

Responsible business conduct in conflict-affected areas: the notion of heightened human rights due diligence*

CONDUCTA EMPRESARIAL RESPONSABLE EN SITUACIONES DE CONFLICTO ARMADO: LA NOCIÓN DE DEBIDA DILIGENCIA REFORZADA EN MATERIA DE DERECHOS HUMANOS

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Abstract: Business' activities and operations could be associated with armed conflict and the parties to the conflict in different ways, and consequently, enterprises would need to avoid contributing to negative impacts in those areas. This article aims to examine the business and human rights frameworks applicable in situations of armed conflicts with a particular focus on the UNGPs and the recent guidelines provided by the UN Working Group on Business and Human Rights, UNDP and OHCHR. The article addresses the importance of the notion of heightened human rights due diligence in those scenarios, where and when should be implemented, as well as how to assess the decision to disengage and its consequences.

Resumen: Las actividades y operaciones empresariales podrían estar asociadas con los conflictos armados y con las partes en conflicto de diferentes formas y, en consecuencia, las empresas deberían evitar contribuir a impactos negativos en esas áreas. Este artículo tiene como objetivo examinar los marcos de empresas y derechos humanos aplicables en situaciones de conflicto armados con especial atención a los Principios Rectores sobre Empresas y Derechos Humanos y las recientes directrices proporcionadas por el Grupo de Trabajo de la ONU sobre Empresas y Derechos Humanos, el PNUD y la ACNUDH. El artículo aborda la importancia de la noción de diligencia debida reforzada en materia de derechos humanos en esos escenarios, dónde y cuándo debe implementarse, así como la decisión de retirarse y sus consecuencias.

* This paper has been prepared in the framework of the Postdoctoral Research Project UIDP/00714/2020, funded by the Fundação para a Ciência e a Tecnologia (FCT) in Portugal, and the research project «Acceso a la justicia en el contexto de abusos corporativos: la litigación como estrategia de resistencia y de empoderamiento a las víctimas (ACCJUSTEDH)» (ref: ICI023/23/000001), funded by the International Catalan Institute for Peace (ICIP). A previous version of this paper was presented at the Socio-Legal Studies Association Annual Conference that took place on 4-6 April 2023 at Ulster University's Magee campus in the city of Derry-Londonderry (Northern Ireland).

Keywords: Business, human rights, armed conflicts, due diligence, disengagement, international crimes, Russia.

Palabras clave: Empresas, derechos humanos, conflictos armados, debida diligencia, retirada, crímenes internacionales, Rusia.

I. Introduction

Situations of violence and armed conflict generally lead to severe human rights violations committed by different actors. In such scenarios, business should understand their responsibilities and the possible impacts of their actions and operations. In fact, as indicated by the UN Working Group on Business and Human Rights, «businesses are not neutral actors; their presence is not without impact. Even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics»¹. In particular, business' activities and operations could be associated with armed conflict and the parties to the conflict in different ways, whether directly or indirectly. For instance, they could be involved directly by providing financial, logistical, military, or any other type of support to the parties to the conflict; or indirectly, influencing the conflict dynamics or actors involved, even without the intention of assisting the belligerent parties².

In this regard, there are companies that could be at high risk of contributing to or exacerbating conflict and negatively impacting human rights in conflict-affected areas. These examples could include companies importing minerals from conflict-affected regions in the Democratic Republic of Congo (DRC), or companies supplying materials for the construction of houses in the illegal settlements in the Occupied Palestinian Territories. The recent Lafarge case is one of the latest examples of a company being involved in human rights abuses in a conflict situation, where the French cement company that maintained its business activities in Syria during the civil war is currently charged with complicity in crimes against humanity in France³. The company is accused of making arrangements with the Islamic State and other armed groups, in particular, buying raw material from jihadist groups and negotiate safe passage for its workers and products, in order to keep its cement factory functioning between 2012 and 2014 in northeastern Syria⁴. Likewise, another case subject of recent scrutiny is the

1 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», 21 July 2020, A/75/212, p. 10, para. 43 at <https://www.ohchr.org/en/documents/thematic-reports/a75212-report-business-human-right-and-conflict-affected-regions-towards>

2 Australian Red Cross and RMIT, *Doing responsible business in armed conflict: risks, rights and responsibilities*, 2020 at <https://www.redcross.org.au/globalassets/cms-assets/documents/ihl-no-ihl/doing-responsible-business-in-armed-conflict-final-publication-web.pdf>

3 ÍÑIGO ÁLVAREZ, L. «Un paso adelante en la lucha contra la impunidad corporativa: desarrollos del caso Lafarge», *Agenda Estado de Derecho*, February 2023 at <https://agendaestadodederecho.com/desarrollos-del-caso-lafarge/>

4 ECCHR, «Charges confirmed against Lafarge for complicity in crimes against humanity in Syria», 18 May 2022 at <https://www.ecchr.eu/en/press-release/charges-confirmed-against-lafarge-for-complicity-in-crimes-against-humanity-in-syria/>

case of the former CEO and chairman of the oil company Lundin standing trial for complicity in war crimes during the civil war in Sudan⁵. These examples show some of the most serious cases and the risks of business involvement in conflict-affected areas.

