

Learning from the Conflict Dynamics in Ukraine: Towards a Conceptual Framework for Heightened Human Rights Due Diligence

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1 Introduction*

The United Nations Guiding Principles on Business and Human Rights (“UNGPs”) requires business operators to proportionally shape their human rights due diligence (“HRDD”) processes to the probability and severity of human rights risks.¹ This renders the HRDD instruments potentially adaptive to various operational contexts, including that of armed conflict. This chapter will elaborate on the concept of *heightened* HRDD and its potential triggers, and address the question of how general approaches to HRDD, like those in the European Union (“EU”) Sustainability Due Diligence Directive² (“CSDDD”) and the already adopted national legislation in Europe (i.e. France 2017, Germany 2021, Norway 2021) need to be enhanced to sufficiently address heightened risks of human rights and environmental harm that occur in areas of armed conflict. To that end, we will briefly reconstruct *general* approaches to HRDD (i.e., consideration of processes that enterprises conducting business activities may reasonably be required to implement under peace conditions) and

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- 1 “Human rights and transnational corporations and other business enterprises,” United Nations Human Rights Council (“HRC”), July 6, 2011, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4. Cf. “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” United Nations Office of the United Nations High Commissioner for Human Rights (“OHCHR”), 2011, 15, Commentary to Guiding Principle 14, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (“UNGPs”).
- 2 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 of 1, 2024/1760, 5.7.2024 (“CSDDD”).

confront those approaches with the emerging concepts on *heightened* HRDD in conflict-affected settings.³

We situate the argument in the context of the war in Ukraine and propose a conceptual framework for analyzing heightened HRDD obligations for enterprises directly operating in a country involved in the conflict or linked to conflict through their economic relations. We consciously apply the locution of business *obligations* instead of *responsibilities*, and derive such obligations from national and international human rights law norms and jurisprudence rather than mere “social expectation.”⁴ The proposed conceptual framework is based on three interlinked components: (i) agent-specific considerations⁵ such as company size, market position and sphere of activity; (ii) the potential impact that company conduct may have on the rights-holders; and (iii) the agent’s geographical, relational or other economic proximity to the armed conflict. While these components have already been identified in the scholarly and policy output,⁶ salient aspects of how the interplay between them impacts on business obligations remain underexplored. This chapter will argue that while the proximity component alone determines the need for the corporate exercise of heightened HRDD, concretizing the substantive content of HRDD obligations in conflict-affected areas requires a consideration of the complexity of rights-holders and business agents perspectives; and, notably, their nexus under particular conflict dynamics.

Our focus on Ukraine is motivated by the acute and pressing reality of the ongoing armed conflict. Firstly, the Russian Federation’s war of aggression against Ukraine⁷ resulted in an unprecedented support by NATO, its member

3 I.e., Andreas Graf and Andrea Iff, “Enhanced Human Rights Due Diligence in Conflict Affected and High-Risk Areas,” Swiss Peace, May 2016, <https://www.swisspeace.ch/articles/enhanced-human-rights-due-diligence-in-conflict-affected-and-high-risk-areas>; Mara Tignino, “Corporate human rights due diligence and liability in armed conflicts: The role of the ILC Draft Principles on the Protection of the Environment and the Draft UN Treaty on Business and Human Rights,” *Questions of International Law* 83 (July 2021): 47–67; “Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide,” United Nations Development Programme (“UNDP”), June 16, 2022, https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf (“2022 UNDP Guide”).

4 Cf. John G. Ruggie and John F. Sherman, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale,” *The European Journal of International Law* 28, no. 3 (2017): 923.

5 See David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge University Press, 2022).

6 See more extensively Section 4 *infra*.

7 See “Resolution adopted by the General Assembly on 2 March 2022, ES-11/1: Aggression against Ukraine,” United Nations General Assembly, March 18, 2022,

states, and allies for Ukrainian efforts of self-defense.⁸ Also, for the first time since the Cuban missile crisis in 1962, the war in Ukraine is believed to imply a direct threat of the use of nuclear weapons.⁹ The scale of the conflict and its negative impact are further extended by the observable economic¹⁰ and cyberspace¹¹ warfare. These developments carry the risk of further escalation. Secondly, the strong pre-war presence of both Ukraine¹² and Russia¹³ in continental (Europe) and global export markets offers potentially abundant study material and interesting insights into business reactions to the war and interlinked risks across their value chains. Thirdly, the commercial exchange between both countries and the EU¹⁴ might have diminished or been subject

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- <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2FES-11%2F1&Language=E&DeviceType=Desktop&LangRequested=False>. Pursuant to Article 5(2) of the 1974 UN consensus resolution 3314 (XXIX) on the Definition of Aggression, a war of aggression is a crime against international peace and aggression gives rise to international responsibility.
- 8 “NATO’s response to Russia’s invasion of Ukraine,” North Atlantic Treaty Organization, last updated March 21, 2024, https://www.nato.int/cps/en/natohq/topics_192648.htm.
- 9 Allegedly a statement made off-camera by the US President Joe Biden; Samuel Osborne, “Ukraine war: ‘For the first time since the Cuban missile crisis, we have a direct threat of the use nuclear weapons’, says President Biden,” SkyNews, October 7, 2022, <https://news.sky.com/story/ukraine-war-first-time-since-the-cuban-missile-crisis-we-have-a-direct-threat-of-the-use-nuclear-weapons-says-president-biden-12714106>.
- 10 Economic warfare involves States trying to harm their war enemies by applying economic measures such as issuing import and export restrictions, expropriating foreigners, prohibiting trading with the enemy, etc. Wars also have considerable effects on market prices, as goods become scarcer. Niels Petersen, “Armed Conflict, Effect on Contracts,” in *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, eds. Frauke Lechenmann and Reedier Wolfrum (Oxford University Press, 2017), 32. Russia’s war on Ukraine, ensuing economic sanctions on the country, and its retaliation caused serious disruptions to global markets. Prices of oil, gas, and certain agricultural products have risen significantly, threatening, for example, food security in some developing economies. Price hikes and shortages disrupted also markets for raw materials critical for green transition. “OECD Policy Responses on the Impacts of the War in Ukraine,” Organisation for Economic Co-operation and Development (“OECD”), August 4, 2022, https://www.oecd-ilibrary.org/trade/the-supply-of-critical-raw-materials-endangered-by-russia-s-war-on-ukraine_e01ac7be-en.
- 11 See e.g. Matthias Schulze and Mika Kerttunen, “Cyber Operations in Russia’s War against Ukraine: Uses, limitations, and lessons learned so far,” Stiftung Wissenschaft und Politik, April 17, 2023, <https://www.swp-berlin.org/10.18449/2023C23/>.
- 12 Ukraine’s top export was agricultural products (46%) and semi-finished products (42%). Eric Hamilton, “The global supply chain consequences of the Russia-Ukraine war,” February 21, 2023, <https://news.ufl.edu/2023/02/russia-ukraine-global-supply-chain/>.
- 13 Russia’s top exports were fuels and energy products (63%) and metals (10%). It also produces about 25% of the world’s nitrogen fertilizer. See *id.*
- 14 The EU was Ukraine’s primary export destination. Russia is a major supplier of energy to the EU. See *id.*

to sanctions in some areas, but it has not ceased as such. The relevant question worth exploring is whether companies based in states that have already adopted HRDD legislation are compelled to exercise heightened HRDD, and if yes, how are they fulfilling this obligation and under what circumstances?

The following analysis proceeds in four parts. Section 2 points to the alleged human rights violations in the war in Ukraine and explores how business actors may be contributing or linked to such violations through their activity or omissions. Section 3 considers general approaches to HRDD and how those approaches model business obligations in respect of human rights and the environment. Section 4 turns attention to heightened HRDD. It applies the proposed conceptual framework, and seeks to draw on cases where business actors were allegedly implicated in adverse impacts during the war in Ukraine. Finally, Section 5 concludes by highlighting that in reference to concrete conflict situations, heightened HRDD requires business actors to assess whether their activity is compatible with minimum standards as guaranteed by the substantive core of specific human rights.

2 No Mere Side Effects of the Armed Conflict: Human Rights Violations in Ukraine and Their Implications for Business Conduct

The first months of the Russian Federation's aggression on Ukraine saw grave human rights violations affecting both civilians and combatants, including arbitrary deprivation of life and detention, enforced disappearance, torture and ill-treatment, and conflict-related sexual violence.¹⁵ Such violations amount to war crimes under international humanitarian law ("IHL").¹⁶

The civilian population in Ukraine has also suffered from massive violations of economic, social and cultural ("ESC") rights.¹⁷ The destruction of civilian

15 "Report on the Human Rights Situation in Ukraine, 1 February to 31 July 2022," OHCHR, September 27, 2022, 1–2, <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-09-23/ReportUkraine-1Feb-31Jul2022-en.pdf>.

16 *Id.* at 2. The report correctly merely presumes some of those violations "may amount to war crimes," as such may be determined through international criminal justice due process or transitional justice mechanisms.

17 As pointed out by Silja Vöneky, "the majority view seems to approve the general applicability of peacetime law during war in regard to certain types of peacetime treaties," including human rights treaties, and the latter impose additional restraints on the methods and means of warfare. Silja Vöneky, "Armed Conflict, Effect on Treaties," in *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, eds. Frauke Lechenmann and Reeder Wolfrum (Oxford University Press, 2017), 38, 40.

infrastructure and housing, including medical and educational facilities, had a direct impact on the enjoyment of the right to health, work, education, and housing. Moreover, as of December 9, 2022, the massive shelling caused “all thermal and hydroelectric power plants in the country [to be] damaged, [and] 40% of high-voltage network facilities were damaged to varying degrees.”¹⁸ During heavy winter conditions, most Ukrainians were forced to use candles to prepare a hot meal and generators and power banks to charge their mobile phones. In some regions, people had electricity for only two hours per day – and in some cities, only two hours per three days.

Whilst international criminal justice is often perceived as focusing on violations of civil and political rights, war crimes may also be economic, social, cultural or environmental in nature.¹⁹ Depriving civilians of water, food, health care, education, and housing may amount to war crimes and be prosecuted as such under specific legal criteria.²⁰ However, evidentiary difficulties exclude successful demonstration of many harmful abuses before criminal tribunals. Hence, other mechanisms applying international criminal law, such as truth commissions, may be desirable in post-conflict efforts to address legacies of human rights abuses. They allow for possibilities to establish that criminal conduct has occurred without relating it to specific perpetrators, and thus do not necessitate an examination of perpetrators’ mental state.²¹

Another noteworthy issue is that, with the exception of the Common Article 3 of the 1949 Geneva Conventions, the applicability of IHL to non-state actors

18 “Шмигаль: в Україні пошкоджено 40% об’єктів високовольтної мережі,” Радіо Свобода, December 9, 2022, <https://www.radiosvoboda.org/a/news-shmyhal-poshkod-zhenyua-vysokovoltna-merezha/32169794.html>.

19 Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press, 2015).

20 Destroying facilities (water services and infrastructure, etc.) necessary for the survival of civilian population as a punitive measure during armed conflicts constitutes concomitantly the violation of IHL (“Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (with annexes, Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session), adopted at Geneva on 8 June 1977,” United Nations Treaty Collection, January 23, 1979, 27, Article 54, para. 2, text available online at <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf>) as well as international human rights law (cf., *inter alia*, “General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),” UN Committee on Economic, Social and Cultural Rights (“CESCR”), January 20, 2003, paras. 21–22, <https://digitallibrary.un.org/record/486454?ln=en&v=pdf>).

21 Schmid, *Taking Economic*, *supra* note 19, at 328.

remains controversial.²² Likewise, the applicability of international human rights law (“IHRL”) to non-state actors remains in dispute, be it in times of peace or of armed conflict. However, the experience of other armed conflicts has shown that violations of peremptory norms of international human rights law can also directly engage the legal responsibility of collective non-state actors.²³ Notably, armed groups that are parties to conflict, insofar as they aspire to become legitimate governments or recognized actors at the interstate level, are said to have state-like obligations.²⁴ Limiting the application of IHRL to state actors has clear limitations, though. As Andrew Clapham aptly put it: “[o]nce we rid ourselves of the assumption that human rights only cover the relationship between individuals and governments there is no danger that accusing an armed group of human rights violations lends it automatic legitimacy or quasi-governmental status.”²⁵ A related question is whether business enterprises could be perpetrators guilty of international crimes.²⁶ Most international tribunals limit their jurisdiction to natural persons,²⁷ although the exclusion of collective non-state actors like armed groups or corporations from

22 *Id.* at 68. For a view advancing such applicability, see: OHCHR, “Business, human rights and conflict-affected regions: towards heightened action.” Report of the Working Group on the “Issue of human rights and transnational corporations and other business enterprises: Note by the Secretary-General,” OHCHR, July 21, 2020, 4, <https://www.ohchr.org/en/documents/thematic-reports/a75212-report-business-human-right-and-conflict-affected-regions-towards>.

23 Cf. e.g. Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, “International law and armed non-state actors in Afghanistan,” *International Review of the Red Cross* 93, no. 881 (March 2011): 47–79.

24 See e.g. Christian Tomuschat, “The Applicability of Human Rights Law to Insurgent Movements,” in *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, eds. Horst Fischer et al. (Berliner Wissenschafts-Verlag, 2004), 587.

25 Andrew Clapham, “Human Rights obligations of non-state actors in conflict situations,” *International Review of the Red Cross* 88, no. 863 (September 2006): 523. This is confirmed by the letter of the Common Article 3 of the Geneva Conventions which explicitly stipulates that the application of its provisions “shall not affect the legal status of the Parties to the conflict.” “Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949: Commentary of 2016,” International Committee of the Red Cross (“ICRC”), accessed May 25, 2024, Article 3, para. 4, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016>.

