

The draft Directive on Corporate Sustainability Due Diligence: responsible business in conflict-affected areas

March 1, 2023

About the authors: Cindy Carvalho holds a Bachelor's Degree in Private Law from the Aix-Marseille University. She is a student of the Master's in International and European Law at Nova School of Law and a Research Associate of the NOVA Centre on Business, Human Rights and the Environment.

Cláudia Baptista holds a Bachelor's Degree in International Law from Coventry University. She is a student of the Master's in International and European Law at NOVA Faculty of Law and a Research Associate of the NOVA Centre on Business, Human Rights and the Environment.

*This blog post is part of the postdoctoral project led by Prof. Laura Íñigo Álvarez and funded by FCT (FCT Reference: UIDP/00714/2020).

It is mostly in armed conflict situations where the most horrendous human rights violations take place. The State often lacks controls over the country or is unable to protect human rights of those under its territory and jurisdiction. Transnational corporations need to come to terms with the fact that their actions (and omissions) on conflict zones are not neutral and could affect conflict actors and conflict dynamics, including potentially contributing to human rights abuses or war crimes. Operating in regions affected by armed conflict exposes companies to increased risks of becoming implicated in gross human rights violations. Nevertheless, businesses also have the potential to affect positive change.

Against this background, the proposal for a Directive on Corporate Sustainability Due Diligence was adopted by the European Commission in February 2022. This proposal aims to establish human rights due diligence obligations, so companies act responsibly while carrying out their activities throughout their global supply chains.

Operating in conflict scenarios

As established by the UN Guiding Principles on Business and Human Rights (UNGPs), businesses have a corporate responsibility to respect human rights. Within this corporate responsibility, one of the main tasks is to conduct "human rights due diligence" processes, understood as "the steps a company must take to become aware of, prevent and address adverse human rights impacts".

As for application of human rights due diligence in conflict areas, one of the first things that could be highlighted is the lack of a universal and straightforward definition of what a “conflict affected zone” is. Effectively, one of the main gaps of the draft Directive is the fact that it does not tackle this issue. Instead, the most widely accepted definition derives from the UNDP Guidance on Heightened Human Rights Due Diligence which refers to “geographic areas, regions, or countries that experience various levels of armed conflict or widespread violence including inter-state or civil war, armed insurrections, violent extremism or other forms of organized violence.” In this sense, it needs to be emphasised that these areas could be understood as relating to conflict of an ongoing nature, it can be recurrent, it could relate to post-conflict scenarios or to increasing concerns of human rights violations or widespread political and social instability.

Consequently, before establishing or entering in operations in a conflict-affected area, businesses should conduct a conflict-sensitive analysis which includes, among other things:

- Analysis of the characteristics of the region – its historical or perceived grievances and root causes related to the conflict.
- Identification of the main parties to the conflict and affected stakeholders.
- Identification of potential risks in analyzing to what extent its operations, products and services may contribute to intensifying the existing conflict situation, or even create new tensions in a particular country.
- Assurance that their staff is well trained and “equipped with a proper understanding of conflicts dynamics”.

The draft Directive on Corporate Sustainability Due Diligence and the issue of heightened human rights due diligence

As mentioned above, no provision regarding business conduct in conflict-affected areas is included in the draft Directive. This is one of the main critics emphasized by a number of scholars and civil society organizations. This is problematic because the proposed Directive claims to be in alignment with the UNGPs, which considers that the higher the risk, the more complex human rights due diligence should be. Additionally, this proposal should include international humanitarian law for cases where companies operate in conflict-affected zones. At the moment, it merely covers environmental and human rights instruments. As we have witnessed, human rights violations tend to increase in areas of armed conflict, therefore companies need to be aware of these risks and be able to mitigate them from the beginning.

Furthermore, the proposal for a Directive on Corporate Sustainability Due Diligence seems to be incomplete by not requiring companies operating in conflict-affected areas to conduct heightened due diligence. These due diligences processes are particularly important and should be considered as “conflict sensitive”. Particular attention has to be given to the consultation with major stakeholders (both national and international) and local communities and actors. These consultations may help businesses understand the impacts of their activities and align human rights due diligence with the idea “the higher the risk, the more complex the process”.

Additionally, it has been argued that the Directive should extend the notion of remedies and redress where human rights violations have been committed. Non-monetary reparations are often equally important to financial compensation in conflict and post conflict situations. Truth and reconciliation procedures, criminal prosecutions and official recognitions and memorialization should also be considered.

Another point where the proposal for a Directive on Corporate Sustainability Due Diligence could offer some insights is the question on how companies can perform a “responsible exit”. This is related to companies ending business relations in conflict-affected territories in their supply chain which can be motivated for security and human rights risks. A particularly

difficult situation emerges in relation to companies that provide essential services (including water, electricity, food, healthcare, or similar services) which will need to evaluate who will then be in charge of providing such services or what consequences could be derived if essential services are suspended or are no longer provided to local communities. Therefore, it is key for companies to “anticipate and plan a clear exit strategy in advance” in consultation with workers, communities, and other relevant stakeholders.

It is for these reasons that the proposal for a Directive on Corporate Sustainability Due Diligence will need to pay attention to the above mentioned questions. Even though this proposal Directive is going the right direction, there are still important gaps (inclusion of international humanitarian law, conducting heightened due diligence, extending the notion of remedies, planning for responsible exits) that would need to be addressed so that respect for human rights by companies in conflict-affected zones is reinforced. These developments are paramount in ensuring compliance and alignment with the UN Guiding Principles on Business and Human Rights (UNGPs).

Suggested citation: C. Carvalho and C. Baptista, ‘The draft Directive on Corporate Sustainability Due Diligence and its application in conflict-affected areas’, Nova Centre on Business, Human Rights and the Environment Blog, 1st March 2023.