Consequently, there are important factors that need to be taken into consideration when doing business in regions affected by armed conflicts. One of the key measures recommended by the UN Guiding Principles on Business and Human Rights (UNGPs) in its second pillar, relies on the implementation of human rights due diligence processes (HRDD) in order to help businesses identify, prevent and mitigate the human rights-related risks of their activities and their business relationships. This consists of an ongoing process that businesses are expected to implement in order to respond to real or potential adverse human rights and environmental impacts from their activities. In this sense, when companies operate in conflict-affected areas, human rights due diligence processes should be *heightened* based on the idea that «the higher the risk, the more complex the processes»⁶. In other words, companies need to conduct heightened HRDD because of the risk of contributing to human rights abuses together with the risk of exacerbating conflict-drivers and influencing conflict dynamics⁷. In this scenario, business might also weigh the decision to suspend or terminate their activities and operations in such regions and, in such case, will need to evaluate how to do it in a responsible way.

Against this background, this article aims to examine the relevant business and human rights frameworks applicable in situations of armed conflicts with a particular focus on the UNGPs and the recent guidelines provided by the UN Working Group on Business and Human Rights, UNDP and the UN Office of the High Commissioner for Human Rights (OHCHR). The article addresses the importance of the notion of heightened human rights due diligence in those scenarios, as well as where and when should be implemented. It continues with the analysis of the risks and responsibilities companies might face in those areas and regions, including their possible contribution to the commission of international crimes. Then, the article focuses on the decision about terminating the business relationship and the factors that companies would need to balance. Finally, the article concludes with an assessment of the Russian-Ukrainian conflict and the reaction of businesses in such situation and some final remarks about the steps that companies should follow in conflict-affected areas in order to avoid negatively impacting human rights.

II. International legal framework applicable to business in conflict affected-areas

When business operate in a conflict-affected area, there are a number of international and regional instruments that should be taken into consideration. Starting with the UN

5 See «Sweden Charges Lundin Energy Executives with Complicity in Sudan War Crimes», *Reuters*, 11 November 2011 at <https://www.reuters.com/world/africa/sweden-charges-lundin-energy-executives-complicity-sudan-war-crimes-2021-11-11/>

6 Report UN Working Group on Business and Human Rights, 2020, *supra note 2*, p. 14, para. 13.

7 See United Nations Development Programme, *Heightened Human Rights Due Diligence for business in conflict-affected contexts; A Guide*. New York, United States of America, 2022.

Guiding Principles on Business and Human Rights (UNGPs), unanimously endorsed by the Human Rights Council in 2011, they are the authoritative global framework for business and human rights that rest on the 3 pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and the access to remedy⁸. In relation to situations of conflict and high-risk, the UNGPs indicate that «because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses»⁹. The commentary to the UNGPs further explains that more and more businesses are requesting practical «guidance about how to avoid contributing to human rights harm in these difficult contexts»¹⁰. In particular, the UNGPs pay special attention to the implementation of International Humanitarian Law indicating in the commentary to Principle 12 that «in situations of armed conflict enterprises should respect the standards of international humanitarian law»¹¹.

Following up with additional instruments, it is key to highlight the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, updated in June 2023, that also consider the situation of enterprises operating in difficult environments, including armed conflicts¹². The current version of the Guidelines specifically refer to the need to respect IHL standards by enterprises and to conduct *enhanced due diligence* in relation to adverse impacts, including violations of international humanitarian law¹³. Moreover, the OECD has produced a guidance to facilitate conflict-sensitive conduct for companies sourcing minerals or metals from conflict-affected and high-risk areas, known as the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016)¹⁴. This Guidance aims to assist companies in implementing their corporate responsibility to respect human rights in the choice of their suppliers to avoid contributing to conflict through their sourcing decisions.

As mentioned above, there is a key branch of law which is especially relevant in conflict scenarios that is International Humanitarian Law (IHL). IHL establishes rules to limit the effects of armed conflict by protecting civilians and civilian objects, and to restrict the means and methods of warfare. The emergence of an armed conflict triggers the application of IHL and introduces additional rules that relevant stakeholders, including corporations, need to be aware of. In particular, IHL is binding on anyone whose activities are closely linked to an armed conflict. This means that «IHL binds both state and non-state actors, including corporate personnel and executives, whose activities are closely linked to an armed conflict»¹⁵. Among

8 OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs) 2011*, Principle 7, at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

9 UNGP 7.

10 Commentary to UNGP 7.

11 Commentary to UNGP 12.

12 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, Paris, 2023, <https://doi.org/10.1787/81f92357-en>.

13 Commentary para. 45 of the Chapter of Human Rights, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023.

14 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, OECD Publishing, Paris, 2016, at <https://www.oecd.org/corporate/mne/mining.htm>

15 KOLIEB, J. «Don't forget the Geneva Conventions: achieving responsible business conduct in

the relevant provisions that business might need to be aware of are those related to the core principles of IHL (principles of distinction, proportionality, prohibition of unnecessary suffering, etc.), workforce conditions, manufacture and trade of weapons, pillaging of assets and property, forced displacement, and the protection of the environment in armed conflicts, among others¹⁶.

In relation to companies providing security services, there are a number of sectoral standards and guidelines that should be considered, such as the Voluntary Principles on Security and Human Rights¹⁷ and the International Code of Conduct for Private Security Service Providers (ICoC)¹⁸. These guidelines offer recommendations as to how to conduct an assessment of human rights risks associated with security services and better align their policies and practices with human rights and international humanitarian law standards. Nevertheless, one of the negative sides is that these are voluntary instruments which lack the necessary enforcement mechanisms.

Another relevant framework which is worth mentioning is the UN Sustainable Development Goals (SDGs), whose action programme is particularly relevant for business enterprises. Goal 16 about *Peace, Justice and Strong Institutions* encourages all stakeholders, including corporations, to «work together to implement lasting solutions to reduce violence, deliver justice, combat corruption and ensure inclusive participation at all times»¹⁹. Besides, Goal 17 entitled *Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development* focuses on recognising multi-stakeholder partnerships, including public-private partnerships, as important vehicles for mobilizing and sharing knowledge, expertise, technologies and financial resources to support the achievement of the SDGs in all countries²⁰.