26 Schmid, *Taking Economic*, *supra* note 19, at 67.

27 See e.g. the Rome Statute on the International Criminal Court, text available online at “Rome Statute of the International Criminal Court,” United Nations, July 17, 1998, Article 25, para. 1, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FCONF.183%2F9&Language=E&DeviceType=Desktop&LangRequested=False> (“ICC Statute”).

the jurisdiction of international criminal tribunals is said to be procedural in nature rather than substantive.²⁸

A comprehensive analysis of such considerations is beyond the scope of this chapter, but they serve as a critical lens through which we both contextualize and concretize heightened HRDD obligations for businesses in a conflict-affected setting. Such considerations become especially pertinent where, due to occupation of the public sphere or the exercise of public functions by business actors, their human rights obligations go beyond duties to *respect*, and embrace state-like duties to *protect* and to *fulfil* human rights.²⁹

In the case of the war in Ukraine, the Russian Federation is responsible for the alleged violation of IHRL and IHL through targeted destruction of infrastructure that is critical for the survival of the civilian population. A question arises, however, as to what kind of business operators' action or inaction amounts to their complicity in a state's violations, even if only indirectly. Moreover, business conduct may have both positive and negative impact on the civil population affected by conflict. For example, following the full-scale Russian invasion, many Ukraine-based multinational companies faced an unexpected dilemma: they had to decide whether they should continue their operations. Metro Cash & Carry and McDonald's restaurants closed on the first day of the invasion. The need to ensure the safety and security of the workplace in the face of missile attacks is a legitimate concern, but irresponsible disengagement may have other dire consequences for the local population affected by the conflict, such as limited access to food.³⁰ Similar security-oriented concerns arose for multinationals operating in Russia. According to an analytical report, as of April 9, 2023, only 212 out of 3,169 analyzed foreign companies have fully

28 Andrew Clapham, "Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups," *Journal of International Criminal Justice* 6, no. 5 (February 2009): 902.

29 E.g. the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) acknowledges "the possibility of private persons being burdened similarly or to exactly the same degree through the indirect application of the fundamental rights, irrespective of their own fundamental rights, in particular if they come to acquire in practice comparable positions as duty holders or guarantors as the state." BVerfG, Judgment of the First Senate of February 22, 2011, 1 BvR 699/06, para. 56 (English version available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/02/rs20110222_1bvro69906en.html).

30 Daria Nagaiwska and Łukasz Szoszkiwicz, "Lesson from Ukraine: In the midst of war, there is a need for the heightened human rights diligence," Global Campus of Human Rights, February 23, 2023, <https://gchumanrights.org/gc-preparedness/preparedness-conflict/article-detail/lesson-from-ukraine-in-the-midst-of-war-there-is-a-need-for-the-heightened-human-rights-diligence.html>.

exited the Russian market. 1239 foreign companies continued their operations in the Russian Federation; 1,213 companies have voiced intentions to leave, and 505 chose not to make a decision.³¹ Leroy Merlin is one of the companies benefiting from operating in both Ukraine and Russian Federation. In September 2022, its Ukrainian subsidiary implemented “filtering measures”³² and dismissed employees who spoke out against the company’s business activities in the Russian Federation. On October 3, 2022, after a series of dismissals, Leroy Merlin Ukraine issued a statement that said the company “respects all the sanctions put in place by the European Union as well as the principles of the UN Global Compact.”³³

Abuses of labor rights, notably through unlawful termination of contracts, overtime abuses, and non-payment of wages are also reported as violations of Ukrainian companies, and in each instance the employers attempted to justify their actions by invoking national emergency laws.³⁴ At the same time, it should be noted that due to continuing hostilities, landmine threats (primarily in agricultural territories), loss of suppliers, and reduced access to internal and external sales markets, numerous enterprises – especially those in the proximity to the ‘contact line’ – were forced to switch into a survival mode.³⁵ Some Ukrainian enterprises faced security and economic risks even before the beginning of the full-scale war in February 2022. These early risks were predominantly connected to the 2014 annexation of Crimea and the subsequent war conflict in the Donetsk and Luhansk regions (Eastern Ukraine regions near the Russian Federation border). The enterprises’ reduced capacity (notably of

31 “Analytics as of May 19, 2024,” Leave Russia, accessed May 25, 2024, <https://leave-russia.org/bi-analytics>.

32 “Leroy Merlin Ukraine allegedly fires employees who ask questions about chain’s operation in Russia,” Business & Human Rights Resource Centre, September 23, 2022, <https://www.business-humanrights.org/en/latest-news/leroy-merlin-ukraine-allegedly-fires-workers-that-questions-cos-operation-in-russia/>. See also “Фільтраційні заходи: з Leroy Merlin Україна звільняють працівників, які задають питання про роботу мережі в Росії,” RAU, September 23, 2022, <https://rau.ua/новини/lerua-merlen-zvilnjaje-patriotiv/>.

33 “Leroy Merlin response,” Business & Human Rights Resource Centre, October 3, 2022, <https://www.business-humanrights.org/en/latest-news/leroy-merlin-response/>.

34 Cf. Georgii Sandul, “A full-scale attack on Ukraine’s labour rights,” International Politics and Society, February 10, 2023, <https://www.ips-journal.eu/topics/democracy-and-society/a-full-scale-attack-on-ukraines-labour-rights-6501/>.

35 See “Business and Human rights in Ukraine: Accelerating sustainable and equitable development through implementation of the UN Guiding Principles on Business and Human rights,” United Nations Development Programme (“UNDP”), 2022, 10, <https://www.undp.org/ukraine/publications/business-and-human-rights-ukraine-accelerating-sustainable-and-equitable-development-through-implementation-un-guiding>.

Small and Medium Enterprises, “SMEs”) to guarantee employees decent work and pay³⁶ has negatively affected socio-economic rights of vulnerable groups, particularly those living in rural areas. Destruction of crops and infrastructure complicated access to opportunities for work in neighboring areas, mostly for people with disabilities, the elderly, and people with family responsibilities. While many qualified people have relocated to safer regions or other countries, the most vulnerable groups do not have such options.

Enterprises located in Ukraine that are directly affected by the armed conflict should, in accordance with the accepted international standards, exercise *heightened* HRDD.³⁷ Geographical proximity to conflict is not, however, the only determining factor for heightened diligence. Relational and other economic proximities (e.g. proximity through established business relations or international trade)³⁸ also require companies to implement heightened vigilance to potential or actual conflict-related impacts. Although non-exhaustive, the following sections attempt to provide an analytical framework for considering varying degrees of HRDD obligations for businesses in view of the agent, rights-holders, and context specific perspectives. To that end, we must first briefly outline general benchmarks for HRDD and subsequently address the question how such benchmarks need to be enhanced (heightened) in the conflict-affected settings.

3 General vs. Conflict-Sensitive Approaches to HRDD

3.1 *The UNGP HRDD Framework and Its Misconceptions and Limitations*

The UNGPs construe HRDD as a *process* consisting of a proactive effort that business actors must make starting with the project phase and ending with the close of the business activity’s life cycle. This effort should be comprehensive and attempt to uncover risks of adverse human rights impacts that the business actors may cause or contribute to through their own operations, products, services, or through their business relationships.³⁹ This HRDD process, more

36 The concept of *decent* work refers notably to the conditions of work safety and remuneration. The latter should in particular allow workers to support themselves and their families. “The Right to Work: General comment No. 18,” CESCR, February 6, 2006, para 7, <https://undocs.org/Home/Mobile?FinalSymbol=E%2FC.12%2FGC%2F18&Language=E&DeviceType=Desktop&LangRequested=False>.

37 See the analysis in *infra* Section 3.3.

38 See *infra* section 4.3.

39 Cf. UNGPs, *supra* note 1, at 13 and 17.

adequately named “a bundle of interrelated processes,”⁴⁰ involves four core stages: (i) identifying and assessing actual or potential adverse human rights impacts; (ii) taking appropriate measures to effectively prevent and mitigate the actual or potential adverse human rights impacts identified; (iii) monitoring the effectiveness of the applied measures; and (iv) communicating to stakeholders, notably the affected individuals, how adverse impacts are being addressed.⁴¹ In short, the UNGPs take a risk-management approach that business enterprises are familiar with⁴² and in which HRDD is instrumental. As a “practical management tool,”⁴³ HRDD should thus enable business enterprises to “know and show” that they respect human rights.⁴⁴ The UNGPs assume that HRDD may be integrated into the existing corporate risk-management systems “provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.”⁴⁵ Arguably, such a shift in risk perspective may only be achieved when stakeholders are involved at every stage of HRDD processes.

General Principle (“GP”) 17c highlights that risks of negative impacts on human rights may change over time as a company’s operational environment evolves. Therefore, rather than being a one-off performance, the UNGP HRDD model is conceived as “an ongoing *management process* that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances”⁴⁶

40 “Working Group on the issue of human rights and transnational corporations and other business enterprises,” United Nations General Assembly, July 16, 2018, para. 10, <https://undocs.org/Home/Mobile?FinalSymbol=A%2F73%2F163&Language=E&DeviceType=Desktop&LangRequested=False>.

41 *Id.* See also UNGPs, *supra* note 1, at Principle 17. These core HRDD elements correspond with those under “Text of the third revised draft legally binding instrument with the textual proposals submitted by States during the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*,” HRC, February 28, 2022, Article 6, para. 3(a)-(d), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F49%2F65%2Fadd.1&Language=E&DeviceType=Desktop&LangRequested=False>.

42 Cf. Bilchitz, *Fundamental Rights*, *supra* note 5, at 196; Surya Deva, “Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the Guiding Principles,” in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, eds. Surya Deva and David Bilchitz (Cambridge University Press, 2013), 98.

43 Very critically Björn Fasterling and Geert Demuijnck, “Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights,” *Journal of Business Ethics* 116, no. 4 (September 2013): 805.

44 UNGPs, *supra* note 1, at Commentary to Principle 15.

45 *Id.* at Commentary to Principle 17.

46 OHCHR, “The Corporate Responsibility to Respect Human Rights: An Interpretative Guide,” OHCHR, 2012, 6, https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf.

(emphasis added). While the UNGPs require all business enterprises to respect human rights, the scale and complexity of *means* through which enterprises can meet that requirement should be proportionate to business-related factors (size, sector, operational contexts, ownership and structure) and the severity of the adverse human rights impacts.⁴⁷ Thus, by building on the concept of proportionality, the general approach to HRDD under the UNGPs is potentially adaptive to various operational contexts, including that of high-risk and conflict-affected areas.

Yet, the manner in which the UNGPs frame HRDD tends to give rise to some misconceptions concerning the nature and scope of related human rights obligations for business. The misconceptions need to be debunked to understand our subsequent analysis. We will start with the misconception on the nature of business obligations. Along with policy commitment and other processes for the remediation of negative human rights impacts, the UNGPs construe HRDD as a means by which businesses meet their non-binding (based merely on social expectations⁴⁸ or social norms)⁴⁹ *responsibility to respect* human rights.⁵⁰ The choice of the concept of “responsibility” rather than “obligations” thus provided for a thin consensus around the UNGPs, whereby many business representatives continue to see their role in regard of human rights as purely voluntary and charitable-like.⁵¹ Contrary to such presumptions, business actors are subject to a wide range of human rights obligations.⁵² Take the example of the obligation to avoid human trafficking or forced labor. Such crimes are almost universally punishable under national and international criminal law. The horizontal effect of human rights, or its applicability to non-state actors (in German legal doctrine *Drittwirkung*),⁵³ is also quite advanced in labor and

47 UNGPs, *supra* note 1, at Principles 14–15. On consequences of company ownership and its human rights obligations, see Section 4 *infra*.

48 See also Florian Wettstein, *Business and Human Rights: Ethical, Legal and Managerial Perspectives* (Cambridge University Press, 2022), 18.

49 Ruggie and Sherman, “The Concept of ‘Due Diligence,’” *supra* note 4.

50 See notably UNGPs, *supra* note 1, at Principle 15.

51 Very critically Deva, “Treating human rights lightly,” *supra* note 42. The author argues that the deliberate use of concepts such as “responsibility” rather than “duty” and “impact” rather than “violation” “has the effect of rolling back the legal concretisation of corporate human rights *obligations*” (emphasis added). *Id.* at 80.

52 The UNGPs consider HRDD responsibility for business as existing “over and above compliance with national laws and regulations protecting human rights,” thus ascertaining the existence of human rights obligations for business. UNGPs, *supra* note 1, at Commentary to Principle 11.

53 The doctrine of the German “third party effect” assumes indirect application of human rights, which have radiating effect upon private law. See e.g. Claus-Wilhelm Canaris,

non-discrimination law⁵⁴ and confirmed by a body of national and international case law.⁵⁵ Relevant cases concern instances where private actors exercise public functions⁵⁶ or create public spaces (e.g. shopping malls, airports, etc.) by way of the character of their activity and are consequently compelled to, at a minimum, respect freedom of speech and assembly in such spaces.⁵⁷ Arguably, the more effective the domestic legislative and judicial mechanisms for the protection of individuals against human rights abuse by business actors are, the better that State fulfils its duties to protect all rights.⁵⁸

Another misconception concerns the scope of human rights obligations for business. This misconception appears to arise from the HRDD's exclusive focus on the *respect* of human rights. There are instances where the scope of business obligations de facto cover *duties to protect* and/ or to *fulfill* human rights, which are primarily State obligations. Protecting human rights entails "working towards preventing or stopping third parties from infringing on the rights of others. It is not about an agent's own harmful conduct, but about the harmful conduct of a third party."⁵⁹ An illustrative example is an employer's duty to protect its employees from harassment by fellow employees or superior company officials. Furthermore, States tend to rely on the private sector to provide many essential services such as water, electricity, healthcare, telecommunications, transport, and waste disposal. As aptly stressed by Wettstein, privatization of such services does not mean that their provision is subject to the

"Grundrechte und Privatrecht," *Archiv für die civilistische Praxis* 1984, 184. Bd., H. 3 (1984): 201–246.

