Part 2: Responsible Exit from Russia: Business and Human Rights in a Global Governance Gap

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This is a two-part blog series. In Part 1 Dr Irene Pietropaoli discusses whether foreign companies have a responsibility under international law to leave Russia. In Part 2, Dr. Irene Pietrapaoli and Dr. Daniel Aguirre discuss responsible exits from Russia.

Hundreds of multinational companies have left Russia since the beginning of the invasion of Ukraine. While this voluntary divestment - most are not subject to sanctions - may be an effective economic weapon in response to Russia's illegal war, it is an ad hoc response by businesses to crisis, potential liability, sanctions, and other operational risks rather than responsible exit. Human rights are linked vaguely to corporate social responsibility (CSR) or environmental and social governance (ESG) policies and are not the priority. This large scale, uncoordinated divestment will have important positive and negative impacts on the conflict, human rights and on the future of the rules based international legal order.

Businesses subject to sanctions or that directly contribute to violations of international law open themselves and their personnel to liability in Russia and the Ukraine. Business relations with Russian state-owned enterprises, for example, create a salient risk of aiding, abetting, or facilitating Russia's violations of international law. Prosecutions are possible before national courts. For example, Lafarge, a French company, is currently charged with complicity in international crimes during the Syrian civil war. The prosecutor of International Criminal Court (ICC), announced on 28th February that his office would open an investigation into potential war crimes stemming from the conflict. The UN General Assembly has recognised an 'act of aggression'.

Most businesses are unlikely to be complicit in international crimes. Nevertheless, they are taking the private decision to divest outside of any agreed legal or political frameworks. While companies have no binding human rights obligations to leave high risk areas, responsibly exit is covered in the UN Guiding Principles on Business and Human Rights (UNGPs) which address responsible exit and require an ongoing human rights due diligence (HRDD) process. The UNGPS call for enhanced measures in high risk areas and the Working Group clarifies this means the application of a conflict sensitivity analysis. This expands the set of stakeholders consulted and set of business relationships monitored to include those impacted or impacting conflict and requires leverage to mitigate both human rights and conflict impacts. None of this can be done in response to a crisis - it is an ongoing process undertaken before predictable conflict and human rights crisis arise.

Responsible exit must be planned, rights and conflict sensitive, based on stakeholder consultation through a HRDD process that identifies, attempts to prevent or mitigates - using business leverage - negative impacts on human rights. The consequences of leaving must be identified, and negative impacts prevented or mitigated. This cannot be done after an escalation into conflict or crisis. Research shows that few businesses conduct adequate HRDD. Even less conduct a heightened version. Few businesses investing in Russia can claim to have conducted such a process. Russia has long been associated with conflict - see Chechnya, Georgia, Syria or Crimea, for example - and long standing business-related human rights risks and abuses that were well documented. Business can now only react to the predictable crisis.

Consider a business providing essential services such as water, food, electricity, healthcare, or telecommunications. If it decides its business operations are no longer tenable and exits, it should consider who if anyone will then provide the service. Will valuable assets fall into the hands of a party to the conflict or a connected crony business? The Russian government announced plans to seize the assets of foreign companies leaving the country. Do the risks of complicity outweigh the risks of worsening conflict and rights? What happens if essential services cease to function? Every company considering divestment needs to consider what will happen to its employees and its customers. Companies have been accused of failing to develop a responsible exit strategy. For example, see Telenor - a responsible Norwegian investor - and its experience in Myanmar: It chose to divest after the military coup but not an alleged genocide or ongoing internal armed conflicts. Telenor, despite its HRDD process and responsible investment policies, now finds itself subject to an OECD national contact point complaint as it plans to sell its operations to questionable or

unknown buyers.

The absence of a process or discriminatory application of standards raises many concerns. It is open to accusations of politicisation and hypocrisy: many businesses divesting from Russia continue to operate in other States engaged in armed conflict and accused of atrocity crimes; Sanctions against Russia are not applied to other States engaged in conflict. What is the threshold for divestment? Will this divestment process set a precedent? China is accused of committing genocide against the Uyghurs and Saudi Arabia executing 81 people is a single day on 12th March but neither warrant waves of voluntary divestment. Previous illegal acts of aggression, from Russia's invasion of Crimea to the US and the UK's war in Iraq have resulted in nothing of the kind. Will business react in the same way to any future war of aggression? What will happen if China conducts a special military operation in Taiwan?

The failure of the international community to agree upon binding standards regulating business and human rights in in conflict affected areas exposes a gap in global governance and the rule of law. It leaves key decisions impacting conflict and human rights in the hands of private actors influenced more by profit than people. Rather than make HRDD mandatory and ensuring access to justice, the international community has brushed aside business-related human rights and conflict risks. What impact will this governance gap have on business in future conflicts? Do we divest only when crimes are committed by those deemed the bad guys? Hopefully divestment pressures on Putin to end an illegal war and encourages business to follow the UNGPs in the future. But how it impacts the human rights of Russian and Ukrainian people now and the precedent it sets for business in other conflicts remains to be seen.

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