Finally, at the EU level, there are a number of relevant instruments on business and human rights that highlight additional responsibilities for businesses operating in conflict situations. In this sense, the EU Conflict Mineral Regulation (Regulation 2017/821) establishes the supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas²¹. And more recently, the Draft

conflict-affected areas through adherence to international humanitarian law», *Australian Journal of Human Rights*, vol. 26, No. 1, 2020, p. 148.

16 Australian Red Cross and RMIT, *Doing responsible business in armed conflict: risks, rights and responsibilities*, 2020, pp. 15-23.

17 The Voluntary Principles on Security and Human Rights were established in 2000 as a multi-stakeholder initiative involving States, companies and civil society organisations. The principles are available at <https://www.voluntaryprinciples.org/wp-content/uploads/2021/11/Voluntary-Principles-on-Security-and-Human-Rights-english-2.pdf>

18 International Code of Conduct for Private Security Service Providers, as amended 10 December 2021, at https://icoca.ch/wp-content/uploads/2022/01/INTERNATIONAL-CODE-OF-CONDUCT_Amended_2021.pdf

19 United Nations, *Peace, Justice and Strong Institutions: Why the Matter*, at https://www.un.org/sustainabledevelopment/wp-content/uploads/2019/07/16_Why-It-Matters-2020.pdf

20 United Nations, *Multi-stakeholder partnerships* at <https://sdgs.un.org/topics/multi-stakeholder-partnerships>

21 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

Directive on Corporate Sustainability Due Diligence whose provisional deal adopted by the Council and the European Parliament in December 2023 contains references to the notion of heightened and conflict-sensitive due diligence, although the text still needs to be endorsed and formally adopted by both institutions²². It is precisely this notion of heightened human rights due diligence that will be addressed in the following section.

III. The notion of heightened human rights due diligence

One of the key measures that businesses need to undertake in order to comply with the second pillar of the UNGPs, their corporate responsibility to respect human rights, relies on the implementation of human rights due diligence processes in order to help businesses «identify, prevent and mitigate the human rights-related risks of their activities and business relationships»²³. Nevertheless, the UNGPs did not adopt a specific type of human rights due diligence for conflict situations, being the latter based on the severity of the human rights risks, the size of the enterprise and the nature and contexts of their operations. This means that in conflict situations, human rights due diligence needs to be operationalised through a conflict-sensitive approach, something that was already emphasized by the UN Working Group on Business and Human Rights in its 2020 report on *Business, human rights and regions affected by conflicts: towards heightened action*²⁴. This would be in line with the idea that «the higher the risk, the more complex the process»²⁵. However, the UNGPs did not offer much detail about how to implement an enhanced or heightened version of human rights due diligence.

After the Russian invasion of Ukraine in February 2022, a number of guides and recommendations have been produced in order to better understand the importance of conducting heightened human rights due diligence in conflict scenarios and other situations of high risk. In particular, UNDP together with the UN Working Group on Business and Human Rights published in June 2022 a guidance (UNDP Guide onwards) that aims to «provide the business community, governments, civil society, and other stakeholders with a better understanding of the practical measures that should be taken to ensure responsible engagement from business in conflict-affected areas»²⁶. In August 2023, the UN Office of the

22 See Press release of 14 December 2023, «Corporate sustainability due diligence: Council and Parliament strike deal to protect environment and human rights» at <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/?s=08>. See also Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 1 June 2023, p. 34 at https://www.europarl.europa.eu/doceo/document/A-9-2023-0184_EN.html

23 UNGP 7 (a).

24 Report of the UN Working Group on Business and Human Rights, 2020, *supra* note 2.

25 *Ibid.*, p. 4, para. 13.

26 United Nations Development Programme, Heightened Human Rights Due Diligence for business in conflict-affected contexts; A Guide. New York, United States of America, 2022 (UNDP Guide onwards).

High Commissioner for Human Rights published a legal brief entitled *Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting* that addresses the question of businesses operating in fragile contexts, including conflict situations, and the remaining and existing business responsibilities²⁷. Therefore, we see a current interest in responsible business conduct in conflict situations gaining particular attention since the Russian invasion of Ukraine. Nevertheless, the actual and potential negative impact of doing business in conflict-affected situations and high-risk areas is not new, as can be perceived from the analysis of previous scenarios in Colombia, DRC, Syria or Myanmar, just to mention some examples²⁸.

The main idea that can be derived from these recent documents is the need to integrate a conflict-sensitive analysis within HRDD processes. In particular, UNDP and the UN Working Group on Business and Human Rights summarised the three key elements that business should integrate in order to better implement their heightened HRDD: «a) understand the conflict; b) identify their impact on the conflict; and c) act upon those findings by identifying business responsibility»²⁹. Firstly, understanding the conflict requires examining the profile of the conflict, its main parties and other relevant actors involved, as well as causes and consequences of the conflict. In particular, this means analysing the contextual factors, such as the characteristics of the region, historical or perceived grievances and root causes of the conflict, as well as identifying the main parties to the conflict and affected stakeholders³⁰. One important aspect would be to monitor social media to identify the positions of the parties to the conflict and their narratives³¹. Moreover, this first element would also require that business staff operating in the region should be trained and «equipped with a proper understanding of conflict dynamics»³².