54 Non-discrimination in employment is generally better regulated than in the areas of provision of goods and services.

55 Such obligations are typically interpreted as indirect application of human rights to non-State actors. See e.g. BVerfG, 1 BvR 699/06, *supra* note 29. For discussion, see Bilchitz, *Fundamental Rights*, *supra* note 5.

56 "Protect, Respect and Remedy: a Framework for Business and Human Rights" United Nations General Assembly, April 7, 2008, para. 55, <https://digitallibrary.un.org/record/625292?v=pdf>. The UN Framework admits that when companies exercise certain public functions, they may have "additional responsibilities" beyond that of respecting rights of others.

57 BVerfG, 1 BvR 699/06, *supra* note 29. The case concerned a stock corporation (in which the majority of shares are publicly owned, though) that operates Frankfurt airport (*Fraport Aktiengesellschaft*) and that restricted the right to protest of activists objecting to deportations.

58 Cf. in that sense Evelyne Schmid, "The Identification and Role of International Legislative Duties in a Contested Area: Must Switzerland Legislate in relation to 'Business and Human Rights,'" *Schweizerische Zeitschrift für internationales und europäisches Recht*, no. 25 (December 2015): 563–589.

59 Wettstein, *Business and Human Rights*, *supra* note 48, at 131.

primacy of private gain.⁶⁰ Rather, private actors are performing public functions whereby they incur certain obligations to the rights-holders. Such obligations include working towards the progressive realization of equal access to services and fulfilling human rights.⁶¹ In short, if human rights are to be fully realized under the conditions of a free market economy, companies need to practice all three duties (*respect, protect and fulfil*), even if they vary in nature and extent from that of State duties.⁶²

The UNGP conceptual and normative framework of HRDD also has important limitations. HRDD concentrates on processes that business actors must have in place, while leaving the substantive content of the corporate human rights “responsibilities” unaccounted for. GP 12 limits itself by specifying that corporate responsibility to respect human rights refers to internationally recognized human rights.⁶³ As rightly pointed out by Bilchitz, HRDD needs to be exercised in relation to certain human rights standards, and the process itself does not determine these standards. One cannot simply assume that the said standards, as well as any possible corresponding legal obligations, can be “read off directly from ... [the human rights] instruments.”⁶⁴ An argument *a contrario* may also be formulated: where adverse impacts of corporate activity do not “reach the deontological threshold of an actual violation of human rights,”⁶⁵ it is doubtful that legal obligations and liability may be attributed to a corporate actor causing or contributing to such impact.⁶⁶ In certain cases

60 *Id.* at 139.

61 On the role of business entities in progressive realization of ESCR, see “General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,” CESCR, August 10, 2017, para. 58, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2017-state-obligations-context>.

62 Cf. Deva, “Treating human rights lightly,” *supra* note 42, at 95.

63 These involve, at a minimum, the International Bill of Human Rights, i.e. the Universal Declaration of Human Rights (“Universal Declaration of Human Rights,” United Nations, December 10, 1948, text available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>), the International Covenant on Civil and Political Rights (“ICCPR”) (“International Covenant on Civil and Political Rights,” United Nations General Assembly, December 16, 1966, text available online at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) (“International Covenant on Economic, Social and Cultural Rights,” United Nations General Assembly, December 16, 1966, text available online at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>), as well as the eight ILO core conventions.

64 Bilchitz, *Fundamental Rights*, *supra* note 5, at 195.

65 Wettstein, *Business and Human Rights*, *supra* note 48, at 65.

66 Cf. Deva, “Treating human rights lightly,” *supra* note 42, at 98.

a business's activity may have an adverse impact on an individual human right (under German doctrine "berührt den Schutzbereich"), but the activity is considered to be justified by a conflicting fundamental right of the business operator.

The overarching limitation of the UNGP HRDD framework is its non-binding character. In view of potential costs and risks that the implementation of effective HRDD processes may imply, "the moral commitment of a corporation or lack thereof becomes a decisive factor for the importance and means that a corporation will attribute to its [HRDD] process."⁶⁷ The situation changes when States take "appropriate steps to prevent, investigate, punish and redress" human rights abuses by non-State actors within their territory or jurisdiction through "effective policies, legislation, regulation and adjudication."⁶⁸

3.2 *HRDD in Nascent Regulatory Practice*

The first initiatives to improve the protection of individuals against human rights abuse were undertaken by introducing the general corporate duty of care. So far in Europe, France (2017),⁶⁹ Germany (2021),⁷⁰ and Norway (2021)⁷¹ have binding HRDD legislation in place. At the level of the EU, the Corporate Sustainability Due Diligence Directive ("CSDDD")⁷² was adopted in May 2024. These instruments take a process-oriented approach to HRDD,⁷³ and substantive

67 Fasterling and Demuijnck, "Human Rights in the Void?," *supra* note 43, at 808.

68 UNGPs, *supra* note 1, at Principle 1. As rightly stressed by Schmid, "The Identification," *supra* note 58, at 569, by endorsing the UNGPs without a vote, States concomitantly have endorsed the view that they have obligations to take such steps.

69 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n° 0074 du 28 mars 2017.

70 Lieferkettensorgfaltspflichtengesetz (*LkSG*), Bundesgesetzblatt 2021/1, Nr 46, July 22, 2021, 2959 ("*LkSG*").

71 Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act), LOV-2021-06-18-99, (unofficial English translation available at "Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)," LovData, October 12, 2021, <https://lovdata.no/dokument/NLE/lov/2021-06-18-99>) ("Norwegian Transparency Act").

72 See the CSDDD, *supra* note 2.

73 E.g., the Norwegian Transparency Act, *supra* note 71, at Section 4 requires enterprises to conduct due diligence in accordance with the OECD Guidelines for Multinational Enterprises. In a six-step process it aims at implementing suitable measures to cease, prevent or mitigate negative impacts that are linked with the enterprise's operations, products or services through its supply chain or business relations. Prioritisation of impacts, monitoring the effectiveness of the implemented measures, communicating with the affected parties and providing for or co-operating in remediation and compensation are core elements of the due diligence process.

obligations regarding particular human rights are concretized to a very limited extent. For example, the Norwegian Transparency Act requires companies to carry out due diligence in light of negative impacts on working conditions, including health, safety, and living wages.⁷⁴ Pursuant to French law, companies must undertake *reasonable* vigilance measures that allow for identifying and preventing “severe violations of human rights and fundamental freedoms, serious bodily injury, environmental damage, or health risks resulting directly or indirectly from the operations of the company and of the companies it controls.”⁷⁵

In general, HRDD legislation tries to evoke binding human rights or environmental standards by reference to particular human rights instruments,⁷⁶ concrete human rights, or possible negative impacts on such rights and the environment.⁷⁷ As we alluded to in the previous section, this approach is limited because neither human rights instruments, nor specific impacts on rights, provide clear answers on concrete business obligations under particular circumstances. In order to determine what obligations corporations have and how they should act to best meet them, we first need to understand when an impact becomes an impermissible impact (i.e. an abuse).⁷⁸ To establish whether a given impact on rights caused by corporate activity is impermissible, it is necessary to balance conflicting interests of a corporate actor and an affected individual.⁷⁹ When determining the respective scope and substance of corporate HRDD obligations, such balancing exercise takes a variety of aspects (or factors)⁸⁰ into account. These relate to the agent-specific considerations and its operational context and potential impact that its activity, products, or services may have on the rights-holders and on the public interest. Context sensitivity, or paying due attention to the interaction of the corporate actor

74 *Id.* at Section 4 b) in connection to Section 3 c).

75 Article L. 225-102-4.-1 of the amended Commercial Code. English translation available at “Article 1,” Respect International, accessed May 25, 2024, <https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>.

76 *LkSG*, *supra* note 70, at Anlage zu § 2 Absatz 1, § 7 Absatz 3 Satz 2.

77 See notably *id.* and the SDDD, *supra* note 2.

78 Bilchitz, *Fundamental Rights*, *supra* note 5, 196. Cf. also Deva, “Treating human rights lightly,” *supra* note 42, at 98.

79 See e.g. a recent judgment of the ECtHR of 14 February 2023 in the case *Halet v. Luxembourg* [GC] – 21884/18, Judgment 14.2.2023 [GC], February 2023: the court determined the infringement on the applicant’s right to freedom of speech and to impart information, holding as insufficient the balancing of interests between the applicant and his employer as performed by the domestic courts.

80 That is why Bilchitz, *Fundamental Rights*, *supra* note 5, 219 *et seq.* refers to it as a “multi-factoral approach.”

and the right-holder under a particular circumstance, plays crucial role in the process.

While the UNGPs are not conclusive in that respect, it is arguable that impermissible impacts on rights must be prevented, or – if already materialized – they must be stopped.⁸¹ It is fairly easy to arrive at this conclusion in cases where business conduct that causes or contributes to an adverse impact on a concrete right is unlawful, say under domestic law. A clear example to that effect are reprisal dismissals of employees exercising their freedom of speech, like the case of Leroy Merlin Ukraine discussed above. Conversely, where a specific business conduct causes or contributes to a negative impact on an individual right, the fact that such conduct is not legally prohibited (businesses are likely to make use of legal loopholes) or even covered by an explicit authorization under the law in force does not immediately mean that the impact is permissible. A competent court could, for instance, establish that a law permitting certain business conduct is unconstitutional, as it infringes on the core (essence) of a constitutionally protected individual right.⁸² As for permissible impacts on rights, mitigation may be apposite so that the least restrictive means on the right are applied by business.⁸³ This would also follow from the principle of proportionality, which is inherent to human rights law. Consequently, entrepreneurs may be required to remedy only impermissible impacts on rights.⁸⁴ As the analysis of business conduct in the context of the war in Ukraine will show, determining exactly when the threshold for such an impermissible impact is fulfilled remains challenging.

The discussed extant legislation does not explicitly provide for corporate obligation to exercise heightened HRDD (“hHRDD”) in the armed conflict context. Still, as this legislation normally attempts to align with the UNGPs, which are built around the concept of proportionality, that is heightened risks in conflict environments require accordingly heightened due diligence, one could

81 Such tentative interpretation is, however, possible based on the UNGPs, *supra* note 1, at Commentary to Principle 19, which reads: “[w]here a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to *cease* or prevent the impact. Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to *cease* or prevent its contribution” (emphasis added).

82 In some legal systems, such rulings are within the powers of constitutional courts when considering a constitutional complaint, provided for e.g. under Polish or German law.

83 This approach would apply analogous rules for establishing a tolerable restriction of individual rights as that governing the margins for such restriction on the part of States. It generally builds on the concept of inviolable core of human rights.

84 Cf. Bilchitz, *Fundamental Rights*, *supra* note 5, at 196.

possibly argue that the distinction between HRDD and hHRDD is not necessary.⁸⁵ On the other hand, the following section spells out the rationale behind hHRDD and its emerging concepts. In practice, the requirement of hHRDD has the potential to alert less vigilant business operators of their proximity to armed conflict, both directly and through economic relationships. It can also induce sensitivity to conflict risks and dynamics by helping to determine the need for more cautious and responsive action. It is noteworthy that the Draft UN Treaty provides for State parties' obligation to ensure that HRDD measures undertaken by business enterprises include "[a]dopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation."⁸⁶ Conversely, the EU CSDDD does not explicitly compel companies to exercise hHRDD, but requires the European Commission to issue guidelines on how companies should fulfil their HRDD obligations, including relating to conflict-affected and high-risk areas.⁸⁷

3.3 *Raising the Bar: Conflict-Sensitive Approaches to HRDD*

The UNGPs recognize the heightened risk of gross human rights abuses in business activities in conflict affected areas. Hence, they compel States to ensure "that their current policies, legislation, regulations and enforcement

85 E.g. the Norwegian Transparency Act, *supra* note 71, at Section 4 requires companies to carry out HRDD "in proportion to the size of the enterprise, the nature of the enterprise, the context of its operations, and the severity and probability of adverse impacts on fundamental human rights and decent working conditions." The German law builds on concept of "appropriateness" (*Angemessenheit*) of HRDD processes (*inter alia* *LkSG*, *supra* note 70, at § 3(2) and § 5(1–2)).

86 "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises," Open-ended intergovernmental working group ("OEIGWG"), August 17, 2021, Article 6, para. (4)(g), <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf> ("2021 UN Draft Treaty").

87 CSDDD, *supra* note 2, Article 19, in connection to recital 42. Unlike the Draft UN Treaty which focuses on preventing conflict-related abuses, the amendments to the draft CSDDD proposed during the negotiation process by the European Parliament seemed to limit hHRDD obligations to companies in direct, geographical proximity to conflict, thus risking to leave other important instances of corporate proximity to conflict outside the scope of its provisions. "Pg_TA(2023)0209: Corporate Sustainability Due Diligence," European Parliament, June 1, 2023, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.pdf. These amendments were clearly the reaction to the war in Ukraine, as neither the initial report ("REPORT with recommendations to the Commission on corporate due diligence and corporate accountability," European Parliament, February 11, 2021, https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html) nor the initial Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, featured provisions on hHRDD.

measures are effective in addressing the risk of business involvement in [... such] abuses".⁸⁸ Conflict-affected settings may involve international or internal armed conflict, military occupation, widespread or pervasive political and social instability, or post-conflict settings. The UNGPs do not explicitly mention "a different type of due diligence" for conflict affected settings, but instead simply require HRDD processes to be proportional to the probability and severity of actual and potential risks.⁸⁹ As an enhanced form of regular due diligence processes, the concept of hHRDD emerged from a subsequent interpretation of the UNGPs.⁹⁰ Such interpretation, in line with the general approaches to HRDD⁹¹ notably stresses the risk of company's actual or potential impacts on (armed) conflict as such, requiring hHRDD processes to embrace such risks.⁹²

Thus, the conception of hHRDD builds on the expectation that business actors will develop an understanding of conflict and its dynamics and react accordingly. Such an understanding is a precondition for any company to effectively assess material risks of its potential connection to abuses arising from war, humanitarian situations, or other situations of widespread and pervasive violence. Therefore, the 2022 United Nations Development Programme ("UNDP") Guide construes hHRDD as an instrument for companies to prevent causing or contributing to conflict-related violence through strengthening their understanding of the contexts in which they operate, notably "by identifying flash points, potential triggers or the forces that are driving the conflict."⁹³ A conflict-sensitive approach implies companies acting on the surrounding conflict dynamics. The challenge lies in the nature, scope, and implications of the risks that business enterprises operating in conflict or high-risk areas should take account of.⁹⁴ They involve (but are not limited to) companies becoming military targets or part of the ongoing conflict (also inadvertently)

88 UNGPs, *supra* note 1, at Principle 7.

89 OHCHR, "Business," *supra* note 22, at 4; 2022 UNDP Guide *supra* note 3, at 9; UNGPs, *supra* note 1, at Commentary to Principle 12 only specify that greater risks to human rights in particular industries or contexts require "heightened attention."

