**UN Working Group Call for Input: Investors, ESG and Human Rights**

*Submission by Heartland Initiative[[1]](#footnote-1)*

**Question 12 - Corporate responsibility to respect human rights: How should investors take a heightened human rights due diligence approach in conflict affected areas?**

It is useful to distinguish between what investors must, should, and can do regarding portfolio companies with operations and relationships in conflict-affected areas (CAA). Given that the actions of portfolio companies can present both human rights and financially material risks – legal, regulatory, operational, and reputational – to investors and in light of the UN Guiding Principles on Business and Human Rights (UNGPs) guidance concerning CAA, shareholders are prudent to conduct heightened human rights due diligence (hHRDD). At the same time, given the interlinkages between investor and company responsibilities to respect human rights as articulated by the UNGPs, investors are well-placed to encourage their portfolio companies to conduct their own hHRDD and use the process to identify, assess, prevent, and mitigate harms.

Investors must ensure that they and the companies they hold comply with the ever expanding number of sanctions, trade controls, and other regulatory measures that have been issued in response to a growing number of conflicts and human rights crises (e.g., Xinjiang Uyghur Autonomous Region, China, coup in Myanmar, Russian invasion of Ukraine). Most notably, the European Parliament's adopted position on the Corporate Sustainability Due Diligence Directive (CSDD) will require Member States to mandate companies conduct conflict-sensitive due diligence regarding their operations and business relationships in CAA, which should include identifying risks associated with causing or contributing to violations of international humanitarian law (IHL).[[2]](#footnote-2) Further, under the EU’s Sustainable Finance Disclosure Regulation (SFDR), covered financial market participants will be required to disclose how they are addressing sustainability risks, which includes human rights harms, in their investment strategies and publicly report on their product’s negative sustainability impacts on their websites.[[3]](#footnote-3)

However, a growing number of investors have made clear that they do not consider legal compliance a sufficient response to the urgency of these high-risk contexts.[[4]](#footnote-4) Instead, these investors are developing and adopting a more principled approach to identifying and addressing the human rights, conflict-related, and financially material risks that is grounded in international human rights and humanitarian law in analyzing business and investment activities in CAA. These investors increasingly expect their portfolio companies to do the same. Such an approach advises companies and investors to undertake a process of hHRDD and provides a framework for decision-making that simultaneously recognizes the financial imperatives of business and the need to avoid doing harm.

The UNGPs provide more detail on how all investors and companies should undertake HRDD to identify, prevent, mitigate and account for their adverse human rights impacts, and further emphasize that the complexity of a HRDD process depends on factors such as the operating context and risk of severe human rights impacts.[[5]](#footnote-5) Built around the concept of proportionality, the UNGPs note that because ‘the risk of gross human rights abuses is heightened in conflict-affected areas’, companies’ due diligence activities should be ‘heightened accordingly’.[[6]](#footnote-6)

Heightened HRDD involves the following key steps: understand the conflict using tools such as conflict analysis, understand the connection between business activities and the conflict using tools such as actor mapping, and act on the findings by identifying and mitigating adverse impacts on both human rights and the conflict.[[7]](#footnote-7) Companies should undertake hHRDD in the event of widespread armed violence, international armed conflict between two states, internal armed conflict, post-conflict, military occupation, gross human rights violations, pervasive instability, and/or any early warning signs of conflict.[[8]](#footnote-8)

In all CAA, there is a conflict build-up phase, which requires businesses to be aware of the triggers that drive armed conflict, such as the amassing of weapons, imposition of emergency laws, and hate speech.[[9]](#footnote-9) Similar to traditional HRDD, hHRDD is an ongoing process that should respond to constantly shifting conflict dynamics and human rights risks.[[10]](#footnote-10) Robust stakeholder engagement and grievance management systems are key to effective hHRDD, enabling companies to understand the positions of different stakeholder groups involved in the conflict (including vulnerable groups), mitigate information vacuums, and create multiple feedback loops to ensure an objective understanding of the conflict.[[11]](#footnote-11)

In the case of a war between two states, investors and companies should exercise hHRDD of their activities, products, and services in both states to identify and mitigate negative impacts.[[12]](#footnote-12) These stakeholders should pay particular attention to their connections to the aggressor country, and in addition to respecting international human rights and humanitarian law, avoid and mitigate connections to the war effort of the aggressor country to ensure that they do not exacerbate the [conflict] situation.[[13]](#footnote-13)

