

# Conflict & Due Diligence Legislation

In conflict-affected areas, companies face a high risk of involvement in severe human rights abuses and violations of international humanitarian law. According to the international standards on business and human rights - the UN Guiding Principles and the OECD Guidelines - companies need to be 'extra diligent' when operating in these areas and governments need to ensure that policies and legislation effectively address these risks. Policy makers in the Netherlands and Europe should therefore include specific provisions on conflict in the current national and European legislative proposals on corporate sustainability due diligence. At the core of these provisions lies a heightened, conflict-sensitive due diligence obligation for companies operating in conflict and high-risk areas.

## Business, conflict and human rights

Over the past decade, the number of violent conflicts in the world, as well as the number of deaths and refugees resulting from war and violence, has risen sharply.<sup>1</sup> Violent conflicts have also become increasingly complex and protracted, characterized by a proliferation of (non-state) conflict parties, stalled peace negotiations and interlinkages with organized crime and violent extremism and terrorism. This trend is reinforced by the effects of climate change. As an increasing number of regions experience protracted violent conflict, companies will increasingly operate, either directly or within their value chains, in conflict-affected and high-risk areas.

Factors such as economic, political and social inequality and exclusion, feelings of injustice, a lack of perspective, oppression, lack of space for civil society and dialogue and the absence of the rule of law form the drivers of violent conflict.<sup>2</sup> In turn,

violent conflict is the source of many of the most serious human rights abuses, sometimes through environmental damage caused by conflict. Governments are often unable or unwilling to protect human rights, or are themselves involved in human rights abuses and violence. In such circumstances, a company's presence is never neutral. Its activities always influence the conflict dynamics and the company runs a high risk of becoming involved in serious human rights abuses. Therefore, companies should be particularly aware of the positive and negative impact of their presence in a conflict or high-risk area and make additional and targeted efforts to avoid becoming involved in conflict and serious human rights violations arising from this conflict. In addition, by actively addressing the aforementioned factors of conflict, companies can contribute to the creation of an enabling environment for human rights and peace.

<sup>1</sup> Uppsala Conflict Data Program, <https://ucdp.uu.se/>

<sup>2</sup> United Nations and World Bank (2018), *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*.

## Responsibilities of States

According to the UN Guiding Principles, governments should ensure that companies exercise extra caution when operating in conflict situations: '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'.<sup>3</sup> This includes having effective laws and regulations in place.<sup>4</sup> However, the EU legislative proposal on corporate sustainability due diligence currently lack crucial provisions on conflict and the responsibility of a company to operate in a conflict-sensitive and preventive manner. Due diligence legislation should require companies to carry out heightened, conflict-sensitive due diligence on all its operations and value chain relationships in conflict-affected and high-risk areas.

This policy brief sets out (1) what increased due diligence in conflict-affected and high-risk areas entails; (2) in which cases heightened due diligence is needed to be conducted; (3) what other specific provisions with regards to business conduct in conflict-affected and high risk areas must be included in due diligence legislation.

## 1. Heightened due diligence

As the complexity of the due diligence process depends on, among other things, the complexity of the operational environment and the severity of the potential negative impact, the UNGPs and OECD Guidelines require companies to carry out heightened due diligence on operations and value chain

relationships in conflict and high-risk areas. In order to assess the mutual interaction between business activities and the complex environment in which they take place and to prevent and mitigate negative impacts, companies are expected to enhance and complement their standard due diligence procedures with a conflict-sensitive approach, consisting of the following elements<sup>5</sup> :

- ◆ Conducting a **conflict analysis**, identifying both the context and root causes of tensions and grievances and the potential triggers of conflict. This enables companies to look beyond the human rights impact of their own operations to the (potential) human rights and environmental impact of the conflict.
- ◆ Identify and analyze the main **actors** and their motives, interests, roles and the relationships between them.
- ◆ Analyzing the **interaction** between the company's activities and existing or potentially new tensions and conflicts and vice versa.
- ◆ Based on the above three steps, drawing up and implementing an **action plan** to prevent and/or mitigate the identified risks that cause or promote conflict. The measures taken as part of this action plan must themselves be conflict sensitive.

As with standard human rights due diligence, the above procedures need to be continuously repeated,

<sup>3</sup> UNGP 7.

<sup>4</sup> UNGP 7(d).

<sup>5</sup> See the July 2020 report of the UN Working Group on Business and Human Rights, *Business, human rights and conflict-affected regions: towards heightened action*. <https://undocs.org/en/A/75/212>

especially given the rapidly changing context, risks and impact of business operations in conflict-affected and high-risk areas. If, due to the complexity of the operating environment, heightened due diligence cannot be conducted, a company should not start (new) operations in the area or should exit responsibly.

