effectiveness of measures in order to assess whether they are working (Principle 20); and 4) communicating with stakeholders about how impacts are being addressed and showing stakeholders that there are adequate policies and processes in place (Principle 20)⁸.

UNWG further develops the characteristics of HRDD, stressing that it should: 1) be undertaken first and foremost to prevent adverse human rights impacts; 2) be commensurate with the severity and likelihood of the adverse impact (the higher the likelihood and severity of an adverse impact, the more extensive the due diligence should be) and be tailored to specific risks and how they affect different groups (such as applying a gender lens or taking into account how actual or potential adverse impacts may differ for or may be specific to women) and adjusting actions accordingly; and 3) be ongoing, in recognition of the fact that the risks to human rights may change over time as operations and operating contexts evolve⁹.

4. OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, p. 23. Available at: <http://dx.doi.org/10.1787/9789264115415-en>.

5. UNGPs, footnote 2, pp. 22-23.

6. OECD Guidelines, footnote 4, p. 23.

7. On example of consequences, see Rachel Davis and Daniel Franks (2014).

8. Working Group on Business and Human Rights, Corporate human rights due diligence - identifying and leveraging emerging practices. Available at: <https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices#:~:text=Human%20rights%20due%20diligence%20is,with%20which%20they%20are%20involved>.

9. UN General Assembly, The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/73/163, 16 July 2018. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement>.

For twelve years now, HRDD has been seen as a crucial part of companies' conduct. It has been integrated in national legislation and frameworks, for instance, Modern Slavery Act (United Kingdom), Transparency Act (Norway) and Act on Corporate Due Diligence in Supply Chains (Germany). Besides, thirty adopted National Action Plans all over the world reaffirm that Governments expect companies to conduct HRDD in their activities¹⁰.

In 2018, UNWG presented a report to the UN General Assembly on corporate human rights due diligence: emerging practices, challenges, and ways forward. It states that most of the companies do not demonstrate practices that meet the requirements set by the UNGPs. Besides, UNWG noted gaps in current practice in corporate disclosure of risk assessments and HRDD processes, as well as the "taking action" and "tracking of responses" components of HRDD. Similarly, connections between HRDD and the remediation of actual impacts were not being made in practice. Beyond a small group of "early adopters" - mostly large corporations based mainly, but not exclusively, in some Western markets - UNWG found a general lack of knowledge and understanding of the corporate responsibility to respect human rights¹¹.

At the same time, we can notice some positive examples among businesses. For instance, let's get back to October 2021, when the German Federal Ministry for Economic Cooperation initiated research on practical implementation of HRDD. Under this initiative the authors selected ten companies from different sectors and invited them to share their experience in HRDD implementation¹². Adidas, A.P. Møller - Mærsk, BASF, Bierbaum-Proenen, Continental, Daimler, Deutsche Telekom, Merck, Siemens, and Thomas Becker were among the companies studied in the report.

The report shows how companies fulfil the steps of HRDD process in their business activities by: 1) adopting internal policy (corporate principles, codes of conduct, supplies codes of conduct, purchasing policy etc.); 2) setting up an organizational structure to monitor the ongoing process (either horizontal or vertical structure); 3) assessing risks and acting upon findings (Compliance Management System; on-site assessment; collaboration with rightsholders and local NGOs, trainings and workshops, action plans elaboration, etc.); 4) establishing grievance mechanisms, and 5) communicating the results of HRDD process (company website; annual reports; sustainability reports, etc.)¹³.

Despite the positive practice mentioned above, a variety of human rights violations is still being committed both by the companies mentioned in the

10. Data derived from <https://globalnaps.org/country/> (as of February 2023).

11. Working Group on Business and Human Rights, Corporate human rights due diligence: emerging practices, challenges, and ways forward. Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163). Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ExecutiveSummaryA73163.pdf>.

12. Accenture GmbH, Twentyfifty GmbH, Moving with responsibility towards success. Practical implementation of human rights due diligence in 10 companies. October 2021, p. 122. Available at: <https://twentyfifty.co.uk/wp-content/uploads/2022/06/2021-Practical-implementation-of-HRDD-in-10-companies.pdf>.

