

Companies operating in conflict-affected areas: legal frameworks, risks and obligations



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Operating in conflict-affected areas poses complex legal, socio-economic, and operational challenges for business actors. As such, corporate activities could be connected to armed conflict scenarios in different ways, either directly, 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 parties.¹ 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”.²

Consequently, there are important factors that need to be taken into consideration when doing business in regions affected by armed conflicts. In addition, 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.

Main international instruments and standards

The UN Guiding Principles on Business and Human Rights (UNGPs), unanimously endorsed by the Human Rights Council in 2011, establish that:

¹ Australian Red Cross and RMIT, *Doing responsible business in armed conflict: risks, rights and responsibilities*, 2020 at <https://www.redcross.org.au/globalassets/cms-migration/documents/ihl--no-ihl/doing-responsible-business-in-armed-conflict-final-publication-web.pdf>

² 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 (Report of the UN Working Group) at <https://www.ohchr.org/en/calls-for-input/reports/2020/report-business-human-right-and-conflict-affected-regions-towards>

“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”.³

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”.⁴

The OECD Guidelines for Multinational Enterprises also consider the situation of enterprises operating in difficult environments, including armed conflicts.⁵ In particular, 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).⁶

In addition to business and human rights standards, there is a complementary body of law which is especially relevant in conflict scenarios: international humanitarian law (IHL). The outbreak of an armed conflict triggers the application of IHL and introduces additional rules that relevant stakeholders need to be aware of. Importantly, IHL binds both States and non-state actors, including individuals. This means that “IHL is already binding on anyone whose activities are closely linked to an armed conflict”.⁷ IHL establishes rules to first, limit the effects of armed conflict by protecting persons who are not or are no longer participating in the hostilities, and second, restrict the means and methods of warfare.

Moreover, in relation to companies providing security services, there are a number of sectoral standards and guidelines which need to be taken into account, such as the Voluntary Principles on Security and Human Rights⁸ and the International Code of Conduct for Private Security Service Providers (ICoC).⁹ These guidelines offer recommendations as to how to conduct risk assessment and analysis “regarding

³ 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

⁴ Commentary to UNGP 7.

⁵ OECD Guidelines for Multinational Enterprises, OECD Publishing 2011, Chapter 4, Commentary para. 40, at <https://www.oecd.org/daf/inv/mne/48004323.pdf>

⁶ OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, OECD Publishing 2016, at <https://www.oecd.org/corporate/mne/mining.htm>

⁷ Australian Red Cross and RMIT, *Doing responsible business in armed conflict*, p. 7.

⁸ 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>

⁹ 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

contractual, procurement and labour standards, as well as issues related to training, equipment, and use of force”.¹⁰

Finally, the UN Sustainable Development Goals (SDGs), whose action programme is particularly relevant for business operations, contain Goal 16 about *Peace, Justice and Strong Institutions* which 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”.¹¹

Human rights due-diligence in conflict-affected areas

The UNGPs indicate that states should ensure that business enterprises operating in conflict-affected areas are not involved in human rights abuses. Thus, one of the measures recommended by the UNGPs 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”.¹² This means that in conflict situations, human rights due diligence needs to be operationalised through a conflict-sensitive approach. This is in line with the idea that “the higher the risk, the more complex the process”.¹³

In relation to their heightened due diligence responsibilities, some key steps companies could take when operating in conflict settings are the following ones:

1. Analyse the contextual factors, such as the characteristics of the region, historical or perceived grievances and root causes of the conflict, as well as identify the main parties to the conflict and affected stakeholders.¹⁴
2. Assess and anticipate 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 region.¹⁵
3. Ensure business staff operating in the region is trained and “equipped with a proper understanding of conflict dynamics”.¹⁶

¹⁰ M. Cuervo and D. Schönfelder, “Responsible Business Conduct Regarding Security Providers: Legal and Non-Binding Frameworks for Practical Implementation”, *Nova Centre on Business, Human Rights and the Environment Blog*, 25th January 2022, at <https://novabhre.novalaw.unl.pt/responsible-business-conduct-security-legal-non-binding-framework/>

¹¹ 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

¹² UNGP 7 (a).

¹³ Report of the UN Working Group, p. 4, para. 13.

¹⁴ *Ibid.*, p. 10, paras. 46-47.

¹⁵ *Ibid.*, p. 11, para. 48.

¹⁶ *Ibid.*, p. 11, para. 49.

4. Incorporate “consultation and engagement with external stakeholders - national and local experts, and local communities”.¹⁷ A strong and broad stakeholder engagement will benefit the relationship with local actors.