90 OHCHR, "Business," *supra* note 22, at 4; 2022 UNDP Guide *supra* note 3, at 9.

91 Like regular HRDD (see section 3.1 *supra*), hHRDD involves four core stages of risk assessment and management.

92 Cf. 2022 UNDP Guide, *supra* note 3, at 24.

93 *Id.* at 10.

94 Materialised risks in conflict contexts are usually more severe regarding scale, scope and irremediable character. "Responsible business conduct implications of Russia's invasion of Ukraine," OECD, March 28, 2023, 4, <https://www.oecd-ilibrary.org/docserver/f222a4d1-en.pdf?expires=1716596482&id=id&accname=guest&checksum=5C41C98CA671848D57961CF40E5A571A>.

through their operations, personnel, products or services.⁹⁵ In such circumstances, the odds for business enterprises violating peremptory norms of IHRL and IHR are very high. In addition, under IHL, both the perpetrators and their accomplices may face criminal liability for the commission of war crimes.⁹⁶ Thus, beside the legal risk of civil liability for damages, business enterprises also run legal risks of criminal liability for the commission of or complicity in war crimes or other serious human rights violations. Such liability may apply in any jurisdiction that has endorsed the provisions of the Rome Statute on the International Criminal Court, especially if the jurisdiction provides for corporate criminal liability.⁹⁷ Lack of such liability does not prevent holding company directors and their subordinates criminally liable for acts of grave human rights abuses.⁹⁸ Consequently, even the UNGPs⁹⁹ recommend that business enterprises handle risks associated with causing or contributing to such abuses as a matter of legal compliance. For the scope and nature of business obligations with respect to peremptory norms of IHRL and IHL, it is irrelevant whether the enterprise consciously chose to operate in a context of ongoing armed conflict or its operations, established in a peaceful setting, are caught up by the outbreak of an armed conflict,¹⁰⁰ as is the case of the war in Ukraine.

95 “Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises Under International Humanitarian Law,” ICRC, 2022, https://www.icrc.org/en/doc/assets/files/other/icrc_002_0882.pdf (“ICRC 2022”).

96 Complicity as a form of commission of war crime is said to be the most relevant to business enterprises. *Id.* at 26. See also “Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability,” International Commission of Jurists (“ICJ”), 2008, 11, <https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf>.

97 On some of such jurisdictions, see Anita Ramasastry and Robert C. Thompson, “Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law,” *Fafo report No. 536* (September 2006).

98 Numerous national (including Ukrainian) statutes incorporating International Criminal Law (“ICL”) cover grave breaches of ICL. *Id.* at 16. Importantly, introduced by the Geneva Conventions, the principle of universal jurisdiction allows any State to exercise criminal jurisdiction over persons accused of committing war crimes, regardless of the nationality of the alleged perpetrator, the victim or the place where the crime was committed. The rationale of the system of universal jurisdiction over war crimes is to avoid impunity of perpetrators whose grave crimes are considered as “attacks on international order” and whose prosecution is in the interest of international Community. Emily Crawford, “Armed Conflict, International,” in *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, eds. Frauke Lechenmann and Reeder Wolfrum (Oxford University Press, 2017), 48.

99 See UNGPs, *supra* note 1, at Principle 23 and the commentary thereto.

100 ICRC 2022, *supra* note 95, at 14.

Generally, the experience of business operations in conflict environments shows that “conflict *will always create* adverse negative impacts on human rights,” and “business activities in a conflict-affected area *will never be ‘neutral’ and without impact.*”¹⁰¹ In effect, business operators are likely to impact the conflict dynamics¹⁰² and thus potentially contribute to the suffering of civilian populations.¹⁰³ Private companies operating in resource-related armed conflicts are particularly exposed to the risks of being involved in human rights abuses.¹⁰⁴ Such abuses include child and forced labor, sexual violence, the disappearance of people, forced resettlement and the destruction of culturally significant sites. The scale and gravity of these abuses and pressure from civil society prompted policy and regulatory measures at the national,¹⁰⁵ EU,¹⁰⁶ and international level.¹⁰⁷ Regulating the mineral trade in conflict areas is one attempt to eliminate financing armed conflict or groups, the illegal exploitation of minerals and the related abuses, including the exploitation of mine workers and local communities. The adopted legislation provides for corporate due diligence rules on responsible sourcing of the so called “conflict minerals” (under EU Regulation: tin, tungsten, tantalum and gold). For instance, recital 11 of the EU Conflict Minerals Regulation defines supply chain due diligence as “an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof.”¹⁰⁸ Apart from metals and minerals, timber, diamonds, and oil also tend to be “conflict commodities.” Alongside risks of deforestation, undermining good

101 2022 UNDP Guide, *supra* note 3, at 10. OHCHR, “Business,” *supra* note 22, at 10.

102 OHCHR, “Business,” *supra* note 22, at 10. *Infra* Section 4 will argue that business activity may also alleviate the suffering of the civilian population affected by armed conflict.

103 Cf. ICRC 2022, *supra* note 95, at 7.

104 Tignino, “Corporate human rights,” *supra* note 3, at 58.

105 The pioneering law was the United States Dodd–Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376–2223, July 21, 2010 (text available online at www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf). Section 1502 of the law requires US-listed companies whose products contain tin, tantalum, tungsten, or gold to conduct supply chain due diligence checks on minerals that may originate from the Democratic Republic of Congo or its nine neighboring countries.

106 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, OJ L 130, May 19, 2017, 1–20 (“EU Conflict Minerals Regulation”).

107 “OECD Due Diligence for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition,” OECD, 2016, <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>.

108 EU Conflict Minerals Regulation, *supra* note 106.

governance, and threatening the livelihood of local forest-dependent communities, illegal logging can also be linked to armed conflicts. In recognition of such risks, the 2010 EU Timber Regulation¹⁰⁹ requires traders of timber and timber products to exercise due diligence, and mandates that risk assessment criteria shall involve armed conflict considerations.¹¹⁰

Yet, reports are mounting of the shortcomings and negative fall-out of such “anti-conflict” legislation. For example, the implementation of the US Dodd-Frank Act revealed the hurdles of implementing the due diligence process for conflict-free minerals: costs and other, more technical difficulties¹¹¹ resulted in “a de facto embargo” on mining in the Democratic Republic of Congo, with many companies pulling out their investment in the region, thus negatively affecting the livelihoods of the local populations dependent on mining industry and Congolese economy at large (allegedly beyond the mining sector).¹¹² This raises the question of whether such “anti-conflict” legislation and its hHRDD process could be modelled to avoid an effect similar to a prohibition of business activity in conflict-affected settings, as such activity may not only contribute to, but also alleviate the suffering of the vulnerable local populations. Such legislation could, for example, specify on the basis of case-to-case assessments in which areas the positive effects of corporate action outweigh potential risks of human rights abuses.

4 Framing Heightened HRDD: Any Insights from Ukraine?

Armed conflicts are the most obvious, but not the only triggers for hHRDD. Armed conflicts usually induce other forms of instability such as emergency laws, weakness, or dysfunction of the state apparatus, humanitarian crises, and economic and social volatility. Each form of instability alone could trigger the need for hHRDD.¹¹³ Business conduct amidst or related to the war in

109 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance, OJ L 295, November 12, 2010, 23–34 (“2010 EU Timber Regulation”).

110 *Id.* at Article 6(1)(b), in connection to Article 4 of the 2010 EU Timber Regulation.

111 Notably the impossibility of on-site monitoring of mines in areas controlled by armed groups or the manner in which mineral ores are processed. See e.g. Cortney Linnecke, “Evaluating Conflict Mineral Legislation in the Democratic Republic of Congo,” *Proceedings of GREAT Day* 15, Article 15 (2016): 61–62.

112 *Id.* and the scholarly work cited therein.

113 OHCHR, “Business,” *supra* note 22, at 5.

Ukraine is at stake in the selected cases we analyze. This serves as a basis to elaborate on hHRDD through a conceptual framework involving separate, albeit interlinked, perspectives. Similar to general approaches, the scope and extent of hHRDD obligations depends on agent-specific considerations, their operational context, and any potential impact that their activity, products, or services might have on the rights-holders. We commence our analysis with the operational context, as the agent's geographical, relational, or other economic proximity to the armed conflict is enough to determine the need for the corporate exercise of hHRDD. Having specified the conditions for hHRDD, we proceed to agent-specific considerations which are particularly instructive for specifying the type and scope of corporate obligations, including whether they are limited to or go beyond the *duty to respect*. Finally, we discuss the modalities of determining substantive content of hHRDD obligations for enterprises in view of the potential impact that their activity or omissions may have on the rights-holders. This requires referencing established human rights standards and the nexus between the duty-bearer and the right-holder under a particular contextual setting. The following analysis builds on what the authors consider non-exhaustive salient examples transpiring from the conflict dynamics in Ukraine.

4.1 *Operational Proximity to Conflict as a Precondition for hHRDD*

Under *operational proximity* we understand geographical, relational, or other forms of propinquity to conflict and are aware that other writings may introduce different nuancing to this concept.¹¹⁴

Geographical location represents the most evident proximity to military conflict that triggers the need to exercise hHRDD. As a result of the full-scale armed conflict in Ukraine, companies operating in this country face difficulties to ensure the safety and security of the workplace on the one hand as well as the continuity of production processes because of the air alerts and missile attacks on the other.

The need for business operators to *protect* their employees in conflict affected areas is not contested,¹¹⁵ albeit the UNGP language interpreting this

¹¹⁴ See e.g. "Advancing business respect for human rights in conflict-affected areas through the UNGPs," Business & Human Rights Resource Centre, June 9, 2021, <https://www.business-humanrights.org/en/blog/advancing-business-respect-for-human-rights-in-conflict-affected-areas-through-the-ungps/>.

¹¹⁵ "Promotion of all human rights, civil, political, economic, social and cultural, including the right to development – Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and

need as “responsibility to respect” obfuscates that it should instead be classified as a legal obligation.¹¹⁶ Employers are legally obliged to ensure safe and healthy work conditions. Their operation in a conflict zone does not absolve them of this obligation. Since few Ukrainian enterprises have equipped shelters, their operating stability may potentially be in tension with the employees’ safety interests. Enterprises should attempt to reconcile these interests by integrating employee care and considerations into their risk assessment and management practices. Not less important is the role that business enterprises have in the realization of the right to work and adequate standard of living under armed conflict conditions, including access to water and food for their employees, their employees’ families and the local population in general.

Some companies operating in Ukraine hired international experts to analyze the conflict-related risks and prepare business continuity plans that ensure the safety of employees and the main assets. The continuity plans included employee protection and relocation programs, digitalization of core processes, and ensuring cyber-security, securitization of the office building (if possible), developing of crisis communications plans, and reviewing the business model by closing or selling some assets. Seven hundred and seventy-two companies were relocated and 35,000 workplaces were saved thanks to the government relocation program¹¹⁷ implemented in partnership with two State-owned enterprises – the Ukrainian Railways and the Ukraine’s National Post.¹¹⁸ While moving away from the direct frontline is recommended in principle, relocation of companies may pose maintenance risks to the local population dependent on those companies for employment opportunities as well as the provision of necessary goods and services. Many companies used adaptive

other business enterprises*,” HRC, April 22, 2009, para 63, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/11/13.

116 *Id.* at 17: the Report speaks of “a specific operationalization of the responsibility to *respect*, and not a separate *responsibility*” (emphasis added). The same classification dilemma, although under general conception of HRDD, concerns the requirement imposed on the employer to protect employees from violence, harassment and abuses in the workplace.

117 “Завдяки Урядовій Програмі Релокації Збережено Понад 35 Тисяч Робочих Місць – Тетяна Бережна,” Ministry of Economy of Ukraine, November 25, 2022, <https://www.me.gov.ua/News/Detail?lang=uk-UA&id=a54c8281-02fa-4ced-8b14-3a7ca772a826&title=Zavdiaki>.

118 Most of relocated companies are operating in the following sectors: wholesale and retail trade, repair of motor vehicles and motorcycles (40,7%), processing industry (30,2%), information and communication (6,7%), professional, scientific and technical activities (6,2%), and construction (4,4%). See *id.*

business models,¹¹⁹ which also helped their employees suffering from shelling, lack of electricity, heat, and water to relocate to regions in the center and west of Ukraine and abroad.