13. Ibid, pp. 24-27.

report *supra* and other companies all over the world, who also have adopted HRDD policy.¹⁴

Considering that existing international regulation of business and human rights issues represents only 'soft' law and the fact that companies still do commit human rights violations all over the world, international policymakers are trying to move beyond voluntary commitments to corporate social responsibility to improve human rights and environmental sustainability in supply chains (Muscat, Tostado, 2022). Thus, the European Commission developed a proposal of a directive on corporate sustainability due diligence which in case of adoption will affect approximately 13,000 companies in the EU and 4,000 non-EU companies (Muscat, Tostado, 2022).¹⁵ This document will have a tremendous significance since companies operating in the EU will be legally obliged to conduct due diligence on adverse human rights and environmental impacts in which they are implicated through their operations and business relationships (the so-called *mandatory human rights due diligence* or *mHRDD*).¹⁶

2. Human rights due diligence in conflict-affected and high-risk areas

As it is known, companies always operate in complex environments (widespread supply chains, trade with large number of countries, new offices abroad etc.), which carries risks of human rights violations and abuses. At the same time, the situation turns out to be even more difficult when a company has to operate on a territory that is suffering from conflicts (both internal like a revolution or political instability, and external, like a war or invasion). Regardless of businesses' decision to leave or stay, their activities still have impact on the ongoing situation. We have already heard of some examples, for instance, Lafarge, a French cement company, which maintained its business activities in Syria during the civil war and is currently charged with complicity in international crimes. It is accused of buying raw

14. Some examples of human rights violation by the companies mentioned in the report (footnote 12), *Adidas*' supply chains are allegedly linked to exploitation of Uyghurs in China (source URL: <https://static.poder360.com.br/2020/03/trabalho-forcado-china.pdf>) and low wage payments in Indonesia (source URL: <https://cleanclothes.org/news/2018/06/11/adidas-and-nike-pay-record-breaking-amounts-to-footballers-but-deny-decent-wages-to-women-stitching-their-shirts>); as of September 2022, *BASF* has 239 records of human rights violations ranging from environment-related offenses to employment-related offences and workplace safety tracked by Good Jobs First (<https://violationtracker.goodjobsfirst.org/parent/basf>). Some examples of the companies not mentioned in the report: *Coca-Cola* has 118 records of human rights violations varying from employment-related to consumer-protection-related offenses tracked by Good Jobs First (<https://violationtracker.goodjobsfirst.org/parent/coca-cola-co>); *Shell* has 436 records of human rights violations, including environment-related offenses, financial and employment-related offenses tracked by Good Jobs First (<https://violationtracker.goodjobsfirst.org/parent/shell-plc>).

15. European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

16. Business & Human Rights Resource Centre, Russian invasion of Ukraine: Analysis of companies' human rights due diligence. Briefing, 24 May 2022. Available at: <https://www.business-humanrights.org/en/from-us/briefings/business-response-to-the-russian-invasion-of-ukraine/>.

material from diverse jihadist groups and negotiating safe passage for its workers and products in exchange for compensations amounting to €13million.¹⁷ Another example is Norway's Telenor Group, which was a positive example for conducting due diligence while entering Myanmar but faced criticism for a hasty exit from the country in July 2021, following the attempted coup in February of the same year.¹⁸

Thus, in order for a business to be able to run its activities in a non-harmful way and to be attentive to complex environments where it operates, the United Nations standards suggest following the principle of proportionality, *i.e.* the higher the risk, the more complex the process.¹⁹ As Principle 7 of the UNGPs mentions, since the risk of gross human rights abuses is heightened in conflict-affected areas,²⁰ action by States and due diligence by business should be heightened accordingly.²¹ Thus, the companies should conduct *heightened* (or *enhanced*) *human rights due diligence* (hereinafter "hHRDD"). In comparison to the "classical" HRDD which helps businesses to know and show how to avoid or minimize human rights risks to people, hHRDD strengthens the understanding of the context where businesses operate and ensures that their activities do not contribute to violence by identifying flash points, potential triggers or the forces that are driving the conflict. This process includes a conflict-sensitive approach that complements the ongoing HRDD.²² For the purposes of the OECD Guidelines, "contributing to" an adverse impact is interpreted as a substantial contribution, meaning an activity that causes, facilitates, or

17. Business & Human Rights Resource Centre, Lafarge lawsuit (re complicity in crimes against humanity in Syria). Available at: <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/>. Business & Human Rights Resource Centre, Russian invasion of Ukraine: Analysis of companies' human rights due diligence, *Briefing*. Available at: <https://www.business-humanrights.org/en/from-us/briefings/business-response-to-the-russian-invasion-of-ukraine/>.