Risks and responsibilities

As mentioned before, companies and their directors should consider whether, and if so how, their activities and operations could contribute to human rights abuses and international crimes. In particular, companies investing in or establishing commercial relationships with a party to the conflict face the risk of aiding, abetting, or assisting in the commission of international crimes as examined by several scholars.¹⁸ Thus, business could be accused of complicity in the commission of international crimes (genocide, crimes against humanity or war crimes).

Even though the International Criminal Court does not have jurisdiction to prosecute entities other than natural persons as stated in Article 25 of the Rome Statute,¹⁹ it could potentially try business staff, particularly company directors. At the national level, domestic courts could also try persons involved in human rights violations through civil and/or criminal proceedings. In fact, a number of civil and criminal proceedings have been recently brought against companies and their directors for their potential involvement in international crimes.²⁰ For example, a French cement company is currently facing charges including complicity in war crimes and crimes against humanity committed during the Syrian war for making payments to ISIS and other groups to keep the Jalabiya cement plant running whilst other companies had pulled out of Syria. 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 violations.²¹

¹⁷ Irene Pietropaoli, “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>

¹⁸ See Joanna Kyriakakis, “Developments in international criminal law and the case of business involvement in international crimes”, *International Review of the Red Cross* (2012) Vol. 94, Number 887, 981-1005 at <https://international-review.icrc.org/sites/default/files/irrc-887-kyriakakis.pdf>; Kai Ambos, “Corporate Complicity in International Crimes through Arms Supplies despite National Authorisations?” in *International Criminal Law Review* (2022), 1-5 at https://brill.com/view/journals/icla/21/1/article-p181_181.xml

¹⁹ 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, at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

²⁰ See Victoria Riello and Larissa Futwengler, “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/>

²¹ 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/>; Linde Bryk and Goran Sluiter, “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/>

Incorporating a gender perspective

At it has been well documented, women and girls suffer differently and disproportionately the effects of violence and conflict, not only due to the increase in incidents of sexual and gender-based violence but also due to the long-term adverse effects on the right to health, education, access to land and natural resources, etc.²² In this regard, business actors should understand and examine the “specific experience of women and girls in conflict and post-conflict situations”²³ and consequently, work towards including gender and conflict elements within their human rights due diligence processes.²⁴ In particular, the UN Working Group on Business and Human Rights established specific guidance on the gender dimensions of the UNGPs stating that it is “critical that measures taken by States and business enterprises to implement the UNGPs are gender responsive”.²⁵ The abovementioned International Code of Conduct for Private Security Service Providers (ICoC) also includes specific references to sexual and gender-based violence, as well as gender discrimination in several sections (General Commitments, Specific Principles regarding the Conduct of Personnel, and Specific Commitments regarding Management and Governance).²⁶

A “responsible exit”

At a certain point, business might decide to suspend or terminate its activities in or linked to a conflict-affected area due to several reasons, including the total 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 scenario, “the consequences of leaving must be identified, and negative impacts prevented or mitigated”.²⁷ 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

²² See Report of the UN Secretary-General on conflict-related sexual violence, 29 March 2022, S/2022/272 at <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/04/auto-draft/SG-Report2021for-web.pdf>; Report of the UN Secretary-General on Women, Peace and Security, 27 September 2021, S/2021/827 at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2021_827.pdf

²³ Report of the UN Working Group, p. 14 – para. 62.

²⁴ For a comprehensive study about the inclusion of a gender lens into human rights due diligence, see Joanna Bourke Martignoni and Elizabeth Unlas, “Gender-responsive due diligence for business actors: human rights-based approaches”, Academy Briefing N° 12, Geneva Academy of International Humanitarian Law and Human Rights (2018) pp. 52-63 at <https://www.geneva-academy.ch/joomla/tools-files/docman-files/Academy%20Briefing%202012-interactif-V3.pdf>

²⁵ UN Development Programme (UNDP) and UN Working Group on Business and Human Rights, Gender Dimensions of the Guiding Principles on Business and Human Rights (2019) at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Gender_Booklet_Final.pdf

²⁶ See International Code of Conduct for Private Security Service Providers, as amended 10 December 2021.

²⁷ See Daniel Aguirre and Irene Pietropaoli, “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>

will be then 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.²⁸

Therefore, it is key for companies to “anticipate and plan a clear exit strategy in advance”.²⁹ This plan should include measures to identify and assess the impacts of disengagement with workers, suppliers, providers, local communities and other affected stakeholders, as well as develop mitigation strategies.³⁰ Another important idea is that this “exist strategy” needs to be planned in advance, as part of the enhanced human-rights due diligence processes of the concerned business and not after the escalation of the conflict or the violent crisis.³¹

About the practical brief

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²⁸ *Ibid.*

²⁹ Report of the UN Working Group, p. 14, para. 65.

³⁰ *Ibid.*

³¹ Daniel Aguirre and Irene Pietropaoli, “Part 2: Responsible Exit from Russia”.