The obligation to conduct hHRDD does not exclusively concern companies based in zones directly affected by the hostilities. Operating in the territory of the aggressor country also has immediate consequences for companies which run clear risks of causing, contributing, or being directly linked to adverse impacts related to the war. In fact, most multinational enterprises active in Russia prior to the full-scale invasion continue to operate there.¹²⁰ Operating in the aggressor country does not immediately imply a link to human rights violations or a failure by the operator to exercise hHRDD. However, continuing business activity in the territory of a state waging an aggressive war and subject to extensive international sanctions entails an increased risk of complicity in activities deemed to violate human rights. Also, the Russian Federation's attitude towards operational systems of international human rights protection and the repression by the State apparatus of peaceful protesters against the war raise serious questions about the authority's willingness to respect and fulfil the State's human rights duties. Instances such as Russia's expulsion from the Council of Europe and the consequent termination of its membership in the European Convention on Human Rights,¹²¹ as well as the International Criminal Court's issuance of an arrest warrant against President Vladimir Putin¹²² indicate the breakdown of international human rights protection in Russia and the associated impending risks. This also casts doubts on

119 E.g. Volkswagen Group and BMW needed to close some assembly lines due to the disrupted output of wiring harnesses manufactured in Ukraine by the German company Leoni. BMW faced logistics issues as male truck drivers were barred by law to leave Ukraine. After the first shock of the full-scale invasion, Leoni's employees continued to work, and company recruited female drivers to deliver wiring harnesses to the EU. See: "Ukraine bomb shelters help Leoni keep vw, BMW supplied," *Automotive News Europe*, May 10, 2022, <https://europe.autonews.com/suppliers/ukraine-bomb-shelters-help-leoni-keep-vw-bmw-supplied>.

120 On the need to exercise hHRDD by these companies, see OECD, "Responsible business conduct," *supra* note 94.

121 "Russia ceases to be a Party to the European Convention on Human Rights on 16 September 2022," Council of Europe, March 23, 2022, www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022.

122 "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova," International Criminal Court ("ICC"), March 17, 2023, www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

the margins of maneuver for business to exercise hHRDD under such conditions. The following section elaborates on this idea with reference to concrete examples.

Another instance that requires business operators to conduct hHRDD is their “relational proximity” to conflict through value chains. Companies may have direct or indirect suppliers in the countries involved in armed conflict or may themselves be suppliers of goods or services (e.g. advanced technologies) to public and private entities implicated in serious human rights violations. Complex global value chains render tracking the full life cycle of products or services quite challenging. At a minimum, companies obliged to comply with a sanction regime must carefully monitor both their upstream and downstream value chain. As highlighted by a recent Organisation for Economic Co-operation and Development (“OECD”) report, “the risk of sanctions evasion may be heightened, including risks related to business relationships several tiers away in supply chains. This includes understanding downstream risks related to the sale of products and services in the context of export restrictions on certain dual use technologies with military applications to Russia, for which evidence suggests there are significant and long-standing shortcomings on compliance.”¹²³ Consequently, the following conclusion stands to reason: The mere existence of international sanctions regimes, insofar as they make an increased risk of human rights violations in a given area evident, justifies an increased duty of care to monitor the downstream value chain, even for those companies that are not directly affected by a sanctions regime because they operate elsewhere (e.g. from Kazakhstan, India, Brazil, South Africa). Cutting off Russia’s military industry from the supplies of dual use goods requires a concerted action from State and non-State actors. Under the current EU regime, authorization is required for the export of dual-use goods.¹²⁴ Apart from instances where business operators do not comply with the sanctions regime,¹²⁵ it seems that for some goods¹²⁶ and/ or

123 OECD, “Responsible business conduct,” *supra* note 94.

124 Regulation (EU) 2021/821 of the EP and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, June 11, 2021, 1, Article 3.

125 See e.g. “Umgangene Sanktionen: Hochtechnologie für Russland: Wie Deutsche sich an der Beschaffung beteiligen,” MDR.DE, July 23, 2022, <https://www.mdr.de/nachrichten/sachsen/leipzig/leipzig-leipzig-land/deutsch-technologie-russland-waffen-100.html>.

126 See e.g. “Warum Russland trotz Sanktionen weiter Marschflugkörper produzieren kann,” *Süddeutsche Zeitung*, December 11, 2022, <https://www.sueddeutsche.de/politik/russland-sanktionen-raketen-komponenten-1.5713443>; “Dual-Use-Güter: Werkzeuge

destinations¹²⁷ such authorization should not have been given in the first place.

Minimum compliance does not shield business operators from potential risks of becoming implicated with a perpetrator's gross human rights abuse. As the case of Frans van Anraat, a Dutch entrepreneur who sold chemical components used for the production of mustard gas in Iraq in 1980s, shows, the absence of laws barring certain business transactions in certain regions did not prevent finding van Anraat guilty of complicity in war crimes.¹²⁸ In France, criminal proceedings are ongoing against Amesys, a technology company, and its two executives for complicity in crimes of torture committed in Libya under Muammar Gaddafi's regime. The surveillance technologies Amesys sold to Libya's government allegedly allowed the Gaddafi regime to repress dissidents and commit gross human rights abuses.¹²⁹ Business actors trading certain goods or operating in certain industries are therefore compelled to exercise hHRDD by developing an understanding of the risk of *complicity*.¹³⁰ *Corporate complicity*, i.e. *knowingly* aiding and abetting the criminal acts of others, refers to a wide range of corporate involvements in human rights abuse.¹³¹ These include forced labor, handling questionable assets, trading goods in violation of international sanctions, providing the means to kill, and financing

für Putins Krieg," Die Wochenzeitung, August 2022, <https://www.woz.ch/2234/dual-use-gueter/werkzeuge-fuer-putins-krieg>.

- 127 See e.g. "EU goods worth at least \$1bn vanish in Russia 'ghost trade,'" Financial Times, May 10, 2023, <https://www.ft.com/content/76fc91b2-3494-4022-83do-9d6647b38e3d>.
- 128 In 2007, the Dutch Court of Appeal in the Hague sentenced van Anraat to 17 years prison, asserting that he had repeatedly sold chemical components with the knowledge that they were being turned into mustard gas, chemical weapon used in the attacks on the Kurdish population in Iraq in the years 1987–1988. LJN: BA4676, Court of Appeal The Hague, 2200050906 – 2, ECLI:NL:GHSGR:2007:BA6734.
- 129 In November 2022, the Paris Court of Appeal confirmed the indictment of Amesys and its executives. The Case is pending before the Supreme Court. See "Surveillance and torture in Libya: The Paris Court of Appeal confirms the indictment of Amesys and its executives, and cancels that of two employees", fidh, November 21, 2022, <https://www.fidh.org/en/impacts/Surveillance-torture-Libya-Paris-Court-Appeal-indictment-AMESYS>.
- 130 Cf. Salil Tripathi, "Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards," *Politorbis*, no. 50 (January 2011): 139.
- 131 Ramasastry and Thompson, "Commerce, Crime and Conflict," *supra* note 97, at 16. Complicity is usually defined as "a form of knowing involvement of one subject of international law in a breach of an international obligation attributable to another. Complicity (...) is equally a form of individual liability in most domestic legal systems and in international criminal law." Vladyslav Lanovoy, "Complicity," in *Max Planck Encyclopedia of Public International Law*, eds. Frauke Lechenmann and Reedier Wolfrum (Oxford University Press, 2015).

international crimes.¹³² Criminal liability also extends to any individual who “knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, *including providing the means for its commission*” (emphasis added).¹³³ It is not necessary to show that the assistance caused or aggravated the crime, but it must have a substantial effect on it.¹³⁴ Examples of aiding and abetting may involve the provision of goods, services, personnel, information and logistical assistance to commit a crime, which means the accomplice may be at a remote location from the place of the physical perpetration of the crime.¹³⁵ If company goods (e.g. vehicles, fuel, ...) or services (e.g. banking, private security companies) are used for the purpose of committing a criminal act, withdrawal from the contractual relationship as soon as the company officials become aware of that may shield them from criminal responsibility. End-use certificates or contractual arrangements aimed at curtailing the purposes for which goods or services can be used may be insufficient, as “a criminal court is likely to look behind such documents or other similar mechanisms ... to see what the company officials actually knew, using direct and circumstantial evidence, about the use that the product was to be put to when it was sold.”¹³⁶

In order to develop an understanding of the risk of complicity, a diligent business operator must concomitantly understand and assess its *proximity* to conflict. More precisely, such proximity may be disaggregated by the agent’s proximity to the violator, the violation, and the victim.¹³⁷ The closer the proximity, the higher the risk of complicity.¹³⁸ Geographical and relational proximity do not necessarily coincide with each other. Direct relational proximity to the violator may occur at substantial geographical distance from the actual violation. The chain linking business with conflict tends to vary in length, which adds complexity to due diligence as a process of proactive uncovering of human rights risks over the entire life cycle of a project or business activity. By way of example, financial, insurance, and trading companies do not need

132 “Red Flags: Liability Risks for Companies Operating in High-Risk Zones,” Red Flags, accessed May 17, 2023, <https://redflags.info/>.

133 ICC Statute, *supra* note 27, at Article 25 (3)(c). See also the “Draft Code of Crimes Against the Peace and Security of Mankind: 1996,” International Law Commission (“ILC”), 1996, 18, Article 2(3c), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1_996.pdf.

134 ICJ Report, *supra* note 95, at 17.

135 *Id.*, at 19.

136 *Id.* at 38.

137 Tripathi, “Business in Armed Conflict Zones,” *supra* note 130, at 139.

138 *Id.*

to directly operate in zones of armed conflict themselves, but may do so indirectly through their clients and suppliers, thus sustaining and benefiting from armed conflict and related human rights abuses. Global markets for goods and services may additionally obscure instances of “economic” proximity. For instance, sanctioned Russian-origin export sectors like gold and diamonds are said to continue to reach global markets¹³⁹ through companies operating in countries that do not participate in the sanctions regime, thus providing necessary financial means for the Russian regime to wage war against Ukraine. Consequently, in business relations with companies operating from countries that do not participate in the sanctions regime a heightened due diligence is required.

The Russian war against Ukraine has above all caught policymakers unprepared to address the new disturbances in strategic supply chains, although arguably heightened State and international action should have been put in place as early as 2014. The far-reaching global dependence on Russia’s fossil fuel and mineral supplies rendered immediate disentanglement from the aggressor State¹⁴⁰ impossible without concomitantly endangering the importer States’ energy security as well as disturbing the functionality of its energy-intensive industries. While purely commercial concerns (including the risk of freezing or misappropriation of assets)¹⁴¹ should not hinder immediate disentanglement, energy security touches the sensitive element of a State’s duties to ensure the basic needs of all individuals under its jurisdiction. This does not change the fact that, in practical terms, the ongoing commerce between European countries and the Russian Federation after February 24, 2022, is substantially contributing to providing the aggressor State with the necessary financial means to wage war against Ukraine.¹⁴² The hard lesson learned for both policy makers and business operators is the deepened understanding of the need to diversify supply chains, notably in strategic sectors, to enhance resilience and create conditions for immediate disentanglement from a “supplier-State” that allegedly commits war crimes. Moreover, the urgent need for alternative sourcing to fill supply shortages in both fossil fuels and energy transition

139 OECD, “Responsible business conduct,” *supra* note 94.

140 United Nations General Assembly, “Resolution,” *supra* note 7.

141 Consequences should be assessed against other risks, including that of complicity in a gross human rights abuse.

142 Around 45% of Russia’s income from trade in fossil fuels is paid by the EU countries. Data provided by the Centre for Research on Energy and Clean Air (“CREA”). See “Financing Putin’s war: Fossil fuel imports from Russia during the invasion of Ukraine,” CREA, accessed April 28, 2023, <https://energyandcleanair.org/financing-putins-war/>.

minerals (i.e. minerals essential for low-carbon technologies) implies hazards of dubious, illicit, and other high-risk sources making their way into the supply chains¹⁴³ Such risks, including that of proximity, need to be taken account of by both States and business operators, regarding the latter in view of their specific sector or sphere of activity.

4.2 *Agent-Specific Considerations Influencing Corporate Obligations*

Since hHRDD is conceived as an instrument of means rather than result, agent-specific factors such as company size, market position, and sphere of activity are highly relevant for determining what may reasonably be expected from an entrepreneur under a specific operational context.¹⁴⁴ Large companies dispose of financial and structural resources to implement complex processes that small and micro-businesses lack. Unlike small entrepreneurs, large companies also have sufficient capacities to exercise leverage on business partners, suppliers, and even public authorities, particularly when legitimately acting in concert with other business entities in their industry. Such capacities are exacerbated when companies themselves function under a survival modus due to an ongoing conflict. The destruction of production facilities and disruptions in supply and value chains significantly reduced the leeway of Ukraine-based companies to take human rights and environmental concerns into account when choosing their suppliers. Under pressure to keep operations running, Ukrainian companies were forced to engage available suppliers without paying enough attention to their commitments and practices to meet labor and sustainability standards.

Regardless of company size, a business's share in the local supply market may lead to dependence of the local population beyond employment opportunities. Most Ukrainian bakeries and drinking water suppliers are small enterprises, but their role in sustaining the local population is invaluable. Deciding to close or move the production site is thus neither neutral for the employees nor for the local population. While such aspects are relevant in any context, they become apparent most notably in conflict-affected settings. This raises questions of what constitutes a responsible relocation and how it should be prepared and implemented in order to meet such criteria.¹⁴⁵

143 OECD, "Responsible business conduct," *supra* note 94, at 3.

144 See e.g. the 2021 UN Draft Treaty, *supra* note 86, at Article 3, para. 2, which stipulates that corporate due diligence obligations are to be "commensurate with their size, sector, operational context or the severity of impacts on human rights."

145 See more extensively Section 4.2.3 *infra*.

The sphere (or area) of business activity is a decisive factor in assessing whether a private entity performs (or partakes in the performance of) public functions and is thus subject to legal obligations normally incumbent on the State. One of the prominent spheres of activity whereby business operators enter a State-like role is related to the provision of essential goods and services. Access to essential food, health care, basic shelter, and housing, are minimum core requirements for the enjoyment of economic, social, and cultural rights that States are obliged to respect, protect and fulfill under the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).¹⁴⁶ While any assessment as to whether a given State has discharged its minimum core obligation must take account of resource constraints applying within the country concerned,¹⁴⁷ all State parties to the Covenant are expected to undertake every possible effort to satisfy those minimum obligations. Delegating the provision of essential goods and services to private entities does not absolve States from fulfilment of their human rights duties. Even in peace time, national governments may involve the private sector to meet its duties. Armed conflicts further exacerbate State’s dependence on private entities in providing essential goods and services to individuals under its jurisdiction. Essentiality of goods and services may be context specific.¹⁴⁸ Such goods and services particularly include: drinking water; food; medicine and medical services; centralized water, electricity and gas supply; communication and banking services; and sanitation and garbage collection. As pointed out by O. Uvarova, “During the war, the basic needs of a person do not change, and in some cases their importance increases significantly – e.g., the ability to access public transport becomes critical for evacuation, access to the internet becomes vital to obtain up-to-date information about possible threats, evacuation corridors, and humanitarian aid, and access to communication tools are necessary to keep in touch with family, call emergency services if necessary, and more.”¹⁴⁹ Private actors that decide to base their business model on the provision of essential goods and services must be aware that they take up such public function, with

146 See *supra* note 63; “General Comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant),” CESCR, December 14, 1990, para. 10, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/e199123-committee-economic-social-and-cultural>.