Secondly, identifying the adverse impacts on the conflict would require assessing and anticipating the ways in which businesses operations, products or services might impact the relationship between the parties or might potentially increase the existing tensions in the region³³. As explained by the UNDP Guide, having an «actor mapping» would be key to understand the power dynamics of the conflict³⁴. Thirdly, business might need to act upon the findings by identifying their responsibility for actual or potential negative impacts on human rights and the conflict. This would require taking all the appropriate measures to cease, prevent, and remedy those actual or potential negative impacts, and when necessary the enterprise might «exercise its leverage to mitigate any remaining impact to the greatest extent

27 OHCHR, *Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting*, August 2023 at <https://www.ohchr.org/sites/default/files/documents/issues/business/bhr-in-challenging-contexts.pdf>

28 AGUIRRE, D., PIETROPAOLI, I. «Heightened Human Rights Due Diligence in Practice: Prohibiting or Facilitating Investment in Conflict Affected Areas?» *Journal of Human Rights Practice*, XX, 2023, pp. 1-18.

29 UNDP Guide, p. 23.

30 Report of the UN Working Group on Business and Human Rights, 2020, *supra note 2*, p. 10, paras. 46-47.

31 UNDP Guide, p. 25.

32 Report of the UN Working Group on Business and Human Rights, 2020, *supra note 2*, p. 11, para. 49.

33 *Ibid.*, p. 11, para. 48.

34 UNDP Guide, p. 26.

possible»³⁵. Additionally, throughout these three phases it would be essential to incorporate «consultation and engagement with external stakeholders - national and local experts, and local communities»³⁶. As informed by the relevant practice, a strong and broad stakeholder engagement would benefit the relationship with local actors.

Once we know what heightened HRDD entails, there are two remaining questions that should be posed: where and when business enterprises need to carry out heightened HRDD. The answer to these questions would be addressed in the following sections.

Where to carry out heightened human rights due diligence

As a first observation, the UNGPs do not use the term armed conflict, but instead they mention «conflict-affected territory» or «conflict-affected area» which seems to be broader and encompasses pre-conflict scenarios, as well transitional justice contexts. The UNDP Guide goes further and clarifies that «contexts affected by armed conflicts and other situations of widespread violence» include conventional armed conflict; military occupation; mass atrocities; widespread violence³⁷. Similarly, if we look at the EU Conflict Mineral Regulation (Regulation 2017/821), its list of definitions also mentions that «“conflict-affected and high-risk areas” means 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»³⁸. In fact, this EU regulation even provides an indicative, non-exhaustive, and regularly updated list of conflict-affected and high-risk areas (CAHRAs)³⁹.

However, there are also broader notions such as the one referred by the legal brief of the UN Office of the High Commissioner for Human Rights (OHCHR) as «challenging contexts» in human rights terms⁴⁰. In this case, the OHCHR brief refers to wider contexts that include among others, when the human rights situation is particularly grave due to conflict, political turmoil and/or systematic violations of rights; where national laws or regulations require actions that would be inconsistent with internationally recognized human rights standards; and where national laws or regulations offer a level of human rights protection that falls short of internationally recognized human rights standards⁴¹. The first scenario can be assimilated to the situations addressed in the previous paragraphs, mostly conflict and high-risk. The second scenario refers to cases where enterprises are operating in a country whose domestic legislation requires them to act in a way that is inconsistent or incompatible with internationally

35 UNDP Guide, pp. 26-27.

36 PIETROPAOLI, I. «Part 1: Do foreign companies have a responsibility under international law to leave Russia?», *British Institute of International and Comparative Law*, 14 March 2022, at <https://www.biicl.org/blog/33/part-1-do-foreign-companies-have-a-responsibility-under-international-law-to-leave-russia>

37 UNDP Guide, p. 53.

38 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Article 2(f).

39 See map at <https://www.cahraslist.net>

40 OHCHR, *Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting*, August 2023.

41 *Ibid.*, pp. 4-7.

recognised human rights standards and instruments (for instance, the employment legislation mandates discrimination on the basis of sex, gender, or sexual orientation)⁴². The third scenario refers to situations where the country suffers from «deficiencies in legal regimes, lack of clarity in legal standards or poor enforcement of laws» which might be followed «by structural problems relating to corruption, poverty, a lack of government resources or a lack of respect for the rule of law»⁴³. This situation might resemble the cases of failed states with weak or non-existent governmental functions.

In conclusion, the definition of conflict-affected areas goes beyond the strict definition of armed conflict under IHL, encompassing scenarios of high-risk and tensions before the emergence of an armed conflict and post-conflict situations. Moreover, other situations of tensions and grave and systematic violations of human rights can be considered in order to apply heightened human rights due diligence.

When to carry out heightened human rights due diligence

The other question that emerges is: when should companies conduct heightened human rights due diligence? As mentioned in the introduction, human rights due diligence processes should be undertaken on an ongoing and regular basis, independently of the existence of high risk or tensions. However, in the case of conflict-affected areas the UNDP Guide emphasises that human rights due diligence «is not a “one-and-done” exercise» and heightened human rights due diligence would need to be considered at least in two particular moments: before the enterprise engages in new activities, operations and relationships; and when there are significant changes in the operating environment, for instance, cases of rising social and/or political tensions; derogations or emergency measures taken by the respective government in the region, application of international sanctions, etc⁴⁴.

If we take the example of the Ukrainian conflict, companies only started reacting after the full-scale invasion of the 24th February 2022 and after the imposition of sanctions at the international and regional level. However, as indicated by ECCJ, the concentration of hundreds of thousand Russian troops alongside with tanks and weapons on the border with Ukraine in early December 2021 was a clear security risk, which should have been considered by all companies operating in Ukraine and Russia⁴⁵. Even before, the Russian annexation of Crimea in 2014 was already a sign of increasing tensions in the region.

