

BHR in challenging contexts

Olena Uvarova,

MSCA4Ukraine Postdoc, Law Group Wageningen University
Chair of the International Lab on Business and Human
Rights, Yaroslav Mudryi National Law University



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I. CONFLICT-AFFECTED AND HIGH-RISKS AREAS.
CHALLENGING CONTEXT

II. HEIGHTENED HUMAN RIGHTS DUE DILIGENCE

III. RESPONSIBLE EXIT, RESPONSIBLE REMAINING AND
RESPONSIBLE RETURNING

IV. UNGPs, OECD, CSDDD



Supporting business respect for human rights in conflict-affected areas (UNGPs 7)

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, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- (b) **Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses**, paying special attention to both gender-based and sexual violence;
- (c) Denying access to public support and services for a business enterprise that is involved with **gross human rights abuses** and refuses to cooperate in addressing the situation;
- (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in **gross human rights abuses**.

UNGPs 12

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

Commentary. <...> in situations of armed conflict enterprises should respect the standards of international humanitarian law.

UNGPs 23

Commentary. <...> Some operating environments, such as **conflict-affected areas**, may **increase the risks of enterprises being complicit in gross human rights abuses committed by other actors** (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility.

In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses. In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

Heightened Human Rights Due Diligence – why?

- **Why Heightened HRDD?** UNGPs are built around the concept of **proportionality**: the higher the risk, the more complex the processes required.
- **UNWG report** ‘Business, human rights and conflict-affected regions: towards heightened action’ (2020): “**because the risk of gross human rights abuses is heightened in conflict-affected areas**”, action by States and due diligence by businesses should be heightened accordingly.

Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts

A Guide



Google: 'UNDP UN Working Group Guide on Heightened Human Rights Due Diligence'



- | | |
|--|--|
| 1. Determine whether and when to undertake heightened human rights due diligence | |
| 2.1. Understand the conflict by carrying out conflict analysis | |
| 2.2. Monitor media (including social media) to understand the conflict and your impact on the conflict | |
| 2.3.a Understand the impact of your activities on the conflict | |
| 2.3.b Carry out actor mapping to understand the impact of your activities on the conflict | |
| 2.3.c Understand the impact of your activities on vulnerable groups | |
| 2.4. Identify your responsibility for potential or actual negative impacts on human rights and conflict | |
| 2.5. Take appropriate measures to cease, or prevent, and remedy negative impacts | |
| 2.6. Address the adverse impacts your business is, or could be, having on conflict and human rights | |
| 2.7. Develop an 'exit strategy' | |
| 3.1. Track the measures your business has taken as part of the heightened human rights due diligence process | |
| 3.2. Communicate the measures taken as part of the heightened human rights due diligence process | |
| 3.3. Engage stakeholders in contexts affected by conflict | |
| 3.4. Tailor grievance mechanisms for victims of human rights abuses in conflict-related | |

UNDP Guide

‘the Guide recognizes that businesses invariably impact the dynamics of a conflict and that they therefore need to adopt conflict-sensitive practices to account for, and mitigate, these impacts’

‘heightened human rights due diligence means identifying potential and actual impacts on people (human rights) as well as on the context (conflict)’

As with 'traditional' human rights due diligence, the heightened version is based on the following processes:

- identifying and assessing adverse impacts of a business **on conflict** and human rights,
- acting to cease or prevent them, and
- tracking and communicating the measures taken.

In situations of armed conflict, businesses should consider at a minimum international human rights law and **international humanitarian law**.

UNWG, OECD, CSDDD build the concept of hHRDD around IHL.

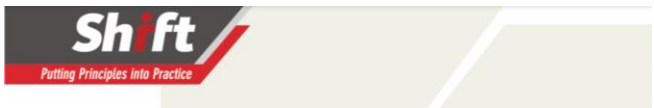
Key developments

- UNGPs, OECD
- In 2020, the UNWG published a report titled **‘Business, human rights and conflict-affected regions: towards heightened action’**
- In 2022, the UN Development Programme (UNDP) and the UNWG developed a practical roadmap for action titled **‘Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide’** (+ many other guides exist)
- August 2023, the UN Office of the High Commissioner for Human Rights (OHCHR) published the guidance note **‘Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting’**