## Prioritization

The UNGPs and the OECD Guidelines stipulate that, when addressing impacts, the most severe (potential) impacts must be tackled first. According to the OECD Guidelines this includes the operations and value chain relations in 'a country that holds higher-risk (e.g. presence of conflict, presence of vulnerable groups, weak rule of law, high rates of corruption, etc.)'.<sup>6</sup> The UN Working Group also states that 'because the impact of conflict is usually more severe for more people, businesses should prioritize salient conflict issues'.<sup>7</sup> Based on the fact that conflict is the source of many of the most severe human rights abuses, conflict risks should always be seen as severe risks and therefore be prioritized.

## Stakeholder engagement

Conflict-affected and high-risk areas are characterized by a high level of polarization, mistrust and a lack of access to information. It is therefore essential that, as part of each of the above four steps, companies engage with a broad, representative group of stakeholders to get a well-informed picture of the situation and of the different perceptions of that situation. In conflict-affected and high-risk areas, it is also essential that a company has a well-functioning

grievance mechanism in place and that confidentiality and the safety of the people using it are fully guaranteed.

## Value chain

Given the severity of the risks and the fact that conflict-affected and high-risk areas are located along the entire value chain (and very often at the far upstream end, for example areas where raw materials are extracted, but also at the downstream end, for example countries that receive arms supplies), the heightened due diligence obligation must apply to all relationships in the entire value chain.

## Scope

Given the severity of the risks, the obligation to carry out heightened due diligence should apply to all companies, regardless of size, that are themselves, or whose relations in the value chain, active in conflict and high-risk areas.

## 2. Conflict-affected and high risk areas

'Conflict-affected and high risk areas' is a broad concept and includes not only situations of armed conflict, large-scale violence or military occupation, but also post-conflict situations and areas with a high level of tensions, unrest and risk of large scale violence. Companies themselves are responsible for carrying out heightened due diligence in those situations where it is necessary, and governments have the responsibility to support companies in this and to hold them accountable. However, the legislation itself or accompanying guidelines could

<sup>6</sup> OECD Due Diligence Guidance for Responsible Business Conduct, p. 66.

<sup>7</sup> UN Working Group, July 2020, p. 11/23.

refer to indicators that can help companies and governments to determine when heightened due diligence is warranted. For example, reference can be made to the indicative guidelines developed by the European Union within the framework of the Conflict Minerals legislation, and to the risk factors and indicators within the framework developed by the United Nations for the prevention of atrocity crimes.<sup>8</sup>

a conflict-sensitive way and does not cause or exacerbate (new) tensions and grievances.

### 3. Other provisions on conflict

#### International Humanitarian Law

In situations of armed conflict, companies should not only respect human rights, but also international humanitarian law (IHL). Following IHL itself<sup>9</sup> and the UN Guiding Principles<sup>10</sup> this obligation should therefore be explicitly included in due diligence legislation.<sup>11</sup>

#### Remedy and access to justice

The current legislative proposal on corporate sustainability due diligence of the European Commission only refers to financial compensation as a possible form of remedy. In conflict situations and as part of a post-conflict transitional justice process, other forms of remedy are evenly important, such as recognition and apologies, guarantees of non-recurrence, participation in truth-finding and reconciliation processes and criminal prosecution of actors who have committed or contributed to serious human rights violations. In addition, it is essential that the process of 'remediation' itself is conducted in

<sup>8</sup> CAHRAs ([cahraslist.net](http://cahraslist.net)); United Nations (2014), *Framework of Analysis for Atrocity Crimes. A tool for prevention*.

<sup>9</sup> The IHL applies to all activities carried out in the context of or in relation to an armed conflict, including activities by business actors.

<sup>10</sup> UNGP 12.

<sup>11</sup> IHL also covers the protection of the environment.

## Recommendations

In conflict-affected areas, companies run a high risk of involvement in severe violations of international human rights law and international humanitarian law. To prevent this, corporate due diligence legislation should include provisions that acknowledge this risk and require companies and governments to be 'extra diligent' in conflict-affected and high risk areas. Policy makers in the Netherlands and the EU should at least include the following provisions in current legislative proposals on due diligence:

- ◆ In situations of armed conflict, companies should respect not only human rights but also **international humanitarian law**.
- ◆ There should be a heightened **due diligence obligation** for companies operating in conflict-affected and high-risk areas. This obligation should apply to all companies, regardless of size, and to the entire value chain.
- ◆ **Remediation** of negative impact must be done in a conflict-sensitive way and may include, in addition to financial compensation, recognition and apology, *guarantees of non-recurrence* and participation in truth-finding and reconciliation processes.
- ◆ Companies and individual directors should face **criminal prosecution** for causing, contributing to or facilitating severe human rights abuses and/or war crimes.

### About the program

In conflict-affected areas, companies often play a negative role. The Business, Conflict & Human Rights program of PAX works to prevent human rights abuses by companies in conflict-affected areas. We hold companies and their investors to account and urge them to improve their policies. We also advocate for meaningful norms, standards and legislation on responsible business conduct in conflict-affected areas and we support and strengthen the voice of victims in their struggle for truth, justice and reparations.

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