147 “General Comment No. 3”, *supra* note 146, para. 10.

148 See Olena Uvarova, “New study: Responsible Business Conduct in Times of War: implications for essential goods and services providers in Ukraine,” Business & Human Rights Resource Centre, July 1, 2022, 4, https://media.business-humanrights.org/media/documents/Essential_services_in_times_of_war_in_Ukraine_3.pdf.

149 *Id.*

all its consequences, including certain constraints on autonomously deciding when and on what conditions they cease their operations. Private providers regularly benefit economically from the stability of demand for essential goods and services, but they may be ignorant of their obligations as providers of such goods. This partly explains why State or municipality owned enterprises in Ukraine continued to provide essential goods and services after the outbreak of the full-scale war, whereas many private enterprises stopped their activity.¹⁵⁰ Public enterprises (i.e. enterprises where public authorities are either the sole owner or, in case of public-private co-ownership, have a controlling influence) are said to be directly bound by the fundamental rights just like States.¹⁵¹ This extends their obligations beyond the *duty to respect* to the *duty to fulfill* human rights related to the access to water, food, electricity, and more. That public enterprises are organized in the forms of private law is irrelevant to their duty to incur these obligations.¹⁵²

The imposition of martial law in Ukraine on February 24, 2022,¹⁵³ had direct consequences on the modalities of ensuring the access of citizens to essential goods and services. The Government has been given authority to determine the procedures for the normalized provision to the population of basic food and non-food products as well as the specifications for suppliers of electronic communication networks and culture and mass media institutions.¹⁵⁴ The Government provided 10 million persons with long-term storage food products for free. In regions where active hostilities are ongoing, the regional military administration distributed food sets among the local population.¹⁵⁵ To prevent artificial price increases and speculation, the prices of socially important goods were regulated in January 2022 by setting a maximum trading margin of 10% on the goods.¹⁵⁶

150 Cf. *Id.* at 5.

151 BVerfG, 1 BvR 699/06, *supra* note 29.

152 *Id.*

153 “ЗАКОН УКРАЇНИ: Про правовий режим воєнного стану,” Верховна Рада України, last updated May 18, 2024, Part 1, Article 8, para. 20, <https://zakon.rada.gov.ua/laws/show/389-19#Text> (“Legal Regime of Martial Law”).

154 *Id.*

155 “Деякі Питання Забезпечення Населення Продовольчими Товарами Тривалого Зберігання В Умовах Воєнного Стану,” Кабінет Міністрів України Постанова, March 20, 2022, No. 328, <https://www.kmu.gov.ua/npas/deyaki-pitannya-zabezpechennya-nas-elennya-prodovolchimi-tovarami-trivalogo-zberigannya-v-umovah-voennogo-stanu-328> (“Providing the Population with Food Products”).

156 “Урядом Запроваджено Державне Регулювання Цін На Деякі Продукти Харчування,” Урядовий портал, January 12, 2022, <https://www.kmu.gov.ua/news/uryadom-zaprov-adzhen-derzhavne-regulyvannya-cin-na-deyaki-produkti-harchuvannya> (“Regulation

The provision of essential goods and services is not left to State bodies alone. In Ukraine, the providers are State, municipal, and private enterprises of various sizes. For example, drinking water is delivered mostly by local private SMEs, and centralized water supply – by municipally owned companies.¹⁵⁷ Under Ukrainian law, drinking water supply and sewerage services can be provided by all forms of enterprise.¹⁵⁸ These enterprises should “take measures to provide the population with drinking water in cases of violations of the functioning centralised water supply and sewerage systems (emergency situations)”¹⁵⁹ and, in collaboration with local administrations, “develop and approve special measures in case of man-made and natural emergency situations that lead to the termination of centralised water supply.”¹⁶⁰ Ukraine also allows electricity and gas providers to be any form of enterprise, but the economic activity on these markets is strictly regulated.¹⁶¹ In view of the general interest, notably the security of supplies, the network infrastructure may be operated only by enterprises that are in the sole ownership of the State.¹⁶²

Ensuring continuous access to essential goods and services has proved particularly difficult as military activity targets essential resources and infrastructure.¹⁶³ In order to fulfil their obligations to provide such goods and services to the citizenry, public enterprises continued operating and performing their services, often at risk for the life and health of their employees repairing critical infrastructure.¹⁶⁴ While public ownership (e.g. public hospitals) or regulation of systemically relevant sectors (electricity, gas, etc.) provides clarity regarding

of Prices for Some Food Products”). One of the State’s duties under the ICESCR is safeguarding accessibility of essential goods, including their economic accessibility. See e.g. CESCR, “General Comment No. 15,” *supra* note 20, at para. 12(c)(ii).

157 Uvarova, “New study,” *supra* note 148, at 14.

158 “Про Питну Воду Та Питне Водопостачання,” Закон України, last updated October 1, 2023, Article 14, <https://zakon.rada.gov.ua/laws/show/2918-14#Text> (“On Drinking Water”).

159 *Id.* at Article 23.

160 *Id.* at Article 24.

161 Business activities related to transportation, distribution, storage and supply of natural gas and electricity are object of licensing. See respectively: “Про ринок природного газу,” Закон України, last updated September 3, 2023, Article 9, <https://zakon.rada.gov.ua/laws/show/329-19#Text> (“On the Natural Gas Market”); “Про Ринок Електричної Енергії,” Закон України, last updated March 8, 2024, Articles 30 and 30¹, <https://zakon.rada.gov.ua/laws/show/2019-19#n1784> (“On the Electricity Market”).

162 For natural gas, see On the Natural Gas Market, *supra* note 161, at Article 23, para. 2 in connection to Article 11, para. 3. For electricity, see On the Electricity Market, *supra* note 161, at Article 31.

163 Uvarova, “New study,” *supra* note 148, at 8.

164 *Id.* at 27.

the duty to continue providing essential goods and services under war time conditions, the situation may be less obvious when several private operators are involved in food or medicine distribution. Closure of grocery stores and pharmacies in the early days of the war deprived people of access to essential goods like medicine, baby food, and hygiene products.¹⁶⁵ A question therefore arises as to whether private sector providers are legally obliged to continue to offer their services? And if not, should they be? Public authorities may need to assess particular conflict situations and introduce additional obligations for private providers under emergency law. Where such obligations are missing, business operators implementing hHRDD should verify for themselves whether they provide essential goods and services to the local population, and if so, determine their role and share in such provision.¹⁶⁶

The need to provide such goods and services (notably food and pharmaceuticals) for Russian civilians was also invoked by international corporations to justify their refusal to withdraw from Russia.¹⁶⁷ In a statement issued on March 27, 2022,¹⁶⁸ the discounter Auchan Retail Services stated it had not ended its activities in Russia or Ukraine, referring to its role in providing food products for the needs of the civilian population and its concern for its employees. The Auchan Group stated that closing its operations in Russia would deprive a population “that has no personal responsibility in the outbreak of this war” and, on charges of premeditated bankruptcy, lead to “an expropriation that would strengthen the Russian economic and financial ecosystem.” In the same statement, Auchan Retail also reported that 3,000 of its employees were working directly in the combat zone in Ukraine. There is a significant disparity between the importance of the Russian and the Ukrainian market for the Auchan Group’s turnover.¹⁶⁹ Auchan has invested in several projects in Russia,

165 *Id.*

166 *Id.* at 18.

167 While declaring divestment, Danone and Nestlé for example justify their decision by humanitarian responsibility to provide essential foodstuffs and the wish not to harm innocent Russian consumers and workers. Phil Bloomer and Ella Sybenko, “Ukraine: Responsible business conduct in a war of aggression,” Business & Human Rights Resource Centre, March 18, 2022, <https://www.business-humanrights.org/en/blog/ukraine-responsible-business-conduct-in-a-war-of-aggression/>.

168 “Піти з Росії було б негуманно – гендиректор Auchan”, Liga.net, March 27, 2022, <https://biz.liga.net/ua/all/prodovolstvие/novosti/uyti-iz-rossii-bylo-by-negumanno-gendirektor-auchan>.

169 Auchan Ukraine focuses on food and non-food retail, with 43 stores, e-commerce and more than 5,000 employees, compared to Auchan Retail Russia’s 230 stores, e-commerce and 30,000 employees. See respectively: “Last year, Auchan Ukraine’s income shrank by

such as the Auchan City shopping and entertainment centre in Moscow.¹⁷⁰ Controversies and criticism over Auchan's activities in Russia first arose in 2014. The Group was subject to international criticism due to the increase of its investments in Russia notwithstanding the Russian annexation of Crimea.¹⁷¹ The most serious controversy over Auchan's hHRDD occurred when its subsidiary was accused of complicity with Russian war crimes by supplying the Russian army with men's socks, cigarettes, lighters, and razors. A joint investigation between *Le Monde*,¹⁷² *Bellingcat*, and the Russian independent media outlet *Insider*¹⁷³ revealed that the Russian branch of Auchan had been supplying Russian forces¹⁷⁴ under the guise of humanitarian aid. In connection with the above and the payment of taxes in Russia, the Ukrainian Ministry of Foreign Affairs placed Auchan¹⁷⁵ on the list of "international war sponsors" maintained by the project "War&Sanctions."

Auchan's Russian subsidiary is not an isolated example. Since September 2022, Russia's mobilization law obliges all companies to assist the Government with its war efforts, notably the draft of new conscripts.¹⁷⁶ Several thousands of employees are said to be called up by German companies.¹⁷⁷ Auchan Retail Russia both distances itself from and refuses to accept any responsibility for

a quarter", *Ukraine Business News*, September 5, 2023, <https://ubn.news/last-year-auchan-ukraines-income-shrank-by-a-quarter/> and "Revenue of Auchan in Russia from 2014 to 2022" *Statista*, accessed May 25, 2024, www.statista.com/statistics/1017464/auchan-turnover-in-russia/.

170 *Statista*, "Revenue," *supra* note 169.

171 "French hypermarket chain Auchan stepping up investment in Russia," *Reuters*, December 13, 2016, www.reuters.com/article/auchan-russia-idUSL5N1E84DZ.

172 "Video investigation: How a French company is supporting Russia's war effort in Ukraine," *Le Monde*, February 17, 2023, www.lemonde.fr/en/international/video/2023/02/17/video-investigation-how-a-french-company-is-supporting-russia-s-war-effort-in-ukraine_6016182_4.html.

173 "Special Op Shop: How Auchan supplies Russian military and sends employees to war," *The Insider*, February 17, 2023, theinsider.ru/en/politics/259460.

174 "Auchan & Leroy Merlin accused of supplying Russian soldiers fighting in Ukraine; incl. cos. Comments," *Business & Human Rights Resource Centre*, February 17, 2023, www.business-humanrights.org/en/latest-news/auchan-leroy-merlin-allegedly-support-russian-soldiers-fighting-in-ukraine-new-investigation-found/.

175 "Державний реєстр санкцій," Апарат РНБО України, accessed May 25, 2024, sanctions.nazk.gov.ua/en/boycott/17/.

176 Ella Skybenko, "Duty failure: Scant evidence of effective due diligence by companies operating in Russia," *Business & Human Rights Resource Centre*, February 20, 2023, <https://www.business-humanrights.org/en/blog/duty-failure-scant-evidence-of-effective-due-diligence-by-companies-operating-in-russia/>.

177 *Id.*

its drafted employees,¹⁷⁸ claiming “by choice” to have “no direct link with the armed conflict and its progress [...] play a part in the deterioration of the situation.” Under present circumstances, it is doubtful that the goods supplied by companies like Auchan Retail Russia to the Russian civilian population present sufficient life-supporting “essentiality” that justifies and outweighs the harms and suffering they potentially contribute to by the Russian and Ukrainian soldiers and the Ukrainian civilian population. While clearly remaining below the threshold for complicity in war crimes, the corporate action of Auchan in Russia is problematic under hHRDD criteria because, due to its relevant dimension, it has the effect of sustaining an unjustified war of aggression.

Another example of an alleged supplying of a party involved in an armed conflict concerns the carmaker Toyota. It operates both in Ukraine (with a market share around 10%),¹⁷⁹ and in Russia (with a market share of 10.4%).¹⁸⁰ The Russian Federation’s aggression against Ukraine in February 2022 prompted several actions by Toyota. On March 4, 2022, Toyota suspended its production operations in St. Petersburg, Russia.¹⁸¹ It cited the interruption in the supply of key materials and parts as the reason for the suspension.¹⁸² In September 2022, Toyota ended production in Russia completely.¹⁸³ The company also stopped importing cars to the country and exporting models produced there to Western markets.¹⁸⁴ For some time, the issue of ownership of machinery and land after the company’s withdrawal from the Russian market remained the subject of a dispute between Toyota and the Russian authorities. Eventually,

178 “Under Russian law, any employee who is mobilised has their employment contract suspended and is therefore no longer managed or paid by their employer from that time. Auchan Retail Russia therefore no longer has any ties with the very few people mobilised to date.” “Auchan response,” Business & Human Rights Resource Centre, October 10, 2022, <https://www.business-humanrights.org/en/latest-news/auchan-response/>.