18. Access Now to Telenor's Board: Stop the sale in Myanmar. Available at: <https://www.accessnow.org/telenor-board-stop-the-sale-myanmar/>. Business & Human Rights Resource Centre, Russian invasion of Ukraine: Analysis of companies' human rights due diligence, *Briefing*. Available at: <https://www.business-humanrights.org/en/from-us/briefings/business-response-to-the-russian-invasion-of-ukraine/>.

19. UNDP, Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts. A Guide, p. 9. Available at: <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

20. UNGPs, footnote 2; Jernej Letnar Čerňič, Eva Gerritse, Opinion - Responsible Business Conduct in Times of War. Available at: <https://www.e-ir.info/pdf/99547>.

21. UN General Assembly, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Business, human rights and conflict-affected regions: towards heightened action, A/75/2012, 21 July 2020, § 13. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/190/21/PDF/N2019021.pdf?OpenElement>.

22. Corporate human rights due diligence: emerging practices, challenges, and ways forward. Summary of the report of the Working Group on Business and Human Rights to the General Assembly, footnote 11, pp. 9-10.

It is worth mentioning that for a significant period of time, a conflict-sensitive approach and human rights due diligence were being considered as autonomous processes. The discussions on the necessity of their convergence appeared less than a decade ago. For more on the similarities between them and their convergence see Andreas Graf, Andrea Iff (2017).

incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions.²³

The conflict-sensitive approach consists of several steps:

- 1) Understanding the context in which a company operates (thorough analysis of actual or potential conflicts).
- 2) Understanding how business operations interact or may interact with the context (factors driving conflict or social cohesion), and
- 3) The definition and implementation of mitigation measures to address potential and actual adverse impacts and to capitalize on opportunities to strengthen social cohesion and peace (Graf, Iff, 2016: 14).

Although various conflicts were arousing and still arise annually (I can list just some of the conflicts that have occurred since the beginning of the century - Afghanistan, Ethiopia, Myanmar, Syria, Ukraine), the issues of hHRDD were understudied and underregulated since the creation of the UNGPs in 2011 and up to recent times. To change this, the UNDP and the UNWG created a Guide for business on heightened human rights due diligence in conflict-affected contexts (hereinafter “The Guide”) in June 2022.

As the authors of the Guide highlight, instead of reinventing the wheel, the Guide is aligned with the expectations of the UNGPs and brings together elements of existing materials, including the work of the UN Working Group on Business and Human Rights, connecting these dots to allow businesses to develop effective systems of heightened human rights due diligence.²⁴

It has already been mentioned that companies should conduct hHRDD in conflict-affected and high-risk areas (hereinafter “CAHR areas”). CAHR areas include a wide range of situations that may occur in country(-ies), from wars to internal political instability and unrests. It is a very dynamic environment by nature, with multiple interconnected actors, drivers, and motivations. They develop, evolve, and can change rapidly.²⁵ One internal conflict may lead to another broader social unrest.²⁶

23. OECD Guidelines, footnote 4, p. 23.

24. Corporate human rights due diligence: emerging practices, challenges, and ways forward. Summary of the report of the Working Group on Business and Human Rights to the General Assembly, footnote 11, pp. 9-10.

25. International Alert, Human rights due diligence in conflict-affected settings. Guidance for extractives industries. 2018, p. 10. Available at: <https://www.international-alert.org/wp-content/uploads/2021/08/Economy-Human-Rights-Due-Diligence-Guidance-EN-2018.pdf>.