IV. Risks and responsibilities for companies involved in conflict-affected areas

As it has been mentioned before, companies and their directors should consider whether their activities and operations might contribute to human rights abuses and international

42 *Ibid.*, p. 5.

43 *Ibid.*, p. 6.

44 UNDP Guide, p. 20.

45 ECCJ & Frank Bold, *From rushed reactions to proper preparedness. Corporate due diligence in times of armed conflict*, Brussels, June 2022, p. 10.

crimes. For instance, companies investing in or establishing business relationships with a party to the conflict face the risk of aiding, abetting, or assisting in the commission of international crimes as argued by several authors⁴⁶. In view of this, business could be accused of complicity in the commission of international crimes, including genocide, crimes against humanity or war crimes.

At the international level, although the International Criminal Court does not have jurisdiction to prosecute legal persons and other entities, as established in Article 25 of the Rome Statute⁴⁷, it could potentially try corporate personnel, particularly company directors. At the regional level, the international criminal section of the African Court of Justice and Human and Peoples Rights envisages the possibility of hearing cases against corporations under article 46C of the African Criminal Court's statute annexed to the Malabo Protocol entitled «Corporate Criminal Liability» which represents an interesting development in the field⁴⁸. However, the Protocol is not yet in force.

At the national level, domestic courts could try persons involved in international crimes through civil and/or criminal proceedings. For instance, in 2007 the Court of Appeal of the Hague found Dutch businessman Frans van Anraat guilty of repeated complicity in the participation of violations of the laws and customs of war, sentencing him to 17 years' imprisonment⁴⁹. In 2009, the Supreme Court of the Netherlands upheld his conviction for complicity in war crimes, although the Court reduced his sentence. The case relates to the supply of chemical precursors to the Saddam Hussein regime in Iraq that were used to manufacture mustard gas⁵⁰. More recently, a number of civil and criminal proceedings have been brought against companies and their directors for their potential involvement in international crimes, like the Lafarge case in France or the Lundin case in Sweden⁵¹. In a separate proceeding in the United States, Lafarge plead guilty to conspiring to provide material support to a designated foreign terrorist organization⁵².

46 See KYRIAKAKIS, J. «Developments in international criminal law and the case of business involvement in international crimes», *International Review of the Red Cross*, Vol. 94, Number 887, 2012, pp. 981-1005; AMBOS, K. «Corporate Complicity in International Crimes through Arms Supplies despite National Authorisations?» in *International Criminal Law Review* 2022, pp. 1-5.

47 Rome Statute of the International Criminal Court, done in Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

48 KYRIAKAKIS, J. «Article 46C: Corporate Criminal Liability at the African Criminal Court» in *African Court of Justice and Human and Peoples' Rights in Context*, edited by Jalloh, C., Clarke, K., Nmeihelle, V. (2017) at <https://ssrn.com/abstract=2970864>

49 *Public Prosecutor v. Frans van Anraat* (2007) ECLI:NL:GHSGR:2007:BA4676 (Court of Appeal of the Hague, the Netherlands). See the procedural history of the case at <https://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/#:~:text=On%209%20May%202007%2C%20the%20Court%20of%20Appeals,war%2C%20and%20sentenced%20him%20to%2017%20years%27%20imprisonment.>

50 KOLIEB, J., *supra note* 16, p. 151.

51 See RIELLO, V and FUTWENGLER, L. «Corporate Criminal Liability for International Crimes: France and Sweden Are Poised to Take Historic Steps Forward», *Just Security*, 6 September 2021 at <https://www.justsecurity.org/78097/corporate-criminal-liability-for-human-rights-violations-france-and-sweden-are-poised-to-take-historic-steps-forward/>

52 US Department of Justice, Office of Public Affairs, «Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations», Washington, 18 October 2022, at <https://>

Likewise, similar allegations could be raised in the current war in Ukraine after the Russian invasion and the potential involvement of foreign and domestic companies in human rights violations⁵³. For instance, in March 2023 two NGOs filed a lawsuit against a multinational in France for alleged complicity in Russia's war crimes in Ukraine⁵⁴. Moreover, investors and banks that facilitate war crimes and other international crimes through the provision of their financial services may also be exposed to legal charges⁵⁵.

V. Deciding about staying or leaving: planning a responsible exit

In those challenging contexts, business might take the decision to suspend or terminate its business relationships or existing certain regions linked to a conflict situation. There are several reasons why enterprise might decide to disengage, including the impossibility to physically continue operating in the field, the direct or indirect effects of economic sanctions posed to the particular country where it operates, or legal, ethical or reputational considerations and risks. In such scenarios, «the consequences of leaving must be identified, and negative impacts prevented or mitigated»⁵⁶. Consequently, in order to weigh the decision about staying or leaving, a number of factors would need to be taken into consideration. In this regard, it is key to understand what the UNGPs stipulate about ending a business relationship, in particular, about the question of disengagement and what elements are essential in order to take such decision.