179 “Toyota Ukraine: One of the largest car dealers in the country,” The Page, accessed May 14, 2023, en.thepage.ua/dossier/toyota-ukraine.

180 With over 102,000 sold vehicles, Toyota was the second best-selling automobile brand in Russia in 2020. “Russia’s 2020 Car Sales Seen Falling 2.1% – AEB,” Reuters, January 14, 2020, www.reuters.com/article/russia-autos-salesfigures-forecast-idINR4N29G00H.

181 Hillary Essien, “Ukraine War: Toyota stops production in Russia,” Peoples Gazette, March 3, 2022, gazettengr.com/ukraine-war-toyota-stops-production-in-russia/.

182 “Toyota to End Vehicle Manufacturing in Russia,” Toyota, September 23, 2022, global.toyota/en/newsroom/corporate/38043074.html.

183 “Toyota Motor to close its factory in Russia,” Reuters, September 23, 2022, www.reuters.com/business/autos-transportation/toyota-motor-terminates-production-its-plant-russia-kommersant-2022-09-23/.

184 Jordan Mulach, “World’s biggest car-maker Toyota exits Russia amid ongoing Ukraine conflict,” Drive, September 26, 2022, www.drive.com.au/news/toyota-closes-russian-car-factory-imports/.

on March 31, 2023, the company transferred ownership to NAMI¹⁸⁵ (Central Scientific Research Automobile and Automotive Engines Institute). However, not all Toyota activities have ceased in the Russian market. It voiced intentions to optimize and restructure its operations in Moscow, with the objective “to continue supporting the retail network in providing ongoing service to existing Toyota and Lexus customers in Russia.”¹⁸⁶

Toyota’s public statements related to hHRDD appear similar to Auchan’s on the issue of labor policies. Both companies’ statements referred to the welfare of their employees, reported on the support given to them, and identified labor policies as one of their priorities in the armed conflict, as well as the reduction of activities in the aggressor market. According to a statement issued by the company regarding actions Toyota has taken in Ukraine,¹⁸⁷ “Toyota in Ukraine (sales and after-sales operations; 37 retail locations) has stopped all activities as of 24 February 2022.” The company also took some policies supporting the involvement of its employees in helping refugees and donated to the Office of the United Nations High Commissioner for Refugees (“UNHCR”).¹⁸⁸

Toyota’s actions do not change the fact that Toyota seems to be directly implicated in the armed conflict. There is widespread use of its civilian vehicles in military operations. The dangers of such practice were first recognized in connection with the 1986–1987 war between Chad and Libya referred to as the “Toyota war” due to the heavy use of the company’s vehicles.¹⁸⁹ Also in the context of the ongoing armed conflict, there are reports of combat use of Toyota cars by both sides in the conflict.¹⁹⁰ The question has to be asked whether the continuation of maintenance services and the provision of spare parts can be considered a form of aiding and abetting the aggressor State, notably if the company knows or should have known about its cars being used in hostilities

185 “Toyota transfers its Saint Petersburg plant to NAMI,” Toyota Europe Newsroom, March 31, 2023, newsroom.toyota.eu/toyota-transfers-its-saint-petersburg-plant-to-nami/.

186 Toyota, “Toyota to End Vehicle Manufacturing in Russia,” *supra* note 182.

187 “Toyota statement on Russian local manufacturing and vehicle imports,” Toyota, March 3, 2022, global.toyota/en/newsroom/corporate/36979255.html.

188 “Toyota Supports Humanitarian Efforts to Help Ukraine Emergency Situation,” Toyota, March 9, 2022, global.toyota/en/newsroom/corporate/36995461.html.

189 Leigh Neville, *Technical: Non-Standard Tactical Vehicles from the Great Toyota War to modern Special Forces* (Osprey Publishing, 2018).

190 Bethany Dawson, “Meet the international team of volunteers who are retrofitting civilian Fords and Toyotas into battle trucks for the Ukrainian forces,” Business Insider, June 12, 2022, www.businessinsider.com/civilian-fords-and-toyotas-turned-into-battle-trucks-for-ukraines-forces-2022-6?IR=T. See also Mark Putzer, “Russia Uses ‘ISIS-Style’ Toyota and Mitsubishi Pickup Trucks in Ukraine,” MotorBiscuit, March 29, 2022, www.motorbiscuit.com/russia-uses-isis-style-toyota-mitsubishi-pickup-trucks-ukraine/.

or for committing war crimes. Even if such activity would not meet the threshold for criminal liability since the services provided were principally destined for civil use, continuing such services cannot be considered to be in line with the conduct expected from companies under hHRDD. Even more problematic is the case of Wintershall Dea, a German oil and gas producer, supplying the Russian army. Wintershall Dea's gas condensate is produced in cooperation with the Russian company Gazprom, and is allegedly fueling Russia fighter jets during the full-scale Russian aggression against Ukraine.¹⁹¹

Legal risks that affect companies, such as civil litigation and criminal prosecution or reputational risks (social, including customer and shareholder censure),¹⁹² should not be confused with risks to rights-holders. The latter are at the heart of the effective HRDD process in all operational contexts, including the complex armed conflict setting.

4.3 *The Rights-Holders' Perspective*

Human rights protect the dignity of all individuals and the fundamental interests flowing from the recognition of such dignity. Both historically and in current legal praxis, human rights serve to protect vulnerable individuals and their legitimate interests from more powerful State or non-State agents, in conflict and in peace time. In determining the standard of care owed by such agents in a given operational context (here, our focus is on business actors), it is instrumental that businesses take account of the rights-holders' perspective. Business actors are therefore expected, be it under binding or soft-law regime, to consult stakeholders (notably potential rights-holders) at all stages of hHRDD process, and address their legitimate concerns when feasible and

191 Malte Humpert, "German Oil and Gas Company Faces Criticism For Slow Exit from Russia," High North News, January 27, 2023, <https://www.highnorthnews.com/en/german-oil-and-gas-company-faces-criticism-slow-exit-russia>; Frederik Obermaier et al., "Deutsche Unterstützung für russische Luftwaffe? Treibstoff des Krieges," Spiegel Wirtschaft, November 4, 2022, <https://www.spiegel.de/wirtschaft/wintershall-joint-venture-des-konzerns-liefert-gaskondensat-an-gazprom-treibstoff-des-krieges-a-99cfc7d-f75b-4243-9600-f37b1026e2b6>.

192 A recent study seems to demonstrate that equity markets are rewarding companies for leaving Russia while punishing those that are refusing to do so or buying time. Jeffrey Sonnenfeld et al., "It Pays For Companies To Leave Russia," SSRN, May 18, 2022, <http://dx.doi.org/10.2139/ssrn.4112885>. The shareholder wealth created through equity gains have already far surpassed the cost of one-time impairments for companies that have written down the value of their Russian assets, one the main argument provided by those which are said to be "digging in." See in that regard also Rebecca DeWinter-Schmitt, Samuel Jones, and Richard Stazinski, "Missing in Action? Investor Responses to the War in Ukraine," *Business and Human Rights Journal* 7, no. 3 (October 2022): 487–493.

make good (remedy) any harms that the rights-holders suffered. In short, business obligations regarding human rights may only be determined in reference to concrete minimum standards protected by these rights. This has direct consequences for the HRDD process, including its enhanced form (hHRDD). Companies cannot properly assess and manage human rights risks without having regard to the concrete substantive minimum (core) of specific human rights.

Such minimum standards may be quite difficult to define with respect to territories affected by hostilities. Armed conflicts tend to exacerbate both State and non-State actors' capacities to ensure the enjoyment of ESC rights. While the protection of ESC rights under IHRL continues in the context of a military conflict, the requirements towards the conflict-affected State regarding its duty to protect and fulfil these rights are lowered.¹⁹³ This allows the affected State to adopt emergency laws legitimizing far-reaching curtailing of constitutionally guaranteed rights and freedoms, including property rights, which in turn strengthens the State's capacity to defend its territorial integrity. The assessment of whether and to what extent the following exemplary cases of curtailing are justified in proportion to the encountered emergency situation will be helpful for arriving at informed judgements about the proportionality of hHRDD requirements addressed to business activities involving conflict areas.

The martial law imposed in Ukraine in February 2022¹⁹⁴ restricts the constitutional rights and freedoms of individuals as well as the legitimate interests of legal entities. It vests some powers to temporary state bodies – military administrations – which may “introduce work obligations for able-bodied persons not involved in work in the defense sphere and protection of critical infrastructure”¹⁹⁵ and “use the capacities and labour resources of enterprises, institutions and organizations of all forms of ownership for the needs of defense.”¹⁹⁶ Regarding compulsory labor, compliance with minimum standards including wages, vacation and rest periods between shifts, maximum working hours, and consideration of a person's health shall be ensured.¹⁹⁷

The imposition of martial law led to the weakening of the already fragile guarantees of the employees' rights in Ukraine.¹⁹⁸ Strikes and peaceful

193 Where there are grounds for that. See Schmid, *Taking Economic*, *supra* note 19, at 61. See also OHCHR, “Business,” *supra* note 19, at 4.

194 See Legal Regime of Martial Law, *supra* note 153.

195 *Id.* at Part 1, Article 8, para. 2.

196 *Id.* at Part 1, Article 8, para. 3.

197 *Id.* at Part 3, Article 20.

198 Institutional failure (including labor inspectorates) to effectively protect labor rights is said to have been common in Ukraine already before the war. In 2021, one in five

assemblies are now prohibited.¹⁹⁹ Protection standards have been lowered, notably with regard to conditions of work (extension of working hours up to 60 per week), rest (shortening of holidays) and dismissal (possible during holidays), stretching the margins of the employer's discretion (state-owned or private).²⁰⁰ Pursuant to the new legislation on the organization of labor relations under martial law,²⁰¹ the employer is allowed to transfer the employee to another job, not stipulated by the employment contract, without their consent,²⁰² "suspend" the employment contract²⁰³ and dismiss the employee during the period of their vacation or temporary incapacity.²⁰⁴ Also, certain provisions of collective agreements may be suspended at the discretion of the employer.²⁰⁵ Moreover, an employment contract with unspecified working hours has been introduced which, even though defined as a "labour contract," provides for work and pay conditions characteristic of civil law contracts, notably in regard to the lack of specified working hours and the payment of wages for the time (hours) actually worked.²⁰⁶

The amendments to the relevant legislation aimed at "optimization" of labor relations substantially dismantle any meaningful protection of employees' rights. This allows numerous Ukrainian companies to "optimize" their workforce

Ukrainians worked in the informal sector with no employment rights and linked social safeguards. See Sandul, "A full-scale attack," *supra* note 34.

199 *Id.* If confirmed, it could be questionable whether such curbing of civil and political rights protected by the European Convention on Human Rights (ECHR) and the ICCPR is justified under current armed conflict conditions.

200 Serhiy Guz, "Ukraine's government dismantles labour rights during the war," *OpenDemocracy*, March 18, 2022, <https://www.opendemocracy.net/en/odr/ukraine-suspends-labour-law-war-russia/>.

201 "Про організацію трудових відносин в умовах воєнного стану," Закон України, last updated December 24, 2023, <https://zakon.rada.gov.ua/laws/show/2136-20#Text> ("Organization of Labor Relations").

202 *Id.* at Part 1, Article 3.

203 *Id.* at Article 13. Contract validity may be suspended in connection with aggression against Ukraine, which excludes the possibility of providing and performing work and for the period no longer than the duration of the martial law.

204 *Id.* at Part 1, Article 5.

205 *Id.* at Part 1, Article 11. Very critically Sandul, "A full-scale attack," *supra* note 34.

206 Such contracts do not establish a specific time for the performance of work; the employee's obligation to perform arises only if the employer provides the work for this employment contract without guaranteeing that such work will be provided permanently. However, the minimum amount of working hours during the month is defined as 32 hours and the maximum amount consists of 40 hours, 6 days per week. "Про внесення змін до деяких законодавчих актів України щодо врегулювання трудових відносин з нефіксованим робочим часом," Закон України, July 18, 2022, <https://zakon.rada.gov.ua/laws/show/2421-20#Text> ("Regarding the Regulation of Labor Relations").

by “suspending” or dismissing employees, which they justify by referring to martial law and its implementing legislation. Unsurprisingly, the application of new legislation on the organization of labor relations under martial law led to a large number of labor disputes.²⁰⁷ The Ukrainian courts are being confronted with the difficult task of balancing the interests of entrepreneurs operating under the strain of military conflict on the one hand with the interests of workers who claim a violation of their labor rights. It emerges from such case law that the courts tend to grant employees’ claims where their employers clearly abuse the new rules without the company’s regular operation being affected by the conflict. For instance, in the case concerning PJSC Kremenchuk Technical Carbon Plant, the company issued an order on June 2, 2022, that suspended the employment contract of its locomotive driver. The court noted that the employer’s right to suspend the contract is not absolute and that it has not demonstrated that at the time of issuing the disputed order, there were circumstances that precluded the possibility of both parties of the labor relationship to perform their duties. Therefore, the court held the order unlawful and declared it void.²⁰⁸ Likewise, in August 2022, the court found the Kyiv Maternity Hospital’s forced dismissal of a gynecologist on his 7-day sick-leave unlawful. The employer referred to the violation of labor discipline to justify dismissal, but did not provide evidence of systematic breach of duty or prior imposition of disciplinary or public sanctions on the employee. The court declared the termination of the employment contract unlawful, and the doctor was reinstated.²⁰⁹ The emerging case law also shows that in their balancing exercise, courts try to accommodate legitimate corporate interests by lowering labor law standards the employers operating under martial law conditions are required to follow. For example, in May 2022, an employee of a Communal Enterprise of heat networks appealed a decision terminating his employment contract.²¹⁰ The claimant worked as a boiler operator for the enterprise. He argued that the enterprise is part of the critical infrastructure and that he did not receive official notification of the termination of its activities, as required under martial law. Each year, after the end

207 “Єдиний державний реєстр судових рішень,” Reyestr, accessed December 14, 2022, <https://reyestr.court.gov.ua/>.