26. *Ibid.* The Guidance mentions some examples of the situations where one unrest evolved into another one. I will share one of them, which describes the situation in South Africa, where arose several cycles of widespread labour unrest linked to workers' dissatisfaction with wages and rising costs of living. Conflict between unions complicated the situation, generating further hostility between and within communities. And when security forces have responded to protests, it has often been with excessive force resulting in clashes, injuries, and fatalities. In 2012, thirty-four mining workers were killed by security forces at a protest over wages in the Marikana region. Instances of xenophobic violence occurred again in 2015, when immigrants were blamed for a lack of employment opportunities.

The European Commission defines conflict-affected and high-risk areas as the areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses.²⁷

International Alert groups CAHR areas in four main groups:

- 1) Armed conflict (intrastate), which it defines as an ongoing conflict between two or more armed actors, usually including state forces and non-state armed groups;
- 2) Armed violence is understood as a context that is relatively stable but with high violence rates. There is localized armed violence, but it does not meet the criteria required for categorization as an armed conflict under international humanitarian law;
- 3) Post-conflict context in which previous armed conflict has recently ended or is undergoing transition, following a peace agreement or political settlement;
- 4) Social unrest – a context in which there is, or is risk of, violence and/or unrest despite the absence of armed conflict (or in addition to). These can also be relatively stable but very volatile environments, whereby an event can trigger conflict and/or violence.²⁸

Taking into account that the International Alert's guide does not cover interstate conflicts, it seems of utmost importance to add one more group to the very beginning of this list – armed conflict (interstate), which is an ongoing conflict between two or more armed actors, usually two and more forces from different states and non-states armed groups. This type of conflict always crosses borders between states and falls upon the regulation of international humanitarian law.

All these contexts have several features in common. First, conflict will always create adverse negative impacts on human rights. Second, business activities in CAHR areas will never be “neutral” and without impact. Even if a business does not take a side in the conflict and strives for impartiality, its activities will necessarily influence conflict dynamics. Third, business should respect the standards of international humanitarian law in addition to internationally agreed human rights.²⁹

Conducting hHRDD allows businesses to understand not only its respect towards human rights in conflict environments and assess actual or potential adverse human rights impacts, but also identify actual or potential adverse

Another example which I cannot omit, and which will be the subject of the third part of this article, is the conflict in Ukraine. Russian annexation of Crimea, Donetsk and Luhansk regions in 2014 transformed into a full-scale military invasion which Russia initiated in February 2022.

27. Commission Recommendation (EU) 2018/1149 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council, 10 August 2018. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H1149>.

28. International Alert, Guidance, footnote 28, p. 12.

29. *Ibid.*, p. 10.

impacts on conflict that the company may cause or contribute to through its own activities, or that may be directly linked to its operations, products, or services.³⁰.

Businesses' attention to international humanitarian law will help them to better understand CAHR areas where they operate, to mitigate risks of gross human rights violations and to better protect their personnel and assets (Kolieb, 2020: 156).

Having mentioned the situation where hHRDD should be conducted, it seems necessary to look at its process. The authors of the Guide distinguish four main components, which can be seen as four main stages of hHRDD (Kolieb, 2020: 156):

1) Identifying and assessing actual or potential adverse conflict and 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 through its business relationships.

The initial stage may be divided into several steps:

a) Mapping out the company's presence and involvement in the country/region/city and the relations that it has in the CAHR area (company can be involved as an investor, trader, producer, buyer etc.). For such in-depth analyses, companies should create a crisis team that operates in place, engaging with stakeholders and experts with the knowledge of both the topic (type of the conflict) and the region;

b) Understanding the conflict/situation at stake, which means analysis of the actors, reasons, drivers, and possible development in the nearest (and not only nearest) future. At this stage the company analyses the level of its involvement there (conflicts in which company does not get involved and the ones where company can be found complicit).

Key elements of a conflict analysis are (1) mapping of relevant actors and their interests and relationships among each other, (2) identification of conflict dynamics, (3) identification of causes and drivers of conflict, and (4) identification of connecting actors and issues which are a source for social cohesion and peace.³¹;

c) Conflict analysis through a human rights perspective. The company understands which human rights are being violated and can be violated on the territory in question, which groups and individuals are under influence and may be influenced in the CAHR area and/or require particular protection (women, children, indigenous people, people with disabilities, etc.). All this should include the company's understanding on how it may be involved in the violations.