According to the UNGPs, there are four factors which should be considered by companies operating in a conflict-affected area: a) the use of leverage when possible; b) the cruciality of the business relationship; c) the severity of the potential or real abuse; and d) the possible adverse human rights impacts derived from the decision of existing.

www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations

- 53 Business and Human Rights Resource Centre, «Ukraine: Global outrage over Russian invasion leads to sanctions, demands for business to divest», 7 March 2022 at <https://www.business-humanrights.org/en/latest-news/ukraine-global-outrage-over-russian-invasion-leads-to-sanctions-demands-for-businesses-to-divest/>; BRYK, L. and SLUITER, G. «Why Corporations Should Cease Business Activities with Russia» *EJIL:Talk!*, 22 March 2022 at <https://www.ejiltalk.org/why-corporations-should-cease-business-activities-with-russia/>
- 54 Business and Human Rights Resource Centre, «France: Two NGOs file new lawsuit against TotalEnergies for alleged complicity in Russia's war crimes in Ukraine», 30 March 2023 at <https://www.business-humanrights.org/en/latest-news/france-two-ngos-file-new-complaint-to-court-against-totalenergies-which-they-accuse-of-complicity-in-russian-war-crimes-in-ukraine/>
- 55 KOLIEB, J., *supra* note 16, p. 153.
- 56 See AGUIRRE, D. and PIETROPAOLI, I. «Part 2: Responsible Exit from Russia: Business and Human Rights in a Global Governance Gap», *British Institute of International and Comparative Law*, 22 March 2022, at <https://www.biicl.org/blog/36/part-2-responsible-exit-from-russia-business-and-human-rights-in-a-global-governance-gap>

The use of leverage

Leverage means the «ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact»⁵⁷. Consequently, the ability of the company to take appropriate action will depend partially on the «extent of its leverage in addressing the adverse impact»⁵⁸.

The UNGPs establish that before considering ending a business relationship, the enterprise should try to look for solutions by addressing those adverse impacts through the exercise of its leverage. Nevertheless, as stated by Principle 19, «there are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so»⁵⁹.

The cruciality of the business relationship

When the enterprise cannot exercise leverage to prevent or mitigate the negative impact, it might consider the decision to terminate the business relationship. However, it should reflect about the cruciality of the business relationship, meaning that if the relationship is deemed «crucial» to the enterprise, ending it would entail a number of additional challenges. According to the abovementioned Principle 19, «a relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists»⁶⁰. Beyond this broad definition, the UNGPs do not provide any other objective criteria for determining when a business relationship might be seen as crucial. In any case, if the enterprise decides to keep the business relationship, it might nevertheless «be transparent with stakeholders and the public at large about the decision-making process used to arrive at that determination and the criteria used, which should be objectively reasonable»⁶¹.

The severity of the abuse

In addition to the cruciality of the business relationship, another key factor to be assessed is the severity of the abuse in the sense that «the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship»⁶². If the abuse relates to potential engagement in torture, grave breaches of the Geneva Conventions, war crimes, crimes against humanity, genocide, or any other serious violations of human rights and international humanitarian law, enterprises need to make sure there are able to exercise their leverage and they need to do it quickly. The longer the company stays in that business relationship, the more likely they are to be sliding on the continuum

57 OHCHR, *The Corporate Responsibility to Respect Human Rights. An Interpretive Guide*, New York and Geneva, 2012, p. 7.

58 Commentary UNGP 19.

59 *Ibidem*.

60 *Ibidem*.

61 OHCHR, *Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting*, August 2023, p. 11.

62 Commentary to UNGP 19.

from being directly linked to actually contributing to human rights abuses. Therefore, as stated by Principle 19, «for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection»⁶³.

Adverse human rights impacts derived from the decision of terminating

Another decisive factor is whether terminating the business relationship could lead to adverse human rights consequences. A particularly difficult situation emerges in relation to companies that provide essential services including water, electricity, food, healthcare, telecommunications, or similar services⁶⁴. In such case, the company will need to evaluate who will be then in charge of providing such services and what consequences could be derived if essential services are suspended or are no longer provided to local communities⁶⁵. For instance, if the company is supplying food to a conflict-affected community, they can justify staying longer in the area because leaving would involve adverse human rights impacts to the community.

If the enterprise decides to terminate the business relationship, it would have to do it in a responsible way mitigating and addressing the potential negative impacts derived from its exiting decision. Leaving responsibly also means finding buyers that would operate in a responsible way in such conflict-affected area and would commit to respect human rights. This is why the UNDP guide recommends that «when transferring ownership, the company need to assess the human rights capacities of the buyer and requests, including through contractual terms, that the buyer put specific human rights-related policies and procedures in place to enable them to operate responsibly in a conflict-affected context»⁶⁶.

One of the cases at point regarding the potential irresponsible disengagement is the complaint filed against Telenor at the Norwegian National Contact Point (NCP) under the OECD Guidelines which deals with Telenor's disengagement from Myanmar and the sale of its Myanmar business to the Lebanese company M1 Group⁶⁷. The complaint was filed by the Center for Research on Multinational Corporations (SOMO) on behalf of 474 civil society organisations in Myanmar in July 2021 and alleges the lack of risk-based due diligence, stakeholder dialogue and disclosure in the company's disengagement from Myanmar related

63 Commentary to UNGP, 19.

64 ÍÑIGO ÁLVAREZ, L. Legal Brief «Companies operating in conflict-affected areas: legal frameworks, risks and obligations» prepared by the NOVA BHRE in April 2022 with the support of the Portuguese Chamber of Commerce and Industry, p. 5 available at <https://novabhre.novalaw.unl.pt/wp-content/uploads/2022/07/Practical-Brief-NOVA-companies-in-conflict-areas.pdf>

65 *Ibid.*, p. 5.