**OECD Due Diligence
Guidance for Responsible
Supply Chains of Minerals
from Conflict-Affected
and High-Risk Areas**

THIRD EDITION



**Human Rights Due Diligence
in High Risk Circumstances:
Practical Strategies for Businesses**

March 2015



**GUIDANCE ON RESPONSIBLE
BUSINESS IN CONFLICT-AFFECTED
AND HIGH-RISK AREAS:
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**Armed conflict, international
humanitarian law and
responsible business conduct**

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Business in
Challenging**

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CSDDD

- Text in Feb 2022 vs Final text
- (42) In conflict-affected and high-risk areas, as defined in accordance with Regulation (EU) 2017/821, human rights abuses are more likely to occur and to be severe. Companies should take this into account when integrating due diligence into their policies and risk management systems to ensure that codes of conduct and processes put in place to carry out due diligence are adapted to conflict-affected and high-risk areas, in a manner that is consistent with international humanitarian law, as laid out in the Geneva Conventions of 1949 and their additional protocols. Companies should take into account that such situations constitute particular geographic and contextual risk factors when performing indepth assessments as part of the identification and assessment process, when taking appropriate measures to prevent, mitigate, bring to an end and minimise identified adverse impacts, and when engaging with stakeholders. For this purpose, companies may rely on the Commission's guidance on the assessment of risk factors associated with conflict-affected and high-risk areas, which should take into account the UN Development Programme's guidance 'Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts. A Guide'.

CSDDD

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Conflict-affected. High Risks. Challenging Context

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

‘Understanding the Definition of Conflict-Affected and High-Risk Areas’ (Commission Recommendation 2018/1149 of 10 August 2018)

State of armed conflict

Fragile post-conflict areas

Failed states

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

Armed conflict

Widespread violence


Other risks of harm to people

Challenging Context

OHCHR, the Guidance Note: 'Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting'

- Situations of armed conflict or authoritarian regimes;
- Where national laws or regulations require actions that would be inconsistent with internationally recognized human rights standards;
- Where national laws or regulations offer a level of human rights protection that falls short of internationally recognized human rights standards.

'Corporate human rights abuses in such contexts may include land grabs and displacement, loss of jobs and livelihoods, environmental pollution and health impacts, excessive use of force by security personnel, and restrictions on speech and privacy'



HRDD in situations of
armed conflict
(hHRDD)

Usual HRDD
(human rights
risks in business
operations)




Risks of
Humanitarian law
violations (impact
on the conflict)



Risks related to
the emergency
situation's impact
on human rights

What about other challenging situations?






Heightened HRDD: all possible efforts of business actors to prevent or minimize the challenging context's negative impacts on human rights, even when those actors are not related to these impacts in the first place.

The European Coalition for Corporate Justice:

'situations of crisis, such as armed conflict or global pandemics, demand rapid and comprehensive decision-making and action on behalf of the private sector as well as governments. Embodying a standard of responsible business conduct and effective decision-making enables companies to respond appropriately to situations of significantly heightened risk, in order to safeguard human rights (including the right to life) and the environment.'

ECCJ and Frank Bold, From rushed reactions to proper preparedness.
Corporate due diligence in times of armed conflict, 2022





Risks to employees' and consumers' physical safety

Risks to employees' and consumers' mental health

Risks for labour rights

Lack of access to essential goods and services

Risks of hate speeches, discrimination and harassment

International Humanitarian Law

Irresponsible business models

International human rights law & International humanitarian law

IHRL and IHL are similar but **distinct** bodies of law. IHRL applies in all situations (in times of peace and conflict), but some rights may be temporarily suspended during states of emergency and armed conflict.

Conversely, IHL is applicable **only in armed conflicts, but no derogations** are permitted from it.

IHL

IHL provides protections to people who are not involved or no longer participating in the fighting, such as civilians, wounded soldiers and prisoners of war. It also places limits on the types of weapons and military tactics permitted on the battlefield.

The most significant sources of IHL are the four Geneva Conventions of 1949 and their Additional Protocols of 1977.



Principles of international humanitarian law

Humanity

(Killing or wounding civilians or an adversary who surrenders, or is no longer able to take part in hostilities, is prohibited.)

At all times, a distinction must be made between military objectives and civilians. This means distinguishing between combatants and legitimate targets on the one hand and civilians and civilian property and objects on the other. Deliberately targeting civilians and civilian objects is a war crime.