2) Acting on the findings. Having understood the situation and the company's possible involvement in the conflict, a business has several options on how to act next:

30. Ibid, p. 14.

31. International Alert, Guidance, footnote 28, p. 23.

a) if the company has an impact on the situation, it should cease its contribution and use leverage to mitigate the remaining impact as much as possible;

b) if the company may have impact on the conflict in the future, it should take steps in the prevention of its contribution to the conflict.

3) Tracking and assessing the effectiveness of measures and processes to address adverse conflict and human rights risks or impacts to understand if they are working and change them depending on the evaluation of the situation.

4) **Communicating** on how risks or impacts are being addressed and showing stakeholders (in particular, affected stakeholders) that there are adequate policies and processes in place to implement the respect for human rights in practice.

One of the consequences of acting stage for a company may be a decision to relocate, suspend or terminate its activities in or linked to a CAHR area. Referring to Principles 19 and 23, the Guide mentions that for situations when activities have started, disengagement (termination or suspension) is an option for addressing adverse human rights impacts of a business relationship. Additionally, enterprises always need to be aware of any risks that a particular course of action may pose to affected stakeholders and take these into account in their decisions.³²

A hasty exit may be as damaging as one that comes too late. For example, an early exit might force people who depended financially on the business activities to join an armed group as means of subsistence. Therefore, the overarching element is to consider whether exiting could exacerbate tensions within a conflict-affected setting and whether the adverse impacts of the decision to exit or suspend the operations outweigh the benefits.³³ One example of a hasty exit was mentioned *supra*, when Norwegian Telenor Group decided to sell its subsidiary to M1 Group. Access Now, a non-profit organization, sent a letter to Telenor's board of directors urging them to reconsider the decision because M1 Group has previous practice of entering markets experiencing violence and conflict, where its operations have demonstrated willingness to collaborate with oppressive regimes on censorship, surveillance, circumvention of sanctions, and other threats to human rights.³⁴

Exit plans should be followed by an exit strategy which analyzes short- and long-term risks of disengagement and plan on minimizing harmful impacts on the people affected, including business partners and communities. In addition, it is important to protect employees that may and will be influenced

32. Corporate human rights due diligence: emerging practices, challenges, and ways forward. Summary of the report of the Working Group on Business and Human Rights to the General Assembly, footnote 11, p. 35.

33. *Ibid.*

34. Access Now, Letter to Telenor Group Board, 12 October 2021. Available at: https://www.accessnow.org/cms/assets/uploads/2021/10/Telenor_Board_Myanmar_Sale_M1_Oct_2021.pdf.

by the decision and to communicate the decision to disengage to stakeholders.³⁵

3. Heightened Human Rights Due Diligence and the war in Ukraine

On the 24th of February 2022, Russia launched a full-scale military invasion to Ukraine, calling it a “special military operation”. This led to an unprecedented response from business and international community, which was not noticed during wars in Syria, Yemen, and the coup in Myanmar, where business actions were both limited and muted.³⁶ As of today, more than 700 companies suspended their operations in Russia, more than 440 withdrew and around 200 completed their exit from the market.³⁷

One of the reasons for such a reaction was the creation of “conditions of legal and financial hostility”, as Alan Beattie (2022) put it. Phil Bloomer (CEO of Business & Human Rights Resource Centre) and Ella Skybenko (Eastern Europe & Central Asia Senior Researcher & Representative) further developed Alan Beattie’s phrase stressing that by being quick to denounce the Russian state’s aggression and applying painful economic sanctions on the country and its oligarch’s overseas wealth, European and North American governments effectively complicated companies’ operations in the regions (created legal and financial complexity, e.g. complications in supply chain maintenance, operations with international currencies, reputational risk of being accused of violating sanctions).³⁸

At the same time, the complicated environment created by governments which leads to a suspension of business activities or exit from the market in a certain country should be accompanied by the ongoing HRDD with incorporated conflict-sensitive approach, as we have already seen in part 2 of the article.

35. Corporate human rights due diligence: emerging practices, challenges, and ways forward. Summary of the report of the Working Group on Business and Human Rights to the General Assembly, footnote 11, pp. 35-36.