66 UNDP Guide, p. 36.

67 OECD Watch, *SOMO representing 474 Myanmar CSOs vs. Telenor ASA*, July 2021 at <https://www.oecdwatch.org/complaint/somo-representing-474-myanmar-csos-vs-telenor-asa/>. See also AGUIRRE, D., PIETROPAOLI, I. «Heightened Human Rights Due Diligence in Practice: Prohibiting or Facilitating Investment in Conflict Affected Areas?» *Journal of Human Rights Practice*, XX, 2023, pp. 12-14.

to its decision to sell 100 per cent of Telenor Myanmar to M1 Group⁶⁸. According to the submission, «the owners of M1 Group have a history of business in authoritarian countries and face unresolved allegations of corruption and terrorist financing»⁶⁹. In fact, M1 Group was named in a 2019 report from the UN Independent Fact-Finding Mission on Myanmar where it was recommended that «no business enterprise active in Myanmar or trading with or investing in businesses in Myanmar should enter into a business relationship of any kind with the security forces of Myanmar, in particular the Tatmadaw, or any enterprise owned or controlled by them, including subsidiaries, or their individual members»⁷⁰. The initial assessment of the complaint was issued on 27 September 2021 and the case is still pending.

Consequently, taking all these factors in mind, it is key for companies to «anticipate and plan a clear exit strategy in advance»⁷¹. As argued by the UN Working Group on Business and Human Rights, this plan should include measures to identify the impacts of disengagement for relevant stakeholders, including workers, suppliers, providers, local communities and vulnerable groups, as well as develop mitigation strategies⁷². Importantly, this exist strategy needs to be planned in advance, as part of the heightened human-rights due diligence process of the concerned business and not after the escalation of the conflict or the violent crisis⁷³. Moreover, the exit strategy should be formulated in consultation with stakeholders, such as employees and other affected groups and communities⁷⁴.

VI. Lessons from the Russian-Ukrainian conflict

Since the 24th February 2022 several global corporations from different industries announced disengagement from Russia, while others halted new projects and investments. The majority of those are based in Western countries, including the US, Canada, UK, and EU countries, and also Japan⁷⁵. These exits could be seen «as unprecedented in the recent global industry» since this is not what happened with wars in Syria, Yemen or the coup in Myanmar, where business actions were more limited.⁷⁶

68 See initial assessment at <https://mneguidelines.oecd.org/database/instances/no0019.htm>

69 *Ibid.*, p. 2.

70 Human Rights Council, «The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar», A/HRC/42/CRP, 5 August 2019, p. 100.

71 Report of the UN Working Group on Business and Human Rights, 2020, *supra note 2*, p. 14, para. 65.

72 *Ibid.*

73 AGUIRRE, D. and PIETROPAOLI, I. «Part 2: Responsible Exit from Russia: Business and Human Rights in a Global Governance Gap», *British Institute of International and Comparative Law*, 22 March 2022.

74 UNDP Guide, pp. 35-36.

75 See «Some of the Biggest Brands Are Leaving Russia. Others Just Can't Quit Putin. Here's a List», *The New York Times*, 7 April 2022 at <https://www.nytimes.com/interactive/2022/04/07/opinion/companies-ukraine-boycott.html>

76 LETNAR ČERNIČ, J. «Russia, disinvestment, business and human rights», *Cambridge Core Blog*, 9 March 2022, at <https://www.cambridge.org/core/blog/2022/03/09/russia-disinvestment-business-and-human-rights/>

There are several reasons that can explain these reactions. First of all, this has been motivated by the rapid action by European and North American governments by denouncing the Russian's aggression and applying painful economic sanctions on the country⁷⁷. The scale of Western sanctions created «conditions of legal and financial hostility», which has been one of the first factors for companies to react, either because they were directly or indirectly affected by the sanctions⁷⁸. At the same time, additional pressure has also arisen by considerations of responsible business conduct or also called responsible ESG investment, by consumer pressure and the power of media and social media, which also had an effect on companies and investors in the sense of «making ethics considerations more central to their business decisions»⁷⁹. Moreover, the regulatory environment in Russia has been more unstable. As explained by Letnar Černič, «one of the responses of Russian authorities to sanctions and business exits has been to freeze foreign investment under the threat of nationalisation»⁸⁰. Therefore, there was a combination of legal, reputational, or financial risks, or ethical and human rights considerations, motivating the decision to leave or suspend operations in Russia.

Nevertheless, although we have witnessed these reactions by businesses, the study prepared by Evenett and Pisani from the University of St. Gallen and the Swiss management school IMD Institute offered interesting findings about the actual weigh of those exists in the global market. They gathered data on companies from the EU and G7 countries that actually left Russia by November 2022 and their findings were quite revealing⁸¹. Despite international sanctions and commitments to leave the Russian market, only 8.5 % of companies from the European Union and G7 countries actually left Russia. In particular, they analysed 1.404 EU and G7 companies with commercially active equity investments in Russia before the invasion of Ukraine, and concluded that by the end of November 2022, only 120 (8.5 %) actually left⁸². Moreover, the study also revealed that «those EU and G7 companies that exited by the end of November 2022 accounted for small shares of the Western corporate footprint in Russia»⁸³.

To complement this study, it is also pertinent to examine the survey conducted by the Business and Human Rights Resource Centre (BHRRC) with 400 companies operating or investing in Ukraine and/or Russia which were invited to respond to questions about heightened human rights due diligence in situations of armed conflict⁸⁴. As for 21 November 2022, 115 companies out of 400 responded: 60 companies sent general responses expressing deep

77 BLOOMER, P. and SKYBENKO, E., «Ukraine: Responsible business conduct in a war of aggression», Business and Human Rights Resource Centre, 18 March 2022, at <https://www.business-humanrights.org/en/blog/ukraine-responsible-business-conduct-in-a-war-of-aggression/>

78 *Ibidem*.

79 *Ibidem*.