Proportionality

Attacks that may cause excessive harm or death to civilians or destruction to civilian objects are prohibited. This includes attacks on legitimate military objectives. Indiscriminate attacks that fail to distinguish between military objectives and civilian objects are also forbidden.

Prohibition of unnecessary suffering

Parties to an armed conflict are forbidden to use weapons or methods of warfare likely to cause superfluous injury or unnecessary suffering. Weapons or tactics of war that risk widespread, long-term or severe damage to the environment are also prohibited.

Military necessity

Military force is not an end in itself – the only legitimate military purpose in an armed conflict is to weaken the military capacity of the other parties to the conflict. Parties do not have unfettered access to war tactics and weapons. Only means and methods that are necessary to accomplish a legitimate military purpose, and are not prohibited by IHL, are permitted.

War crimes and violations of international humanitarian law

This list includes, but is not limited to:

- torture or inhumane treatment;
- disproportionate, unnecessary or indiscriminate attacks against civilians;
- extensive destruction and appropriation of property;
- unlawful deportation or transfer or unlawful confinement, and taking hostages.

Importantly for businesses, complicity – or aiding and abetting the commission of a war crime – is itself a war crime.

The relevance of IHL to business today

- Increasingly common for companies, their supply chains and customers to be present in areas of the world affected by conflict.
- IHL is binding on any individual whose activities are *closely linked to an armed conflict*.
- Failure to respect IHL could give rise to serious risks:
 - Targeted attacks against company personnel/property
 - Exacerbation of armed conflict in local areas
 - War crimes charges, criminal or civil cases
 - Reputational damage, loss of profit, company value, shareholder confidence.



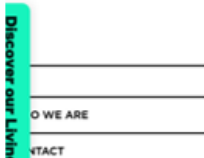
CASE

The proceedings against Lafarge and its subsidiary Lafarge Cement Syria are the result of a criminal complaint filed in November 2016 by eleven Syrian former employees together with ECCHR and Sherpa.

The complaint accused Lafarge of making arrangements with Islamic State (IS) and several other armed groups in order to keep its Jalabiya cement factory plant open and running between 2012 and 2014 in northeastern Syria. The judicial inquiry has since then determined that the financial value of these arrangements amounted to at least 13 million euros.

Lafarge allegedly purchased commodities, such as oil and pozzolan, from IS and paid them fees in exchange for permits. By allegedly providing funding to IS, not only did Lafarge seriously endanger the lives of its employees, but it could also be found to be complicit in crimes against humanity committed by the Islamic State in Syria.

Historic victory before French Supreme Court on the indictment of multinational Lafarge for complicity in crimes against humanity in Syria



In May 2022, the Paris Court of Appeal upheld the charges against the cement group Lafarge (now Holcim) for aiding and abetting crimes against humanity, enforcing the French Supreme Court's September 2021 [decision](#). In October 2023, the French Supreme Court confirmed the charge. Lafarge is the first company in the world to ever face such a charge. However, the court dropped the charge of endangering the lives of its former Syrian employees, despite the fact that a criminal investigation revealed that Syrian workers may have been exposed to hazardous risks, such as death, injury or kidnapping. The court ruled that the safety protections provided by French labor law did not apply to Syrian employees.