It is worth listing some recent examples of companies’ steps to protect employees while exiting the market in a certain country. Thus, while divesting from Russia last year, McDonald’s required that the buyer maintains 62,000 employees which are currently working there for a further two years (available at: <https://www.newsweek.com/mcdonalds-requiring-russian-buyer-employ-current-workers-2-years-1708187>). The company from the next example has quite a controversial fame during the war in Ukraine. It is Leroy Merlin, which decided to exit the Russian market in late March 2023 and to hand all business to local management, requesting the successor to keep 45,000 staff (available at: <https://www.reuters.com/business/retail-consumer/french-diy-retailer-leroy-merlin-transfer-ownership-russian-business-management-2023-03-24/>). According to Financial Times sources, Deutsche Bank decided to fully close its office in Russia and thus it offered severance packages to the employees who were left there (available at: <https://www.ft.com/content/647069d9-6f89-4e5d-8781-bef4bfaeccda>).

36. Business & Human Rights Resource Centre, Ukraine: Responsible business conduct in a war of aggression. Opinion, 18 March 2022. Available at: <https://www.business-humanrights.org/en/blog/ukraine-responsible-business-conduct-in-a-war-of-aggression/>.

37. Statistics is based on a data provided by KSE (as of 1st of February 2023). Available at: <https://leave-russia.org/>.

38. UNDP, Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts, footnote 21.

Based on the steps taken by companies since the beginning of the invasion, they can be divided in three groups:³⁹:

1) Businesses or products linked to sectors which sustain military and security apparatus, as well as Russian oligarchs. This clearly includes oil, gas, strategic minerals, and surveillance software. These are companies that are exposed to IHL and are in high risk of being found complicit in war crimes. Thus, there is a wide range of companies all over the world exiting Russia, e.g., Eni, Enel, Shell, Honeywell, etc.;

2) Aspirational brands from food & beverage, and clothing sector, e.g., Adidas, Carlsberg, Zara, IKEA, Nike. Most of the companies from this group suspended their activities. By suspending the activities, companies avoid negative consequences related to the sanction regime and reputational damages from consumers and investors;

3) Companies which provide essential goods/services. These companies stay in Russia, since their exit may have negative consequences for Russian civilians, especially those who are dependent on pharmaceutical products. Companies like AbbVie, Novo Nordisk, Pfizer, Danone, and Nestlé announced the suspension of new investments, but maintain operations in Russia.

To understand the response of businesses to the war in Ukraine and how they fulfil obligations under UNGPs, the Business & Human Rights Resource Centre (hereinafter “BHRRC”) reached out to 400 companies that operate and/or invest in Russia and/or Ukraine asking how they implement and conduct hHRDD in their operations. As of today, the BHRRC heard back from 115 companies, which is 29% of the companies invited. Among this number, 43 companies provided full or partial responses to the survey, 60 companies sent general statements condemning the invasion, expressing concerns, and sharing links to their website with a publication about support of Ukraine and steps taken after the invasion. 10 companies either asked for an extension or said that they were working on responses, but never followed-up after and 2 companies declined to provide answers.⁴⁰.

This number has not changed since November 2022. Among 43 companies which provided full or partial responses prevail companies from the technological sector (10), with the energy sector and oil & gas next with 5 responses in each; 2 responses were received from the finance & banking, pharmaceutical, food & beverage, autoparts, beauty, and clothing sector. Geographically, the most responsive companies are from Germany (10) and the USA (5), with four in each for the UK, Switzerland and Italy, and three companies from Denmark and France.

The overall conclusion from the responses received is the lack of thorough analysis of the ongoing conflict, possible contribution to human rights violations from the companies’ side and the implementation of a conflict

39. Business & Human Rights Resource Centre, Ukraine: Responsible business conduct in a war of aggression, footnote 41.

40. Business & Human Rights Resource Centre, Russian Invasion of Ukraine: What Companies Have to Say About Their Human Rights Due Diligence, 23 March 2022. Available at: <https://www.business-humanrights.org/en/latest-news/russian-invasion-of-ukraine-what-companies-have-to-say-about-their-human-rights-due-diligence/>

sensitive approach into companies' operations, i.e. lack of hHRDD. Besides, we cannot deny the fact that Ukraine has been living under interstate conflict since 2014 (since annexation of Crimea, Donetsk and Luhansk regions). Thus, companies should have been applying a conflict-sensitive approach for 8 years before Russia launched a full-scale invasion in February 2022.