80 LETNAR ČERNIČ, J. «Russia, disinvestment, business and human rights», *Cambridge Core Blog*, 9 March 2022.

81 EVENETT, S. and PISANI, N. «Less than Nine Percent of Western Firms Have Divested from Russia», 20 December 2022 at <http://dx.doi.org/10.2139/ssrn.4322502>

82 *Ibid*, p. 5.

83 *Ibid*, p. 8.

84 Business and Human Rights Resource Centre, «Russian invasion of Ukraine: What companies have to say about their human rights due diligence», updated 21 November 2022 <https://www.business-humanrights.org/en/latest-news/russian-invasion-of-ukraine-what-companies-have-to-say-about-their-human-rights-due-diligence/>

concerns, reaffirming their commitment to respect human rights and sharing information about their donations in support of Ukraine; just 43 companies provided full or partial responses to the survey questions; 10 companies promised to submit a response but have yet to do so; 2 declined to respond⁸⁵. The technology sector has been the most responsive so far, followed by the oil and gas sector. As for the geographical distribution of responses, they found companies headquartered in USA were the most likely to respond – 26 did, followed by companies headquartered in Germany with 16 responses, 10 responses from Japanese companies, 8 from Swiss companies. These include full and partial responses as well as general comments.

As for their answers, according to the findings of BHRRC, the responses differ substantively, since some companies simply mentioned their human rights policies in place but without explaining any specific measure they were applying as a response to the conflict; while others indicated the steps and mechanisms they were implementing in order to carry out heightened human rights due diligence⁸⁶. Some companies explained they created cross-functional teams and task forces to respond to potential impacts on workers and communities. These examples include Carlsberg, Ericsson, Novartis and Uber. But, again, most of the teams and task forces created by companies were set up either shortly before or after the full-scale invasion on the 24th February 2022. As mentioned before, there were already security risks when Russian troops were concentrated on the border with Ukraine in early December 2021 which should have been considered by all companies operating in Ukraine or Russia, and even before, with the Russian annexation of Crimea in 2014.

As a preliminary conclusion, although several companies have publicly announced actions in response to the Russian invasion of Ukraine, «only a small number of companies appear to be taking their obligations under international human rights law and international humanitarian law seriously»⁸⁷. However, more research needs to be conducted to analyse the response of a higher number of companies. At the same time, the problem is the access to information since we are only evaluating their public statements or their replies to surveys⁸⁸. So probably research will need to include interviews and engaging directly with companies, although this could be a sensitive issue which many of them might not want to share information.

VII. Conclusions

The notion of heightened human rights due diligence has gained prominence in the last years, especially with the most recent armed conflicts taking place in different areas of the world. The UN Guiding Principles on Business and Human Rights already considered the necessity to incorporate a higher standard of due diligence depending on the severity of the

85 *Ibidem*.

86 *Ibidem*.

87 *Ibidem*.

88 To know more about the statements of multinational corporations in the framework of the Russia-Ukraine war see KULIKOV, V., SIMANOVSKYY, M., EICHENBERG, A. and BRAESE, K. A., «Navigating wartime communications: multinational corporations in the Russia-Ukraine war», *Society and Economy*, November 2023, at <https://akjournals.com/view/journals/204/aop/article-10.1556-204.2023.00024/article-10.1556-204.2023.00024.xml>

human rights risk and the context where the enterprise was operating. The updated version of the OECD Guidelines from 2023 have in fact incorporated the notion of enhanced human rights due diligence in conflict-affected areas as a positive development. Additionally, in order to offer guidance, the work of the UN Working Group on Business and Human Rights, UNDP and the OHCHR has been crucial in translating these requirements in more practical terms for governments and companies.

We can summarise some of the main steps and mechanisms that companies operating in conflict-affected areas and high-risk scenarios should bear in mind. Firstly, when companies operate or start operating in those areas, they would need to conduct heightened human rights due diligence in accordance with the standards established in the UNGPs and other relevant instruments, whether the company chooses to stay or exit and would have to do it regularly. As part of this process, it would be essential to map their business activities and relationships across their supply chain to identify and assess potential human rights risks to which they may cause, contribute, or be directly linked with, as well as understand and assess the conflict dynamics and actors involved⁸⁹. Finally, they would need to have a planned and updated exit strategy formulated in consultation with stakeholders even before the conflict or the tensions escalate⁹⁰.

With regard to the possible contribution to serious human rights abuses and international crimes, the recent practice has offered examples of the risks and responsibilities companies might deal with in those situations. In particular, companies and their directors might face charges of complicity in the commission of international crimes, as the cases in France, the Netherlands, the US and Sweden have shown.

As for the lessons learned from the Russian-Ukrainian conflict, the current disengagement from Russia seems to offer an opportunity to incorporate business and human rights standards in companies' policies and in particular to implement human rights due diligence processes according to international standards (UNGPs, OECD Guidelines). However, it is unclear whether these existing decisions represent permanent changes in terms of business and human rights in the global market or whether this is only a temporary solution⁹¹. Unfortunately, we have already seen examples of the contrary as some Western companies have inserted «buy-back» clauses in contracts with buyers of their Russian subsidiaries⁹².

89 UNDP Guide, p. 26-27. See also ECCJ & Frank Bold, *From rushed reactions to proper preparedness. Corporate due diligence in times of armed conflict*, Brussels, June 2022, p. 10.

90 Report of the UN Working Group on Business and Human Rights, 2020, *supra* note 2, p. 14, para. 65.

91 LETNAR ČERNIČ, J. «Russia, disinvestment, business and human rights», *Cambridge Core Blog*, 9 March 2022.

92 EVENETT, S. and PISANI, N. «Less than Nine Percent of Western Firms Have Divested from Russia», 20 December 2022, p. 9.