208 Автозаводський районний суд м Кременчука, 2/524/3291/22, September 28, 2022, (text available online at <https://reyestr.court.gov.ua/Review/106546225>).

209 Дніпровський Районний Суд Міста Києва, 755/7555/22, November 3, 2022 (text available online at <https://opendatobot.ua/court/107132635-7a55ff51e4775d043205e24aedb7d949>).

210 року Тернівський районний суд міста Кривого Рогу Дніпропетровської області, 2/215/1671/22, September 19, 2022 (text available online at <https://reyestr.court.gov.ua/Review/106375415>).

of the heating season the employee stopped performing the tasks attributed to him in accordance with his job description, but his salary and workplace were maintained and at the beginning of the new heating season he resumed the attributed tasks. The defendant justified its decision with the plaintiff's refusal to carry out the tasks of a janitor after the end of the heating season and stated that the contract was terminated by mutual consent of the parties. In effect, the court concluded that the worker had voluntarily submitted an application for dismissal, which the defendant lawfully accepted under the martial law. The court therefore saw no legal ground for satisfying the claim.²¹¹

Martial law and the related legislation facilitate an avenue for employers to divert from the employment standards applicable in peace conditions. In the case discussed above, martial law gives the employer a margin of discretion that allows it to require its employees to take up tasks that are not within the scope of duties specified in the employment contract. The question of whether the far-reaching curtailing of labor rights in Ukraine is necessary under the conditions of war goes beyond the scope of this chapter. It nevertheless establishes the precarity of the working environment which is likely to affect the most vulnerable individuals who cannot travel to work due to safety, sickness or care responsibilities. The State's suspension of supervision activities regarding the respect by enterprises of human rights, including labor standards for the time of martial law further worsens the situation. The State supervision may be carried out only on the basis of the decision of the central executive body in specific areas, particularly with regard to the prevention of uncontrolled price increases for goods that have significant social importance or "in the presence of a threat that has a significant negative impact on the rights, legitimate interests, life and health of a person, protection of the natural environment and ensuring the security of the state."²¹² Such measures are intended to release enterprises from any additional burden when they are struggling to ensure continuity of their activities providing goods and services to their consumers. Stable activity and income of enterprises contributes to the State budget, thus providing means for the defense of the country.²¹³

211 *Id.*

212 "Про припинення заходів державного нагляду (контролю) і державного ринкового нагляду в умовах воєнного стану," Кабінет Міністрів України, last updated March 12, 2024, Part 2, <https://zakon.rada.gov.ua/laws/show/303-2022-п?lang=en> ("Termination of Measures of State Supervision").

213 Sonya Koshkina and Oleksandr Detsyk, "Очільник Мінфіну Марченко: «Нам потрібні кошти для продовження воєнної кампанії на весь наступний рік»,» *ЛВ.ua*, November 3,

Many Ukrainian businesses also provide Ukrainians with humanitarian aid and goods from their storages. For example, the telecommunication company Kyivstar allocated 300 million Ukrainian hryvnia (“UAH”) to the State for the restoration of digital infrastructure and the development of the system for countering cyber threats, it transferred almost UAH 130 million for humanitarian aid to the Armed Forces of Ukraine, hospitals, elderly people and war victims, and it provided free services worth over UAH 574 million for its subscribers.²¹⁴ Farmak, a manufacturer of medicines, invested UAH 11 million in its employees’ safety by ensuring arrangement of storage facilities, and continued to care about environmental protection by putting a new water treatment plant into operation.²¹⁵ Such actions could be considered voluntary rather than the result of the identification, assessing and mitigation of the human-rights related risks. Numerous Ukrainian enterprises seem to intuitively meet their legal or moral obligations under hHRDD, driven by the feeling of social duty and solidarity rather than awareness of latest developments in international standards. And, being on the ground and operating in the conflict-affected context, they are helping their employees and civilians to survive.

A clarifying remark is necessary here: while conducting or financing gross humanitarian action by businesses may be considered voluntary, corporate actors have a legal obligation to help people in acute danger, distress, or hardship. The obligation to *rescue* is established universally in most jurisdictions worldwide. For such a duty to arise, certain conditions are required, notably: a *direct threat* to an individual’s life, health or other protected interest and the *capacity* of a potential duty-bearer to provide help without incurring *unreasonable “costs”* to him- or herself.²¹⁶

4.4 *What Are the Consequences of hHRDD?*

The reference point and essence of hHRDD are human rights standards. Consequently, from an international law perspective, the hHRDD standards remain unchanged, independent of “States’s abilities and/ or willingness to fulfil their own human rights obligations.”²¹⁷ Heightened HRDD standards require

2022, https://lb.ua/economics/2022/11/03/534591_ochilnik_minfinu_marchenko_nam.html.

214 Alexa Shvets, “Переможний внесок. Як бізнес підтримує Україну і українців під час війни,” Dsnews.ua, November 29, 2022, <https://www.dsnews.ua/ukr/economics/peremozhniy-vnesok-yak-biznes-pidtrimuye-ukrajinu-i-ukrajinciv-pid-chas-viyni-25112022-469948>.

215 *Id.*

216 Cf. Wettstein, *Business and Human Rights*, *supra* note 48, at 138–139.

217 UNGPS, *supra* note 1, at Commentary to Principle 11.

particular vigilance from business actors exactly where apparent risks of State violations or weaknesses occur. Exploiting regulatory gaps or emergency laws for economic gain and convenience does not meet such heightened standards.

The conflict in Ukraine clearly shows that companies may be confronted with a tension between human rights standards applicable under international law and the law of their home country, including the lowered standards established under the martial law regime of the State where they are operating. For example, many entrepreneurs located in the occupied Ukrainian territories face a dilemma as to whether they should continue to operate and thus help sustain the local population (some of them provide essential services),²¹⁸ or whether to comply with the prohibition imposed by the Ukrainian government not to contribute to financing the occupant regime by payment of taxes.²¹⁹ Also, the withdrawal or suspension of activity by Ukrainian companies in Russia²²⁰ is to be attributed to the aforementioned regulations prohibiting commercial contacts with the aggressor State and a very negative social perception of such contacts by the Ukrainian society.

An interlinked question arises as to whether it can be reasonably expected that Ukraine-based subsidiaries of multinational corporations will apply higher human rights working condition standards according to their home State or the international norm. A clear answer in the affirmative should be provided, because Ukraine-based subsidiaries of multinational companies, despite their separate legal personality, are normally controlled entities within a complex structure of a more powerful corporate actor. It seems that multinational corporations recognize their duties in that respect. Despite criticism

218 Uvarova, “New study,” *supra* note 148.

219 Sanctions imposed by two decrees of the President of Ukraine on October 19, 2022 (Presidential Decree No. 726/2022 dated 19 October 2022 “On the Decision of the National Security and Defense Council dated 19 October 2022 ‘On Amending and Imposing of Personal Special Economic and other Restrictive Measures (Sanctions),” effective from 20 October 2022 and Presidential Decree No. 727/2022 dated 19 October 2022 “On the Decision of the National Security and Defense Council dated 19 October 2022 ‘On Amending and Imposing of Personal Special Economic and other Restrictive Measures (Sanctions),” effective from 20 October 2022) introduced a complete ban on economic relations with entities related to the aggressor State.

220 Available sources differ in their accounts. Yale School of Management research points to three such entities, of which two withdrew from, and one suspended, its activity in Russia (“Yale CELI List of Companies Leaving and Staying in Russia,” Yale School of Management, last updated May 25, 2024, <https://www.yalerussianbusinessretreat.com/>), compared to Leave Russia, “Analytics as of May 19, 2024,” *supra* note 31, according to which out of twenty-one monitored entities, only one decided to continue operating in Russia.

for its suspension of activity in Ukraine from the first day of war, McDonald's, for example, has continued to pay wages to the employees and donated food to humanitarian purposes.²²¹

The conduct of enterprises whose proximity to conflict or its victims is established only through its value chain may also have a significant impact on the well-being of Ukrainian business partners and suppliers, their employees, and local populations. As rightly stressed by the OECD Guide, “[b]usinesses have a vital role to play in helping keep Ukraine's economy afloat, securing in so far as possible jobs, livelihoods and the supply of essential goods and services.”²²² Destruction of the production facilities and disruption in supply and value chains affected not only enterprises operating in the geographical vicinity of the conflict, but also numerous global corporations dependent on Ukrainian on-site production. Before the onset of the full scale war, at least 241,000 enterprises across the world relied on Ukrainian suppliers, predominantly businesses from U.S., Canada, Italy, Australia, China, and Brazil.²²³ Two Ukrainian companies, Ingas and Cryoin, based in Mariupol and Odesa, supplied about 50% of the world's semiconductor-grade neon critical for the lasers used to make chips. Ingas produced up to 20,000 cubic meters of neon per month for customers in Taiwan, Korea, China, the United States and Germany.²²⁴

Against this backdrop, the corporate reaction to production disruptions in Ukraine such as delayed or reduced supplies may have both positive or negative impact on Ukrainian suppliers and their employees. Anticipating such delays in ones' own production or providing advance payments may help in supporting fragile production lines, thus sustaining job and income for the employees. Diligent companies should also be aware that their purchasing behavior may induce employee overtime, both with standing and new suppliers. If unavoidable, a responsible withdrawal from Ukrainian suppliers should, at a minimum, be performed in consultation with the affected stakeholders,

221 Ukrayinska Pravda, “Ukraine: McDonald's & KFC give away food and open kitchens for the military need despite Russian military invasion,” Business & Human Rights Resource Centre, March 4, 2022, <https://www.business-humanrights.org/en/latest-news/ukraine-mcdonalds-kfc-give-away-food-and-open-kitchens-for-the-military-need-despite-russian-military-invasion/>.

222 OECD, “Responsible business conduct,” *supra* note 94, at 4.

223 “Global Business Impacts: Russia-Ukraine Crisis,” Dun & Bradstreet, accessed January 9, 2023, <https://www.dnb.com/perspectives/russia-ukraine-impacts-global-supply-chain.html>.

224 Alexandra Alper, “Exclusive: Russia's attack on Ukraine halts half of world's neon output for chips,” Reuters, March 11, 2022, <https://www.reuters.com/technology/exclusive-ukraine-halts-half-worlds-neon-output-chips-clouding-outlook-2022-03-11/>.

including employee representatives, and involve a phasing-out stage in the sourcing activity. It can be argued that the greater the importer's share in the Ukrainian supplier's production capacity, the greater its hHRDD obligations in respect of a responsible exit.²²⁵

While company conduct regarding the issues we raised above may result from an interplay between contractual and subjectively perceived moral obligations, it is defensible that companies sourcing in Ukraine under present conditions have some duties of care regarding safety and well-being of their suppliers and their employees. This is the case most notably for companies based in countries where supply chain due diligence laws apply. The due care for suppliers' employees may, depending on the context, embrace issues of their access to basic needs like water and food, safety at work, timely and decent wages, care for their minor children and other vulnerable family members. Even more, companies employing Ukrainian displaced workers in neighboring countries have the legal obligation to ensure their decent working and pay conditions, as well as to provide necessary assistance in other aspects linked to their displacement.²²⁶

5 Conclusions

Armed conflicts put State capacities under strain to protect civilians from negative impacts on their life, health, and personal security, as well as other possible conflict-related violations and abuses of human rights. As socially embedded entities, non-state actors such as business enterprises, churches, or civil society organizations play an important role in assisting, complementing, and, as the case may be, even substituting State authority where the State's capacities in conflict-setting are weak or non-existent. While we acknowledge the duties of a broader spectrum of non-state actors, this chapter focused on business enterprises and their extant and/or purported human rights obligations. Under many jurisdictions, those obligations take some form of a duty of

225 Cf. "Ukraine Heightened Due Diligence" Ethical Trading Initiative and Fair Wear, April 8, 2022, <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://api.fairwear.org/wp-content/uploads/2022/05/Ukraine-Heightened-Due-Diligence-Guidance-ETI-and-FW.pdf>.

226 OECD, "Responsible business conduct," *supra* note 94, at 5–7. The observed surge in remittances (about 20% in 2022) from Ukrainian workers staying in EU countries may probably be attributed to the wish to compensate the loss of income by relatives remaining in the territory of their home country. *Id.*

care (due diligence). Applicable national and international law are sources of numerous peremptory norms that business operators must respect under the pain of liability, including and perhaps in particular in the context of armed conflict. Therefore, we consciously do not follow the distinction between legal compliance to such obligations and hHRDD, as it proves counterproductive and misleading²²⁷ when analyzing the business role in the *realization* of human rights, notably ESC rights.²²⁸ This business role appears in its full urgency in conflict affected settings. The latter must be understood broadly, including any form of operational proximity to armed conflict and its relational and economic dimensions, like through providing financial or other means that sustain such conflict. Once proximity to conflict is determined, even in its most distant and inadvertent variant, heightened risks of conflict-related human rights violations and abuses must be taken into account. While procedural steps are salient elements of the hHRDD concept, they are not sufficient to determine the substantive core, or the minimal standard, owed by businesses in reference to specific human rights. We developed this argument based on selected examples of business conduct in the context of the war in Ukraine. In order to establish concrete business obligations regarding human rights, which we assume are hHRDD obligations, it is necessary to take account of both agent- and rights-holders- specific considerations, and notably the nexus between them under concrete situational (conflict) dynamics. As the discussed examples of business conduct in the face of the war in Ukraine show, many corporate actors are neither prepared nor willing to seriously engage with the impacts their activity has on the conflict or on related human rights abuses. Improved regulatory environment could make a qualitative difference, providing States take their duties of *heightened* action seriously.

227 Very critically on the obligation-responsibility dichotomy, see Danwood Chirwa and Nojeem Amodu, "Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies," *Business and Human Rights Journal* 6, no. 1 (February 2021): 21–41.

228 CESCR, "General Comment No. 24," *supra* note 61, at para. 22.