At the same time, we can derive some positive examples from responses that the BHRRC received. For instance, several companies set up cross-functional teams in response to the war (Carlsberg, Ericsson, Henkel, Hitachi, Novo Nordisk, Pirelli, Siemens, Twitter, Uber, and Wintershall Dea). Additionally, some companies have had introduced a system of risk-based approach (e.g., Know Your Counterparty - Orsted; Sensitive Business Framework - Ericsson), which allows to screen business partners, prevent, and mitigate the potential misuse of company technology.

AbbVie announced that it would continue to supply its essential life-saving medicines in Russia, but all profits from these sales would be donated to support direct humanitarian relief efforts in Ukraine.⁴¹ Nestlé reacted in a similar way, saying that any profit made in 2022 will be donated to humanitarian causes.⁴²

Some peculiar moments were found in Shell's response. It said that the company was not supplying Russia's military with products or services; however, during a military conflict there may be circumstances in which it may have no choice but to supply military transport. This could be the case if armed troops demanded fuel or, indeed, if there was a legal obligation under martial law.⁴³

The situation mentioned by Shell became reality in September 2022 when the Russian government announced partial mobilization under the Federal Law n.º 31-FZ. Article 9 of this Law obliges organizations, including international companies, to conduct military registration of the staff if at least one of the employees is liable for military service. It also prescribes organizations to assist with delivering the summons from the military to their employees, ensure the delivery of equipment to assembly points or military units, and provide buildings, communications, land plots, transport, and other material means as well as information.⁴⁴

Taking into account this development, the BHRRC reached out to 143 companies which either maintain business activities in Russia or withdrew

41. AbbVie statement, Business & Human Rights Resource Centre, 15 April 2022. Available at: <https://www.business-humanrights.org/en/latest-news/abbvie-statement/>.

42. Nestlé, Update on Russia and Ukraine. Available at: <https://www.nestle.com/ask-nestle/our-company/answers/update-russia-ukraine>.

In line with this and the previous footnote, it is worth mentioning that there is a discussion about the possibility of Russian citizens to get access to basic needs through tax-exempt humanitarian aid (see Skybenko, 2023). For more on essential goods and services, see, for example, Uvarova (2022).

43. Shell response, *Business & Human Rights Resource Centre*, 21 March 2022. Available at: <https://www.business-humanrights.org/en/latest-news/royal-dutch-shell-response/>.

44. Федеральный закон «О мобилизационной подготовке и мобилизации в Российской Федерации» от 26.02.1997 № 31-ФЗ, в ред. от 4.11.2022. Available at: http://www.consultant.ru/document/cons_doc_LAW_13454/8e71d9416150f2672873e9fd98c997bb9e41f4b3/.

from the country.⁴⁵ Companies that maintain activities there had to respond to questions about immediate actions taken and their plans to mitigate the heightened risk of contributing or being directly linked to the armed conflict and exacerbating the situation. Companies which withdrew had to respond to a question of whether they still have any contractual employment relationship in Russia and if so, how they are planning to mitigate the heightened risk of contributing or being directly linked to the armed conflict and exacerbating the situation.

Thirty-one companies provided responses. One company committed to respond later (Japan Tobacco) and one declined to respond (Continental). Among companies who provided responses, seven companies informed that they had asked for an exemption of their employees from military service (Bayer, Cargill, Ericsson, Novo Nordisk, Raiffeisen, Roche and SAP). At the same time, Auchan's response seems weird since unlike companies which asked for employees' exemption Auchan said that the company no longer had ties with its conscripted employees, because their employment contracts are suspended and therefore, they are no longer managed or paid by their employer.⁴⁶

Nine companies informed that they were providing essential goods/services, thus, they continue operations (Bayer, Cargill, Nestlé, Novartis, Novo Nordisk, Pfizer, Puratos, Roche and Unilever).