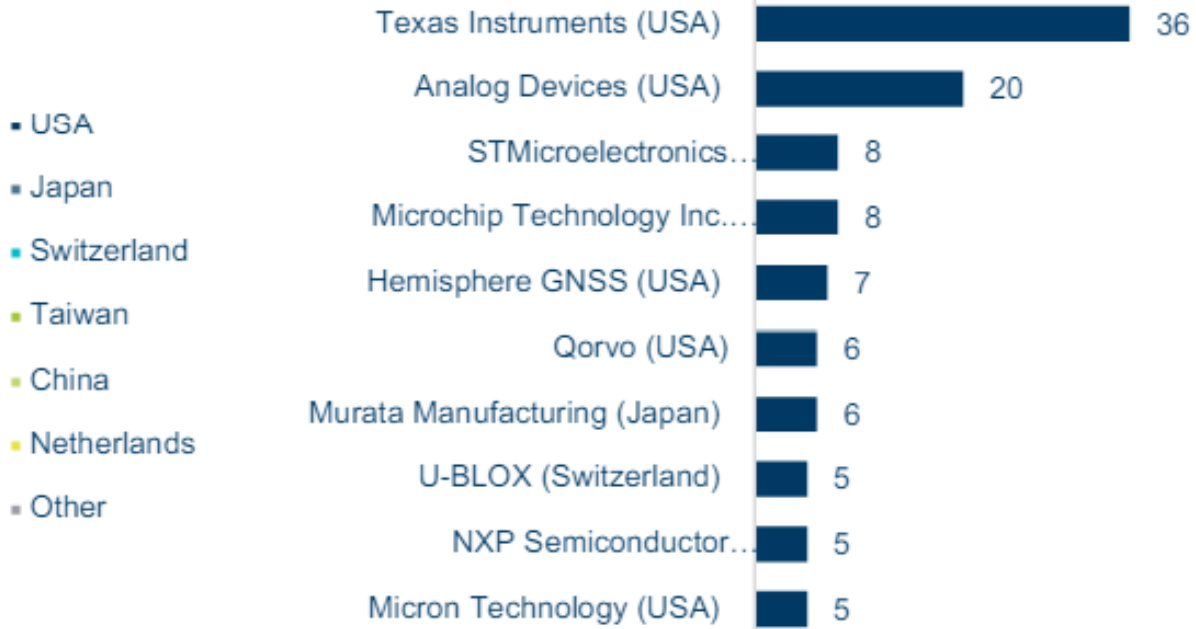
The Supreme Court found that knowingly transferring millions of dollars to an organization whose sole purpose is criminal is enough to characterize complicity.

Figure 1: Producers of the Imported Critical Components In Russian UAVs



Working Group Paper #13

Strengthening Sanctions on Foreign Components in Russian Military Drones



Source: KSE Institute

IHL in the business world

Nuremberg Trials

IG Farben: twenty-four high-ranking executives were charged with helping the Nazi regime wage aggressive war and commit war crimes.

Krupp: company representatives were convicted of pillage.

Hermann Goering Works: the chairman was convicted of pillage.



Heightened HRDD – Key points

- **Conflict-affected contexts** → **Heightened risks** → **Heightened human rights due diligence**
- **Conflict-affected contexts: armed conflicts + situations of widespread violence.**
These include international/internal armed conflicts, occupations, widespread violence. Plus - early warning signs of these.
- Heightened human rights due diligence means **identifying and addressing potential and actual impacts on people (human rights) as well as on the context (conflict).**
- Businesses in conflict-affected contexts have to **respect international human rights law AND international humanitarian law**

Exit strategy

A hasty exit can be as damaging as one that comes too late. If a business decides to exit, it needs a proper exit strategy.

A business contemplating exiting or suspending its operations in a conflict-affected context should consider whether: a) exiting/suspending could exacerbate tensions: and b) whether harms to people outweigh the benefits.

A proper exit strategy requires business to:

— Anticipate and plan a clear exit strategy in advance, ideally at the same time as it plans the start of activity. This will allow it to identify and assess the short- and longer-term risks of disengagement and work to avoid or at least minimize harmful impacts with the people affected, including business partners and communities.

‘Essentiality’ is context specific

No fixed definition of essential goods/services exists in the strict sense. A frequently used term that can be interpreted more narrowly is the term ‘basic goods / services’, defined as goods/services in the social domain that should be available and reasonably accessible to everyone in need for them.

B4Ukraine notes that ‘companies exploiting the ‘essentiality’ justification are some of the biggest revenue generators in Russia meaning that the continued provision of non-essential food and hygiene products significantly contributes to the war in Ukraine.’ B4Ukraine emphasizes that ‘the burden should be on each company to justify why the good/service is essential to the market, why no alternative products are available or no other local actor(s) can supply the good/service, and how the company will mitigate its proximity to human rights harms.’ However, it does not sufficiently take into account the context. Companies, assessing their impact on human rights in a targeted state, should assess not just the nature of their products (food, medicine, etc.), but their role in the implementation of a specific human right and provide evidence that the enjoyment of a fundamental human right would be threatened if it were withdrawn from the market.