Conflict-sensitive, heightened HRDD can help investors and companies prioritize which impacts to address first. The UN Working Group calls on companies to prioritize salient risks that exacerbate conflict and human rights impacts ahead of salient conflict-related issues not directly linked to human rights issues and salient human rights risks that are unlikely to exacerbate conflict.[[14]](#footnote-14) In the case where a business contributes to adverse impacts, it should remedy its contribution and exercise leverage to prevent remaining impacts. The Working Group notes the need for clear corporate exit strategies in situations where human rights harms cannot adequately be addressed,[[15]](#footnote-15) while cautioning that companies should weigh such decisions against the possibility that exiting may exacerbate the conflict or severity of the harms.[[16]](#footnote-16)

Investors’ due diligence responsibilities are intertwined with those of their portfolio companies. In order to meet their responsibility to do no harm through their investment activities, they need to ensure that they are scrutinizing the actual and potential impacts of their investment decision-making throughout the investment life cycle, including pre-investment screening, ongoing investment stewardship and, if need be, responsible divestment.[[17]](#footnote-17) Specifically in CAA, investors should conduct hHRDD to identify companies connected to individuals or entities that may be causing, contributing to, or directly linked to human rights harms in a conflict. They should engage companies with exposure to human rights harms to encourage them to use their leverage to prevent, mitigate, and remediate those harms. Finally, they should consider divesting from companies that are unwilling or unable to mitigate their exposure to human rights harms, while conducting due diligence to ensure that such a decision is not outweighed by potentially adverse impacts.

The bottom line is that investors should ensure that their investment activities are not contributing or directly linked to human rights harms, understanding that such salient risks often translate into financially material risks – regulatory, legal, operational and financial – in CAA. Although conducting hHRDD can be more challenging for investors that may hold thousands of companies, compared with individual companies that are using the process only for their direct and value chain operations, there are resources to assist them in this process. One such hHRDD process developed by Heartland Initiative involves the identification and prioritization of risks in CAHRA based on a company’s geographical, relational and operational proximity to human rights harms, which can be used for individual company engagements or reviewing entire portfolios.[[18]](#footnote-18)

By using a conflict-sensitive lens and conducting hHRDD, investors are able to identify, assess, and address the most severe and systemic human rights and financially material risks among their portfolio companies, use their leverage to incentivize rights-respecting behavior, and uphold their own obligations under the UNGPs.

1. This submission has been excerpted from “Missing in Action? Investor Responses to the War in Ukraine,” published in the *Business and Human Rights Journal* (2022), authored by Samuel Jones and Richard Stazinski of Heartland Initiative and Rebecca DeWinter-Schmitt of Investor Alliance for Human Rights. [↑](#footnote-ref-1)
2. European Parliament, ‘Amendments adopted by the European Parliament on 1 June 2023 on the 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)0071](https://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=EN&type_doc=COMfinal&an_doc=2022&nu_doc=0071) – C9-0050/2022 – [2022/0051(COD)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2022/0051(COD)))’, (1 June 2023). [↑](#footnote-ref-2)
3. European Union, ‘Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability‐related disclosures in the financial services sector’, (27 November 2019); . [↑](#footnote-ref-3)
4. Heartland Initiative (5 June 2022), ‘Investor Statement on the Crisis in Ukraine’, https://www.heartlandinitiative.org/investor-statement-on-the-crisis-in-ukraine/ (accessed 11 October 2023). [↑](#footnote-ref-4)
5. Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011). [↑](#footnote-ref-5)
6. “UN Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action’, A/75/212 (21 July 2020). [↑](#footnote-ref-6)
7. United Nations Development Programme, ‘Heightened Human Rights Due Diligence for Business in ConflictAffected Contexts: A Guide’, New York (16 June 2022). [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. The 2 March 2022 UN General Assembly resolution on Ukraine ‘deplores in the strong terms the aggression by the Russian Federation against Ukraine’. General Assembly, ‘Aggression against Ukraine,’ ES-11/1 (2 March 2022). [↑](#footnote-ref-13)
14. Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011). [↑](#footnote-ref-14)
15. UN Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action’, A/75/212 (21 July 2020). [↑](#footnote-ref-15)
16. United Nations Development Programme, ‘Heightened Human Rights Due Diligence for Business in ConflictAffected Contexts: A Guide’, New York (16 June 2022). [↑](#footnote-ref-16)
17. Investor Alliance for Human Rights (May 2020), ‘Investor Toolkit on Human Rights’, https://investorsforhu manrights.org/investor-toolkit-human-rights (accessed 11 October 2023). [↑](#footnote-ref-17)
18. Business & Human Rights Resource Centre (June 2021), ‘Advancing Business Respect for Human Rights in Conflict-Affected Areas Through the UNGPs’, https://www.business-humanrights.org/en/blog/advancing-busi ness-respect-for-human-rights-in-conflict-affected-areas-through-the-ungps/ (accessed 11 October 2023). [↑](#footnote-ref-18)