The consequences of the mobilisation law have already appeared. At the end of September, a Russian employee of Raiffeisen Bank was conscripted and on the 13th of October killed in the war. He was an IT specialist and was entitled to a draft deferment because of his job.⁴⁷ At the same time, there are companies which either openly support mobilisation and their conscripted employees or allegedly assist with conscription.⁴⁸

45. Business & Human Rights Resource Centre, Partial mobilisation in Russia: Companies' reaction to law that obligates businesses to assist with war mobilisation efforts, 12 October 2022. Available at: <https://www.business-humanrights.org/en/latest-news/partial-mobilisation-in-russia-companies-reaction-to-law-that-obligates-businesses-to-assist-with-war-mobilisation-efforts-2/>.

46. Auchan response, *Business & Human Rights Resource Centre*, 10 October 2022. Available at: <https://www.business-humanrights.org/en/latest-news/auchan-response/>

47. Russian IT specialist killed in Ukraine despite being entitled to draft deferment, *Meduza*, 21 October 2022. Available at: <https://meduza.io/en/feature/2022/10/21/russian-it-specialist-killed-in-ukraine-despite-being-entitled-to-draft-deferment>

48. As an example of such companies, see for example a news article on Schlumberger by Reuters (available at: <https://www.reuters.com/business/energy/exclusive-schlumberger-faces-employee-backlash-russia-over-cooperation-draft-2022-10-14/>); a report on Buzzi Unicem by Stop Doing Business with Russia (available at: https://www.lemonde.fr/en/international/video/2023/02/17/video-investigation-how-a-french-company-is-supporting-russia-s-war-effort-in-ukraine_6016182_4.html).

Companies may be found complicit in war crimes and other human rights violations and abuses under national legislation.⁴⁹ Besides, the CEOs, whose companies maintain business activities in Russia, risk being found complicit in war crimes under Article 25 of the Rome Statute.⁵⁰

Conclusion

Human rights due diligence is a basis that guides companies on the way to acting responsibly and respecting human rights. It is a complex net of proactive steps to prevent and address harmful impacts. The lack of HRDD in companies' activities may undermine the reputation of the business on the market and its possible positive contributions to both society and economy.

Under UNGPs in CAHR areas, companies are to complement the ongoing HRDD with a conflict-sensitive approach. As we have seen from the analysis of businesses' response to the war in Ukraine, the understanding of hHRDD is, unfortunately, missing, as is its implementation. Nearly a year into the war, the results remain the same.

The overall situation is aggravated by the legislative steps taken by Russia which complicate the process of divestment from the country and put companies in a situation where they may be found complicit in war crimes for maintaining business in Russia.

In spite of the ongoing process of adoption of the EU Directive on mHRDD, which will positively affect protection of human rights by businesses both from Europe and across the world, the draft does not plunge into the area of human rights due diligence in CAHR areas, and does not direct companies in their obligations to apply conflict-sensitive approach.

The main steps for businesses to take in CAHR areas are:

- to understand the nature of the conflict and map out potential adverse human rights impacts that company already has or may have in the future.
- to create a team or an employee who will be monitoring the situation and communicate it to the colleagues, directors, and other stakeholders in order to always have somebody attentive to the constantly changing situation.
- to introduce a conflict-sensitive approach into companies' due diligence monitoring process. An important moment here would be not to forget that just implementing both international and national sanctions is not conducting hHRDD.
- if a company decides to exit the country, to create a clear exit plan. A company cannot harm its workers and communities by its decision to leave. At the same time, companies which provide essential goods/services may

49. For instance, French and Ukrainian NGOs have already filed a complaint against TotalEnergies, accusing the oil company of supplying jet fuel for Russian war planes carrying out military attacks against civilians in Ukraine. There are other cases which involve companies and human rights violations under international law, e.g., Lafarge, Nestlé and Lundin.

50. Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998. URL: [https://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](https://legal.un.org/icc/statute/english/rome_statute(e).pdf).

have more negative impacts by leaving than by staying, thus, a detailed and thorough analysis of all possible decisions is needed.

- to constantly keep stakeholders updated on companies' activities and the grievance mechanisms available.

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