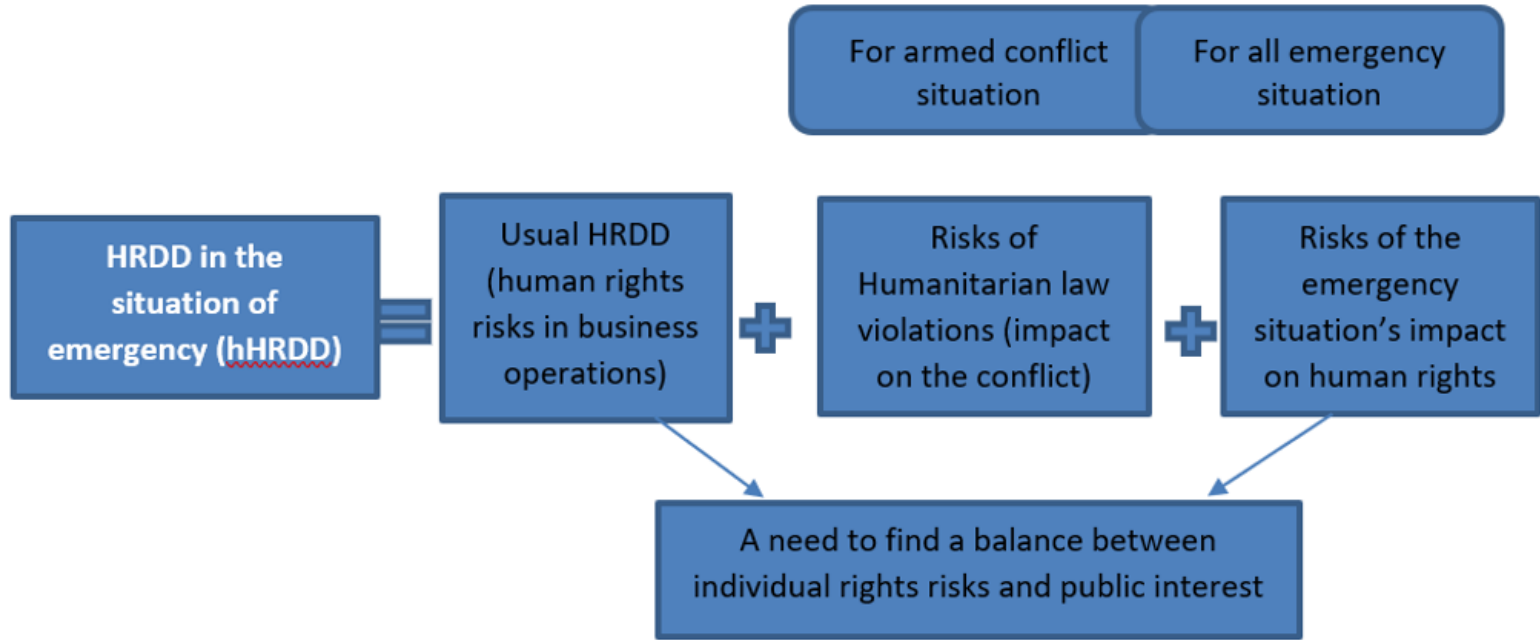
Responses from companies: <https://www.business-humanrights.org/en/from-us/briefings/business-response-to-the-russian-invasion-of-ukraine/>

Context matters: make all possible efforts

UNGPs explicitly recognize **'the context within which a business is working will have a bearing on the action it can and should take in response to adverse human rights impacts'** (UNGPs 14, UNGPs 17(b)). The UNGPs themselves expect that companies take into consideration the operational context, including changes in the context which could happen rapidly.

The Office of the High Commissioner specified, **'there are many features of operating contexts that can make them especially challenging in human rights terms. Situations of armed conflict or authoritarian regimes, where the government plays an active role in violating human rights, will increase the risks of business enterprises becoming involved in severe human rights harms'**





New study: Responsible business conduct in times of war: Implications for essential goods & services providers in Ukraine

Olena Uvarova

RESPONSIBLE
BUSINESS
CONDUCT
IN TIMES OF WAR

Responsible Business Conduct During War in Ukraine: Context Assessment Study

OCTOBER 3, 2023

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Responsible business conduct implications of Russia's invasion of Ukraine

Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza

Dr Irene Pietropaoli

Senior Fellow in Business and Human Rights, British Institute of International and Comparative Law (BIICL)

5 June 2024

From rushed reactions to proper preparedness

Corporate due diligence in times of armed conflict


ECCJ
EUROPEAN CENTRE FOR
CORPORATE JUSTICE


Frank Bold

Dilemmas

- Stay or Go. Return or Not. If go, how fast? Is this question relevant for national companies?
- Essential goods and services
- Occupied territories
- Paying taxes
- (Not)use of leverage beyond of involvement in human rights violations
- Track supply chains